C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.R. No.: 11769

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

HER MAJESTY THE QUEEN

Plaintiff

- and -

JAMIL Y. KARAM et al

Defendant

HEARD: At Halifax, Nova Scotia on the 3rd, 4th and 5th days of September, A.D., 1991.

BEFORE: The Honourable Judge Nancy J. Bateman

CHARGE: Section 11(6) of the Criminal Code.

DECISION: September 6th, 1991.

COUNSEL:

(ORALLY):

The defendants are charged on a six count indictment alleging theft and fraud over an eighteen month period.

They have moved for a stay of proceedings, alleging a violation of their S.11(b) Charter right, to be tried within a reasonable time.

In **R v. Askov**, (1990), 59 C.C.C. (3d) 449 (S.C.C.) Cory J., writing for the majority, drew upon previous S.C.C. decisions such as **R. v. Mills**, **R. v. Rahey**, **R. v. Smith**, in setting out the factors to be considered in determining whether there has been a s. 11(b) violation.

Cory J. sets out four factors:

1. Length of delay;
2. Explanation for the delay;
3. Waiver;
4. Prejudice to the accused.

Little guidance is provided, however, in the way to balance these factors. My understanding of the logical process is as follows:

1 **Length of Delay:**

The court first looks at whether the elapsed time which is alleged to be unreasonable is long enough to **prima facie** invite investigation. If the elapsed time does not call for scrutiny, the matter goes no further, there is no violation.

At this point, therefore, it may be appropriate to look at statistical data speaking to the usual length of time involved for comparable jurisdictions.

If the elapsed time is **prima facie** longer than would be expected, the Court moves on to the second factor.

2. **Explanation for the delay**.

An elapsed time which **prima facie** appears too long may be excusable, taking into account the cause of the delay.

Cory J. suggests three subcategories under this head (i) conduct of the Crown (ii) systemic or institutional delay (iii) conduct of the accused.

While the ultimate burden is on the accused to satisfy the Court that the delay has been unreasonable, at this stage of the matter there is an evidentiary burden on the Crown to satisfy the Court that the time involved in the case was reasonable or excusable (**R. v. Smith** (S.C.C.)). It is not necessary to find any bad faith or improper notice by the Crown, whether the delay is intentional or inadvertent is irrelevant if the period of time is too long.

While the sub categories identified by Cory J. are helpful in isolating the causes of the delay, in the final analysis he seems to find that there are really only two types of delay - that which is actively caused by the accused and, therefore, of which he cannot take advantage and all other delay whatever the cause.

I have difficulty in distinguishing between Justice Cory's "conduct of the accused" category under this head and the factor which he calls "waiver", which is separately considered - they seem to be the same.

It seems the only significance of categorizing the causes of delay is to remove from consideration those periods of time which ran because of the actions of the accused. The Crown is relieved from providing any excuse or justification for those periods. In all other cases the Crown must explain the delay.

If the Crown adequately explains the delay in a manner that justifies the lapse of time, then the delay is not "unreasonable" and the inquiry ends. There is no violation.

If the Crown is **unable** to satisfy the Court that the length of time involved is reasonable, then the Court moves on the consider the next factor.

3. **Waiver**;

Notwithstanding an unreasonable delay, the court may refuse to grant relief if the accused has clearly and unequivocally and in an informed manner waived her right to a trial within a reasonable time. Silence or lack of objection by the accused is not waiver. An accused may have good reason to waive her s. 11(b) right, as delay can inure to the benefit of the accused.

Agreeing to future dates can result in implied waiver if there is no conduct rebutting the implication and if the accused is truly exercising an option, rather than acquiescing to the inevitable.

If there has been waiver, relief is denied and the stay is not granted.

It is clear that stay is not a discretionary remedy, once unreasonable delay is found, but rather the minimum relief which can be granted, as clarified in **R. v. Bennett**.

If there has been no waiver, the delay having been found unreasonable, the Court will grant relief subject to the last consideration.

4. **Prejudice to the Accused**;

As I understand the decision of Cory J., where the delay is unreasonable **and** there has been no waiver, the Crown may nevertheless forestall the granting of a stay if it can demonstrate that the accused has not suffered any prejudice as a result of the delay. This is so because the very essence of the s. 11(b) right is to ensure that an accused is not prejudiced in the process, beyond what is to be expected from the fact of being charged.

It seems logical that prejudice is only considered in the context of the Crown's last ditch effort to save a proceeding that has been unreasonably delayed.

It is not clear, however, that the judges in **Askov** are unanimous on this point. It appears that in **Askov** and subsequent cases some judges consider whether or not there has been prejudice in determining if the length of the delay is unreasonable. I will address this point below.

All judges in **Askov** agreed that there is certain prejudice inherent in being charged. They differ as to whether these inherent prejudices can be exacerbated by time, sufficient to meet the test, or whether special prejudice must be demonstrated.

I have difficulty considering prejudice in the context of deciding whether the delay is too long. For example, a person may be charged with a serious matter shortly before the conclusion of a significant business transaction. He may, as a result, lose the deal. The trial may be concluded within a very short time frame, yet the prejudice is great - that does not make the time elapsed, which would otherwise be reasonable, unreasonable. If that were the case, active business people would be entitled to be tried sooner or faster than the ordinary person, who's business or employment is unaffected by pending charges. This does not seem appropriate.

At page 483 Cory J. says:

> "Furthermore, the option left open by Sopinka J. in the Smith case whereby accused persons who have suffered some additional form of prejudice are permitted to adduce evidence of prejudice

> on their own initiative in order to strengthen their position in seeking a remedy under s. 24(1) of the Charter is consistent with the primary concern of protecting the individual's right under s. 11(b)."

At page 36 of **Bennett**, Arbour J. states:

> "Some forms of prejudice are so readily apparent, such as pre-trial custody, that the system is expected to, and does routinely, take it into account in setting early trial dates. However, if an accused is being prejudiced by delay in a less apparent way, he or she must bear the responsibility for taking the initiative in alleviating that prejudice.
>
> This, in my view, is not inconsistent with the proposition that an accused need not assert his s. 11(b) right. An accused who claims prejudice, beyond the prejudice common to most accused and inferred from any delay, is claiming an entitlement to a speedier trial than other accused in apparently similar circumstances. The only way for the system to accommodate that claim is to hear it expressed. There comes a point, in my opinion, where an accused who is suffering a special prejudice from the delay of his trial must bring his or her plight to the attention of the prosecuting authorities and the courts."

Applying the **Askov** test to this case I first consider:

1. **The length of the delay.**

The elapsed time from first appearance to the beginning of the trial is 842 days - 27.7 mos. On any objective analysis this length of time calls for some explanation. The evidentiary burden shifts to the Crown to explain the delay.

2. **Explanation for the delay.**

The defence says the period of time is so long it cannot possibly be justified. All but three weeks, it says, is attributed to the Crown.

While, ultimately, the total period of time must be considered, for the purposes of identifying causes, the total time is broken down into segments.

The most significant period runs from arraignment on July 6, 1989 to the preliminary on December 3, 1990. This totals 546 days or approximately 18 months.

The preliminary was originally scheduled for March 1, 1990, by agreement of counsel. Material to the defence agreeing to that date, however, was the Crown's anticipated schedule for disclosure. It was expected that the accountant's report would be available June 5th, 1989 and the balance of material by the end of July.

Based upon that timetable the defence agreed to March 1, 1990 as the preliminary hearing date. I infer from this that the defence felt that the time between disclosure and preliminary was a reasonable one and was presumably time necessary for the defence to prepare, including consultation with their own experts. I am not suggesting that the defence, by agreeing to the date waived the s. 11(b) right - that is to be considered at a later stage - but rather, in order to get a sense of what is a "reasonable period" in this case, it seems appropriate to look at the reactions of counsel, who were intimately involved with the matter. Clearly, experienced counsel involved at the time are in the best possible position to determine what is reasonable. The correspondence exchanged between counsel indicates that the defence was invited to suggest dates for the preliminary other than March 1st but declined. There is indication as well that defence counsel, at the time of setting the preliminary in June for the following March, expressed some doubt as to his ability to be prepared within that time frame - assuming the disclosure was made as anticipated. As stated by Dubin, C.J.O. **R. v. Bennett** at p. 8:

> "Mere silence a lack of objection...cannot constitute lawful waiver. However it has also been held that the accused's conduct must be taken into account in assessing the prosecution's explanation for the delay."

And at p. 32, Arbour J. states:

> "The conduct of counsel prior to **Askov** may assist in ascertaining whether, in a given jurisdiction, there was a subjective perception of unreasonableness in the length of time it took for cases to be tried. Acquiescence to dates and to adjournment cannot always be construed as simple resignation to the inevitable. In some instances, the acceptance of a trial date more than eight months away may indicate a recognition by counsel that such a time lapse, in all the circumstances, is not unreasonable."

In the defence's assertion that its agreement to March 1 was driven by the Crown's disclosure schedule, is implicit the suggestion that if disclosure had been simultaneous with the charge, or at least sooner than projected, the matter could have proceeded before March 1, 1990.

Since full disclosure was anticipated by the end of July, about 2 months after election and plea, working backwards, the defence is suggesting it might have been ready to proceed in early January 1990.

The first question, then, is whether the Crown's proposed disclosure schedule was reasonable for this case. I have not been presented with any material on the timing of disclosure. There are presumably no fixed time frames other than the clear principle that the defence is entitled to timely and full disclosure.

At the time the information was sworn (May 15) the Crown's expert accountants had completed their review of the documents and provided an oral assessment to the Crown. The police had investigated the matter from December 1987 to May 1988. In May search warrants were obtained and executed resulting in the seizure of 76 large boxes of documents. These were the records analyzed by the accountants.

It seems logical that the accountants not prepare a formal report, suitable for trial presentation, before the Crown had determined to proceed with charges. Obviously if charges were not to result the expert report would not be necessary.

On the other hand, it also seems logical and fair that the Crown not make a decision to charge the accused

in mid May but wait months for a formal report before swearing the information - just to facilitate immediate disclosure. For the Crown to decide to lay charges yet wait for the formal report would be particularly unfair in these circumstances where the accused was aware of the investigation and, I presume, anxiously awaiting its outcome. It is quite appropriate that the accused be advised at the earliest possible time of the decision of the Crown to proceed - this was done.

The initial time estimated to provide the report by the accountants retained by the Crown appears reasonable given the many thousands of documents seized and reviewed. At this point I must add that it is extremely difficult for me to make judgments as to the "reasonableness of the time" to prepare the report, or prepare for trial, when I have only sketchy information about the case. Obviously I can't examine proposed exhibits or hear details in advance of the trial. It may be that this type of motion is better handled by a judge other than the one assigned to hear the case.

The Crown did not provide the accounting report until August 23rd with the balance of the disclosure over the next several weeks, culminating with the rough court brief on October 18th - some 2½ months later than anticipated.

On July 4th, 1990 defence counsel wrote the Crown and expressed doubt that the matter could proceed March 1st since the end of June disclosure had not been provided. This is further indication of the length of time required by the defence to prepare for the preliminary - and goes to my determination of the "reasonableness" of the period.

Due to the delayed disclosure, the Crown suggested adjourning the preliminary to April 30, 1990. In a letter of September 28th the Crown enumerated other reasons why the adjournment would be convenient. The defence responded that they "would not oppose" the adjournment.

Again, while the defence's lack of opposition cannot be viewed as waiver, it leads me to the conclusion that the additional time to April 30th was considered reasonable, and probably necessary by the defence. I would add, however, that it might have been more appropriate for the Crown to affirm its willingness to proceed and leave the matter of the adjournment to the defence - if needed. These were, however, the "**pre-Askov**" days referred by Arbour, J. in **R. v. Bennett**.

Was the Crown unreasonable in not fully disclosing prior to mid October? Again I am called upon to make a critical decision with inadequate information. I know

there are 19 exhibit books comprising 4,000 documents; that the alleged offences occurred over an 18 month period; that the amount allegedly defrauded over that period exceeds $900,000.00; that there are 3 alleged institutional victims; that there are two defendants, one being a corporation; that this alleged offence was not a single transaction but an ongoing fraud over the 18 month period, and that it was necessary to retain an accounting expert to review 36 boxes of seized documents. I cannot conclude that the overall time to make full disclosure, in these circumstances, was unreasonable.

In August 1989 Sgt. Neil Smith assumed conduct of the file from the two original investigating officers. The defence says that transfer of responsibility caused unnecessary delay in the disclosure. The original disclosure timetable had by then passed, even though the two original investigating officers remained in place. Sgt. Smith agrees that his job in assembling the witness' statements and court brief would have been easier, had he continued to have the assistance of one of the original officers, but he does not agree with the proposition that the disclosure would have come sooner. He says he worked days and evenings assembling the material. It seems reasonable, in cases such as this spanning years, including investigative time,

that the officials involved such as police officers, be permitted to get on with their lives and careers. One of the officers left to attend law school - that does not seem unreasonable. Indeed the period after completion of the investigation and before trial seems particularly appropriate time to make personnel changes in long cases such as this.

Full disclosure in terms of the initial court brief was made in mid October - if it hadn't been made by September when the original investigating officers were available - the further six weeks does not seem unreasonable. It is my understanding from the evidence of Sgt. Smith that the documents in support of the experts report could not be assembled until the report was received August 23. The original disclosure estimate anticipated full disclosure within two months after the accountant's report. This is almost exactly the period of time that followed. I cannot relate the extended time for full disclosure to the change in personnel, but rather it appears to have been triggered by the late arrival of the accounting report.

I find the Crown has adequately explained the reason for the time elapsed from arraignment to April 30, 1990. The period of time, in the circumstance of this case was not unreasonable.

The next period for consideration runs from April 30, 1990 to December 3, 1990, when the preliminary hearing was finally held.

Around April 17, 1990 the Crown attorney developed unforseen complications from routine eye surgery. He would be unavailable until early May. The Crown suggested postponing commencement of the preliminary to May 14th. The defence rejected this suggestion due to its concern that the remaining time would not be sufficient to complete the preliminary. In his response on April 25th, counsel for the defence suggested a postponement to "late fall".

The Crown then suggested a June preliminary, this was not convenient to the defence. While there was court time available in July and August, it is not clear that that timing was specifically discussed with defence counsel. Defence counsel was unavailable throughout the fall - the preliminary was rescheduled to December 3, 1990, the earliest available date for the defence.

The defence says the delay from April 30 to December 3 is inexcusable and caused solely by the Crown's unavailability to start March 1. The Crown says the delay

attributed to the Crown was minimal, but the lengthy period resulted from the unavailability of the defence.

The unavailability of the Crown attorney was an unavoidable and unexpected event. Given the timing of the problem, just two weeks before the preliminary was to start, the file could not be handed over to another Crown attorney.

At this point the defence had full disclosure and presumably some idea of the actual time required for the preliminary. Ultimately the hearing consumed only 5½ days although that was not known in advance. In my view, defence counsel would have been prepared to proceed on May 14 or would have made some effort to investigate summer dates if the prospect of a further delay was unreasonable. In his letter to the Crown attorney on June 4th defence counsel says at the time of the adjournment he did have available dates in June, July and August, yet in a conversation with the Crown's office on April 26th he rejected the June dates. The very first response by the defence was to suggest a late fall date. This is not waiver by the accused but a clear indication that a delay of that magnitude was not unreasonable - consistent with

the above quoted remarks of Dubin C.J.O. and Arbour J. in **Bennett**.

I again find that the Crown has provided a satisfactory explanation, justifying the postponement of the preliminary to December 3, 1990. In the unique circumstances of this case the delay is reasonable. Cory J. specifically recognizes in **Askov** at p. 485 that a lengthy delay can be justified where there is a need for a lengthy investigation or retention of and discussion with expert witnesses. This is addressed as well by MacLachlin J. at p. 496.

The next period for consideration is the time from re-election in County Court (Dec. 20, 1990) to the date of trial (Sept. 3, 1990). (257 days, 8.7 months).

At the time of setting down, days were available in June, however the first month long block began in September. Of the subcategories of delay this is "systemic". The entire period of delay in **Askov** was systemic and unacceptable. It was held in **Askov** that the case was not complex, and not one which required significant resources or time. The appellant had suffered prejudice through incarceration. (This account is as summarized by Arbour

J. at p. 11 of **Bennett**). Cory J. recognizes that systemic delay is the most difficult factor to assess.

The defence has filed an affidavit of Professor Carl Barr, summarizing dispositions in various jurisdictions. Clearly the **total** time required for this case significantly longer than the norm.

Is 8½ months to obtain a trial date after committal too long? Dr. Barr acknowledges that he had no means of measuring the complexity of cases in his study of elapsed time. His material does not conclusively answer the question as to an acceptable period from committal to trial.

In this instance the counsel were seeking a significant block of court time. It is reasonable to expect the time from setting down to trial would be somewhat longer than the norm. Cases were being scheduled in County Court within five to six months. This case was scheduled about two months beyond that time frame.

That time frame does not seen unreasonable. A significant factor contributing to the congestion in the County Court is the failure of accused persons, who intend to enter guilty pleas to notify the court sufficiently

in advance of the trial date to allow a substitute case to be scheduled. Most commonly we learn of the change of plea the morning of the trial. A court day is lost. We currently have a system of assigning dates only if convenient to counsel, generally defence counsel. While that is desirable from the perspective of the accused, it causes some waste. Requests for adjournments are not uncommon and generally granted. It is to convenience both counsel and the accused that cases are not doubled booked - as occurs in many jurisdictions. With double booking few court days are lost. At present, however, we operate a consensual system. This results in a somewhat longer waiting time before trial - that is the price of managing our resources to convenience accused persons and their counsel.

As stated by Dubin C.J.O. in **Bennett** at p. 15:

> "However, if a stay is held also to be the only appropriate remedy to protect the latter interests, then serious consideration will have to be given to the manner in which trial dates in criminal cases are to be set in this province where traditionally, within reasonable limits, every effort has been made to accommodate the accused and his or her counsel."

As stated by Arbour J. in **R v. Bennett** at page 14, "it is the reasonableness of the total period of time

that has to be assessed in the light of the reasons that explain its constituent parts". I take this statement to mean that even if a part of the whole case is unreasonably delayed, if the overall time frame is reasonable, stay will not be granted.

I have found that there is a justification for the delay from arraignment to the preliminary. I have also found that the systemic delay from re-election to trial is within acceptable limits. Accordingly, there has been no S. 11(b) violation. As I understand the test the inquiry ends here.

Waiver is only considered if the elapsed time is unreasonable.

I have earlier stated my understanding that prejudice is considered only in the negative, to excuse an otherwise unreasonable delay. On this point I refer to Arbour J's summary of **Askov** in **Bennett** at p. 11:

> "The two year delay subsequent to committal for trial was such a lengthy period that only a strong justification could excuse it. It turned out to be pure systemic delay, in a case which

> was not complex or inherently difficult. Three of the appellants had been subject to lengthy periods of pre-trial custody and all were under somewhat stringent bail conditions. It could not therefore be said that absence of prejudice could excuse the delay."

One matter which bears comments is the timing of this application. There has been much debate as to the appropriate procedure to follow when launching charter arguments. Some are best made well in advance of the trial and others can only be made at the commencement or during.

It appears to me that this motion should have been made months ago, very shortly after the trial was scheduled for County Court. In making that remark I intend no criticism of the defence in this matter. I am sensitive to the likely concern of the defence that if the motion was made too early the alleged prejudice to the defendants may not have fully matured.

On the other hand, this is a crucial motion and deserving of significant time and attention. No time allowance was made for the motion at the initial setting down. As a result I have had to deal with the matter in a very compressed time frame. Due to these constraints, while I am comfortable with the decision, I have not been

able to put together a judgment which contains full case references and, in some instances, I have not had time to fully articulate my analysis of the issues. While I could have adjourned for a longer period of time, that would have taken valuable days away from the trial (if it was to proceed) and I am now told sufficient time has not been allowed.

Additionally, in my view, the s. 11(b) argument in this case should have been heard by a judge other than the one scheduled to hear the case. That judge could then have viewed some of the intended exhibits and heard better detail as to the "complexity" of the case.

Finally, had the motion been heard months ago, and if allowed, the court time could have been assigned to other cases. Had I allowed this motion, a month of court time would be lost with virtually no hope of filling the days. This is the type of situation which contributes to "systemic delay".

I make it clear that I did not take these latter items into consideration in determining the merits of the motion. I do recognize that defence counsel must ultimately

make a decision as to timing governed only by the interests of the accused.

In summary, then, I find no violation of the defendant's s. 11(b) rights. The motion is denied. The trial will proceed.