Date: 20011114

Docket: CMAC-443

Neutral citation: 2001 CMAC 3

CORAM: **DÉCARY J.A.**
LINDEN J.A.
DURAND J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

AND:

CAPT. C. LANGLOIS

Respondent

Hearing held at Ottawa, Ontario on October 31, 2001

Judgment rendered at Ottawa, Ontario on November 14, 2001

REASONS FOR JUDGMENT BY: **DÉCARY J.A.**

CONCURRED IN BY: **LINDEN J.A.**
DURAND J.A.

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] This appeal, for the third time in a year in this Court, deals with the application of s. 7 of the Canadian Charter of Rights and Freedoms to certain delays occurring in the administration of military justice (see The Queen v. Perrier, CMAC-434, November 24, 2000 and *Larocque v. The Queen*, CMAC-438, October 16, 2001).

[2] In the case at bar the military trial judge allowed a motion for a stay of proceedings made by Capt. Langlois at the start of the hearing. He said that in his opinion there had been an infringement of s. 7 of the Charter. Accordingly, the trial did not take place.

Applicable principles

[3] Before considering the particular circumstances of this case, it will be helpful to review briefly the present state of the law on ss. 7 and 11(*b*) of the Charter.

[4] In ss. 7 to 14 the Charter defines a number of legal guarantees, proceeding from the general in s. 7:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

to the particular, in the following sections, including s. 11(*b*):

> 11. Any person charged with an offence has the right
> . . . . .
> (*b*) to be tried within a reasonable time.
> . .
>
> 11. Tout inculpé a le droit:
> . . . . .
> *b*) d'être jugé dans un délai raisonnable.
> . .

(a) Section 11(*b*) of Charter

[5] The "reasonable time" mentioned in s. 11(b) is the interval between the charge and the end of the trial. This time period is said to be "post-charge" and is not at issue here. The rules governing it were set out by the Supreme Court of Canada in R. v. Morin, [1992] 1 S.C.R. 771.

[6] However, in determining whether this post-charge delay is reasonable the Court in certain circumstances may consider the pre-charge delay, not so as to add its duration to that of the post-charge delay but to determine whether the time elapsed before the charge adversely impinged on the fairness of the trial or the right to make a full answer and defence. (See *Larocque, supra,* reasons of Létourneau J.A., paras. 4 and 5; *R. v. Finn*, [1997] 1 S.C.R. 10; and reasons of Marshall J.A. of the Newfoundland Court of Appeal in *R. v. Finn* (1996), 106 C.C.C. (3d) 43, at 60, 61 and 62.)

(b) Section 7 of Charter

[7] Section 7 protects the right to life, liberty and security of the person. This right is infringed when the person is deprived of it contrary to the principles of fundamental justice. To determine whether there is a breach of s. 7 it must first be decided whether the individual has been deprived of the right to life, liberty or security of the person; the relevant principles of fundamental justice must then be identified and defined; finally, it must be determined whether the deprivation has occurred in accordance with those principles. (R. v. White, [1999] 2 S.C.R. 417, at 436.)

[8] The right to life and liberty of the person is not in any way at issue in the case at bar: all we need consider here is what is meant by the "right to security of the person".

(i) Security of person

[9] The Supreme Court of Canada, per Bastarache J., who speaks on this point for a majority of his colleagues and whose comments on this point were not approved or disapproved by his dissenting colleagues, has recently reiterated, in Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, that

> In the criminal context, this Court has held that state inference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual's security of the person. In this context, security of the person has been held to protect both the physical and psychological integrity of the individual . . .
>
> (at 343)

[10] Proceeding to analyze the "psychological integrity" aspect of "security of the person" — the only aspect with which we are concerned here — Bastarache J. concluded that s. 7 could only be relied on if the act allegedly committed by the government had "a serious and profound effect on . . . psychological integrity":

> Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, supra, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G. (J.)*, at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered.
> First, the psychological harm must be <u>state imposed</u>, meaning that the harm must result from the actions of the state.
> Second, the psychological prejudice must be <u>serious</u>. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations.
>
> (at 344)

He added, at 355 and 356:

> In order for security of the person to be triggered in this case, the impugned state action must have had a serious and

> profound effect on the respondent's psychological integrity (G. (J.), supra, at para. 60). There must be state interference with an individual interest of fundamental importance (at para. 61). Lamer C.J. stated in G. (J.), at para. 59:
>
> > It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.

(ii) Principles of fundamental justice

[11] What are the principles of fundamental justice relied on by the respondent in the case at bar?

[12] First, there is the principle of abuse of process. This is not strictly speaking a principle of fundamental justice within the meaning of s. 7 of the Charter. Rather, as L'Heureux-Dubé J. explained in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at 463, it is a common law doctrine which supports various guarantees recognized by the Charter, depending on the circumstances:

> (ii) Section 7, Abuse of Process and Non-disclosure
>
> As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the *Charter*. Depending on the circumstances, different *Charter* guarantees may be engaged. For instance, where the accused claims that the Crown's conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best

> addressed by reference to s. 11(*b*) of the *Charter*, to which the jurisprudence of this Court has now established fairly clear guidelines (*Morin*, *supra*). Alternatively, the circumstances may indicate an infringement of the accused's right to a fair trial, embodied in ss. 7 and 11(*d*) of the *Charter*. In both of these situations, concern for the individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In addition, there is a residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a matter as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[13] Then there is the principle, challenged by the appellant, that the state has a duty to act expeditiously before the charge. The respondent cited this Court's judgment in Perrier in support of his arguments. For her part, the appellant referred to the new s. 162 of the *National Defence Act*:

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

as a basis for arguing that the duty to act expeditiously in military matters is a principle of fundamental justice, but only since September 1, 1999 and only after the indictment is laid. (See *Act to amend the National Defence Act* and to make consequential amendments to other Acts, S.C. 1998, c. 35, s. 42, in effect September 1, 1999.)

[14] I do not feel that s. 162 is very helpful, as it only restates in its own way s. 11(*b*) of the Charter. Section 11(*b*) takes priority, of course, and s. 162 clearly cannot be construed so as to limit the rights conferred on an accused by s. 11(*b*).

[15] This certainly does not mean that I accept the respondent's argument, which is at variance with the stated intent of Parliament in s. 11(*b*) to impose no constitutional limitation based simply on the lapse of time preceding the charge.

[16] In Perrier, it is true that this Court, at para. 44 of its reasons, referred to the "principle of fundamental justice that requires speedy justice", but in my view this was in the context of an abuse of process. It should be borne in mind that in Perrier the accused made a confession on August 7, 1997, was suspended without pay on August 13, 1997 and the indictment was not laid until June 22, 1999. In my opinion, Perrier only established as a principle of fundamental justice that there is a duty to act expeditiously in charging a person who admits having committed the crime.

[17] In *Larocque*, I noted that at para. 17 Létourneau J.A. identified the principle of fundamental justice more clearly than the Court did in *Perrier*. In his view, the principle in the circumstances was the following:

> [TRANSLATION]
>
> . . . a person arrested without a warrant because the authorities have reasonable grounds to believe he or she has committed an offence, whether detained or discharged, must be charged as soon as it is physically possible and without unnecessary delay, unless in the exercise of their discretion the authorities decide not to prosecute.

[18] The conclusion has to be, in my view, that the pre-charge delay is a factor that has an influence in identifying a principle of fundamental justice, but that factor does not by itself imply a breach of fundamental justice. The pre-charge delay should rather be taken together with other factors, the combined effect of which places the government's conduct in the "residual category" described by L'Heureux-Dubé J. in O'Connor (supra, para. 12) at 463:

> . . . the panoply of diverse and sometimes unforseeable circumstances in which a prosecution is conducted in such a matter as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[19] It would not seem desirable to treat as a principle of fundamental justice a duty to act expeditiously that imposes time constraints on any inquiry, further inquiry or reopened inquiry regardless of the circumstances. The comments of Stevenson J. in *R. v. L.* (W.K.), [1991] 1 S.C.R. 1091, seem greatly relevant here:

> Many of the cases which have considered the issue have held that "mere delay" or "delay in itself" will never result in the denial of an individual's rights. This language is imprecise. Delay can, clearly, be the sole "wrong" upon which an individual rests the claim that his or her rights have been denied. The question is whether an accused can rely solely on the passage of time which is apparent on the face of the indictment as establishing a violation of s. 7 or s. 11(d).
>
> Delay in charging and prosecuting an individual cannot, without more, justify staying the proceedings as an abuse of process at common law. In *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, Laskin C.J. (with whom the majority agreed on this point) stated that (at pp. 1040-1041):
>
> > Absent any contention that the delay in apprehending the accused had some ulterior purpose, courts are in no position to tell the police that they did not proceed expeditiously enough with their investigation, and then impose a sanction of a

> stay when prosecution is initiated. The time lapse between the commission of an offence and the laying of a charge following apprehension of an accused cannot be monitored by courts by fitting investigations into a standard mould or moulds. Witnesses and evidence may disappear in the short run as well as in the long, and the accused too may have to be sought for a long or short period of time. Subject to such controls as are prescribed by the *Criminal Code*, prosecutions initiated a lengthy period after the alleged commission of an offence must be left to take their course and to be dealt with by the Court on the evidence, which judges are entitled to weigh for cogency as well as credibility. The Court can call for an explanation of any untoward delay in prosecution and may be in a position, accordingly to assess the weight of some of the evidence.

Does the Charter now insulate accused persons from prosecution solely on the basis of the time that has passed between the commission of the offence and the laying of the charge? In my view, it does not. Staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence. In Canada, except in rare circumstances, there are no limitation periods in criminal law. The comments of Laskin C.J. in *Rourke* are equally applicable under the Charter.

Section 7 and s. 11(*d*) of the *Charter* protect, among other things, an individual's right to a fair trial. The fairness of a trial is not, however, automatically undermined by even a lengthy pre-charge delay. Indeed, a delay may operate to the advantage of the accused, since Crown witnesses may forget or disappear. The comments of Lamer J., as he then was, in *Mills v. The Queen*, *supra*, at p. 945, are apposite:

> Pre-charge delay is relevant under ss. 7 and 11(*d*) because it is not the length of the delay which matters but rather the effect of that delay upon the fairness of the trial. [Emphasis added.]

Courts cannot, therefore, assess the fairness of a particular trial without considering the particular circumstances of the case. An accused's rights are not infringed solely because a lengthy delay is apparent on the face of the indictment.

(at 1099 and 1100)

[20] Accordingly, what the respondent is arguing is essentially that the circumstances in the case at bar are such that his case falls within the "residual category" referred to by L'Heureux-Dubé J. in *O'Connor*.

Facts

[21] Toward the end of July 1997 certain incidents occurred at Port-au-Prince, Haiti. Members of the Canadian contingent committed acts of brutality against Haitian civilians.

[22] On August 1, 1997 the Provost Marshal of the Canadian Forces, commander of the future National Investigation Service (NIS), assigned Warrant Officers Pelletier and Pellerin to conduct an investigation.

[23] A preliminary investigation report was filed on September 30, 1997. That report identified six soldiers, including Capt. Langlois, as suspects in these incidents.

[24] On November 30, 1997 s. 106.02 of the *Queen's Regulations and Orders for the Canadian Forces* (QROCF) was amended so as to henceforth include as a person authorized to lay charges under that section the military police holding investigator positions in the NIS. Warrant Officer Pelletier thus became authorized to lay charges. However, the interim policy of the NIS provided that a person authorized to lay charges, before doing so, had to obtain the approval of the unit legal adviser (appeal book, vol. 2, p. 323). In the event of disagreement

between the person authorized to lay charges and the unit legal adviser, the matter was to be referred to a superior officer for decision.

[25] The final investigation report was completed on January 29, 1998.

[26] On April 14, 1998 Cdr. Price, unit legal adviser to the NIS, issued a legal opinion in which he concluded that there was not sufficient evidence to lay charges against Capt. Langlois but that there was evidence to lay charges against Sgt. Pineault and Cpl. Ouellet (appeal book, vol. 2, p. 286).

[27] Warrant Officer Pelletier did not agree with the legal opinion that there was not sufficient evidence against Capt. Langlois. As required in the NIS interim policy, he forwarded his disagreement to his superior officer for decision. He was then instructed not to lay any charge against Capt. Langlois, as recommended in the legal opinion.

[28] On April 28, 1998 Warrant Officer Pelletier laid charges against Sgt. Pineault and Cpl. Ouellet.

[29] Sgt. Pineault and Cpl. Ouellet were tried by a standing court martial in November 1998 and January 1999. Both were convicted of assault contrary to s. 130 of the *National Defence Act*.

[30] On March 30, 1999, once the trials were concluded, the Canadian Forces Chief of the Land Staff, Lt. Gen. Leach, convened a commission of inquiry into the incidents in Haiti in July 1997.

[31] In its June 1999 report the commission of inquiry concluded there was sufficient evidence to lay charges against Capt. Langlois. A review of the police investigation was subsequently conducted and ultimately after another legal opinion charges were laid against Capt. Langlois on March 28, 2000.

[32] On September 1, 1999, following amendments to the *National Defence Act* (*supra*, para. 13), amendments were made to the QROCF. Under s. 109.05, it was no longer the referral authority who decided that further action should be taken on the charge, but the Director of Military Prosecutions. Additionally, the possibility of a summary trial was eliminated for the type of situation in which Capt. Langlois found himself.

[33] On June 8, 2000 Brig. Gen. Gagnon, in his capacity as referral authority, asked the Director of Military Prosecutions in the Office of the Judge Advocate General, pursuant to 109.05 QROCF, to decide whether a court martial should be convened. In his request the Brigadier General explained that if it was up to him, he might [TRANSLATION] “find it difficult to recommend a court martial in such circumstances” (appeal book, vol. 2, pp. 305 and 306).

[34] On August 9, 2000 the Director of Military Prosecutions nevertheless decided to proceed with the charge against Capt. Langlois (appeal book, vol. 2, p. 275).

[35] The indictment was signed on August 16, 2000. Captain Langlois was charged with two counts of acts to the prejudice of good order and discipline contrary to s. 129 of the *National Defence Act* (appeal book, vol. 2, p. 2).

[36] On September 15, 2000 a convening order was issued which set October 3, 2000 as the date of the trial (appeal book, vol. 1, p. 1).

[37] That summary of events is incomplete but in my opinion it sufficiently describes the important developments.

[38] I note that counsel for the respondent did not argue in this Court that the post-charge delay between the date of the charge, March 28, 2000, and the date set down for trial, October 3, 2000, was an unreasonable time within the meaning of s. 11(*b*) of the Charter. Counsel relied exclusively on the pre-charge delay and on s. 7 of the Charter.

[39] Counsel for the respondent also admitted before the military trial judge that [TRANSLATION] “the harm done to the accused was minimal”. It appeared from the oral and documentary evidence that the respondent was continued in his employment in a regular and normal way from the time the investigation began; no administrative action was taken against him following the filing of the charges; he believed after April 28, 1998, based on information

received from superior officers, that no charge would be laid against him; he believed in April and May 1999, when he was informed that his testimony would not be required before the commission of inquiry, that the matter had been finally settled; and he was greatly surprised when on March 3, 2000 he was summoned to his commander's office and formally charged.

[40] Counsel for the respondent also argued, and perhaps most importantly, that as Capt. Langlois was not charged before the amendments to the *National Defence Act* came into effect on September 1, 1999 he lost the opportunity hitherto available to the referral authority to proceed by summary trial rather than court martial and so of being subject to a lesser penalty in the event of conviction.

[41] Additionally, the prosecution explained the delay incurred by the confusion caused by the changes in regulations and legislation in mid-stream, affecting the identity of the person authorized to lay charges, and the duty of the Canadian Forces not to order the holding of a commission of inquiry so long as Sgt. Pineault and Cpl. Ouellet's trial had not been completed. In this connection, she cited *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy*), [1995] 2 S.C.R. 98.

Application of principles to facts of case

[42] Strangely, the military trial judge did not consider the meaning to be given to the phrase "security of the person". Worse, by concluding that the delay [TRANSLATION] "had the effect of seriously damaging Capt. Langlois' right to liberty and security of his person", he suggested that the respondent's right to liberty was at issue and of course that is not the case.

[43] Had the military trial judge considered the meaning of the phrase “security of the person” and examined the observations of Bastarache J. in *Blencoe*, he could only have come to the conclusion that there was no deprivation of Capt. Langlois’ security within the meaning of s. 7 of the Charter. Captain Langlois only suffered the psychological insecurity that any suspect person undergoes: he may have even suffered less since he believed for a long time that he would not be prosecuted. He simply did not present evidence that the governmental act complained of, in respect of his personal, family, social and professional life, had “a serious and profound effect” on his psychological integrity (*Blencoe*, *supra*, para. 9, at 355).

[44] I do not think the alleged harm resulting from the convening authority’s loss of discretion to hold a summary trial should be considered in the case at bar in terms of a deprivation of psychological integrity. The psychological insecurity resulting from that harm was to say the least theoretical: as the respondent did not think he would be prosecuted, he could hardly have been concerned by the type of trial he would have.

[45] Additionally, I do not think the respondent can argue that the change in the QROCF threatened his physical integrity as he was henceforth subject to certain more severe penalties than those which could have been imposed on him in a summary proceeding. The respondent had no vested right to such a summary proceeding. The discretion to choose a summary proceeding belonged not to him but to the reviewing authority. Here again, he retained the right to refuse a summary trial because of the procedural guarantees associated with a trial by court martial. In

this sense, I am not prepared to say that Capt. Langlois' physical integrity was compromised at this stage.

[46] The question is one which might arise instead at the second stage of the analysis, when the principle of fundamental justice at issue must be identified. I will not proceed to that second stage since I have already concluded that no evidence was presented of a deprivation of security of the person. Even if for the sake of argument I did so proceed and came to the conclusion that there was a breach of s. 7, the appropriate remedy under s. 24 of the Charter would probably not be for this Court to order a stay of proceedings but for the court martial judge, if he finds Capt. Langlois guilty, not to impose on him a heavier sentence than what could have been imposed if he had been tried in a summary way.

[47] I would allow the appeal, quash the decision of the military trial judge and, making the decision which should have been made, dismiss the motion for a stay.

Robert Décary
J.A.

I concur.
A.M. Linden, J.A.

I concur in this opinion.
R. Durand, J.A.

Certified true translation

Suzanne M. Gauthier, LL.L. Trad. a.

COURT MARTIAL APPEAL COURT OF CANADA
NAMES OF SOLICITORS OF RECORD

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DATE OF REASONS:	November 14, 2001

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