Citation: *R. v. Ex-Corporal S.C. Chisholm,* 2006 CM 07

Docket: C200607

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE BORDEN

Date:22 March 2006

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

HER MAJESTY THE QUEEN
v.
EX-CORPORAL S.C. CHISHOLM
(Accused)

DECISION RESPECTING A PRE-TRIAL APPLICATION CONCERNING SECTION 11(b) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* AND THE REMEDY OF SECTION 24(1) OF THE *CHARTER*.
(Rendered Orally)

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[1] Former Corporal Chisholm is charged with four offences under the *National Defence Act*; that is, two charges of disobedience of a lawful command contrary to section 83, alleged to have occurred on 11 and 22 November 2004, and a charge of knowingly making a false accusation against a non-commissioned member contrary to section 96, and, finally, a charge of an act to the prejudice of good order and discipline contrary to section 129, both also alleged to have occurred on 22 November 2004.

[2] At his trial by Standing Court Martial he applies by way of pre-trial application, prior to plea, for a stay of proceedings under section 24(1) of the *Canadian Charter of Rights and Freedoms*, alleging an infringement of his right to trial within a reasonable time guaranteed by section 11*(b)* of the *Charter*.

[3] For the reasons that follow the application is granted and the court directs a stay of proceedings.

[4] The evidence on this application consisted largely of an agreed statement of facts setting out the chronology of events leading up to this trial. In addition, the

court heard the evidence of Dr Labonte, a psychiatrist who has worked for the Canadian Forces since 2000.

[5] The agreed facts disclose that the charges were the subject of an investigation report made 6 December 2004 that resulted in two charges of disobedience of a lawful command. On 22 February 2005 the applicant was served with a Record of Disciplinary Proceedings, the document that originates charges under the Code of Service Discipline. On the same date he was offered the election for trial by court martial and, it appears, was given until 24 February to consider his election. On that date he requested an extension to 1 March to make his election, and the extension was granted. On 1 March he elected trial by court martial.

[6] On 16 June 2005 the acting commanding officer applied for disposal of the charges to the referral authority, Major-General Arp, the acting Assistant Deputy Minister, Human Resources – Military, who in turn referred the matter to the Director of Military Prosecutions on 5 July 2005. Then, on 20 September 2005 the four charges before the court were preferred to the Court Martial Administrator, who, on 5 December 2005, issued a convening order for a Standing Court Martial to commence 21 March 2006.

[7] I was advised by counsel that the applicant was informed on 10 November 2005 that the charges were preferred for court martial. The applicant, thereupon, promptly consulted counsel from the office of the Director of Defence Counsel Services on 11 November 2005.

[8] On 21 March the court convened as scheduled, and on 22 March I dealt with other pre-trial matters. Then, at the joint request of the parties this pre-trial application was adjourned to 10 April.

[9] Thus the court is dealing with a period of time approaching 14 months from the time charges were laid on 22 February 2005 until the time of trial.

[10] In the case of *Bombardier Wolfe*, in a ruling delivered in Gagetown on 24 August 2005, I stated:

> [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;
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> 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 by 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 ...

> 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 [*sic*] 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".

[13] What is meant by the term "reasonable time" in this context? The Supreme Court of Canada has set out the analytical framework. 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] 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;
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> 3. Limits on institutional resources; and
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> 4. Any other reasons for delay.
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> [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.
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> [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.
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> [16] These principles developed in Canadian civilian courts, but they apply equally to military cases under the Code of Service Discipline contained in the *National Defence Act*.

[11] In the present case of ex-Corporal Chisholm, the prosecution concedes that the period of delay to trial in this case is such as to require an analysis of the other factors set out by the Supreme Court of Canada.

[12] There is no waiver by the applicant of any of the time periods involved in the present case.

REASONS FOR DELAY

[13] I have not been directed to any authorities dealing specifically with the inherent time requirements for bringing a case to trial by court martial. However, Justice Létourneau, speaking for the Court Martial Appeal Court in *R. v. Lachance* [2002] C.M.A.J. No.7, did note that, for two simple charges necessitating only a short period of time for preparation by counsel, “the normal period for trying such charges is four months."

[14] In the military justice system, in addition to vindicating the public right to justice, the maintenance of individual and collective discipline is of cardinal importance. Military authorities at all levels are obligated by section 162 of the *National Defence Act* to deal with charges under the Code of Service Discipline “as expeditiously as the circumstances permit.”

[15] The unnecessary lapse of time between the commission of an offence and punishment following a trial diminishes the disciplinary effect that can be achieved only by the prompt disposition of charges. This distinguishes the system of military justice from the civilian criminal justice system where there is no disciplinary objective,

nor is there any statutory obligation on any of the actors to proceed promptly at all stages of a prosecution.

[16] There does not appear to be any unusual complexity involved in the charges in the present case. Certainly the investigation of the charges seems to have been concluded in a matter of days.

[17] The actions of the accused have not contributed significantly to delay. It is true that he postponed his election for trial by court martial for a period of five days. He also filed this application, intending to call expert evidence in support, on relatively short notice, and this required an adjournment of proceedings at the request of the prosecution for a period from 22 March to 10 April of 2006. Otherwise, the applicant has not caused or contributed to any delay.

[18] But, of course, there is no burden upon the defence to get the matter on for trial. It is the responsibility of the prosecution authorities to bring an accused to trial, and to do so within a reasonable time. In this case, the charges remained within the applicant's unit for a period of some three and one-half months, from 1 March until 16 June 2005. There is no evidence before me showing why these relatively straightforward charges were not recommended for court martial within days, or at most a few weeks, of the time the applicant made his election for trial by court martial.

[19] Once the charges were preferred for court martial on 20 September 2005, the applicant was not notified of the fact for over one and one-half months until 10 November. There was no evidence to explain this delay.

[20] In the absence of evidence as to what occurred during these periods of time, I am left to conclude that the pace of the prosecution was set by the chain of command, and by the prosecution authorities, without regard for the obligation imposed upon them by section 162 of the *National Defence Act*.

[21] There were no other reasons for delay. In particular, on the evidence I have heard I am not persuaded that judicial resources were not available to handle this case with the necessary promptness.

PREJUDICE

[22] Counsel for the applicant points to the medical condition of the applicant in support of his submission that the applicant has suffered prejudice by reason of the delay until trial.

[23] Dr A. Labonte was called to give evidence on behalf of the applicant. She was qualified by the court as an expert for the purpose of offering opinion evidence

in the area of psychiatry, and specifically post-traumatic stress disorder. She testified that she first met the applicant when he was referred to her by another physician in early December of 2004. I note, parenthetically, that this was a matter of but a few weeks following the events forming the subject matter of the charges against the applicant.

[24] Dr Labonte assessed the applicant on 8 December and noted a recurrence of symptoms of post-traumatic stress disorder such as anxiety, disordered sleep, and angry outbursts. The applicant reported to her that he was angry and getting concerned about his ability to control his anger. As a result he sought medical help before something happened.

[25] Dr Labonte confirmed a diagnosis of PTSD that had apparently been made on some unspecified earlier occasion, the basis of which was not explored in the evidence by either counsel. Dr Labonte explained that PTSD is an anxiety disorder caused by the experience of a traumatic situation in which the sufferer endures extreme fear or horror. The prosecution does not challenge Dr Labonte's diagnosis.

[26] Dr Labonte prescribed medications and continued to see the applicant on several occasions over the following months until August of 2005. During this time it appears that the applicant's condition first deteriorated and then improved again. By the end of June 2005 he was awaiting the setting of a date for his release from the Canadian Forces, his panic attacks were under control, he felt better, and he appeared to be more cheerful. I note that it was about this time that the decision was made to refer the charges that had been laid on 22 February for disposal by court martial.

[27] The applicant's main concern, as expressed to Dr Labonte, appears to have been his work situation, which was described as a "toxic climate." In addition, he was concerned about a request for a transfer to other duties, his application to join the Regular Force, his claim for benefits as a result of the disability, and, later, his release from the Canadian Forces and rejoining his spouse in British Columbia.

[28] I am told that the applicant has now been released from the Canadian Forces on medical grounds and resides in British Columbia. At the time of trial his symptoms are described as more under control.

[29] Dr Labonte testified that legal proceedings are stressful for all those involved except perhaps those who are used to them. This is true for an accused person because of the feelings of powerlessness they normally experience. With respect to the sufferer of PTSD, she noted that those feelings of powerlessness may reproduce the situation that gave rise to the trauma in the first place.

[30] In cross-examination Dr Labonte was not challenged as to her observations or conclusions. She agreed, however, that the applicant did not express to her any

anxiety concerning the charges he faced from the time he was charged on 22 February 2005 until he stopped seeing Dr Labonte in August of 2005.

[31] I was impressed with the professional, candid, precise and objective manner in which Dr Labonte gave evidence, and I accept her evidence without reservation.

[32] The prosecution points to the failure of the applicant to press for a speedy trial in support of its submission that the applicant has not suffered significant prejudice. On the evidence I have heard, it is clear, however, that from the time the applicant made his election for court martial on 1 March 2005 until 10 November 2005 when he was given notice of the preferring of the charges, the applicant could only have speculated that his court martial was being scheduled. It is unrealistic to suppose that a soldier in the position of the applicant would press his chain of command to get on with the scheduling of his court martial. I do not consider that his failure to demand of his chain of command that his court martial proceed in a timely manner undermines the claim of prejudice made by the applicant in this case.

[34] The situation might well be different if the applicant were represented by counsel during this period. If his counsel was aware of the prejudice occasioned to the applicant by reason of delay, he or she would be aware of the legal significance of that prejudice and could reasonably be expected to press the authorities on behalf of the applicant for an early trial date. In such circumstances, and in the absence of any expression of concern about delay during the pre-trial stage, the court might well find that prejudice had not been established because the defence has chosen to acquiesce in the delay.

[35] That is not this case. The applicant here was not represented by counsel until some time after 10 November 2005 when he was given notice that the charges had been preferred for court martial.

[36] QR&O article 109.04 imposes a duty upon the accused's commanding officer, at the time an application is made to a referral authority for the disposal of a charge, to cause the accused to be advised of that application, to inquire whether the accused intends to obtain counsel, and to advise the Director of Defence Counsel Services of the wishes of the accused. In this case these duties arose on 16 June 2005. Counsel for the prosecution advised the court that these duties were not discharged by Corporal Chisholm's commanding officer in this case.

[38] I have had occasion in the past to comment on cases in which the duties imposed by article109.04 have not been discharged. I reiterate that the failure to comply with this article may, in some cases, result in serious consequences for the ensuing trial. Referral of charges for disposal by a referral authority involves a mandatory consultation with military legal advisers under QR&O article 107.11. Legal

officers can bring this responsibility to the attention of commanding officers and facilitate the discharge of this important duty. I regard the failure to discharge these duties as a serious matter.

[39] On the evidence I have heard, I do not find any basis to suppose that the failure to comply with article 109.04 has caused unfairness to the applicant in this case. However, I reject the submission of the prosecution that the failure of the applicant to press for an early trial date while unrepresented by counsel suggests that he has not suffered any prejudice.

[40] On the basis, particularly of the evidence of Dr Labonte as to the medical condition of the applicant, I find that he has suffered some prejudice which is attributable to the anxiety and stress of post-traumatic stress disorder, and that this has been exacerbated both by the fact that he has been charged, but more importantly, by the unduly lengthy period it has taken to bring this case to trial.

BALANCING OF INTERESTS

[41] In the case of *Bombardier Wolfe* I stated:

> ... 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* [[1992] 1 S.C.R. 771 at 787]...
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> > 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....

[42] In the present case, as in the case of *Bombardier Wolfe*, the applicant seeks a stay of proceedings as a remedy under section 24(1) of the *Charter* for the infringement of the right to trial within a reasonable time.

[43] Subsection 24(1) reads:

> ... Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[44] A stay of proceedings is a judicial pronouncement that a prosecution will not proceed to a finding of guilt or innocence.

[45] In the same case of *Morin*, McLachlin J, as she then was, stated as follows:

> 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.
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> On the other side of the balance stands the right of a person charged with an offence to be tried within a reasonable time. When trials are delayed, justice may be denied. Witnesses forget, witnesses disappear. The quality of evidence may deteriorate. Accused persons may find their liberty or security limited much longer than necessary or justifiable. Such delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice.
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> The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. In the final analysis the judge, before staying charges, must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial.

[46] In this case it has taken almost 14 months to bring relatively straightforward charges to trial by court martial. There are periods during that time in which delay has been caused by the prosecution authorities, and the reasons for those delays are unexplained. The result has been some prejudice to the security interests of the applicant.

[47] It cannot be denied that the community has a substantial interest in the final disposition of the charges against the applicant by a finding of guilty or not guilty. But balancing all of the factors to which I have referred, I have concluded that the right of the applicant in this case to a trial within a reasonable time has been infringed.

[48] In the course of submissions I was asked to "send a message" to the authorities by granting this application and directing a stay of proceedings. I decline to attempt to do so. My proper role is only to decide the application before me on the evidence and submissions that I have heard and in light of the legal principles that guide my decision. That I have done.

[49] On all the charges I direct a stay of proceedings.

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