IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Ivy Fisheries et al, 2004 NSPC 2

Date: (20040108)
Docket: 1145493, 1145505
1145506, 1145507
1145517, 1145518
1145519, 1145521
1145525, 1145495
1145530, 1145532
1145543, 1153632
1153634, 1153635
1153640, 1145509
Registry: Bridgewater

Between:

R.

v.

Ivy Fisheries et al

Judge:	The Honourable Judge Crawford
Heard:	January 6, 2004 in Bridgewater, Nova Scotia
Written Decision:	January 8, 2004
Counsel:	Ronda Vanderhoek & James Martin, for the Crown Thomas Hart & David Demirkan, for the Defence

By the Court:

[1] This is an application by the defence for a stay of proceedings for breach of the defendants' right under s. 11(b) of the *Canadian Charter of Rights and Freedoms* to trial within a reasonable time.

History of the Matter to date

[2]	October - December 2000:	fishing trips from which the charges arose
	July 2001:	search warrant obtained and executed. Records of Ivy Fisheries Ltd. seized
	January 2002:	charges laid
	March 6, 2002:	first appearance by accused, all represented by counsel. Plea set to May 1, 2002 to allow for disclosure
	May 1, 2002:	Disclosure still incomplete; Crown requests 6 further weeks, modified to three when defence refuses to consent to adjournment.
	May 22, 2002:	Disclosure still incomplete; Crown gives notice of application for joinder of all charges. Set to June 19.
	June 19, 2002:	Disclosure still incomplete; set to July 24.
	July 24, 2002:	Disclosure completed. Adjourned to September 18 for defence to review disclosure and get instructions on joinder application and pleas.
	September 18, 2002:	Defence agreed to joinder and requested further time to review disclosure. Set to October 23, 2002
	October 23, 2002:	consent by letters from all parties to adjourn to October 30, 2002
	October 30, 2002:	pleas of not guilty entered. Trial set for three weeks beginning June 2, 2003.
	April 29, 2003:	pre-trial telephone conference held. Trans-shipping charges dropped by the Crown; and defendants Malone and Dockside Fisheries severed. Malone and Dockside to be tried first.

June 2-10, 2003:	Malone and Dockside trials completed, ending in acquittal on all charges. Trial on other charges to begin June 16th.
June 12, 2003:	As a result of a pre-trial telephone conference on the same date, all matters were set over to July 9, 2003 to get a new trial date, if necessary, due to unavailability of a Crown witness and to allow for plea negotiations.
July 9, 2003:	Defence not present; Crown by agent asked that three weeks available for trial beginning December 2, 2003 be set aside until the following week.
July 16, 2003:	following a telephone conference call, thirteen days between December 2, 2003 and January 15, 2004 were set aside for trial.
December 2, 2003:	Trial began. Despite the large number of documents involved and the long delay in getting to trial, Crown had prepared no exhibit books and had provided no definitive list of witnesses to defence. Nor had she provided "can-say" summaries of witnesses from whom statements had not been taken. Court was adjourned for a number of hours for Crown to prepare exhibit books.
December 4, 2003:	Court was again adjourned to December 8 when it became clear that the Crown's exhibit books were improperly numbered. Crown was again directed to prepare properly organized exhibit books.
December 5, 2003:	Defence gives notice of *Charter* applications for stay due to unreasonable delay and abuse of process and states it will be ready to argue on December 8. Court clerk advised Crown and Defence by telephone that due to an expected snowstorm she would need phone numbers where they could be reach in case of cancellation .
December 8, 2003:	Defence, judge and all court personnel had arrived at court, despite bad roads, when the Crown called at 9:20 a.m. to say she was unable to make it due to road conditions on Highway 14 from Windsor, but that she would try again for the afternoon session. Rather than hold counsel for half a day on the possibility that the Crown could appear, court was adjourned to the next scheduled date, December 11.

December 11, 2003:	Defence application heard; Crown motion for dismissal of application for improper notice heard and time granted for Crown to prepare to argue application on the merits. To avoid wasting further trial time the Court asked if Crown could be ready by Monday, December 15, but was informed that a minimum of two weeks would be required. As this period would expire on Christmas Day, the matter was adjourned to January 5, 2004, thus wasting three scheduled trial days, December 15, 16 and 18th.
December 17, 2003:	Lengthy telephone conference held on the record to clarify various issues raised in a letters from defence and Crown and to deal with Crown objections to admissibility of defence affidavits. It was agreed that Defence affiants would be cross-examined by Crown on December 18.
December 18, 2003:	Crown cross-examination of defence witnesses completed.
January 5, 2004:	Discussions between the parties lead to the abandonment by defence of its application for a stay based on abuse of process and by the Crown of its application to remove Mr. Hart as counsel for the defence. As a result several affidavits were withdrawn and F/O Mossman's affidavit was withdrawn, redrafted and resubmitted by agreement.
January 6, 2004	Crown presents oral argument on the remaining defence application for a stay based on unreasonable delay under s. 11 of the *Charter*.

Relevant legal principles

[3] In *R.* v. *B.M.* [2002] N.S.J. No. 380; 2002 NSPC 38 Curran J.Y.C. summarized the factors set out in Sopinka, J.'s judgment in *R.* v. *Morin* [1992] 1 S. C. R. 771; [1992] S.C.J. No. 25, 71 C.C.C. (3d) 1 as follows:

> ¶ 3 In the leading case of R. v. Morin (1992), 71 C.C.C. (3d) 1, the Supreme Court of Canada identified the following factors to be considered by Courts in determining s. 11(b) applications:
>
> > (1) length of delay - Unless the delay is long enough to raise the issue of unreasonableness, the application should be dismissed without further inquiry.
> >
> > (2) waiver - Even if the delay is long enough to warrant an inquiry, the defendant may have made an informed decision to waive the delay, or enough of

> it that the remainder is not unduly long.
>
> (3) reasons for delay - If waiver does not resolve the issue, the court must consider the reasons for or causes of the delay. The court in Morin identified four specific kinds of reasons:
>
> > (a) inherent time requirements - Some delay is unavoidable in all cases and the more complex the case the longer the unavoidable delay.
> > (b) actions of the accused - If the defendant uses legal processes that lengthen the case, the court must take those processes into account when deciding the issue of reasonableness of delay.
> > (c) actions of the Crown- If the prosecution causes unnecessary delay, that, too, must be taken into account.
> > (d) limits on institutional resources - If the lack of judges or other required personnel or resources contributes to delay beyond the inherent time requirements of the case, that should weigh against the position of the state or Crown.
>
> (4) prejudice to the accused - The defendant may offer evidence of prejudice, but need not always do so. If the delay is long enough, prejudice may be inferred from it. A defendant may be prejudiced in his/her liberty interest if detained pending trial or if subject to conditions of release (s. 7 of the Charter). The defendant's security interest may be prejudiced by public notoriety or other results of the charge affecting everyday life (s. 7). The defendant's fair trial interest may be affected by the loss or deterioration of defence evidence (s. 11).

Application of *Morin* Factors to this case

Length of delay:

[4] Here a total delay of 23 months from the laying of the information to the beginning of trial is sufficient to warrant further inquiry, given that these charges are summary conviction regulatory matters.

Waiver

[5] Waiver must be “clear and unequivocal”; not mere inadvertence or acquiescence in the inevitable. *R.* v. *Morin*, *supra*, para. 39.

[6] It took the Crown six months from the date of laying the informations to July 24, 2002 to complete disclosure. I have reviewed the relevant portions of transcripts of all court appearances within that period and find no such waiver on the part of the defence, if waiver is even possible prior to completion of the Crown’s duty to disclose.

[7] Given the fact that the Crown had taken 6 months to deliver disclosure, it does not seem unreasonable that it took defence 3 months to review it before entering pleas on October 30, 2002. I find no waiver in this period.

[8] The agreement to the seven month delay from October 30, 2002 to June 2, 2003 was acquiescence to the inevitable docket delay for a lengthy trial in Bridgewater Provincial Court at the time. Defence and Crown agreed to the first date offered, which would be the first date available for such a lengthy matter.

[9] After the completion of trials of two of the accused represented by other counsel, defence and Crown agreed to an adjournment for plea negotiations to July 9, 2003. On that date the Court required a pre-trial conference to ensure that the requested new trial dates would actually be required, and on July 16, 2003, following the pre-trial conference, new trial dates beginning December 2, 2003 were set. Once again, defence agreement to the new dates cannot be seen as other than acquiescence in the inevitable.

[10] From December 2 to January 5, trial time has been consumed by adjournments for the Crown to prepare exhibits books and for the argument of this and other Defence and Crown motions, none of which delay was waived by defence.

[11] As I find that there has been no waiver by defence of any portion of the delay, it will be necessary to consider the reasons for the delay.

Reasons for the Delay

[12] These include inherent time requirements in the case; limits on institutional resources, actions by the Crown and defence, as well as other reasons for the delay, as set out in *Morin, supra*, para 31.

[13] This is a complex case, involving many defendants and an analysis of many thousands of documents generated by the Department of Fisheries and Oceans monitoring and recording systems, as well as those seized in the search of the corporate defendant's business office. This complexity helps to explain the lengthy pre-charge delay of thirteen months. However, as Sopinka, J. stated in *Morin, supra*:

> Pre-charge delay may in certain circumstances have an influence on the overall determination as to whether post-charge delay is unreasonable but of itself it is not counted in determining the length of the delay.

[14] In this case, following more than a year of investigation, it took the Crown an additional six months, from January 29 to July 24, 2002, to complete disclosure, which would, at first blush, appear to be unreasonable. However, I note that during that period three Crown counsel were involved and that more than one hundred three-inch binders of documents had to be reviewed individually, not only from the standpoint of relevance, but also for the protection of third-party privacy interests. Given these complexities, it is not for me to attempt to second-guess the Crown's exercise of its discretion and I must conclude that this six months is simply part of the inherent time required for the preparation of this case.

[15] From the standpoint of the defendants, noting the complexities previously alluded to, as

well as the physical difficulties of getting instructions from multiple clients, it does not seem unreasonable to allocate the three months it took to review disclosure before pleas were entered to the same category of inherent time requirement.

[16] The seven-month period from the date of setting down for trial to the first trial date – October 30, 2002 to June 2, 2003 – is not unusual in Bridgewater Provincial Court for a lengthy matter such as this and most, if not all of it, would have been required by Crown and defence for preparation in any event. This delay belongs in the category of inherent time requirements for the case.

[17] Between June 2 and 10, 2003, by agreement the trial of two related defendants represented by other counsel went first, and acquittals were entered. Three days of the initial time allotted for all of these matters were left and, during a pre-trial telephone conference held on June 12, 2003, were relinquished because of the unavailability of a Crown witness due to a serious illness in his family and to allow for plea negotiations. It was agreed that new trial dates would be set, if necessary, on July 9, 2003. In argument each party attempted to blame the other for this adjournment, but I find that there were good reasons, on each side as well as from the viewpoint of the Court, for seeking and granting this adjournment. Therefore it too belongs in the category of inherent time requirement.

[18] On July 16, 2003, after another telephone conference, the present block of time, December 2, 2003 to January 15, 2004 was docketed for this case. Once again, these were the earliest dates available for a lengthy matter. In hindsight, this matter should probably have been dealt with by special sittings rather than in the ordinary course, but at the time the court was dealing with a shortage of judges and resources and there was no ability to arrange such earlier double sittings. Be that as it may, this is purely institutional delay and must weigh against the position of the state.

[19] Between December 2 and present the following adjournments occurred:

[20] December 2 - 8: Court ordered adjournments to allow the Crown to prepare proper Exhibit books – a task which should have been completed prior to the commencement of the first trial on June 2, 2003. This delay is attributable to the Crown.

[21] December 8: Crown notified the court by telephone that she was unavailable due to snow-covered roads, but would attempt to be present for 1:30 p.m. To avoid further inconvenience to the parties court was adjourned to the next scheduled date, December 11. Although the Crown's absence was no doubt *bona fides*, the defence was present and prepared to proceed, so that this adjournment is attributable to Crown action.

[22] The delay from December 11 to January 5 is partly attributable to the defence, in bringing a late motion with short notice, partly to the Crown in requiring an unreasonable length of time to prepare and partly to the season of the year, i.e. inherent or institutional delay. Given these multiple factors, I find that one week of this delay is attributable to the defence and two

weeks to the Crown and institutional delay.

[23] In summary, then, out of a total delay of 24 months to date, I find that sixteen months (six months for disclosure, three months for review of disclosure, seven months' docket delay) was due to the inherent time requirements of the case and that of the balance of eight months, one week was due to the defence and the rest was attributable to the Crown, either directly due to Crown actions or indirectly as institutional delay.

Prejudice to the accused

[24] Although the defendants' liberty interests were not affected in that they were neither incarcerated nor on any form of conditional release, I find that their security interests were affected by the notoriety of this case over a significant period of time, both before and after the laying of the charges, and by restrictions on the transfer of their fishing licences, as well as by on-going business inconvenience resulting from the seizure and retention of business files and the piece-meal and disorganized return of copies. However, given the fact that two-thirds of the time when this prejudice occurred was required for the proper handling of the case, and that there were no restrictions on their liberty, I conclude that there was little, if any, actual prejudice to them over and above the normal prejudice suffered by anyone charged with such regulatory offences.

Conclusion

[25] Having weighed the individual rights of the accused protected under s. 11(b) against the societal interest in ensuring that "those who transgress the law are brought to trial" (*R.* v. *Askov*,[1990] 2 S.C.R. 1199 at p. 1219), I conclude that in all of the foregoing circumstances the unjustified delay of less than eight months over and above the time inherently required for this case and/or attributable to the defence does not put it within that small category of those "clearest of cases" where a stay under s. 24 of the *Charter* is an appropriate remedy.

[26] Accordingly, the defendant's application for a stay of proceedings is denied.