IN THE YOUTH JUSTICE COURT
PROVINCE OF NOVA SCOTIA

Citation : R. v. T.Y., 2010 NSPC 41

Date: May 24, 2010
Docket: 1762021, 1762022, 1762023, 1762024, 1762339

Registry: Sydney

Between

Her Majesty the Queen

and

T.Y.

DECISION ON APPLICATION FOR STAY OF PROCEEDINGS

Judge: The Honourable Judge A. Peter Ross

Decision: May 24th, 2010

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Counsel: John W. MacDonald for the Crown
Jeffrey R. Hunt for the accused

Summary

[1.] The accused was charged with sexual offences under former sections 155 and 156 of the Criminal Code alleged to have occurred between 1979 and 1982. At that time the accused, and the complainants, were young persons. He was charged on April 17th, 2007. Trial is presently scheduled for four days commencing August 30, 2010. Disclosure (including late disclosure of certain statements), a third party records application, the unavailability of an expert witness, docket exigencies and other factors contributed to the delay.

Issue

[2.] Has the right of the accused to be tried within a reasonable time been infringed by the delays experienced here? Ought the proceedings be stayed pursuant to s.24 of the Charter?

Conclusion

[3.] The delay of 40½ months, in all the circumstances, is unreasonable and a stay of proceedings is entered.

DECISION

Introduction

[4.] The accused, TY, is charged with committing offences when he was a young person. The allegations refer to unlawful sexual conduct towards other young persons at Eskasoni between 1979 and 1982. The charges are framed under former sections of the Criminal Code, s.155 and s.156, which were in force at that time.

[5.] This is a decision on a defense application for a stay of proceedings pursuant to s.24 of the Canadian Charter of Rights and Freedoms, alleging an infringement of the right of the accused to be tried within a reasonable time as set out in s.11(b) of the Charter.

[6.] I will begin with the principles which pertain to 11(b) applications as set out in well-known decisions from the Supreme Court of Canada. I will then give the chronology of the present proceeding and a brief synopsis of each court session. I will next examine the reasons for each adjournment and attempt to categorize them according to established caselaw. I will briefly discuss a pre-trial application by the defense which resulted in some of the delay. I will then turn to some cases in this Province and elsewhere which have dealt with an 11(b) issue. After brief mention

of systemic matters, I will consider the specific prejudice suffered by the accused before proceeding to a final conclusion.

Basic principles

[7.] Although somewhat lengthy, it is worth setting out portions of the judgements which serve to guide trial courts faced with 11(b) applications.

[8.] The Supreme Court of Canada stated in R. v. Askov [1990] S.C.J. No. 106 at para. 69 :

> From the foregoing review it is possible I think to give a brief summary of all the factors which should be taken into account in considering whether the length of the delay of a trial has been unreasonable.
>
> (i) The Length of the Delay.
>
> The longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason.
>
> (ii) Explanation for the Delay.
>
> (a) Delays Attributable to the Crown.
>
> Delays attributable to the action of the Crown or officers of the Crown will weigh in favour of the accused. The cases of Rahey and Smith provide examples of such delays.
>
> Complex cases which require longer time for preparation, a greater expenditure of resources by Crown officers, and the longer use of institutional facilities will justify delays longer than those acceptable in simple cases.
>
> (b) Systemic or Institutional Delays.

> Delays occasioned by inadequate resources must weigh against the Crown. Institutional delays should be considered in light of the comparative test referred to earlier. The burden of justifying inadequate resources resulting in systemic delays will always fall upon the Crown. There may be a transitional period to allow for a temporary period of lenient treatment of systemic delay.
>
> (c) Delays Attributable to the Accused.
>
> Certain actions of the accused will justify delays. For example, a request for adjournment or delays to retain different counsel.
>
> There may as well be instances where it can be demonstrated by the Crown that the actions of the accused were undertaken for the purposes of delaying the trial.
>
> (iii) Waiver.
>
> If the accused waives his rights by consenting to or concurring in a delay, this must be taken into account. However, for a waiver to be valid it must be informed, unequivocal and freely given. The burden of showing that a waiver should be inferred falls upon the Crown. An example of a waiver or concurrence that could be inferred is the consent by counsel for the accused to a fixed date for trial.
>
> (iv) Prejudice to the Accused.
>
> There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay.

[9.] Sopinka, J. In R. v. Morin [1992] S.C.J. No. 25 at para 26

> The primary purpose of s. 11(b) is the protection of the individual rights of accused. A secondary interest of society as a whole has, however, been recognized by this Court. I will address each of these interests and their interaction.
>
> The individual rights which the section seeks to protect are: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial.

> 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.
>
> The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public. As observed by Martin J.A. in R. v. Beason (1983), 36 C.R. (3d) 73 (Ont. C.A.): "Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused..." (p. 96). In some cases, however, the accused has no interest in an early trial and society's interest will not parallel that of the accused.
>
> There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In Conway, a majority of this Court recognized that the interests of the accused must be balanced by the interests of society in law enforcement. This theme was picked up in Askov in the reasons of Cory J. who referred to "a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (pp. 1219-20). As the seriousness of the offence increases so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket.

[10.] Morin, *supra*, at para 31:

> 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. As I noted in Smith, supra, "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p. 1131). While the Court has at times indicated

otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

1. The length of the delay

2. Waiver of time periods

3. The reasons for the delay, including
   (a) inherent time requirements of the case
   (b) actions of the accused
   (c) actions of the Crown
   (d) limits on institutional resources, and
   (e) other reasons for delay; and

4. Prejudice to the accused

[11.] These factors are substantially the same as those discussed by this Court in Smith, supra, at p. 1131, and in Askov, supra, at pp. 1231-32.

> The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. See R. v. Kalanj, [1989] 1 S.C.R. 1594. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused.

[12.] Morin re: waiver at para 38

> This Court has clearly stated that in order for an accused to waive his or her rights under s. 11(b), such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights (Korponay v. Attorney General of Canada, [1982] 1 S.C.R. 41, at p. 49;

see also Clarkson v. The Queen, [1986] 1 S.C.R. 383, at pp. 394-96; Askov, supra, at pp. 1228-29). Waiver can be explicit or implicit. If the waiver is said to be implicit, the conduct of the accused must comply with the stringent test for waiver set out above. As Cory J. described it in Askov, supra, at p. 1228:

> ... there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s. 11(b) guarantee, understood its nature and has waived the right provided by that guarantee.

Waiver requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver. Such conduct may be taken into account under the factor "actions of the accused" but it is not waiver. As I stated in Smith, supra, which was adopted in Askov, supra, consent to a trial date can give rise to an inference of waiver. This will not be so if consent to a date amounts to mere acquiescence in the inevitable.

[13.] Morin re: institutional delay at para 40:

If the application by an accused is not resolved by reason of the principles of waiver, the court will have to consider the other explanations for delay. Some delay is inevitable. Courts are not in session day and night. Time will be taken up in processing the charge, retention of counsel, applications for bail and other pre-trial procedures. Time is required for counsel to prepare. Over and above these inherent time requirements of a case, time may be consumed to accommodate the prosecution or defence. Neither side, however, can rely on their own delay to support their respective positions. When a case is ready for trial a judge, courtroom or essential court staff may not be available and so the case cannot go on. This latter type of delay is referred to as institutional or systemic delay. I now turn to a closer examination of each of these reasons and the role each plays in determining what delay is unreasonable.

[14.] Morin re: inherent time requirements of case at para 41

All offences have certain inherent time requirements which inevitably lead to delay. Just as the firetruck must get to the fire, so must a case be prepared. The complexity of the trial is one requirement which has often been mentioned. All other factors being equal, the more complicated a case, the longer it will take counsel to prepare for trial and for the trial to be conducted once it begins. For example, a fraud case may involve the analysis of many documents, some conspiracies may involve a large number of witnesses and other cases may involve numerous intercepted communications which all must be transcribed and analyzed. The inherent requirements of such cases will serve to excuse longer periods of delay than for cases which are less complex. Each case will bring its own set of facts which must be evaluated. Account must also be taken of the fact that counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case. The amount of time that should be allowed counsel is well within the field of expertise of trial judges.

As well as the complexity of a case, there are inherent requirements which are common to almost all cases. The respondent has described such activities as "intake requirements". Whatever one wishes to call these requirements, they consist of activities such as retention of counsel, bail hearings, police and administration paperwork, disclosure, etc. All of these activities may or may not be necessary in a particular case but each takes some amount of time. As the number and complexity of these activities increase, so does the amount of delay that is reasonable. Equally, the fewer the activities which are necessary and the simpler the form each activity takes, the shorter should be the delay. . . .Another inherent delay that must be taken into account is whether a case must proceed through a preliminary inquiry. Clearly a longer time must be allowed for cases that must proceed through a "two-stage" trial process than for cases which do not require a preliminary hearing.

[15.] Morin re: actions of Crown at para 46

As with the conduct of the accused, this factor does not serve to assign blame. This factor simply serves as a means whereby actions of the Crown which delay the trial may be investigated. Such actions include adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc. An example of action of this type is provided in Smith, supra, where adjournments were sought due to the

wish of the Crown to have a particular investigating officer attend the trial. As I stated in that case, there is nothing wrong with the Crown seeking such adjournments but such delays cannot be relied upon by the Crown to explain away delay that is otherwise unreasonable

[16.] Morin re: guideline at para 51

A number of considerations enter into the adoption of a guideline and its application by trial courts. A guideline is not intended to be applied in a purely mechanical fashion. It must lend itself and yield to other factors. This premise enters into its formulation. The Court must acknowledge that a guideline is not the result of any precise legal or scientific formula. It is the result of the exercise of a judicial discretion based on experience and taking into account the evidence of the limitations on resources, the strain imposed on them, statistics from other comparable jurisdictions and the opinions of other courts and judges, as well as any expert opinion.

I have already stressed that a guideline is not to be treated as a fixed limitation period. It will yield to other factors. Rapidly changing conditions may place a sudden and temporary strain on resources. This was the situation in the District of Durham in which this case arose. Such changing conditions should not result in an amnesty for persons charged in that region. Rather this fact should be taken into account in applying the guideline.

The application of a guideline will also be influenced by the presence or absence of prejudice. If an accused is in custody or, while not in custody, subject to restrictive bail terms or conditions or otherwise experiences substantial prejudice, the period of acceptable institutional delay may be shortened to reflect the court's concern. On the other hand, in a case in which there is no prejudice or prejudice is slight, the guideline may be applied to reflect this fact

[17.] Morin re guideline in Provincial Court at para 55

In Askov, Cory J., after reviewing comparative statistics suggested that a period in the range of 6 to 8 months between committal and trial would not be unreasonable. Based on the foregoing, it is appropriate for

> this Court to suggest a period of institutional delay of between 8 to 10 months as a guide to Provincial Courts.

[18.] Some of the implications of a stay of proceedings are described by Cacchione, J. in R. v. Whitehouse [1998] N.S.J. No. 82 at para 40 :

> In the present case the accused is a school teacher alleged to have breached his position of trust by having sexual relations with one of his students. There is a significant societal interest in having the matter heard on its merits. Should the charges be stayed on the basis of an unreasonable delay society will never know whether the charges are true or false. The complainant's allegations will never be tested under oath and adjudicated upon by an impartial trier of fact. The accused will never have the opportunity of rebutting under oath those allegations. He will continue to bear the stigma of being charged and never formally acquitted. Should the charges be stayed the accused will no doubt be viewed by society as "having gotten off on a technicality". This in my view is not beneficial either to the accused or to society.
>
> A stay of proceedings based on a s.11(b) breach is obviously not the desired outcome for a criminal trial. It is difficult to see it as a victory for anyone.

Synopsis

[19.] Court staff prepared a written transcript of the proceedings to assist counsel and the court. From this transcript, on file with the court record, I have encapsulated the proceedings as follows.

17 April 07

Five count Information sworn alleging offences upon complainants during the period 1979 to1982

1 May 07

first appearance - TY present with his counsel - adjourned for plea - defense received disclosure just the previous day

10 July 07

defense counsel indicates “there are ongoing discussions on various disclosure matters” and suggests an eight week adjournment for it to be accumulated and reviewed

18 September 07

defense indicates that its written request for additional disclosure, made some weeks previous, had not been met, the material not having been delivered to the Crown - parties agree to adjourn to 13 November 07

13 November 07

defense counsel says that one of two disclosure “streams” still outstanding - Crown says disclosure is complete and expresses concern that delays are running against the Crown - Court suggests a plea be taken - TY pleads not guilty to all charges - date offered in March but defense counsel requests May - trial set for 27 May 08 in Eskasoni

25 March 08

s.278.3 application for access to third party records initiated by defense

27 May 08

Crown advises that holder or records, Dr. Ali, is out of the country, necessitating an adjournment - counsel appointed to represent interests of complainants in s.278.3 application is present - 19 Sept.08 set to hear s.278 application - 12 and 13 of February 09 set for trial

19 September 08

Dr. Ali again not present, but counsel stipulate an agreement to shorten procedure - counsel agree two days sufficient for trial, in February, as set.

23 October 08

Affidavit of Dr. Ali tendered, but more time requested to allow him to produce the requested records for review by the Court

10 November 08

records received by Court just that morning - agreed that all relevant information received from Dr. Ali - discussion regarding number of copies and limits on further disclosure on any material which may be produced to defense after review by Court

5 December 08

Court files decision on s.278.3 application, granting defense access to a portion of the medical records, issuing usual sealing orders, etc.

12 February 09

defense requests adjournment due to unavailability of witness - says “Crown agreeable with my motion to adjourn” - although parties aware of situation a month before, they did not bring matter forward earlier because of the recent appointment of an additional judge to the Sydney area - acknowledge Judge Ross seized of matter but hopeful time can be made available in the near future - parties agree some time needed “to sort out the docket matters” after which parties would discuss what dates might be feasible

26 March 09

parties advise four days needed for trial - Court indicates that trial dates are available in July 09 - defense says July poses problem both for witness and counsel - no other early dates available - matter thus set for trial on 26 January 2010

26 January 10

Crown recently comes into possession of statements of complainants given initially to members of local RCMP detachment, before file was transferred to section which assumed control over investigation - parties became aware of lack of disclosure the previous Friday, this being a Tuesday - knowing adjournment would likely be necessary, defense witness cancelled to mitigate costs - Court advises it was now booking trials in April of 2011 - dates reserved in April 2011 but matter docketed for February 9th in case earlier dates become available - defense intention to file application for stay of proceedings raised

9 February 10

matter adjourned for two weeks so that possibility of switching judges and obtaining earlier dates can be explored

24 February 10

Crown, having received defense brief on stay application two days before, requests time to review and prepare - transcript of previous court appearances ordered - stay application adjourned to 11 March 10 - possible dates of August 9 to 13 discussed for trial

11 March 10

Court entertains argument on stay of proceedings application - defense advises its expert witness not available in mid-August - Court sets August 30 to September 3 of 2010 for trial, despite defense having another case scheduled in another part of the province that week, and despite court not being scheduled to sit due to vacations - these dates assigned given the history of the proceedings, the lapse of time, and the need to have a set date in order to evaluate the case for a stay.

30 August to 3 September 2010

dates presently set for the trial which would conclude 40½ months after the accused was formally charged.

[20.] Until 27 May 08 the case was before Judge Ryan in Eskasoni. It was then scheduled for trial in Sydney before me. On 19 September 08 I assumed conduct of the proceeding with a hearing into the s.278.3 application.

[21.] I note here that although the start point for calculating delay in an 11(b) application is the date a person is charged, defense counsel indicated in his

submission that TY was actually arrested on the offences in early March of 2007, more than a month before the Information was formally sworn.

[22.] As is usually done is such cases I have reviewed the history of the proceeding by looking at each interval of time and asking whether it should be attributed to actions of the Crown, attributed to the defense, or should be seen to flow from systemic and institutional factors. In the process I have attempted to identify any delays for which the accused may have waived his 11(b) rights. This sort of analysis is necessary and helpful, but it is not always clear where a given delay belongs. Even after these variables become 'known" there is no formula from which an algebraic sort of solution can be derived.

[23.] As noted in the case extracts cited above, an accused cannot receive instant justice, at least not as we understand the term in modern Canadian society. The defense needs time to review the case which the Crown intends to present. S/he may need time to locate and interview witnesses. The prosecution too needs time to collect and disclose the evidence, to interview witnesses, etc. Counsel for both sides need time to prepare their case. Neither can courts respond instantly to every accused or complainant. Each case is one of many, which must be scheduled sequentially (usually in the order they enter the system). Whatever the label, this is

the time reasonably required to ensure due process for the individual litigants, and the time which any system needs to address the needs of many and various members of the public.

[24.] Delays attributed to the defense include those which may result from a failure to prepare in a timely fashion, failure to subpoena a witness, etc. Counsel or accused may want an adjournment for some personal reason, or request extra time to prepare. Often these delays come with an express or implied waiver. An accused claiming an infringement of the right to be tried within a reasonable time cannot point to such delays to support his application.

[25.] As noted, it is sometimes difficult to categorize a delay. For instance, where defense brings an application in the midst of a proceeding to obtain or exclude evidence, causing a delay in the trial date, should this be considered a necessary part of making full answer and defense, and thus an inherent time requirement of the case, or a strategic move which comes with an implied waiver? It may be helpful to know whether the application has merit, but a trial judge, not knowing the case until it unfolds at trial, will not always to able to evaluate the significance of a piece of evidence nor whether it was reasonable for defense to seek it, or seek to exclude it. The Crown, of course, may bring mid-trial applications of its own. Similarly the

importance of an expert witness may be difficult to evaluate, yet the unavailability of an expert is a common reason, advanced by both Crown and defense, to seek an adjournment. The trial judge's ignorance of these things is good in the sense that s/he embarks on the trial with no pre-conceived ideas, but it can limit, to some degree, what conclusions may be drawn about the motives for and the merits of requests for adjournments.

[26.] My approach to the "balancing of interests" is to first identify how much of the total time, from 17 April 07 (date of charge) to 3 September 10 (end of trial), being 40½ months, was reasonably necessary. Necessary time includes the "intake requirements", and some "waiting in line" for trial. It also includes a reasonable period during which disclosure is discussed, made and reviewed.

[27.] Intake and disclosure covers the period up to 18 September 07, being 5 months. (The two additional months to obtain disclosure, to 13 November 07, run against the Crown.) The 6 month period November 07 to May 08 awaiting trial is acceptable and unremarkable. The total under this heading is 11 months. This is slightly outside the Morin guideline but in all the circumstances is a delay which someone in TY's position might expect and should accept.

[28.] Subtracting this 11 months from the total delay of 40½ months, one then asks: why did it take an additional 29½ months to bring this accused to trial?

[29.] One begins with any delays attributable to or waived by the defense. I include here some periods which arguably were no fault of the accused or his counsel, and which appear on their face to be the result of mounting a prudent and vigorous defense. I cannot detect any laches or negligence from the available record. As such, my approach may, if anything, be somewhat harsh on the defense and overly generous to the Crown. Be that as it may I include here the period May 08 to February 09 during which Dr. Ali's absence from the country delayed the s.278 application, as well as the entire period 12 February 09 to 26 January 10. This interval encompasses the July 09 trial date offered to defense but not accepted because of the unavailability of a witness. The total here becomes 20 months.

[30.] Thirty one months, in Provincial Court, is a long time between plea and trial. TY however must wait even longer. He must wait for more than 40 months, and the remaining nine-plus months of delay are attributable solely to the Crown. Both arise from a failure to provide timely disclosure. It includes the period Sept 07 to November 07 (noted above) and the period between 16 January and 3 September of 2010.

[31.] I note again that this 9½ months of extra wait-time is added to a 20 month period during which the accused (i) pursued what seems to be a bona fide third party records application and (ii) attempted to accommodate an out-of-province expert witness deemed necessary to his defense.

[32.] I also note that the court system, arguably at least, should have been able to offer TY, on 26 March 09, a trial date earlier than 26 January 10, despite the fact that defense declined the proffered dates in July 09. In Askov, above, at para. 77 the court cites a report by Justice Zuber which states that the unhappy backlog in the Peel region "is aggravated by the fact that there is not a system in place whereby an early second trial date is guaranteed in those situations where the first trial date is missed." July 09 was offered to TY and declined, and I have attributed the resultant delay to January 10 entirely to him, but the system, arguably, should have made other dates available in the fall of 09. On this view, another 3 or 4 months of delay could be considered systemic delay and so attributed to the Crown.

The s.278.3 application

[33.] Criminal law has evolved considerably in the past number of years. Various procedures have been introduced into the trial process designed to protect and advance the rights and interests of accused persons and victims. One which has

been employed in this proceeding is an application under s.278.3 for the production of third party records. The defence wanted to see what the complainants may have said to a psychiatrist concerning the accused. The possible benefit of this is not hard to see, but the information sought is protected by a very important privilege between doctor and patient. In years gone by an accused could compel a person to attend at trial and bring "records related to the subject matter of the proceedings", but there was no mechanism whereby the accused could force a third party (such as a doctor) to hand over copies of potentially relevant documents prior to trial.

[34.] In the well-known O'Connor case in the Supreme Court of Canada, and subsequently in legislation (s.278.3 *et seq* of the CC), accused persons were given a means by which to obtain pre-trial production of relevant material in the hands of third parties. The procedure seeks to advance the right to make full answer and defense while protecting the interests of the holder of the records and the privacy interests of complainants. However, such procedural enhancements of the right to make full answer and defense come with a cost. They take time. It may seem odd if the time given over to protecting this right could later be used to bolster a contention that this very same right has been affected by the passage of time. Disclosure is another time-consuming process which the Supreme Court, in Stinchcombe, declared an essential part of a fair trial. The additional obligations placed on various actors in the criminal justice system and the attendant increase

in complexity of a typical criminal case tend to drag the proceedings out. While more resources have been expended on criminal justice - more prosecutors, police, judges, etc. - it seems that the overall length of time required to complete trials has increased.

[35.] It bears mention that due process and complexity aside, increases in the sheer number of criminal charges and in the number of criminal cases dealt with in provincial courts are also significant contributors to the waiting period which an accused person will face.

[36.] In the present case a mid-trial application was made for records in the control of a local psychiatrist. His absence from the country and subsequent difficulties communicating the importance of the issue appear to have caused some of the delay in bringing the matter forward. Eventually the records were vetted and a portion released to the accused, with restrictions on further disclosure. Written reasons were delivered on December 9, 2008 although they are presently sealed along with the other material concerning this application. It appears that after obtaining these extracts from the medical records of the complainants defense counsel decided that it would be prudent and in the best interests of the accused to

call an expert witness. The witness is from Ontario. Her unavailability has led to some of the delay experienced in this proceeding.

[37.] It is difficult to assess the potential relevance of the produced extracts or the need to call this particular witness. For instance, there was no descriptive narrative corresponding to the actual charges. There was mention of effects. Not having seen any statements given by the complainants, not being privy to any other evidence which the Crown may possess, not having heard from anyone involved, it is difficult to know what relevance or importance these records may eventually have at trial. In a similar vein, it is difficult for me to assess the importance of the expert, not knowing what she may say, not knowing what defense theory her evidence may support.

[38.] I have attributed the delays caused by the unavailability of Dr. Ali, and the expert, to the defense. My decision to do so may be influenced to some degree by an after-the-fact impression of what, ultimately, was produced to the defense. Defense counsel submits that the decision to call the expert, and at least some part of her opinion evidence relates to the disclosed medical records. There is also no question that the expert was going to be called at trial - her flight had been booked

and the accused has incurred cancellation penalties. It seems reasonable to suppose that the produced extracts were deemed relevant to the defense.

[39.] The foregoing is intended as something as a caveat. It is not simply a matter of putting these number of months in the defense column and then forgetting about it. There are contextual considerations. Where defense counsel is pursuing a legitimate avenue of inquiry in regard to very serious charges there may an additional obligation on the system, court and Crown included, to make some reasonable accommodation to the accused in the allocation of dates for hearing and trial.

Caselaw

[40.] Other cases concerning s.11(b) stay applications provide useful guidance, but this is not the sort of issue where a clear answer can be found in the ratio of a previous case. In a certain sense, decisions from the same level of court are more instructive than decisions from others. Procedures are significantly different in Supreme Court, for instance, particularly where jury trials are concerned. There are different demands on the system. There is usually the additional requirement of a preliminary hearing. This results in a different expectation of what is a reasonable length of time to bring a criminal matter to a conclusion.

[41.] There is a plethora of caselaw on s.11(b). The few mentioned here are those cases which were referred to by counsel in closing argument, together with some others from our provincial court.

Provincial Courts in Nova Scotia

[42.] In R. v. Weatherbee [1998] N.S.J. No. 221, an offence against property case, the delay amounted to just over 20 months, but as half the period was attributable to the defense, or waived by the defense, the delay did not give rise to a s.11(b) breach. There was no mention of any particular prejudice suffered by the accused.

[43.] In R. v. Hiscock [1999] N.S.J. No. 24 there was a delay of 21 months. No part was the fault of police, Crown or accused, but about 15 months was attributed to the failure of court staff to bring file material to the attention of the trial judge. Two witnesses of potential benefit to the defense became unavailable. The proceedings were stayed.

[44.] In R. v. R.C. [2002] N.S.J. No. 405 a young person applied to stay charges of sexual assault against him. The court found that while the total delay from charge to trial (738 days) was an unreasonable time, the defense had waived much of the time period through requested adjournments such that systemic and institutional

delay amounted to 85 days. As well, there was no evidence that the young person had suffered actual prejudice.

[45.] In R. v. Abbass [2004] N.S.J. No. 154, an impaired driving case, the delay was 14½ months, with no waivers from the defendant. The delay was found to be entirely due to limits on institutional resources, and well outside the guidelines. Some prejudice was inferred, given the importance of the evidence to the fact-specific nature of the arguments. The only remedy for the breach was a stay of proceedings.

[46.] In R. v. Coughlan [2003] N.S.J. No.222 the defendant was charged with impaired driving and the time from charge to trial was 20½ months. There were three adjournments at the request of the Crown due to the health of a witness, but there was no evidence to substantiate two of these. The defense did not contribute in any way to the delay. The court determined that a stay should be entered.

[47.] The judge referred to his earlier decision in R. v. Symonds [2001] N.S.J. No. 459 in which he stated that requests for adjournments must be evaluated in the known context of the court, in particular, any difficulties which the court may be experiencing in assigning early trial dates. A party requesting an adjournment is

expected to have some knowledge of whether the court has sufficient flexibility to find early dates, or conversely is so burdened with cases that this can only be done with great difficulty, if at all.

[48.] R. v. Kennedy 2010 N.S.J. No. 50 was a fisheries case. As of the date of decision the delay was two years, with an anticipated six additional months before trial. The judge discussed how to treat defense acceptance of a distant trial date in the face of a busy docket - whether this was waiver or simply submission to the inevitable. The decision not to grant a stay was influenced to some degree by the timing of a Charter application, and largely by the fact that the defendant suffered little in the way of stigma or other actual prejudice as a result of the delay.

[49.] Certain comments on the workings of provincial court, at para. 23 to 25, bear repeating here :

> Provincial Courts tend to be busy places. Scheduling issues require the balancing of a variety of issues every day. Trials are often double booked and sometimes triple booked in an effort to play the odds that some will not proceed. If that were not done, the backlog of cases awaiting trial would grow significantly. Individuals in custody must be given priority so that sometimes scheduled trials are bumped to accommodate bail hearings. Sometimes trials are bumped to allow the trial of a person in custody. People arriving for trials on a set date and time may find themselves waiting while sentencing hearings in other matters are completed. People are frustrated when they attend for trials that are adjourned when a subpoenaed witness fails to show up.

> Dates for trial are often not set in an atmosphere of serene and dignified quiet but most often in a full arraignment court where many others may be awaiting their turn or sometimes even waiting for a seat.
>
> Dates for trial are offered by the clerk or the judge based on the available dates in that courtroom. Lawyers who attend more or less regularly are aware of the lead times generally available for trials in that courtroom.

Third party records cases

[50.] In R. v. Herrington [2003] O.J. No. 4754 (Ont. C.A.) the bulk of a 31 month delay resulted from defense efforts to pursue a third party records application. Counsel for the accused did not display due diligence in pursuing the application in that filing of papers and attempts to locate the complainant were undertaken too close to trial dates. This alone caused 12½ months of delay. Subtracting this, and some “neutral time”, the resulting delay was within the acceptable range for that court.

[51.] In R. v. Whitehouse [1998] N.S.J. No. 82 (NSSC) the court had to decide whether to attribute to the accused the delay associated with his pursuit of a third party records application. Cacchione J. said that “while the accused’s application for these records is entirely appropriate and mandated by the information which the defense possessed” the defense was responsible for 7½ months of delay owing to its failure to file appropriate documentation in timely fashion. In addition the accused

did not request an early date for a preliminary hearing even though the court gave him the opportunity to do so. The application for a stay was refused.

[52.] In R. v. Cistrone [2009] O.J. No. 1056 the court stated at para. 20 “The time necessary to process a third party records application is also an inherent time requirement although it may run concurrently with other time periods.” However, on the facts of the case the court allocated much of the 2 year 8 month delay to the defense because it was unprepared to pursue the application in a timely fashion. With respect to disclosure, the Crown acknowledged that taking 6 months to provide full disclosure was excessive, and the court allocated 2 months of this to Crown delay. In the result, given that there was little by way of actual prejudice to the accused, the application for a stay was dismissed.

[53.] In R. v. R.E.W. [2010] N.S.J. No. 99 (NSSC) a sexual assault allegation took 66½ months to proceed from charge to trial. This included 18½ months in provincial court from charge to committal. A third party records application was made just days before the first scheduled trial date, and the matter was rescheduled so as to allow time to deal with that application. The court said at para. 46 that for the most part the requests to adjourn were beyond the control of the accused, and that the case was not a complicated one requiring lengthy periods of preparation and court time. There was an inference of prejudice, and some evidence of actual prejudice. The

court found that the accused's 11(b) rights were infringed, and that a stay should be entered.

Other cases

[54.] In R. v. Maracle [1998] S.C.J. No. 7 the Supreme Court of Canada restored and endorsed a stay of proceedings entered by the trial judge. One of the adjournments resulted from the accused, for financial reasons, changing counsel. This accounted for 10½ months of a 23½ month delay from committal to trial (the proceedings being in superior court). The trial judge characterized the 10½ months as a "shared responsibility" and thus concluded that the delay was "well beyond the guideline time frame . . . in Morin" (see [1996] O.J. No. 166 at para. 14).

[55.] Of note, the Crown had been told, when the second trial date was assigned, that it may have to prioritize its cases and thus arrange with the court to switch one for another so as to bring Mr. Maracle to trial sooner. In a similar vein, when the accused declined an earlier trial date because of his lawyer's schedule, he was told that the court would attempt to accommodate a request for an earlier date, possibly by switching some other trial. None the less, the court said at para. 8 "the fully-booked schedule of the court for so many months was a factor and the system therefore bears some responsibility for that segment . . . of delay."

[56.] In R. v. W.H.M.C. [2001] N.S.J. No. 61 a physician was charged with a sexual assault on a patient. There were 27 months between charge and trial. At para 29 the judge noted that “on the limited record before me I am unable to determine whether earlier trial dates were available and offered, whether the dates chosen were set simply to accommodate the schedule of counsel or whether the dates set were the first available dates when all parties could attend.” As a result he could not find any express or implied waiver of a 7 month portion of the delay. Delays of 24 months were found to be the result of inherent time requirements, limits on institutional resources and the actions of the Crown. Post committal delay was 11 months, “well in excess of what is reasonable” (at para.44). Against an 8 to 10 month guideline to complete proceedings in provincial court the judge noted that it took 15 (at para.45). There was evidence of actual prejudice. The case was not unusually complicated. At para. 63 to 66 the court stated:

> In conclusion on the issue of prejudice I find that not only has the accused suffered the presumed prejudice caused by the passage of an unreasonable period of time, but also that he has suffered real prejudice as outlined above.
>
> I am mindful of the societal interest in having a case disposed of on its merits. Should the charges be stayed on the basis of an infringement of the right to be tried within a reasonable time society will never know whether the accusations have been proven or not. The complainants' allegations will never be tested under oath and adjudicated upon by an impartial arbiter. The accused will never have the opportunity of rebutting the allegations under oath or of vindicating himself. He will continue to bear the stigma of being accused but never formally acquitted.
>
> The issue before me is to determine where the line should be drawn between conflicting interests. On the one hand stands the interests of

> society in bringing those accused of crimes to trial to account before the law for their conduct. On the other hand stands the right of every person charged with an offence be tried within a reasonable time.
>
> Given that a stay of proceedings is equivalent to an acquittal it should only be granted in the "clearest of cases". R. v. Conway (1989), 49 C.C.C. (3d) 289 (S.C.C.).

[57.] The court concluded that on a balance of probabilities the accused had established an infringement of his right to be tried within a reasonable time, and entered a stay of proceedings as the only appropriate remedy.

Institutional considerations

[58.] In Askov the Supreme Court of Canada made extensive use of research into trial delays in various courts in Ontario, the U.S. and the rest of Canada (see para. 76 to 89). Statistics from this study were cited and observations and conclusions were adopted for the purposes of the case. Subsequently in Morin the court cautioned that comparisons between different jurisdictions can be misleading (see para. 51). While I have an impression of working in a reasonably busy courtroom there is no statistical analysis I can point to which would support this belief or offer any useful comparison with other courtrooms or locations, even within Nova Scotia.

[59.] In Nova Scotia criminal justice is by and large a matter of public record. As with any public institution or system there are expectations, sometimes reasonable, sometimes not. In a given case it might be illuminating to review the sittings of a

particular court over a specific period of time, with a view to the number of hours the court was in session, the number and nature of the cases dealt with, etc. In the time period during which this case has unfolded it is well known that dockets in Sydney provincial court were backed up and that many accused and complainants were (and still are) forced to endure lengthy delays. In this particular case, however, the bulk of the delay is not connected to the general backlog which the system was experiencing, or to the state of its dockets.

Prejudice

[60.] One of the three interests which the Supreme Court in Morin said s.11(b) is designed to protect is the right to fair trial. There are many components of a fair trial, but what the court had in mind here was the value of having a trial while the evidence was still available and fresh. However, this interest has less relevance here. The charges against TY are “historical” in nature; the allegations refer back to the period 1979 - 1982. No matter how quickly the matter was brought on for trial the evidence, in this sense, would never be fresh and TY is not in any worse position to defend himself because of the passage of an additional 3 or 4 years.

[61.] Although the Youth Criminal Justice Act sets out “timely intervention” and “promptness and speed” as principles applying to youth criminal justice, the accused here is well into adulthood. While s.14(1) of the YCJA requires that these offences

be tried in Youth Justice Court, the delay brings no additional prejudice because of TY's age (as there would be if he had been a young person at the time the charges were laid).

[62.] The charges are serious in nature, and thus there is a greater societal interest in seeing them brought to trial than for a lower-end offence.

[63.] TY is at a disadvantage compared to the typical adult facing trial for indictable offences in that he has no right to a preliminary hearing. The allegations date back to a time when he was a young person within the meaning of the current Youth Criminal Justice Act. It appears that he must be tried according to the procedures applicable to young persons, and as such he cannot avail himself of a preliminary hearing. Defense submits that it has lost this opportunity to examine the complainants at a pre-trial proceeding.

[64.] Prejudicial effects of undue delay can be presumed in every case, and there are sometimes particular ramifications to the individual accused. In this case TY has filed an affidavit in which he speaks of the impact of the charges upon him. This evidence is unchallenged by the Crown and thus forms a basis for findings of actual prejudice. Without reproducing his affidavit verbatim, TY describes it in the following terms:

[EDITORIAL NOTE- removed to protect identity]

Conclusion

[65.] The onus of proof of a Charter violation is on the accused, on a balance of probabilities. The relief sought, a stay of proceedings, should only be entered “in the clearest of cases”.

[66.] Given the overall length of time to bring this matter to trial, having regard to the factors which precipitated each specific adjournment, and given the significant prejudice suffered by the accused, I conclude that TY’s right to be tried within a reasonable time has been infringed and hereby enter a stay of these proceedings.

Dated at Sydney, Nova Scotia this 25th day of May, 2010.

_____

Judge A. Peter Ross