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

C. BW. No. 8266

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

HER MAJESTY THE QUEEN

- and -

DANIEL LAWRENCE SABEAN

David S. Walker, Q.C., Counsel for the Accused, Daniel Lawrence Sabean.
C. Lloyd Tancock, Esq., Counsel for Her Majesty the Queen.

1991, February 28th, Palmeter, C.J.C.C.:- This is an application by the accused under Section 24(1) of the **Canadian Charter of Rights and Freedoms**, alleging that his right to a trial within a reasonable time has been breached pursuant to Section 11(b) of the **Charter**, and to obtain such remedy as the Court considers appropriate and just in the circumstances.

On such an application, which is most appropriately made to the trial judge either prior to or at the commencement of the trial, the onus is on the party asserting a breach of a **Charter** right to establish such a breach on a preponderance of evidence.

It is necessary to set forth the relevant dates and circumstances in this matter:

1.	November 23, 1989	Date of alleged offence. Mr. Sabean given Appearance Notice on that date alleging **Criminal Code** Section 253(b) (breathalyzer) offence and Section 253(a) (impaired driving) offence;
2.	November 29, 1989	Information laid and Summons issued alleging breathalyzer offence and impaired driving causing death;
3.	January 10, 1990	Mr. Sabean appears in Court, elects trial by Judge without Jury, Preliminary Inquiry set for April 4, 1990;
4.	April 4 & 6, 1990	Preliminary Inquiry held;
5.	April 6, 1990	Mr. Sabean was committed to stand trial in County Court on June 19, 1990 on charge of impaired driving causing bodily harm under Section 255(2) of the **Criminal Code.**
6.	May 8, 1990	Indictment signed and filed;
7.	May 11, 1990	Letter sent to Crown and defence by Deputy Clerk of County Court indicating trial dates would be November 13 and 14, 1990;
8.	May 15, 1990	Defence counsel wrote Deputy Clerk confirming November 13 and 14, 1990 were satisfactory to him;
9.	August 1, 1990	County Court Judge for District Number Two appointed a Justice of the Supreme Court of Nova Scotia, Appeal Division. No replacement County Court Judge appointed.

10.	November 6, 1990	Mr. Sabean and defence counsel appeared before myself sitting as an additional judge for District Number Two. Over defence objections matter was rescheduled to December 11, 1990 for the selection of a new trial date, as there were no judges available to hear the matter. Defence counsel indicated that Mr. Sabean was ready to go to trial on November 13 and 14, 1990 and that he objected to the postponement of the trial and indicated he was reserving the rights of the accused under the **Charter**.
11.	November 28, 1990	Judge Hiram Carver appointed Judge of the County Court for District Number Two.
12.	December 7, 1990	Judge Carver sworn in as County Court Judge for District Number Two.
13.	December 11, 1990	Mr. Sabean appeared before Judge Carver. He agreed to Judge Carver trying case although he had presided at the Preliminary Inquiry. Trial was scheduled for March 5 and 6, 1991, at the Court House, Lunenburg, Nova Scotia. (It was subsequently rescheduled to Liverpool, Nova Scotia). Defence counsel objected to the adjournment and informed Judge Carver he would, at trial, be making representations under, particularly, Section 11(b) of the **Charter of Rights.**

Judge Carver asked that a Brief be submitted ahead of time.

The first question to be asked is whether the trial will be heard "within a reasonable time". The dates indicate a period of over fifteen months from the date of the issuance of the Appearance Notice (November 23, 1989) to the date set for trial (March 5, 1991) and some eleven months from the date of committal for trial (April 6, 1990) to the date set for trial.

In the case of **Carter v. The Queen** (1986) 26 C.C.C. (3d) 572, Lamer J., as he then was, of the Supreme Court of Canada, referred to his decision in **Mills v. The Queen** (1986) 26 C.C.C. (3d), 481 (S.C.C.) and indicated that the time frame in computing trial within a reasonable time generally runs only from the moment a person is charged.

Although, in this case, I am particularly concerned with the time from committal for trial to the end of the trial, I must consider all of the time involved, including from the date the accused was given his Appearance Notice.

In the case of **R. v. Askov** (1990), 59 C.C.C. (3d) 449 (S.C.C), the Supreme Court of Canada sets forth four significant factors to be considered in determining whether there has been unreasonable delay, as follows:

1. The length of the delay;
2. Explanation for the delay;
3. Waiver; and
4. Prejudice to the accused.

In **Askov**, Mr. Justice Corey in the majority decision in speaking of length of the delay at p. 477 states:

> "It is clear that the longer the delay, the more difficult it should be for a court to excuse it. This is not a threshold requirement as in the United States, but rather is a factor to be balanced along with the others. However, very lengthy delays may be such that they cannot be justified for any reason."

Three prior cases of the Supreme Court of Canada, dealt with unreasonable delay, namely **Mills v. R.**, supra, **Rahey v. The Queen** (1987) 33 C.C.C. (3d) 289 and **R. v. Smith** (1989) 52 C.C.C (3d) 97. Referring to these three cases Cory, J., in **Askov** at p. 484, states:

> "It is interesting to note that the delay at issue in **Mills** was 19 months, in **Rahey** 11 months, and in **Smith** one year. Although the period of delay in **Conway** is comparable to that of this case, it must be remembered that in that case the delay was directly attributable to the actions of Conway."

Stays of proceedings were granted by the Supreme Court of Canada in **Mills**, **Rahey** and **Smith**.

At p. 490 of **Askov**, Mr. Justice Cory states:

> "Making a very rough comparison and more than doubling the longest waiting period to make every allowance for the special circumstances in Peel would indicate a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable."

In referring to Peel, Mr. Justice Cory refers to the District of Peel in the Province of Ontario which had special problems relating to hearing caseload and lack of facilities and court resources.

Counsel for the accused in referring to **Askov** makes the comment that in a district which was categorized as being one of the worst in Canada, the outside limit between committal and trial as set by the Supreme Court of Canada was eight months, and in the case before me the time elapsed would be some eleven months.

In **Askov** Mr. Justice Cory refers to statistical surveys done involving other parts of Canada and the time limits between committal and trial in other provinces. He seems to suggest that the time of eight months between committal and trial is the outside limit anywhere in Canada. On the basis of the submissions made to me eight months would surely be the outside limited in District Number Two. I would be almost inclined to think that in this District a range between four months and six months would be the outside limit. Based on the **Askov** decision, eleven months in this case would appear to indicate that the trial will not be held "within a reasonable time", as contemplated by Section 11(b) of the **Charter**.

I must now consider the explanation for the delay and whether that explanation is a reasonable one. I agree with counsel for the accused that the reason for the day was the failure to expeditiously appoint a replacement judge for District Number Two. As a matter of fact, a period of over five months elapsed between the time of

the announcement of the appointment of Judge Freeman to the Appeal Division (which was announced the first week of July, 1990) to the date of the swearing-in of the new judge in December.

This in effect constituted a lack of institutional resources. In **R. v. Mills**, supra, Lamer, J., at p. 550 states:

> "In an ideal world there would be no delays in bringing an accused to trial and there would be no difficulties in securing fully adequate funding, personnel and facilities for the administration of criminal justice. As we do not live in such a world, some allowance must be made for limited institutional resources.
>
> It is imperative, however, that in recognizing the need for such a criterion we do not simply legitimize current and future delays resulting from inadequate institutional resources. For the criterion of institutional resources, more than any other, threatens to become a source of justification for prolonged and unacceptable delay. There must, therefore, be some limit to which inadequate resources can be used to excuse delay and impair the interest of the individual."

At p. 554 Lamer, J., also states:

> "In many ways, the problem of systemic delay poses one of the first significant challenges to this Court's interpretation and application of the **Charter**."

And at p. 555:

> "There can be no assumption that the constitutional right to be tried within a reasonable time must conform to the status quo; rather, it is the system for the administration of criminal justice which must conform to the constitutional requirements of the **Charter.**"

In **Askov** at p. 478, the majority of the Supreme Court of Canada states:

> "The right guaranteed by s. 11(b) is of such fundamental importance to the individual and of such significance to the community as a whole that the lack of institutional resources cannot be employed to justify a continuing unreasonable postponement of trials.
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> However, the lack of institutional facilities can never be used as a basis for rendering the s. 11(b) guarantee meaningless."

I do not find the failure to appoint a replacement judge for District Number Two for a period of some five months a reasonable or satisfactory explanation for the delay. Had a judge been appointed within three months of date of Judge Freeman's elevation, although the announcement thereof had been made a month previous, the trial could have gone ahead as scheduled in November. It seems to me that once it is shown that there was an unreasonable delay in bringing the matter to trial there is some burden on the Crown to show that the delay has a satisfactory explanation. In this case the Crown has

not done so. I make this comment fully acknowledging that the accused in alleging a breach of a **Charter** right has the ultimate or legal burden of proof throughout. See the decision of Sopinka, J., in **R. v. Smith**, supra, at p. 106-107:

> "I accept that the accused has the ultimate or legal burden of proof throughout. A case will only be decided by reference to the burden of proof if the court cannot some to a determinate conclusion on the facts presented to it. Although the accused may have the ultimate or legal burden, a secondary or evidentiary burden of putting forth evidence or argument may shift depending on the circumstances of each case. For example, a long period of delay occasioned by a request of the Crown for an adjournment would ordinarily call for an explanation from the Crown as to the necessity for the adjournment. In the absence of such an explanation, the court would be entitled to infer that the delay is unjustified. It would be appropriate to speak of the Crown having a secondary or evidentiary burden under these circumstances. In all cases, the court should be mindful that it is seldom necessary or desirable to decide this question on the basis of burden of proof and that it is preferable to evaluate the reasonableness of the over-all lapse of time, having regard to the factors referred to above. I believe that this is the type of flexibility referred to by my colleague in her reasons quoted above."

I must also consider whether there has been a waiver by the accused in regard to the time periods. I do not find a waiver in this case. In May of 1990 the accused by his counsel agreed to trial dates on November

13th and 14th, 1990 some six months away. In my opinion this would be the outside limit for expiry of time between committal and trial in this District unless otherwise agreed to by counsel.

On November 6th, 1990 the accused, through counsel, objected to any adjournment and indicated he was reserving his rights to make application under the **Charter.** The same thing occurred on December 11th, 1990 when the matter was adjourned again and was set for trial commencing March 5th, 1991 at Liverpool.

L'Heureux - Dube, J., of the Supreme Court of Canada in the case of **R. v. Conway** (1989) 49 C.C.C. (3d) 289, states at pp. 306 - 307:

> "Waiver involves a consideration of whether any delays were requested, caused or consented to by the person charged. Such delays as a rule do not weigh meaningfully in favour of the unreasonableness of the over-all time period and 'should normally be excluded from consideration when assessing reasonableness': **Rahey, supra**, at p. 305, per Lamer J. In effect, when delays are caused, requested or consented to by an accused, it may generally be assumed that the accused benefits from the resulting protraction of the proceedings, although the ultimate decision will of course have to be made having regard to all the circumstances in each particular case. This is not to say that an accused will necessarily be at fault for contributing to the protraction of the proceedings. An accused has the right to make a full answer and defence and, to this end, to choose the manner in which the exercise this right in

> accordance with the law. Neither for that matter will blame be imputed to the Crown or the judicial system when a claim under s. 11(b) succeeds. The Crown is free to use its prosecutorial discretion as it seems fit, provided that it does not conduct the prosecution in an abusive manner. We are not here concerned with fault but with the reasonableness of the over-all delays in bringing an accused to justice."

I find the actions of the accused in this matter did not constitute any waiver.

The last matter to be considered under **Askov** is prejudice to the accused.

In my opinion unreasonable delay in itself infers prejudice to an accused. Lamer, J., in **Mills**, supra, indicates that there is a prejudice, or an impairment of an accused's security interests which necessarily arises from being charged. At page 543 he states:

> "The proper approach, in my view, is to recognize that prejudice underlies the right, while recognizing at the same time that actual proven prejudice need not, indeed, is not, relevant to establishing a violation of s. 11(b).
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> This approach is predicated upon two propositions. First, prejudice is part of the rationale for the right and is assured by the very presence of s. 11(b) in the Charter. Consequently, there exists an irrebuttable presumption that, as of the moment of the charge, the accused suffers a prejudice the guarantee is aimed at limiting, and that the prejudice increases over time.

> Secondly, actual prejudice is, therefore, irrelevant when determining unreasonable delay. Actual prejudice will, however, be relevant to a determination of appropriate relief as will be hereafter explained. Prejudice to the liberty and security of the person, the former objectively, ascertainable and the latter presumed, must be kept to a minimum if the presumption of innocence is to be respected."

Apparently, the Court held that it was not necessary to prove actual prejudice when considering whether the delay was unreasonable.

In **Askov**, Cory, J., at pp. 482-483 states:

> "The different positions taken by members of the court with regard to the prejudice suffered by an accused as a result of a delayed trial are set forth in **Mills** and **Rahey**. Perhaps the differences can be resolved in this manner. It should be inferred that a very long and reasonable delay has prejudiced the accused. As Sopinka J. put it in **Smith**, supra, at p. 111:
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> > 'Having found that the delay is substantially longer than can be justified on any acceptable basis, it would be difficult indeed to conclude that the appellant's s. 11(b) rights have not been violated because the appellant has suffered no prejudice. In this particular context, the inference of prejudice is so strong that it would be difficult to disagree with the view of

> Lamer J. in **Mills** and **Rahey** that it is virtually irrebuttable.
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> Nevertheless, it will be open to the Crown to attempt to demonstrate that the accused has not been prejudiced. This would preserve the societal interest by providing that a trial would proceed in those cases where despite a long delay no resulting damage had been suffered by the accused. Yet, the existence of the inference of prejudice drawn from a very long delay will safely preserve the pre-eminent right of the individual. Obviously, the difficulty of overcoming the inference will of necessity become more difficult with the passage of time and at some point will become irrebuttable. None the less, the factual situation presented in **Conway** serves as an example of an extremely lengthy delay which did not prejudice the accused. However, in most situations, as Sopinka J. pointed out in **Smith**, the presumption will be 'virtually irrebuttable.'
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> 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)."

Again, there seems to be some shift of burden to the Crown to attempt to demonstrate that the accused has not been prejudice. I have heard submissions by counsel for the Crown and have come to the conclusion that the Crown has not rebutted the presumption of prejudice to the accused by virtue of what I have found to be an unreasonable delay.

I do not find it necessary for the accused to adduce evidence to establish active prejudice in order to be successful in making a **Charter** claim under s. 11(b). The headnote summary of the judgment of Wilson, J., in **Askov**, states at pp. 452-453:

> "One of the elements by means of which he may try to prove the unreasonableness of the delay in bringing him to trial is by showing that he has been prejudiced by the delay, not the prejudice that everyone suffers as a consequence of being charged, but the prejudice that is directly attributable to the lapse of time. It cannot be inferred that an unreasonable delay causes prejudice but that this inference may be overcome by the Crown. On the other hand, prejudice is not an essential element of a s. 11(b) claim. Prejudice to the accused is just one of several factors that need to be weighed in assessing a claim under s. 11(b). The absence of prejudice is not necessarily fatal to such a claim."

In **Rahey**, supra, LaForest, J., is summarized in the head note at p. 292, as follows:

> "There is, however, no requirement that the accused prove actual prejudice to his defence in order to establish that the delay he faced was unreasonable. While prejudice to the right of the accused to a fair trial may help to justify the claim under s. 11(b) it cannot be regarded as essential to it."

In view of the foregoing I have no difficulty in coming to the conclusion that the right of the accused

to a trial within a reasonable time pursuant to s. 11(b) of the **Charter** has been breached. I will, accordingly, grant the application under s. 24(1) of the **Charter** and impose the appropriate remedy, which I find in this case to be a stay of proceedings.

An Additional Judge of the
County Court for District
Number Two