

Citation: *R. v. Lieutenant(N) C.B. Jollimore*, 2006CM2016

Docket: 200617

**STANDING COURT MARTIAL
CANADA
BRITISH COLUMBIA
CANADIAN FORCES BASE ESQUIMALT**

Date: 2 November 2006

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

HER MAJESTY THE QUEEN

v.

LIEUTENANT(N) C.B. JOLLIMORE

(Accused)

**DECISION RESPECTING A NOTICE OF MOTION FOR A STAY OF
PROCEEDINGS BASED UPON AN ALLEGED VIOLATION OF HIS RIGHTS
GUARANTEED BY SECTION 7,11(a) AND 11(b) OF THE *CANADIAN
CHARTER OF RIGHTS AND FREEDOMS.***

(Rendered orally)

[1] At the opening of his trial by Standing Court Martial and prior to plea, the accused applied by written Notice of Motion for a stay of proceedings based upon what was alleged to be an infringement of his rights guaranteed by sections 7, 11(a) and 11(b) of the *Canadian Charter of Rights and Freedoms*. At the conclusion of argument on the application on 19 September 2006, I made a ruling dismissing the application, with reasons to follow. I will therefore deal first with my reasons for dismissing the pretrial application.

[2] Section 11(a) of the *Canadian Charter of Rights and Freedoms* reads:

Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

[3] In this case, the offence is alleged to have occurred on or about 11 May 2004. On 20 April 2005, a Record of Disciplinary Proceedings was raised, charging the

applicant with a number of offences, including, in the fifth charge, an act to the prejudice of good order and discipline, which in its particulars appears to relate to the conduct charged against the applicant in the one charge in the Charge Sheet before the court. An alternative charge of behaving in a disgraceful manner was laid at the same time and appears to particularize the same conduct. The applicant was served with a copy of the Record of Disciplinary Proceedings on 25 April 2005, then, in November of 2005 the charges were changed to the specific charge that is now before the court.

[4] The applicant argues at paragraph 10 of his written submission, exhibit M1-5, that the period of 14 months from the time the National Investigation Service completed their investigation in August of 2004, until the present charge was finalized in November of 2005, was an unreasonable delay.

[5] In my view the calculation of time for purposes of section 11 begins only with the laying of a formal charge. That is clear from the opening wording of section 11 as interpreted by the Supreme Court of Canada in several case authorities dealing with section 11(b). There is no obligation upon the investigating authorities to proceed with charges as soon as they can be said to have reasonable grounds to believe an offence has been committed, see *R. v. Cancor Software Corp.* (1990) 58 C.C.C. (3d) 53.

[6] In this case, formal charges were laid on 20 April 2005. The applicant does not suggest that he was not informed of the charges within a reasonable time of them being laid. It is true that the precise terms of the charge may have changed over time, but this in itself is not a violation of section 11(a). Accordingly, I consider that there has been no delay in informing the applicant of the specific offence, and there is, therefore, no infringement of the right in section 11(a).

[7] Section 11(b) of the *Charter* protects the right of a person charged with an offence "to be tried within a reasonable time." In the case of *Bombardier Wolfe*, I stated:

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.

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".

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.

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;
3. Limits on institutional resources; and

4. Any other reasons for delay.

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.

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.

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*.

[8] In my view, the time period for consideration in the present case begins with the laying of the original charges on 20 April 2005, and continues to the trial date of July 2006, a period of 15 months.

[9] The applicant submits that on the authority of *R. v. Perrier* (2000), CMAC No. 434, the court should consider that time begins to run from the time the administrative procedure of being "landed" from his ship was followed on 11 May 2004, as the process of "landing" is tantamount to being charged with an offence. In the case of *Perrier*, the Court Martial Appeal Court considered whether, in the specific milieu of the Canadian Forces, the period preceding an indictment could, in conjunction with the period subsequent to the laying of the indictment, be considered for the purpose of determining whether the rights under section 7 and 11(b) of the *Charter* were infringed. In that case, the accused was required to undergo a "clearance procedure" which, according to the military judge in that case, bears a strong resemblance to a discharge from the Armed Forces.

[10] In my view, on the evidence I have heard in the course of this application, being landed from one's ship is not tantamount to the kind of administrative action that was taken in the case of *Perrier*. Landing amounts to being assigned to duties ashore, and so far as its effects on the individual concerned, it does not approach the kind of action taken in *Perrier*. Accordingly, the length of delay in the present case begins with the laying of the charge on 20 April 2005.

[11] The respondent, the prosecution on the application, does not rely upon waiver of any of the time periods involved.

[12] With respect to the reasons for the delay in this case, the principle causes

seem to have been a reassignment of a prosecutor, a period slightly in excess of 4 months, and the unavailability of a military judge to hear the case, a period from 14 November to 6 December 2005, and again from 19 January to 31 January 2006. As well, the defence declined the offer made on 1 February, of trial time beginning 28 February 2006, because of a previous commitment in counsel's schedule.

[13] I do not fault the defence for declining the opportunity of an earlier trial date because of a previous scheduling commitment. Nevertheless, the fact that the defence was not prepared to accept the offer of an earlier date has weighed with me in determining the extent of the prejudice the applicant claims he has suffered.

[14] In the present case, counsel for the applicant does not argue that delay affected the liberty interest of the applicant, or his interest in a fair trial. But he relies upon the effects of delay upon the security interests of the applicant.

[15] In *R. v. Kporwodu* (2005), 195 C.C.C. (3d) 550 the Ontario Court of Appeal stated the following, paragraph 172:

In *Mills v. The Queen* (1986), 26 C.C.C. (3d) 481 (S.C.C.) at 538, Lamer J. (as he then was) adopted the following description of what is encompassed by the phrase "security of the person" in the context of s. 11(b): "It encompasses protection against overlong subjection to the vexations and vicissitudes of a pending criminal accusation". Security of the person recognizes the stigmatization, loss of privacy, and stress and anxiety created by criminal proceedings. (See *Morin*, supra, at 12.) As well, an individual's security interest can be infringed by any state action that has a "serious and profound effect on a person's psychological integrity", including state interference with a person's familial relations. (See *New Brunswick (Ministry of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at paras. 60-61.)"

[16] The applicant argues that he has suffered prejudice by reason of the delay in bringing this case to trial. Specifically, he points to a loss of a potential foreign posting, loss of training opportunities, slower career progression, loss of sea duty allowance, and social stigma in his personal life. I accept the evidence of the applicant accused as to the effects upon him of the charges. But I do not accept his conclusion that the charges have seriously affected his career progression. I do accept the evidence of Lieutenant-Commander Learn and Captain(N) Adamson, and find on the basis of their evidence that the effect of the landing upon the career progression of the applicant is not nearly as serious or profound as the applicant seems to think.

[17] In my view, the prejudice of which the applicant complains has not been shown to be, in any significant degree, more serious than that experienced by anyone facing the prospect of trial on a serious charge. But more importantly, the sources of prejudice of which he complains are attributable to the fact that he was charged rather

than to any delay in dealing with the charges by trial.

[18] Ultimately, the question of whether the right of the applicant to a trial within a reasonable time has been breached is a weighing process. On balance I cannot conclude that the right has been violated in this particular case.

[19] Although the applicant's Notice of Motion refers also to an alleged violation of section 7 of the *Charter*, no argument was advanced on that point.

[20] For these reasons, the application for a stay of proceedings was dismissed.

COMMANDER P.J. LAMONT, M.J.

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