Citation: *R. v. Corporal Wolfe,* 2005CM48

Docket: C200548

STANDING COURT MARTIAL
CANADA
NEW BRUNSWICK
4TH AIR DEFENCE REGIMENT MONCTON

Date: 24 August 2005

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
CORPORAL WOLFE
(Accused)

DECISION RESPECTING AN APPLICATION PRESENTED UNDER SECTION 11(b) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*.
(Rendered orally)

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[1] The accused, Bombardier Wolfe, is charged with one offence of unlawful possession of an explosive substance contrary to section 82(1) of the *Criminal Code*, which is made a service offence by section 130 of the *National Defence Act*. At the opening of the trial by court martial on 23 August 2005, he applies for a stay of proceedings on the basis of a violation of his right under section 11(*b*) of the *Canadian Charter of Rights and Freedoms* to be tried within a reasonable time.

[2] For the reasons that follow, the application is denied.

[3] The evidence before the court on this application consists of an Agreed Statement of Facts; the testimony of two witnesses on behalf of the applicant, including the accused himself; as well as documentary materials introduced into evidence by both parties. The material facts on this application are not complicated, nor are they really in dispute. The parties differ, however, in the legal significance that they attach to those relevant facts.

[4] The offence is alleged to have occurred on or about 19 October 2003. At that time, the accused was a member of the Reserve Force serving as an Air Defence Artilleryman with the 4 Air Defence Regiment in Moncton, New Brunswick. In the early morning hours of that day, he came to the attention of a Fredericton City police officer who arrested him for possession of liquor contrary to the New Brunswick *Liquor Control Act*. A search of the person of the accused disclosed a pyrotechnic device called a "Simulator Projectile Ground Burst" which, it is agreed by the parties, is an explosive substance.

[5] The military police conducted an investigation and it was concluded in early March of 2004. In May, and again in October of 2004, the 4 Air Defence Regiment sought legal advice from the Deputy Judge Advocate Gagetown on a draft record of disciplinary proceedings, the charging document by which charges under the *National Defence Act* are initiated against a person subject to the Code of Service Discipline. On 25 November 2004, Bombardier Wolfe was charged with one count of unlawful possession of an explosive substance, and on 10 December, Major Thomas was assigned by the Director of Defence Counsel Services to act as counsel for Bombardier Wolfe.

[6] On 10 January 2005, the accused's commanding officer referred the charge to the Commander Land Forces Atlantic Area after receiving legal advice. The Commander LFAA, in turn, referred the matter to the Director of Military Prosecutions on 27 January, 2005.

[7] On 7 February 2005, the prosecutor, Captain, now Major, Samson, was assigned the case to conduct post-charge screening of the charge. This process involved collecting materials from the military police and from the Fredericton City Police, as well as the office of the Assistant Judge Advocate General Atlantic. It also involved the interviewing of ten potential prosecution witnesses, and a consultation with a sergeant with an expertise in explosive substances. On 10 May 2005, during the post-charge screening process, Captain Samson made disclosure of the information he obtained to defence counsel for Bombardier Wolfe in response to a request by defence counsel made on 30 March 2005.

[8] On 9 June 2005, the Deputy Director of Military Prosecutions preferred a charge sheet alleging one charge of possession of an explosive substance pursuant to section 165(1) of the *National Defence Act*. At that time, the earliest available date for trial before a military judge was 22 August 2005.

[9] On 5 July 2005, the court martial administrator issued a convening order convening this court martial for 23 August 2005.

[10] The *Canadian Charter of Rights and Freedoms* provides in section 11(*b*):

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

Section 11(*b*) protects the interests of accused persons by advancing the rights to liberty, to security of the person, and to make full answer and defence. As well, Canadian society as a whole has an important interest in seeing that criminal prosecutions are dealt with without undue and unreasonable delay.

[11] In R. v. MacDougall, [1998] 3 S.C.R. 45, McLachlin J, as she then was, delivered the judgement of the Supreme Court of Canada. At paragraph 29, she wrote:

> The right to security of the person is protected in s. 11(*b*) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

And at paragraph 30 and I quote:

> The societal interest protected by s. 11(*b*) has at least two aspects.... First, there is a public interest in ensuring a speedy trial, so that criminals are brought to trial and dealt with—possibly through removal from the community—as soon as possible. Second, there is a public interest in ensuring that those on trial are dealt with fairly and justly. This societal interest parallels an accused's "fair trial interest".

[12] The right to trial within a reasonable time arises at the time a charge is laid, but it is obvious that no trial can proceed immediately upon charges being laid. Both parties will require some time to marshal the evidence for presentation to the court, to consider their respective positions, and to bring any pretrial proceedings that may be thought necessary. In addition, of course, a court system must be in a position to accommodate the hearing of the trial with the necessary physical facilities and personnel, including a judge. All these matters take time and, therefore, cause delay. The *Charter* does not mandate that there be no delay between charges and trial, only that any such delay be "reasonable".[1]

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[1] *R. v. Smith* [1989] 2 S.C.R. 1120 at page 1131 *per* Sopinka J, "It is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable."

[13] What is meant by the term "reasonable time" in this context? The Supreme Court of Canada has set out the analytical framework.[2] There are four principal factors that the court must examine and consider to determine whether, in a particular case, the time taken to move a case to trial is unreasonable. These factors have been referred to by counsel before me. They are:

1. The length of the delay from the time charges are laid until the conclusion of the trial;

2. Waiver of any periods of time;

3. The reasons for the delay; and

4. Prejudice to the accused.

In its consideration of the reasons for delay, the court must look at:

1. The inherent time requirements of the case;

2. The actions of the accused and of the prosecution;

3. Limits on institutional resources; and

4. Any other reasons for delay.

[14] These factors guide the court in its determination, but they are not applied in a mechanical way, nor should they be considered as immutable or inflexible, otherwise this provision of the *Charter* would simply become a judicially imposed statute of limitations upon prosecutions.

[15] It is not simply the periods of delay that the court is concerned with. Rather, it is the effect of delay on the interests that section 11(*b*) is designed to protect. In assessing the effect of delay, it is important to remember that the ultimate question to be decided is the reasonableness of the overall delay between the time charges are laid and the conclusion of the trial.[3]

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[2] *R. v. Morin* [1992] 1 S.C.R. 771 at page 787.

[3] *R. v. MacDougall, supra*, para. 41, and see *R. v. Conway* [1989] at 1674 *per* L'Heureux-Dubé J "In deciding a claim made under section 11(b) of the *Charter*, the correct approach in my view is to evaluate the reasonableness of the overall lapse of time. A piecemeal analysis is generally not appropriate. In a case where each individual period, taken in isolation from the others, may constitute a reasonable delay,

[16] These principles have been developed in Canadian civilian courts, but they apply equally to military cases under the Code of Service Discipline contained in the *National Defence Act.*

[17] The applicable period in this case begins with the laying of the charge on 25 November 2004. The prosecutor submits that the delay in issue of nine months until the commencement of the trial is not inordinate or out of the ordinary, and, therefore, does not call for an examination of the remaining factors. It is argued, on the basis of a table of 27 current courts martial showing the periods of post-charge delay of between 180 and 613 days, that the period of 271 days in the present case is less than the average.

[18] In my view, a statistical analysis is of limited usefulness on this threshold question. I consider that the period of nine months from charge to trial in the present case does indeed warrant an examination of the remaining factors. Indeed, in the 1999 case of Adjudant Gingras, the former chief military judge entered a stay of proceedings in a case involving a period of delay similar to the present case. In so ruling, Chief Military Judge Brais noted the importance to the military justice system of a prompt and efficient mechanism to deal with breaches of military discipline. This sentiment now finds statutory expression in section 162 of the *National Defence Act* which provides:

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

I hold that the delay to trial in the present case is such as to warrant an inquiry as to the reasons.

[19] The prosecutor argues that the defence waived the period of delay from the date of preferral of the charge on 9 June 2005 until the opening of the trial, by agreeing to the trial date of 23 August 2005 set by the court martial administrator. The standard for waiver of a constitutional right in this context is high. Waiver must be clear and unequivocal.[4] I cannot characterize the mere acquiescence of the defence in accepting a trial date that was the earliest date a judge was available as amounting to waiver.

[20] There are three time periods of significance in this case, which the court considers in assessing and examining the reasons for the delay. From the time the charge was laid on 25 November 2004 until it was referred to the Director of Military Prosecutions in late January of 2005, the charge was in the hands of the chain of command, both at the unit level and at the level of the Commander of Land Forces Atlantic Area, a "referral authority" for

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the total period may nevertheless be unreasonable for the purpose of s. 11(b)."

[4] *R. v. Morin* [1992] 1 S.C.R. 771 *per* Sopinka J at page 790.

courts martial. This period of approximately two months is not a model of dispatch in any sense. But bearing in mind the need to exercise judgement at each level, perhaps with the benefit of legal advice, and the intervening year-end holiday period, I cannot say that, in this case, the delay was excessive.

[21] It must be borne in mind that in some cases the chain of command may choose not to refer a charge to court martial. Only proper cases should proceed further, and therefore, a period of reflection is justified. An accused person may benefit from an anxious consideration by the chain of command as to whether charges should proceed further. Certainly the processes of military justice would not be served by hasty or ill-considered charges.

[22] The second time period runs from the time the prosecutor took over the case until the charge was preferred. Again the period of four months, in this case, is not a model of dispatch, but I cannot find, on the evidence in this case, that the file languished for any significant period, or that the prosecutor was dilatory.

[23] The third time period of concern runs from the date of preferral, 9 June 2005, until the trial date of 23 August 2005. I have already held that the defence did not waive this period of delay. Nevertheless, I consider that a period of two and one-half months from preferral to trial is not excessive.

[24] All three time periods involve assessments or practical scheduling considerations that are inherent to the process of trial by court martial under Queen's Regulations and Orders for the Canadian Forces. While the individual time periods under consideration in this case may not be unusual or inordinate in themselves, it is the total time period under consideration that must concern the court in dealing with an application such as this. It may fairly be said that the prosecution service will be aware of the time the charge has been in the system and under the consideration of the chain of command.

[25] The prosecutor should also be aware of the likely time frame within which a preferred charge can be scheduled for hearing. Where excessive time is taken up during one phase of the proceedings, it naturally falls to others in the process to bear in mind the added importance of dealing promptly with the charges. For example, it is no answer for the prosecutor to say that he or she did their work efficiently but without regard for other sources of possible delay in the system of trial by court martial.

[26] The accused gave evidence on the issue of prejudice suffered by him. He referred to his current financial circumstances. Since the charge was laid he has not been usefully employed at his unit and has not progressed in his military career. He did not seek to be called out on Reserve Force service because he thought such an application would not be

approved. Before the alleged offence date, he had applied to join the Regular Force by way of a component transfer. It appears that he was a very promising candidate to succeed in the application, but shortly after the charge was laid, the recruiting office became aware of the outstanding charge, and his application appears to have been put on hold pending the outcome of this trial.

[27] It is argued that the accused has suffered prejudice by reason of the delay in the disposition of the charge because he has not been able to pursue a military career in the Regular Force. In my view the degree of prejudice is accurately characterized by the prosecutor when he points out that the accused has not been denied a Regular Force career; rather, he has been denied a prompt decision on his application to join the Regular Force.

[28] The legal prejudice of which the law is concerned refers to the harm occasioned to the accused not simply by reason of the fact that he is charged, but more importantly by reason of delay in dealing with and resolving the charge after a trial.[5]

[29] I accept the evidence of the accused that he genuinely and earnestly wishes to pursue a military career with the Regular Force, and that the laying of the charge and the delay until the disposition of the charge has adversely affected his career ambitions. I consider though that this result is more a direct consequence of the laying of the charge than it is a consequence of the time it has taken to come to trial. I accept his evidence that it has been hard for him to wait for the trial, but I do not find that the natural anxiety of this accused is significantly greater than other persons who are facing trial at court martial.

[30] In the end, the court must weigh the competing interests at play. In speaking of the right to trial within a reasonable time, Sopinka J. for a majority of the Supreme Court of Canada wrote in the case of *R. v. Morin*,[6] and I quote:

> The general approach to a determination as to 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 either inevitably lead to delay or are otherwise the cause of delay....

[31] In the present case, the application seeks a stay of proceedings as a remedy for what is said to be a violation of the right to trial within a reasonable time. A stay of

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[5] *R. v. Rahey* [1987] 1 S.C.R. 588 *per* Wilson J at page 624. And see *R. v. Conway* [1989] 1 S.C.R. 1659 *per* L'Heureux-Dubé J.

[6] *supra,* footnote 4 at page 787.

proceedings is a judicial pronouncement that a prosecution will not continue to a finding of guilt or innocence. In the same case of *R. v. Morin*, McLachlin J. wrote,[7] and I quote:

> It is easy, in considering the factors which can bear on that determination, to lose sight of the true issue at stake—the determination of where the line should be drawn between conflicting interests. On the one hand stands the interest of society in bringing those accused of crimes to trial, of calling them to account before the law for their conduct. It is an understatement to say that this is a fundamental and important interest. Even the earliest and most primitive of societies insisted that the law bring to justice those accused of crimes. When those charged with criminal conduct are not called to account before the law, the administration of justice suffers. Victims conclude that justice has not been done and the public feels apprehension that the law may not be adequately discharging the most fundamental of its tasks.

[32] The liberty interest of the accused, and his interest and that of the community in a fair trial are not directly implicated in this application. In this case, the court is concerned with the security interests of this accused in a prompt trial of the charge weighed in the light of the factors I have referred to above.

[33] Weighing these factors as best I can, I cannot conclude that the right of the accused to a trial within a reasonable time has been infringed or denied. The application is therefore dismissed.

COMMANDER P.J. LAMONT, M.J.

Counsel:

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Counsel for Corporal Wolfe

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[7] *ibid*., at page 809.