Citation: *R. v. ex-Major J.G.C.M. Rompré*, 2008 CM 4009

Docket: 200818

STANDING COURT MARTIAL
CANADA
RÉGIMENT DE MAISONNEUVE
QUEBEC

Date: 21 August 2008

PRESIDING: LIEUTENANT-COLONEL JEAN-GUY PERRON, MILITARY JUDGE

HER MAJESTY THE QUEEN
v.
EX-MAJOR J.G.C.M. ROMPRÉ
(Applicant)

DECISION RESPECTING A MOTION UNDER SECTION 11(*b*) OF THE *CHARTER* FOR THE VIOLATION OF THE RIGHT TO BE TRIED WITHIN A REASONABLE TIME
(Rendered orally)

OFFICIAL ENGLISH TRANSLATION

INTRODUCTION

[1] The accused, ex-Major Rompré, filed a motion in accordance with subparagraph 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces* seeking a stay of proceedings under section 24(2) of the *Canadian Charter of Rights and Freedoms* because of the alleged violation of the accused's right to be tried within a reasonable time under section 11(*b*) of the *Charter*.

THE EVIDENCE

[2] The evidence before the Court is as follows: first, the facts and matters within judicial notice under section 15 of the *Military Rules of Evidence*; second, the agreed statement of facts submitted to the Court by consent of both counsel; and lastly, the testimony of ex-Major Rompré.

THE FACTS

[3] Ex-Major Rompré, the applicant, participated in the JULIEN-BROSSEAU exercise that took place from 31 March to 2 April 2006 at the Farnham Training Centre . On 18 April 2006, the Canadian Forces National Investigation Service was notified of alleged safety breaches on the part of the applicant. An investigation was therefore initiated by Petty Officer 2nd Class Rouillard, and five witnesses were interviewed. On 27 January 2007, Petty Officer 2nd Class Rouillard called the applicant at his residence to ask him to report for an interview. Petty Officer 2nd Class Rouillard mentioned to the applicant that it concerned the JULIEN-BROSSEAU exercise and that he was a suspect. After calling the Director of Defence Counsel Services, the applicant decided not to take part in this interview.

[4] On 10 April 2007, Petty Officer 2nd Class Rouillard completed a record of disciplinary proceedings containing six charges, which was remitted to the applicant. The commanding officer of the Régiment de Maisonneuve requested legal advice from the unit legal adviser as required by article 107.11 of the QR&O. He only received said legal advice on 19 October 2007.

[5] On 25 October 2007, the commanding officer of the Régiment de Maisonneuve made an application to the referral authority for disposal of the charges. That same day, he also sent a request for counsel to the Director of Defence Counsel Services. Lieutenant(N) Létourneau was assigned to the case on 29 October 2007.

[6] On 6 November, the referral authority forwarded the file to the Director of Military Prosecutions. On 9 November, the unit informed the applicant of his rights in accordance with article 109.04 of the QR&O and made a second request for the services of defence counsel.

[7] On 13 November, the Director of Military Prosecutions assigned Lieutenant-Commander Raymond to the file, and he requested disclosure of the evidence from the NIS on November 15, 2007. From 19 November 2007 to 6 January 2008, Lieutenant-Commander Raymond was either busy on other cases or on vacation during the Christmas holidays.

[8] He requested additional investigation from the NIS on 11 January 2008. That same day, he asked the Director of Defence Counsel Services for the identity of the applicant's counsel, and learned that it was Lieutenant(N) Letourneau, whom he contacted immediately by e-mail.

[9] On 11 February, Lieutenant-Commander Raymond signed a charge sheet and proceeded with the disclosure of evidence. On 18 February, the Deputy Director of Military Prosecutions sent said charge sheet to the Court Martial Administrator and

indicated that the prosecution was prepared to proceed with this matter as of 1 March 2008.

[10] On 19 February 2008, Lieutenant(N) Létourneau received the disclosure of evidence and communicated with the prosecutor for the first time. He informed Lieutenant-Commander Raymond that it was necessary to proceed as soon as possible since the offence dated back two years and the witnesses' memories are fragile. Also on 19 February, Lieutenant-Commander Raymond asked Lieutenant(N) Létourneau what the defense's intentions were in this matter. On 21 February 2008, Lieutenant(N) Létourneau informed Lieutenant-Commander Raymond that given all of the circumstances, his client wished to plead not guilty and proceed quickly. On 13 March 2008, Lieutenant-Commander Raymond contacted Lieutenant(N) Létourneau, asking him whether his client still intended to plead not guilty and stating that should this be the case, they would have to arrange a conference call with the Chief Military Judge to obtain a trial date. On 13 March 2008, Lieutenant(N) Létourneau confirmed that his client still wished to plead not guilty. Also on 13 March, Lieutenant-Commander Raymond notified the Court Martial Administrator that the counsel of record were ready to set a trial date. On 26 March 2008, Lieutenant(N) Létourneau informed Lieutenant-Commander Raymond that he had accepted a position as provincial Crown attorney and could no longer represent the applicant. On 1 April 2008, Lieutenant(N) Desbiens was assigned by the DDCS to represent the applicant. On 24 April 2008, Lieutenant(N) Desbiens and Lieutenant-Commander Raymond took part in a conference call to schedule a trial date. The parties agreed on 11 August 2008, the first available date.

[11] The applicant testified that he had experienced a great deal of stress and anxiety since receiving the telephone call from Petty Officer 2nd Class Rouillard on 27 January 2007. This stress and anxiety were more pronounced during specific events, such as his being charged, and were the cause of certain problems in his relationship with his partner, although he did not describe the nature or extent of those problems.

[12] In November 2006, his name was taken off the list of candidates for the command of an infantry company during an exercise in the United States. His name was apparently removed because he was under investigation by the NIS. He was also aware that some of his peers within the unit were discussing his situation, and that increased his stress.

[13] The applicant also testified that some five months after his return from Afghanistan, he was examined by medical services and then informed that he had contracted tuberculosis. Furthermore, he was referred to a psychologist because he was suffering from depression related to traumatic shock, and his treatment lasted approximately 33 months. The charges and other events in the disciplinary process aggravated his symptoms, specifically loss of appetite, sleep disorders and loss of

concentration. Above all, the applicant strongly emphasized that the lack of information regarding the disciplinary proceedings caused him a great deal of stress and anxiety. Three times during September and October 2007 he asked his unit commanding officer whether he had more information about him. Finally, around 23 October, the commanding officer told him that disciplinary proceedings would take place. The applicant spoke with his defence counsel on 29 October and told him he wanted the proceedings to advance at a brisk pace.

POSITIONS OF THE PARTIES

The applicant

[14] The applicant is accused of an offence under section 127 of the *National Defence Act*, namely having voluntarily done an act in relation to things that may be dangerous to life or property, which act was likely to cause loss of life or bodily injury to a person or damage to property. It is alleged in the particulars of the charge that the offence occurred between 30 March 2006 and 3 April 2006. The applicant argues that his right to be tried within a reasonable time under section 11(*b*) of the Charter was infringed and that this Court should order a stay of proceedings under section 24(1) of the *Charter* on the basis of the Supreme Court of Canada's decision in *R. v. Morin*, [1992] 1 S.C.R. 771. The applicant submits that the Court should find that the delay lasted approximately 16 months, that is, from the initial date of charging on 10 April 2007 until the trial date. The applicant submits that it is a relatively simple case and that all of the evidence was readily available. Accordingly, the applicant requests that the Court order a stay of proceedings.

The respondent

[15] The prosecution states that defence counsel's inaction must be taken into account in the analysis of the delay and in the assessment of the alleged prejudice to the accused.

DECISION

[16] Section 11(*b*) of the *Charter* reads as follows:

> 11. Any person charged with an offence has the right:
>
> (*b*) to be tried within a reasonable time;

This section of the Charter is the subject of important decisions of both the Supreme Court of Canada and appeal courts, including the Court Martial Appeal Court. Section 11(*b*) focuses on each individual's interests in liberty, security of the person and the right to a fair trial. However, section 11(*b*) also contains an implicit social or

community component. A failure by the justice system to deal quickly and efficiently with criminal proceedings inevitably leads to frustration with the justice system on the part of the community, and potentially to a feeling of frustration towards court proceedings. This has proved to be true, not only in the case of civilian courts of criminal jurisdiction, but also before courts martial. In the context of military law, Parliament has furthermore explicitly provided at section 162 of the *National Defence Act* that, and I quote:

> 162. Charges under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.

[17] The primary purpose of section 11(*b*) of the *Charter* is the protection of individual rights—the right to security of the person, the right to liberty and the right to a fair trial—and the interests of society as a whole. Thus, the general approach to a determination of whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which lead to or otherwise cause delay. As counsel for the applicant indicated, the factors to be taken into account derive from *R. v. Morin*, and it is clear from that decision that the factors to be considered are the following:

1. the length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including
   - (a) inherent time requirements of the case,
   - (b) actions of the accused,
   - (c) actions of the Crown,
   - (d) limits on institutional resources,
   - (e) other reasons for delay;
4. prejudice to the accused.

The decision of the Court Martial Appeal Court in *Legresley*, 2008 CMAC 2 provides courts martial with an excellent review of the principles the Supreme Court of Canada set forth in *Morin* and their application in military justice.

[18] For a motion concerned solely with section 11(*b*) of the Charter, only the time elapsed from the charge to the trial date is relevant, unless the pre-charge delay had an impact, not on the prejudice to the accused, but on the accused's right to make full

answer and defence, or if this pre-charge delay in any way affected the integrity and fairness of the trial. In this case the delay is approximately 16 months, from 10 April 2007 to 20 August 2008. The prosecutor agreed that this 16-month delay is sufficient to raise the issue of reasonableness.

[19] The evidence before this Court clearly shows that the accused has not waived any delay.

[20] As regards the reasons for the delay, some delays are inevitable in any system, be it civilian or military. Therefore, all cases have certain inherent time requirements which delay the trial. The complexity of the matter and the workload of counsel for the prosecution and the defence are but two of the factors mentioned by the Supreme Court of Canada in *Morin*. In the military justice system, the *National Defence Act* and the QR&O govern each step from charges to trial, be it a summary trial or a court martial. I appears from the evidence that the initial RDP contained six charges. The military prosecutor requested additional investigation and in the end, the charging process resulted in the charge sheet containing only one charge. Five witnesses were interviewed during the investigation. So, it does indeed seem that this case is relatively simple. An inherent delay of four to six months would be reasonable given all of the steps in the miliary justice system.

[21] As regards the actions of the accused, we know from *Legresley* that counsel for the defence is responsible for taking an active approach in a case; that is, it is up to counsel to request disclosure of evidence. What is more, in the context of a motion for unreasonable delay, the Court Martial Appeal Court clearly indicates that the accused cannot remain passive. The evidence in our record shows that the first counsel for the defence, Lieutenant(N) Létourneau, was assigned to the case on 29 October 2007. He made no request for disclosure and did not attempt to communicate with the military prosecutor before 21 February 2008. Although it is true that the charge sheet was not drafted until 11 February 2008, this did not prevent Lieutenant(N) Létourneau from making contact with the prosecutor to inform him that this matter should be settled as quickly as possible, since that was the wish of the accused and the waiting period was causing him stress.

[22] Although the accused says that he suffered a great deal of stress and anxiety throughout these disciplinary proceedings, the Court can find no indication from the evidence that ex-Major Rompré actively and vigorously asked his defence counsel to move the case forward as quickly as possible. The evidence shows only that he discussed this with Lieutenant(N) Létourneau on 29 October 2007 and with Lieutenant(N) Desbiens in April 2008.

[23] Therefore, the four-month period from 29 October 2007 to 19 February 2008 represents a period of inactivity on the part of the accused and his counsel. While

this inactivity did not contribute to the delay, it will influence the assessment of prejudice.

[24] The prosecution's actions, or lack thereof, also merit a serious look in this matter. Here, the Court faces a situation where the unit commanding officer's request for legal advice was not answered until six months later. No explanation was provided to account for this delay, which is *prima facie* unacceptable and quite simply unreasonable. The Court believes that a period of two or three weeks would be acceptable in light of the provisions of section 162 of the *National Defence Act*. Thus, it is apparent that a five-month period is excessive and unreasonable, and attributable to the actions, or rather the inaction, of the Crown.

[25] The evidence shows that Lieutenant(N) Létourneau withdrew from the case on 26 March 2008, and was replaced by Lieutenant(N) Desbiens on 1 April 2008. Lieutenant(N) Desbiens took part in a conference call with prosecution counsel on 24 April, and the parties agreed on 11 August 2008 as the first available date for the trial. The Court did not request and did not receive any other evidence to clarify exactly which factors led to this date. Was it determined by the availability of counsel or that of the judge? Counsel for the applicant states that this four-month period should be considered as an institutional delay. An institutional delay occurs when the parties are ready to proceed but the judicial system cannot accommodate them. This four-month period will not be counted as unreasonable.

[26] Thus, although the overall period of this matter is 16 months, when the evidence filed in the course of this motion is considered, the delay considered by the Court to be unreasonable is approximately five months.

[27] *Morin* indicates clearly that we may deduce that a long delay may prejudice the accused. That is not the case in this matter because the delay the Court deems unreasonable is five months long. It is therefore incumbent upon the applicant to prove that he was prejudiced.

[28] The evidence of prejudice is found in the testimony of ex-Major Rompré. It is evident that he suffered greatly from depression following his return from Afghanistan in November 2004 and, from the start of 2004 onwards, required and received 33 months of treatment by a psychologist. While he states that the various disciplinary proceedings in this matter greatly increased his stress and caused him much anxiety, the Court did not receive any specific evidence demonstrating that this stress and anxiety were distinctly greater than the stress and anxiety normally associated with such disciplinary proceedings.

[29] The removal of his name for the command of a company during a major exercise in the United States cannot be described as a prejudice caused by the delay

since this event took place some five months before the charges against him were laid. The description of the discussions of some of his peers regarding his situation also does not constitute a prejudice attributable to the delay. Although he indicated having certain problems in his relationship with his partner, he did not provide any evidence demonstrating the extent of these problems.

[30] The Court was not provided with any evidence showing that ex-Major Rompré communicated clearly to his counsel the degree of the stress he claims to have suffered or his need for information and the effect that the lack of information had on his stress level. Lastly, the applicant's evidence does not show that he and his lawyer actively sought to move his case forward in order to reduce the stress and anxiety he alleges to have suffered during the delay.

DISPOSITION

[31] Accordingly, the Court concludes that only five of the 16 months of the delay are deemed to be excessive and unreasonable. Furthermore, the Court concludes that the applicant has failed to prove that this delay caused him prejudice warranting a stay of proceedings.

[32] The motion for a stay of proceedings under section 24(1) of the *Canadian Charter of Rights and Freedoms* on the basis of an alleged violation of the accused's right to be tried within a reasonable time under section 11(*b*) of the *Charter* is therefore dismissed.

LIEUTENANT-COLONEL J-G PERRON, M.J.

Counsel:

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Counsel for Her Majesty The Queen
Lieutenant(N) P.D. Desbiens, Director of Defence Counsel Services
Counsel for the applicant, ex-Major J.G.C.M. Rompré