SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Clarke,* 2015 NSSC 224

Date: 20150812
Docket: CRH 346068
Registry: Halifax

Between:

Bruce Elliott Clarke, Robert Blois Colpitts, and Daniel Frederick Potter

Applicants

v.

Her Majesty the Queen

Respondent

INTERLOCUTORY RULING
PRE AND POST CHARGE DELAY
ABUSE OF PROCESS

Judge: The Honourable Justice Kevin Coady

Heard: April 20, 2015 – July 10, 2015 in Halifax, Nova Scotia

Written Decision: August 12, 2015

Counsel: Mark Covan, James Martin and Scott Millar, for the Federal Crown
Barry Whynot and Joshua Nodelman, for Bruce Clarke
Robert Blois Colpitts, Self-Represented
George MacDonald, Q.C. and Jane O'Neill, for Daniel Potter

By the Court:

INTRODUCTION:

[1] Messrs. Clarke, Colpitts and Potter face trial on fraud based charges related to allegations of unlawfully affecting the public market price of Knowledge House Incorporated (KHI) between January 1, 2000 and September 13, 2001. The following Crown theory of the case appeared in an earlier Crown brief:

> Bruce Clarke, Blois Colpitts and Daniel Potter are charged on a multiple count Indictment that they, in concert with others, developed and implemented a scheme to artificially maintain high share prices of Knowledge House Incorporated (KHI) stock to the detriment of financial institutions, investors known to the suspects, investors unknown to them and the public at large. These three individuals were well placed to carry out this scheme: Mr. Potter was the CEO of KHI, Mr. Colpitts was legal counsel to KHI, and Mr. Clarke was a financial advisor with National Bank Financial (NBFL). The scheme was put in place in early January, 2000 and continued up to August 2001 when the share price of KHI plunged. The company ceased operations in September, 2001.

The RCMP preferred an indictment against all three defendants on March 17, 2011, some nine years after the alleged frauds were discovered.

[2] The collapse of KHI resulted in a plethora of civil actions involving several banks, these defendants, investors and others associated with the rise and fall of KHI. Many of these claims were consolidated or settled. Justice Warner of this Court conducted a lengthy and complex trial and a comprehensive decision was

released on August 7, 2013 (2013 NSSC 248). The Nova Scotia Court of Appeal dismissed the appeal on May 14, 2015 (2015 NSCA 47).

[3] The collapse of KHI also resulted in a regulatory investigation conducted by the Nova Scotia Securities Commission (NSSC). The investigative component of this inquiry was concluded by early 2004, although the process continued until 2011 when criminal charges were preferred. Mr. Colpitts and Mr. Clarke settled with the NSSC years ago and received financial and administrative penalties. Mr. Potter did not settle with the NSSC.

[4] Mr. Scott Peacock was the NSSC compliance officer/investigator during the 2003 investigation into the demise of KHI. On February 20, 2003 he wrote the following letter to Inspector G.J. Stuart of the RCMP: (Exhibit #38)

> Please accept this correspondence as advice to you that I have been conducting an investigation under the authority of the Securities Act, R.S.N.S 1989, Chapter 418, as Amended in conjunction with the appropriate SRO, in respect to trading activities of the shares of KHI.
>
> Based on the results of my investigation, I wish to inform you that it is my belief that there has occurred within the Province of Nova Scotia an [sic] elsewhere a conspiracy to manipulate the market price of the common shares of KHI as traded on The Toronto Stock Exchange. It is my belief that the conduct revealed constitutes criminal conduct and I am referring this matter to you for such investigation as you may determine appropriate.
>
> If you have any questions or comments, please do not hesitate to contact the undersigned.

Mr. Peacock's reference to "criminal conduct" was sufficient incentive for the RCMP to commence a criminal investigation.

[5] For the purpose of this application the investigative period extended from February 20, 2003 until March 17, 2011. It became immediately apparent the RCMP Commercial Crime Unit in Halifax did not have the training or resources necessary to conduct such a complex investigation. This realization resulted in the recruitment of a federal team known as the IMET Quick Start Team. The IMET approach was designed to assist local police agencies in getting public market investigations up and going. Historically these types investigations stumbled or stalled when left to local forces (Bre-X). KHI was the first investigation conducted by a Quick Start Team in Canada.

[6] It was anticipated that the IMET team would periodically travel to Halifax to assist and to assemble and interpret the technical data. It was expected their involvement would last one year and the balance of the investigation would be carried forward by the local Commercial Crime Unit (CCU). The IMET approach is described in Exhibit #31:

> Our quick start approach calls for the local Commercial Crime Section to retain the ultimate custody of the investigation. You are being asked to lend a hand and to help guide the initial, and more prominent, stages of the investigation. Use your skills to move this investigation forward quickly. We want to demonstrate that we can bring in highly

> skilled people from across the country and have them get the job done – fast! As you work through this process, please do your utmost to help nurture a strong and positive relationship with the Halifax Commercial Crime Section.

These "fast" objectives were not realized and IMET had limited involvement in the KHI investigation until 2007.

[7] For the purpose of this application the prosecutorial period extended from March 17, 2011 until the end of the trial, a period that could amount to almost five years. These years have been consumed by much interlocutory litigation brought by both the Crown and the defendants.

[8] The defendants have applied for an order staying all charges on the basis of pre-charge and post-charge delay. They also allege the Crown are guilty of abuse of process and, as such, all charges should be stayed. The defendants rely on sections 7, 11 and 24 of the *Canadian Charter of Rights and Freedoms*.

[9] This decision will be divided into three areas of analysis. Initially, I will address a number of preliminary issues that impact on the application as a whole. I will then deal with pre-charge delay followed by post-charge delay.

PRELIMINARY ISSUES:

JOINT INVESTIGATION:

[10] The defendants have advanced the view that the KHI investigation was a joint investigation on the part of the RCMP and the NSSC. The relevance of this issue relates to the Crown's disclosure obligations with respect to the NSSC regulatory documentation. Much ink has been spilled over the past two years in the defendant's attempt to acquire these records. The Crown has refused to pursue these materials arguing they are not first party disclosure and exist outside of their *Stinchcombe* obligations. The defendants argue that *R. v. McNeil*, 2009 SCC 3 requires the Crown to obtain such records and then vet them before releasing them to the defendants. The defendants have acquired these records either by way of subpoena or Court application.

[11] The defendants submit the RCMP investigation focused on the exact same conduct and the same individuals as the NSSC investigation. They allege the NSSC disclosed its investigative findings to the RCMP and repeatedly briefed the RCMP on material developments. It is suggested that Scott Peacock met with the RCMP eighteen times between February 27, 2003 and February 8, 2006. The

essence of these submissions is that Scott Peacock was a driving force in the RCMP investigation.

[12] It is accepted that Scott Peacock referred a complaint of "criminal conduct" to the RCMP by letter dated February 20, 2003. It is also accepted that he maintained a relationship with the RCMP until 2006. Much of that contact has been chronicled in correspondence, continuation reports and briefing notes. A review of the materials satisfies me that the following schedule accurately describes Scott Peacock's involvement in the RCMP investigation:

> Feb. 20, 2003 – Peacock letter to RCMP containing an initial complaint in relation to a conspiracy to manipulate the market price of KHI shares.
>
> Feb. 27, 2003 – First meeting between Insp. Stuart, Sgt. Barrett and Peacock to discuss complaint.
>
> May 15, 2003 – Meeting between Peacock and Insp. Stuart and telephone conversations to discuss status of NSSC regulatory investigation.
>
> May 16, 2003 – Peacock letter to RCMP providing status of regulatory investigation conducted jointly with other regulatory agencies.
>
> Sept. 2, 2003 – telephone call to Peacock advising of upcoming media release by the RCMP.
>
> Oct. 14, 2003 – during meeting regarding an unrelated regulatory initiative, Peacock told the RCMP that the NSSC regulatory inquiry will not be completed until mid/late December 2003.
>
> Mar. 3, 2004 – Sgt. Barrett and Sgt. MacDougall meet with Peacock and Peacock informs the RCMP that the NSSC regulatory inquiry will not be complete until April 2004.
>
> April 19, 2004 meeting – Peacock gives RCMP IMET team overview of KHI allegations of securities manipulation.
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> May 5, 2004 – Letter from the RCMP to Peacock requesting disclosure under the *Securities Act* of NSSC findings/results of investigation.

> May 18, 2004 – Letter from Peacock to RCMP indicating that its request for information under s. 148 of the *Securities Act* has been forwarded to the Commission.
>
> May 25, 2004 – Peacock letter to RCMP setting out summary of regulatory inquiry to date.
>
> June 1, 2004 – RCMP attend NSSC and meet with Peacock and receives several market reports and court documents from Peacock.
>
> June 8, 2004 – letter from Peacock to RCMP attaching CD containing the text of non-compelled statements taken by the NSSC.
>
> April 25, 2005 – RCMP attend NSSC and meet with Peacock. Peacock advises of status of NSSC regulatory inquiry.

It is noteworthy that most of these contacts pre-date the April 2, 2004 IMET start up.

[13] There is nothing nefarious about joint investigations. Modern policing involves external agencies with special skills. The *Securities Act* envisages such cooperation at section 148(3):

> (3) Notwithstanding the *Freedom of Information and Protection of Privacy Act* and the *Personal Information International Disclosure Protection Act*, the Commission may provide information to and receive information from other securities or financial regulatory authorities, stock exchanges, self-regulatory bodies or organizations, law enforcement and other governmental or regulatory authorities and any information technology service provider approved by the Commission to facilitate the exchange of information pursuant to this Act, and the rules and regulations made thereunder, both in Canada and elsewhere, and any information so received by the Commission is exempt from disclosure under this Act if the Commission determines that the information should be maintained in confidence.

The RCMP is a law enforcement body and was authorized to accept Scott Peacock's assistance. A question of greater weight is what they do with any information and documentation received (*R. v. Williams*, 130 N.S.R. (2d) 8).

[14] I do not find that the RCMP investigation was conducted jointly with Scott Peacock and the NSSC. Most investigative steps occurred between 2004 and 2007. Records for that period do not suggest that Scott Peacock was a critical player in the overall investigation. The impression I am left with is that he was a valuable resource.

[15] A review of the 349 tasks listed in the Task Inventory (Exhibit #106) does not disclose NSSC/Scott Peacock leadership. A review of the 31 judicial authorizations prepared between 2004 and 2008 indicates they were the product of the RCMP team (Exhibit #104). There were 149 witness interviews conducted between 2004 and 2008. I have concluded that these witnesses were questioned by the RCMP team. I view Scott Peacock as just another witness, although admittedly a valuable witness.

[16] This determination refutes any argument that the NSSC regulatory file should have been disclosed as part of the investigative file or as the "fruit of the investigation" as required by *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

NATIONAL BANK FINANCIAL LTD:

[17] National Bank Financial Ltd. (NFBL) was Mr. Clarke's employer at the time of these alleged offences. It is the Crown's theory that KHI and its insiders utilized this bank to facilitate market manipulations. Throughout this prosecution Mr. Potter has maintained a focus on NBFL and their employees. It appears that he is trying to link the conduct of NBFL during its civil and regulatory process to this criminal trial. Mr. Potter obviously feels such a strategy will lead to a legitimate defence.

[18] It is not surprising that Mr. Potter's attention was drawn to NBFL, its senior managers and their relationship with the NSSC and Scott Peacock. After the regulatory investigation was complete NBFL and their local manager Eric Hicks were accused of breaching the *Securities Act* when dealing with KHI in 2000-2001. Yet these allegations seemed to disappear while NBFL and Eric Hicks portrayed themselves as victims.

[19] One of the first indicators of NBFL's questionable conduct was its actions around the KHI servers. In 2003 Mr. Potter learned that NBFL counsel had possession of the servers for the purpose of the civil litigation it had brought against Mr. Potter and others. He later realized that NBFL counsel had provided the NSSC with the emails contained in the servers for their regulatory

investigation. These were clandestine transfers effected without any inquiry as to whether they were protected by privilege

[20] The significance of the servers and the emails will be more apparent in the pre-charge delay analysis. The immediate consequences were the removal of NBFL counsel and the development of a protocol to search the emails for privilege. Mr. Potter responded with two applications; one to strike the NBFL civil action against him and another to quash the NSSC investigation.

[21] In *National Bank Financial Ltd. v. Potter*, 2005 NSSC 113, Justice Scanlan was highly critical of the actions of NBFL counsel in its dealings in the civil litigation as well as its dealings with the NSSC. Justice Scanlan commented at paragraphs 47-48:

> [47] Messrs. Haber and Wisenfeld made every attempt to do what was best for NBFL in relation to these investigations. In this case Mr. Haber and Wisenfeld say it was their mutual decision to cooperate as fully as possible with the regulatory investigations. In the present case a copy of the CD's with a number of the e-mail accounts was provided to the investigators at the same time it was provided to the various parties to the litigation. It is not clear to me how the investigators came to know how NBFL had the KHI servers.
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> [48] I am satisfied Messrs. Haber and Wisenfeld were as much concerned with reputational risk management for NBFL as they were with the debt collections. In cross-examination Mr. Haber said:
>
> > "(He)...first started to become aware of what was happening in regard to Knowledge House in late August and September. It quickly became pretty clear to me pretty quickly that this was

> going to be a bit of a mess on a number of different levels given the magnitude of the losses that we had suffered, given the fact that a company had collapsed in this context, given the heavy involvement of our Halifax branch to the ownership of the stock, given the fact that it was getting media."

> Mr. Haber also acknowledged the prospect of regulatory investigation by the Security Commission, the Investment Dealers Association and Regulation Services Inc. was one of his main concerns. Central to that concern was the issue as to whether or not Mr. Clarke or others of the Halifax branch of NBFL had been properly supervised. This was all part of the reputational risk management concern of Messrs. Haber and Wisenfeld. The question then arises as to whether the efforts at risk management explains the actions of NBFL in relation to handling of the e-mail accounts. If so, does this amount to abuse of process which warrants a stay of proceedings.

Later in 2005 Justice Richard ordered that the NSSC return the servers. NBFL filed an appeal.

[22] In *Potter v. Nova Scotia Securities Commission*, 2006 NSCA 45, the Court gave a strong message to the NSSC to immediately address Mr. Potter's concerns. Justice Cromwell stated at paragraphs 52-54:

> [52] The purpose of the stay of the judicial review application is to provide Mr. Potter an opportunity to raise the matters on which it is based with the Commission and for the Commission to address them. The stay may be lifted by a judge of the Supreme Court on application with notice. I specifically note that there has been no determination on the merits of any of the allegations made by Mr. Potter in his judicial review application.
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> [53] I should also say, respectfully, that the Commission appears from the material before us to have been slow to recognize the seriousness of the implications of the allegations made by Mr. Potter in relation to the investigation. I say this without in any way pre-judging the ultimate merits of those allegations. It has been obvious for many months that

> there are serious claims of solicitor-client privilege in relation to material in the Commission's hands and yet, so far as we can tell, it has done virtually nothing to come to grips with the implications of those claims for the investigation it has authorized. The Commission has also had the benefit for many months of Scanlan, J.'s decision in *National Bank Financial Ltd. v. Potter* (2005), 233 N.S.R. (2d) 123; N.S.J. No. 186 (Q.L.)(S.C.) which held that the onus is not on the party claiming privilege to take steps to have the privilege issue determined: see para. 62. The judge also set out some very clear statements of what he understood to be the ethical obligations of lawyers who come into the possession of material for which privilege is claimed: see paras. 62 -63. It cannot have been lost on the Commission, which we are advised had counsel on a watching brief throughout the proceedings before Scanlan, J., that these statements have serious implications for some or all of its investigators. The Commission, through counsel, claims to have the authority and the tools to address these issues. This decision gives it the opportunity to put those submissions into action.
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> [54] In short, while I prefer to extend considerable judicial deference to the Commission in the discharge of its regulatory responsibilities in the public interest, that deference is neither absolute nor open-ended. It is, in my view, essential that the Commission take serious and immediate steps to come to grips with the obvious issues which have arisen in the course of the investigation which it has ordered.

Mr. Potter submits that instead of dealing with the issues of privileged documents staff of the NSSC issued a statement of allegations against him.

[23] A further irritant for Mr. Potter arose when a NSSC investigator, in 2010, was asked at discovery why NBFL was not sanctioned under the *Securities Act*. Counsel refused to allow him to answer the question on the basis that to do so would violate securities law. This led to a series of applications in this Court; in the Court of Appeal; and at the NSSC. On May 18, 2011 Justice Rosinski heard from the parties in an in camera session. For the first time Scott Peacock revealed

that he had entered into a secret agreement with NBFL and Eric Hicks in 2005 under which they both admitted to failing to properly supervise Mr. Clarke.

[24] This settlement was kept in escrow while the NSSC and NBFL settled with others on the basis that KHI and its insiders were manipulating the market. NBFL denied any wrongdoing in the manipulation scheme and asserted they were not vicariously liable for anything Mr. Clarke might have done. We now know that position is at variance with their secret settlement agreement. We now know NBFL settled several civil actions by not disclosing the secret settlement.

[25] It should be noted that the *Securities Act* allows a staff negotiated settlement to remain secret until it is approved by a panel of the Commission. Once this approval is in place the settlement becomes a matter of public record. The evidence satisfies me that these approvals generally take place within weeks of achieving settlement. On December 4, 2012 the settlement was approved, some seven years after it was struck.

[26] Securities Commissioner Gruchy issued a decision on April 17, 2012, in advance of the above referenced approval. He stated that staff had acted contrary to the public interest in entering into the secret settlement agreement and directed they immediately seek approval. He offered the following critical remarks:

a) The existence of the settlement agreement has remained hidden from public for nearly seven years;

b) Other individuals in the KHI investigation appear to have been dealt with in the usual course;

c) The effect of the escrow agreement has been a failure to protect the public interest;

d) The escrow agreement was invalid and not permissible;

e) Staff did not have the authority to enter into an escrow agreement;

f) The agreement to hold the settlement agreement with NBFL and Hicks in escrow for nearly seven years has prevented the settlement panel from carrying out its important role in protecting the public interest;

g) There was no public interest in maintaining the escrow agreement;

h) [the escrow provision] thwarted the established process for dealing with settlement agreements and has had the effect of keeping the settlement agreement confidential for a completely unreasonable length of time;

Commissioner Gruchy stated that not only had Mr. Potter's rights been infringed but that the secret settlement eroded public confidence in the system. The following are his words:

> It is public confidence that comes to the fore in the present matter as the existence of the escrow agreement – which has kept a settlement agreement secret for years – cannot possibly be viewed by a right thinking member of the public, the man on the Clapham omnibus or any other standard of reasonableness, as something that would inspire confidence in securities in Nova Scotia.
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> The escrow agreement and continued secrecy surrounding the existence of the settlement agreement has prevented Potter, Wadden and MacLeod from obtaining relevant evidence in this proceeding. To maintain the integrity of the proceeding, the existence of the settlement agreement must be disclosed. Furthermore, in order to maintain public confidence in the Commission, the settlement agreement must be subjected to the usual process contemplated by the Rules, not continued to be held in escrow – especially in light of the ongoing proceeding before me, and the civil and criminal proceedings arising from the same facts.

It is not surprising that Mr. Potter, as well as Messrs. Clarke and Colpitts, would observe NBFL as a player and not a victim.

[27] The civil proceeding ended in what Mr. Potter described as "the most scathing judgment in the history of the Nova Scotia Courts" (2015 NSCA 47). Justice Saunders offered the following remarks at paragraphs 8 and 469:

> [8] At this juncture, it is enough to say that National Bank's actions throughout these proceedings had proven to be so serious as to amount to an abuse of process, calling for extreme, unequivocal, and permanent sanctions. For more than 10 years the Bank maintained a position and asserted facts in its pleadings which it knew to be false. It deliberately set out on a path to hide the truth from the Court and opposing parties. In doing so it deprived the adjudicative process of highly relevant and critically important facts.
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> …
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> [469] This is such a rare and exceptional case. It does not reflect the fair and honourable way by which business or litigation is to be conducted in Nova Scotia. Because of the Bank's egregious misconduct the appellants were forced to endure more than 10 years of unwarranted litigation to say nothing of the monumental expense, inconvenience, delays, frustration and waste of time that entailed. The Bank's abuse of process in this case calls for the striking of its pleadings and a permanent stay of the proceedings insofar as the Bank's claims and defences are concerned, and warrants the level of punitive damages and other relief we have imposed.

[28] Mr. Potter has consistently urged the RCMP and the Crown to focus their investigation on the activities of the NBFL and its senior managers. Additionally, he advocates for a closer look at the NSSC and Scott Peacock. Mr. Potter argues that such a re-focused investigation would uncover evidence that would exonerate

him and legitimize the transactions of 2000-2001. He argues this failure to re-focus amounts to an abuse of process warranting a stay.

[29] I do not accept Mr. Potter's submissions for two reasons. One, much of what he seeks lacks relevance. Two, it is for the police to determine the direction of the investigation.

[30] In this case relevance must relate to the offence of fraud. The elements of fraud are remarkably simple. The Crown must prove the prohibited act and a corresponding deprivation. I am unable to conclude that the demise of KHI; the secret settlement; the decision in *NBFL v. Barthe Estate*, 2015 NSCA 47 and the general conduct of NBFL is relevant to proving the indictment against these three defendants. I suspect Mr. Potter feels singled out. Nonetheless, that does not equate to relevance. In *R. v. Théroux*, [1993] 2 S.C.R. 5 Justice Sopinka commented as follows at paragraph 36:

> Pragmatic considerations support the view of *mens rea* proposed above. A person who deprives another person of what the latter has should not escape criminal responsibility merely because, according to his moral or her personal code, he or she was doing nothing wrong or because of a sanguine belief that all will come out right in the end. Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons. If the offence of fraud is to catch those who actually practise fraud, its *mens rea* cannot be cast so narrowly as this.

On the materials before me I do not detect relevance such that the police should comply with Mr. Potter's directions respecting their investigation.

[31] Mr. Potter cites the decision in *R. v. Brown*, [1998] O.J. No. 4682, for the proposition that the Crown ought to have investigated the collapse of KHI by gathering and reviewing evidence that is in the hands of the NSSC relating to NBFL. Aside from the relevance issue, *R. v. Brown*, *supra*, was rejected by the Ontario Court of Appeal in *R. v. Darwish*, 2010 ONCA 14 (leave to appeal denied). In allowing the appeal, Justice Doherty rejected *Brown's* broad interpretation of the Crown's constitutional obligations as violating fundamental concepts of our adversarial system of justice. He commented at paragraphs 38-40:

> [38] No matter how one characterizes the obligation recognized in *Brown*, that obligation stops well-short of imposing a duty on the prosecution to conduct any investigation that on a reasonable view could assist an accused in advancing a substantive defence. The duty to investigate described in *Brown* is triggered by material and potentially meritorious allegations of state misconduct from which *Charter* relief is sought, made in the context of an ongoing criminal proceeding.
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> [39] An interpretation of the right to make full answer and defence that imposes a duty on the prosecution to investigate possible defences is also irreconcilable with the basic features of the criminal justice system. No doubt, the Crown has obligations to an accused and to the administration of justice that go beyond those normally imposed on opposing counsel in litigation. However, the criminal justice system remains essentially an accusatorial and adversarial one. The prosecution, which includes the Crown and the police, is charged with the responsibility of investigating and prosecuting crime in the public interest. To do so, the prosecution must investigate allegations, lay charges and prove those charges in a criminal proceeding. To properly perform these functions, the prosecution must decide on the nature and scope of an investigation. The accused is

> entitled to the product of that investigation, but is not entitled to dictate the nature or scope of that investigation.
>
> [40] On the trial judge's interpretation of the right to make full answer and defence, any accused could effectively assume *de facto* control of a criminal investigation being conducted against them by pointing to some avenue of investigation that might reasonably assist in advancing a defence. On this approach, the prosecution would be obliged to direct its resources to that avenue of investigation or face the consequences of a constitutional violation of the right to make full answer and defence.

Should the defendants wish to pursue these avenues of investigation, that is their prerogative. It is open to them to call whatever evidence they find in response to the Crown's case. I conclude the RCMP and the Crown have complied with their constitutional and investigative obligations *vis-à-vis* NBFL and the NSSC.

ABUSE OF PROCESS:

[32] The defendants allege that the Crown and the police are guilty of abuse of process during the investigative and prosecutorial periods. The Crown refutes such a suggestion.

[33] One of the earliest cases concerning abuse of process was *R. v. Young* (1984), 40 C.R. (3d) 289. Justice Dubin described the principle at paragraph 88:

> I am satisfied on the basis of the authorities that I have set forth above that there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases.

Prior to the Supreme Court of Canada's decision in *R. v. Jewitt*, [1985] 2 S.C.R. 128, it was unclear whether a Court had the power to stay a validly instituted criminal proceeding for abuse of process, or whether that power was reserved for the Attorney General under the *Criminal Code*.

[34] In *R. v. Jewitt, supra*, the Court held that a trial judge had a residual discretion to stay proceedings for abuse of process. The Court stated a stay is appropriate where compelling an accused to stand trial would violate "those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings." The Court cautioned that this power can be exercised only in "the clearest of cases."

[35] Initially, the common law doctrine of abuse of process was treated as analytically distinct from the *Charter* since its focus was more on preserving the integrity of the judicial system than on protecting individual rights. There were also different burdens of proof under the two regimes. In order to establish a violation under the *Charter* the burden of proof was on the balance of probabilities. For an applicant to successfully invoke the Court's common law power to stay

proceedings for abuse of process the burden of proof was the more onerous "clearest of cases" standard.

[36] In *R. v. O'Connor*, [1995] 4 S.C.R. 411, Justice L'Heureux-Dubé, writing for a unanimous Court on this point, held that the common law doctrine of abuse of process had been subsumed by section 7 of the *Charter*. The Court held that the doctrine was not limited to protection of fair trial interests. It included a residual category of conduct to capture diverse and unforeseeable circumstances in which the prosecution is conducted unfairly to such a degree as to contravene fundamental notions of justice.

[37] In *R. v. Keyowski*, [1998] 1 S.C.R. 657, the Court added an important refinement to the law of abuse of process. The Saskatchewan Court of Appeal held that the accused had to establish prosecutorial misconduct, or that the Crown proceeded for some ulterior motive, to prove that the proceedings were oppressive and therefore an abuse of process. The Supreme Court disagreed and Justice Wilson stated at page 659:

> To define "oppressive" as requiring misconduct or an improper motive would unduly restrict the operation of the doctrine of abuse of process. Prosecutorial misconduct and improper motivation, if present, are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's exercise of its discretion to re-lay the indictment amounts to an abuse of process.

In *R. v. Young, supra*, the Court found an abuse of process and upheld a stay. The Court did not attribute any ulterior motive to the investigator or the Crown.

[38] In *R. v. O'Connor, supra,* the Supreme Court identified two categories of abuse of process which would be caught by section 7 of the *Charter*. One is prosecutorial conduct affecting the fairness of the trial; and two, prosecutorial conduct that does not affect trial fairness but contravenes fundamental notions of justice that undermines the integrity of the judicial process. The latter was described as a "residual category" of abusive conduct. The residual category is a small one. In the vast majority of cases the concern will be about trial fairness.

[39] In *R. v. Power*, [1994] 1 S.C.R. 601, the Court described "clearest of cases," the threshold for granting a stay, as requiring overwhelming evidence that the proceedings are unfair to the point that they are contrary to the interests of justice and "that it would genuinely be unfair and indecent to proceed."

[40] In *R. v. Nixon*, 2011 SCC 34, the Court explained the evidence required to establish a violation of section 7 under each of the two categories. Under the first category, the accused must establish the necessary degree of prejudice. Justice Charron commented at paragraphs 39-40:

> 39 Under the first category of cases, the concern is about the fairness of the accused's trial. Establishing prejudice of the requisite degree is key to meeting the test; proof of prosecutorial misconduct, while relevant, is not a prerequisite: *R. v. Keyowski*, [1988] 1 S.C.R. 657. In *Keyowski*, the accused's first two trials ended with the jury failing to agree on a verdict; his third trial was stayed by the trial judge for abuse of process. The narrow issue on appeal was whether a series of trials could, in and of itself, constitute an abuse of process, or whether it was necessary for the accused to show prosecutorial misconduct.
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> 40 The Court reiterated that the test for abuse of process was whether "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious" (pp. 658-59, quoting from *Jewitt*, at pp. 136-37). While the Court concluded that the Crown's exercise of discretion to proceed with a third trial did not constitute an abuse of process in the circumstances of the case, the Court held that the test could be made out in the absence of prosecutorial discretion. Wilson J. explained as follows (at p. 659):
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> > To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. In this case, for example, where there is no suggestion of misconduct, such a definition would prevent any limit being placed on the number of trials that could take place. Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's exercise of its discretion to re-lay the indictment amounts to an abuse of process.

The requisite degree of prejudice was considered by the Ontario Court of Appeal in *R. v. Cunningham*, [1992] O.J. No. 2754. At its highest, the evidence suggested the possibility that the pre-charge delay might impair trial fairness. The Court stated that the mere possibility that pre-charge delay could prejudice the right to make full answer and defence does not justify a stay for abuse of process.

[41] As to the evidence required under the residual category, Justice Charron commented at paragraph 41:

> [41] Under the residual category of cases, prejudice to the accused's interests, although relevant, is not determinative. Of course, in most cases, the accused will need to demonstrate that he or she was prejudiced by the prosecutorial conduct in some significant way to successfully make out an abuse of process claim. But prejudice under the residual category of cases is better conceptualized as an act tending to undermine society's expectations of fairness in the administration of justice. This essential balancing character of abuse of process under the residual category of cases was well captured by the words of L'Heureux-Dubé J. in *R. v. Conway*, [1989] 1 S.C.R. 1659. She stated the following:
>
> > Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt, supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, per Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

In other words, where an accused alleges that pre-charge delay by authorities has violated his or her section 7 rights, the accused must establish either (1) actual prejudice to his or her ability to make full answer and defence; or (2) that the delay was so egregious, and the state conduct so offensive, that the integrity of the Court would be tarnished if the prosecution is permitted to continue.

[42] Once a violation of section 7 has been established on a balance of probabilities, the Court must still determine whether a stay of proceedings is the appropriate remedy under section 24(1).

[43] In *R. v. Nixon, supra*, the Supreme Court summarized the test for a stay where there has been prejudice to the accused's right to a fair trial, or the integrity of the justice system. Justice Charron commented at paragraph 42:

> [42] The test for granting a stay of proceedings for abuse of process, regardless of whether the abuse causes prejudice to the accused's fair trial interests or to the integrity of the justice system, is that set out in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, and *R. v. Regan*, [2002] 1 S.C.R. 297. A stay of proceedings will only be appropriate when: "(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice" (*Regan*, at para. 54, citing *O'Connor*, at para. 75).

Only where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases will a stay be appropriate (*R. v. Conway*, [1989] 1 S.C.R. 1659).

[44] In *R. v. Regan*, 2002 SCC 12, the Court identified a third factor when considering a stay for abuse of process. Justice LeBel stated at paragraphs 17-18:

> 17 Michael MacDonald A.C.J. identified that the appellant was not claiming an abuse of process which had tainted the fairness of the trial, and was therefore seeking relief under the so-called residual category of

> procedural abuse, which will warrant a stay of proceedings. MacDonald A.C.J. noted, however, that the remedy of a stay remains reserved for only the clearest of cases, where it is the only remedy available to counter the effects of the abuse (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391).
>
> 18 MacDonald A.C.J. adopted the test for a stay articulated in *Tobiass*, at para. 90, where the Court held that in order to grant a stay, two criteria must be satisfied: (1) that the prejudice will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome, and (2) that no other remedy is reasonably capable of removing the prejudice flowing from the abuse. The Court added a third factor which should be considered in cases where it remains unclear whether the abuse is sufficient to warrant the stay. It requires courts to engage in a weighing of the societal interests involved. Courts must then "balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits. This is not to say, of course, that something akin to an egregious act of misconduct could ever be overtaken by some passing public concern" (*Tobiass*, at para. 92). MacDonald A.C.J. acknowledged that this third criterion would play a significant part in his analysis. In approaching the issue, MacDonald A.C.J. noted that he had to weigh the cumulative effect of any alleged wrongdoing. He was also mindful that abuse of process need not be driven by evidence of mala fides to warrant a stay, although such evidence was certainly relevant.

[45] The Supreme Court of Canada revisited abuse of process in *R. v. Babos*, [2014] 1 S.C.R. 309. Justice Moldaver introduces the focus at paragraph 1:

> [1] This appeal provides the Court with an opportunity to revisit the law of abuse of process as it relates to state conduct that impinges on the integrity of the justice system but does not affect trial fairness - sometimes referred to as the "residual category" of cases for which a judicial stay of proceedings may be ordered. In particular, we are tasked with clarifying the approach to be followed when determining whether a stay of proceedings should be ordered where such conduct is uncovered.

[46] Justice Moldaver reviews the present state of law at paragraphs 30-33:

30 A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

31 Nonetheless, this Court has recognized that there are rare occasions - the "clearest of cases" - when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.

32 The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).

33 The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids "schizophrenia" in the law (*O'Connor*, at para. 71). But while the framework is the same for both categories, the test may - and often will - play out differently depending on whether the "main" or "residual" category is invoked.

Abuse of process associated with delay is most often related to pre-charge delay but in limited circumstances it may have a transferred application to post-charge delay (*R. v. Bailey*, 2014 ABPC 104).

[47] There were many steps and events that occurred during the investigative period. They will be the subject of detailed comment later in this decision. The defendants take issue with the following aspects of the investigation:

- The ineffectiveness of the IMET Quick Start Team's choices when getting the investigation started.
- Issues surrounding the KHI servers and the emails contained therein.
- Failing to proceed with the KHI investigation until the NSSC investigation was ongoing.
- Issues related to the retention of legal counsel and the delay associated with that problem.
- Inordinate delays in obtaining search warrants and production orders.
- Failure to conduct timely interviews.
- Delay in processing raw data and in obtaining an expert witness.
- A general lack of resources on the part of the Commercial Crime Team in Halifax.

The defendants suggest that the investigation was compromised and the result was the nine year delay in preferring an indictment.

[48] The defendants also take tissue with the following aspects of the

prosecution stage of this proceeding:

- Issues associated with the Crown's disclosure obligations pursuant to *Stinchcombe*.
- The Crown's failure to obtain NSSC documents pursuant to *McNeil*.
- The consequences of that decision and its impact on defence disclosure applications.
- The Crown's unnecessary and unsuccessful interlocutory applications i.e. conflicts, *Rowbotham* and recusals.
- The Crown's indifference towards evidence at the NSSC.

The defendants suggest that the prosecution lacked a firm direction and the result was the 4-5 years they stood accused.

[49] I am unable to conclude that the choices made by the IMET team, the RCMP or the Crown amount to an abuse of process. There is no way to credibly argue that these decisions would violate those fundamental principles of justice which underlie the community's sense of fair play and decency. Further, there is nothing to suggest these choices amounted to vexatious or oppressive proceedings. This is not even close to being one of the "clearest of cases." Section 7 of the *Charter* is not triggered. There is nothing to suggest fair trial rights have been infringed. There is nothing to suggest these choices undermined society's expectation of fairness in the administration of justice.

[50] *R. v. Babos, supra*, is a valuable comparator of the kind of actions that can lead to an abuse of process. In that case the accused complained about three forms of misconduct:

> - Attempts by the original provincial Crown Attorney to intimidate them into foregoing their right to a trial by threatening them with additional charges should they choose to plead not guilty;
> - Collusion on the part of two police officers to mislead the court about the seizure of a firearm from Mr. Babos's car; and
> - Improper means used by a federal Crown Attorney in obtaining Mr. Piccirilli's medical records from the detention centre where he was being detained pending trial.

The trial judge entered a stay which was overturned by the Quebec Court of Appeal and the Supreme Court of Canada. This case was argued on the residual ground and there was no suggestion fair trial rights were affected. The Court applied the principles and concluded the details of these actions did not amount to an abuse of process requiring a stay. Justice Moldaver stated at paragraph 72:

> [72] In deciding that a stay of proceedings is unwarranted in this case, I have assessed the three forms of alleged misconduct individually. The Crown's conduct in securing Mr. Piccirilli's medical records occasioned no prejudice to the integrity of the justice system. The harm caused by the finding of police collusion was curable through an alternate remedy: excluding the firearm from evidence against both appellants. And the Crown's threatening conduct, while reprehensible, did not approximate the type of shocking conduct needed to justify a stay.

This case is instructive on how serious the state's actions must be to trigger a breach of section 7 requiring a section 24(1) stay of proceedings. The events in the case at bar do not approach the *Babos* behaviours. I find no abuse of process in either the investigative or prosecutorial stage of this proceeding.

ROLE OF REGULATORY AND CIVIL PROCEEDINGS IN THE PRE-CHARGE DELAY ANALYSIS:

[51] On this application the defendants are seeking a stay of proceedings on the basis of delay. They argue that in determining whether to grant a stay I should consider decisions and events that took place during the regulatory and civil proceedings. In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, Justice Bastarache stated at paragraphs 45-46:

> 45 Although there have been some decisions of this Court which may have supported the position that s. 7 of the *Charter* is restricted to the sphere of criminal law, there is no longer any doubt that s. 7 of the Charter is not confined to the penal context. This was most recently affirmed by this Court in New Brunswick (*Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, where Lamer C.J. stated that the protection of security of the person extends beyond the criminal law (at para. 58). He later added (at para. 65):
>
> > ... s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person, i.e., civil committal to a mental institution: see *B. (R.), supra*, at para. 22.
>
> 46 Thus, to the extent that the above decisions of *Nisbett and Canadian Airlines* stand for the proposition that s. 7 can never apply outside the criminal realm, they are incorrect. Section 7 can extend beyond the sphere of criminal law, at least where there is "state action which directly engages the justice system and its administration" (*G. (J.)*, at para. 66). If a case

> arises in the human rights context which, on its facts, meets the usual s. 7 threshold requirements, there is no specific bar against such a claim and s. 7 may be engaged. The question to be addressed, however, is not whether delays in human rights proceedings can engage s. 7 of the *Charter* but rather, whether the respondent's s. 7 rights were actually engaged by delays in the circumstances of this case. Various parties in this case seem to have conflated the delay issue with the threshold s. 7 issue. However, whether the respondent's s. 7 rights to life, liberty and security of the person are engaged is a separate issue from whether the delay itself was unreasonable. I will now examine whether the s. 7 threshold requirements have been met and whether the respondent has demonstrated a breach of his s. 7 rights.

[52] In Peter Hogg's text *Constitutional Law of Canada*, (5th ed.) Toronto, Carswell 2007, the following appears at page 47-73:

> The principle of fundamental justice obviously require that a person accused of a crime receive a fair trial. In this respect, s. 7 overlaps with s. 11(d), which also guarantees to a person charged with an offence "a fair and public hearing by an independent and impartial tribunal." Section 7 is, however, wider than s. 11(d), because s. 7 also applies to civil and administrative proceedings where they affect life, liberty or security of the person. In *New Brunswick v. G.(J.)*, for example, it was held that an application by the state to remove children from custody of a parent affected the parent's security of the person, and made s. 7 applicable.

In a footnote to this section, Professor Hogg notes that a civil action for damages is not caught by either section 7 or section 11(d).

[53] Critical to this issue is whether a regulatory proceeding affects the "life, liberty or security of the person." If it does, an accused may apply for a *Charter* relief on the basis of delay that violates the individual's right to a fair hearing. In

Blencoe v. British Columbia (Human Rights Commission), supra, Justice Bastarache stated at paragraph 47:

> To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that that deprivation is contrary to the principles of fundamental justice. (*R. v. Beare*, [1998] 2 S.C.R. 387, p. 401)
>
> Thus, if no interest in the respondent's life, liberty or security of the person is implicated, the s. 7 analysis stops there. It is at the first stage in the s. 7 analysis that I have the greatest problem with the respondent's s. 7 arguments.

I conclude that neither the civil proceedings nor the regulatory proceedings implicated any of the defendant's section 7 rights.

[54] In *Singh v. Minister of Employment and Immigration,* [1985] 1 S.C.R. 177, Justice Wilson emphasized that "life, liberty and security of the person" are three distinct interests. In the case at bar I find that the liberty factor and the security of the person factor apply.

[55] In *Godbout v. Longueil (City)*,[1997] 3 S.C.R. 844, Justice La Forest stated at paragraph 66:

> The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that

> individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in *B. (R.)* that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.

I conclude the civil and regulatory proceedings did not impact on the liberty interests of these defendants. No fundamental personal choices were compromised.

[56] Security of the person was discussed in *Blencoe v. British Columbia*, *supra*, at page 343:

> In the criminal context, this Court has held that state interference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual's security of the person. In this context, security of the person has been held to protect both the physical and psychological integrity of the individual (*Morgentaler*, *supra*, at p. 56, per Dickson C.J., and at p. 173, per Wilson J.; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 587, per Sopinka J.; Reference re ss. 193 and 195.1(1)(c) of the *Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1177, *per* Lamer J.). These decisions relate to situations where the state has taken steps to interfere, through criminal legislation, with personal autonomy and a person's ability to control his or her own physical or psychological integrity such as prohibiting assisted suicide and regulating abortion.

And again at page 344:

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

I conclude the civil and regulatory proceedings did not impact on the security of the person interests of these defendants. The actions of the state did not evoke any serious psychological stress that would offend section 7.

PRE-CHARGE DELAY:

[57] The investigative phase extended from February 20, 2003 until March 17, 2011. The following is the timeline of that investigation:

- February 20, 2003: Sgt. Barrett, Commercial Crime Section (CCS), receives a letter from Scott Peacock proposing a criminal investigation.
- May 16, 2003: Sgt. Barrett emails John Sliter (IMET) to solicit investigative expertise to assist with the criminal investigation into KHI.

- Summer, 2003: Cst. Robinson transferred to Halifax to join the IMET team. Inspector MacDougall assumes the role of the senior investigator.
- April 19, 2004: IMET Quick Start team first meet with the CCS and initiate an investigative plan.
- April 21, 2004: Investigators attended the prothonotary's office and review all KHI civil filings. This process took approximately two months and captured 755 documents.
- June 14, 2004: Cpl. Murdock assumes the role of file manager and institutes a case management system.
- June 25, 2004: The law offices of Walker Dunlop are searched by consent and 2576 documents are seized. Interviews are conducted and search warrants executed throughout 2004.
- Fall, 2004: Three search warrants were executed. Three CCS investigators, six IMET members, two transcribers and one information processor were assigned to the case.
- December, 2004: Ian Black joins the team as an investigative assistant. His role was to review and complete a trading analysis of KHI transactions. Several other investigators joined the team.
- During 2005: The team filed and executed 19 judicial authorizations which resulted in the analysis of 4512 documents. Fourteen production orders were executed at financial institutions. Two were executed at Computershare, KHI's transfer agent. One search was conducted (notebook). One general warrant was executed at the law office of Tim Hill where the KHI servers were seized. One Mutual Legal Assistance Treaty was prepared resulting in two investigators travelling to Germany to interview three witnesses in 2006.
- During 2005: The team interviewed 36 witnesses whose names arose as a result of previous investigative steps.
- September, 2005: Lori Shea is recruited to determine the number of shares KHI had issued and outstanding at any given time including the actions of the inside group. Ms. Shea's report was finalized in August, 2008.

- During 2006: The team interviewed 43 witnesses. As well, three production orders were executed at financial institutions. The result was the seizure of 852 documents. One search was executed at the offices of the local carpenters union pension administrator.
- November, 2006: Access to the KHI servers resulted in 145,216 emails coming into the investigation.
- During 2007: Access to the KHI servers continued before the Court. Twenty-four witness interviews were conducted at various places across Canada. Two production orders were executed at financial institutions. Two search warrants were executed at the NSSC and the law offices of Stewart McKelvey Stirling Scales.
- March, 2008: The federal Crown takes over the prosecution from the Public Prosecution Service of Nova Scotia.
- During 2008: The team interviewed seven witnesses by June. In addition one warrant to search was executed at the Toronto Stock Exchange.
- September, 2008: The team completes its disclosure brief and delivers it to the Crown.
- November, 2008: Langley Evans was identified as an individual with the qualifications and experience to be the Crown's expert witness. He met with the Crown in January, 2009 and his final report was available in February, 2010.
- July, 2009: Access to the KHI servers was authorized to perform keyword searches (Searchlight 2). One interview was conducted in Montreal (Rousseau).
- October, 2009: A process was established for access to the KHI server for a review of electronic files. The results were received in November, 2010, but nothing of investigative value was found.
- March 17, 2011: The Crown files a direct Indictment.

The defendants plead that the duration of the investigation is of such length that it requires scrutiny. I agree with that assessment.

[58] It would be inaccurate to suggest the KHI investigation unfolded as planned. The reality is that it was fraught with problems. Remember the IMET Quick Start initiative was focused on a "fast" investigation with charges being laid promptly. Those expectations were not met. The following items relate to the delay caused by the investigation.

MOVING CHARGE DATES:

[59] The date for laying charges was a moving target. This fact is the consequence of complications in the investigation. The following evidence supports this proposition. In an April 30, 2004 investigation report (Exhibit #8), the team stated their focus was on laying charges in one year. In a February 10, 2005 briefing note (Exhibit #33), the following appears:

> STRATEGIC CONSIDERATIONS: As we approach the one year goal for IMET investigations, we have requested a decision from PPS with respect to a commitment of eventual criminal charges by March, 2005.

[60] In a March 21, 2005 email to the team (Exhibit #28), the following appears:

> This is in line with our commitment to the Commissioner in our last BN that we would have a determination by the end of March 05 as to whether criminal charges are warranted in Project Newman.

In a January 3, 2006 briefing note (Exhibit #24), appears the following:

> PRIVILEGE ISSUE: It is anticipated that criminal charges will be laid by early summer 2006.

In an April 3, 2006 briefing note (Exhibit #34), the message was again changed:

> STRATEGIC CONSIDERATIONS: The privilege issue is anticipated to slow the laying of criminal charges until the fall of 2006.

In an April 2, 2007 briefing note (Exhibit #55), the timeline is again changed:

> CURRENT STATUS: September remains the target for completion of the investigation and laying of charges, but this may be hampered by the continued delays experienced in the courts of which law enforcement has no control. At each hearing the RCMP and prosecution have been prepared and ready to go. The adjournments have been granted by the court at the request of the defence and form part of our legal system.

In a June 28, 2007 briefing note (Exhibit #56), the following appears:

> November is the new target for completion of the investigation and laying of charges, but this may be hampered by the continued delays experienced in the courts of which law enforcement has no control. At each hearing the RCMP and prosecution have been prepared and ready to go. The adjournments have been granted by the court at the request of the defence and form part of our legal system. When the charges are recommended to the Crown, the Crown will review the package and determine the possibility of going forward with a prosecution. This is based on the Crown's likelyhood [sic] of a conviction. Crown's response is expected prior to January 1st 2008, if the RTCC is submitted in November.

[61] In a March 20, 2008 briefing note (Exhibit #36), the schedule is again adjusted:

> The RTCC was to be submitted this week (after nearly four years of investigation) but is being held back to await direction from the new Crown. This change in Crown will set the file back an estimated six months.

Charges were preferred on March 17, 2011.

SUFFICIENCY OF RESOURCES:

[62] Human resources were also an issue in the KHI investigation. John Sliter of IMET testified that while he was satisfied they were not under-resourced, they were concerned with the speed of the investigation. In a June 29, 2004 briefing note (Exhibit #79) he stated:

> The Halifax CCS commitment of three full time investigative members fell short during the 2nd trip to Halifax in late May early June. The first week we had one resource from Halifax CCS and the 2nd week we had 2 resources.

Throughout 2004/2006 several team members left the team for positions elsewhere in the RCMP.

[63] In a May 7, 2004 email (Exhibit #89), the following appears:

> Not wanting to step on anyones [sic] toes and just so we all have an understanding of the capacities, etc. I spoke to Kevin O'Blenis yesterday afternoon. He advised that with his current resources and equipment, his unit would not likely be able to keep up with the projected pace of this file. He did advise that if one or two additional scanning people (CR-03) were hired (about 34K each) and an additional scanner was installed (25K plus about 10K for software) they would be dedicated to this file and would have no problem handling it.
>
> We discussed the ability of E&R III and Supertext to work together and while it may be accomplished there would certainly be duplication and documents. As I mentioned yesterday I am worried about the disclosure implications this may cause.

In a February 6, 2007 briefing note (Exhibit #44), Inspector MacDougall states:

> Retention of current personel [sic] continues to be problematic to the investigative team. The last investigative assistant assigned to the team has left to take on full time employment elsewhere in the RCMP. IMEB continues in its efforts to find replacements for the team members who have transferred out of the project.

I am satisfied that often during the investigation the team did not have sufficient resources to handle the workload.

NSSC INVESTIGATION:

[64] The defendants argue that the RCMP investigation was held up for a year waiting for the NSSC to complete their investigation. In an April 20, 2004 email (Exhibit #29), John Sliter stated:

> We understand that the NSSC intends to complete their regulatory investigation on April 15, 2004 and we would like to commence with this project to co-incide [sic] with that date.

In a May 4, 2004 email (Exhibit #9), team leader Neville stated:

> In any event, Scott confirmed that he is finished doing what he wanted to do and we can go ahead with our investigation as required.

[65] The RCMP did shelve their investigation until the NSSC investigation was complete. The IMET Quick Start program came into being in 2003 but only started the KHI investigation on April 2, 2004. In his testimony John Sliter addressed this issue. When asked if the team had to wait until the NSSC

completed its investigation he replied in the negative saying "the two are independent and separate, it would have been possible."

RETENTION OF CROWN COUNSEL:

[66] The Public Prosecution Service of Nova Scotia advised the RCMP until March 20, 2008. The Public Prosecution Service of Canada replaced it. The reason for this change relates to a lack of funding for the Nova Scotia Crown. In a June 7, 2004 briefing note (Exhibit #32), John Sliter stated:

> Meetings with the PPS in Nova Scotia were positive and they indicated a willingness to maintain their right to prosecute this file … local representatives for the DOJ advise that the costing issues have not been properly addressed.

[67] In a February 10, 2005 briefing note (Exhibit #33), John Sliter stated:

> Negotiations continue with the Nova Scotia Public Prosecution Services (PPS) for the engagement of an ad hoc prosecutor by March 2005.

In a March 18, 2005 email (Exhibit #28), John Sliter further stated:

> I explained that I had asked for a decision by local Crown as to their expectation of a prospective prosecution by March 31, 2005 as I would take steps to shut down the project if no prosecution coming.

Throughout this period of time the investigative team had limited contact with counsel from outside of Nova Scotia. Team leader Neville wrote, "This investigation is reaching a crucial point where the need for permanent legal counsel to act as advisor and prosecutor is of the utmost importance" (Exhibit

#17). He further stated, "The issue of funding to cover the cost of the ad hoc prosecutor requires immediate action" (Exhibit #20).

[68] In a March 11, 2005 email (Exhibit #26), John Sliter wrote to the team as follows:

> I know that this is not the ideal situation, that is to go ahead with the presentation without the "ad hoc" in place. However, I also feel that we have to continue forging ahead in order not to lose the momentum of the team while bearing in mind that the 490 clock is ticking.

Team leader Neville testified that he had access to some legal advice but not to a dedicated counsel. He wanted someone on site. He stated, "It was an ongoing thing."

[69] In March, 2008 the federal Crown took over the prosecution. After reviewing the file to date, it made three recommendations to the investigative team:

- Obtain an expert to give evidence at trial;
- Re-interview NBFL personnel; and
- Conduct a second search of the KHI servers.

The team pursued all three recommendations in the months that followed.

SEARCH WARRANTS AND PRODUCTION ORDERS:

[70] The defendants plead that these procedures were not pursued diligently and that such contributed to the investigative delay. In total 31 judicial authorizations

were conducted between September 24, 2004 and May 22, 2008. The break down is as follows:

- 2004 – 3 authorizations
- 2005 – 18 authorizations
- 2006 – 4 authorizations
- 2007 – 5 authorizations
- 2008 – 1 authorization

It is noteworthy that 21 if these authorizations were executed by the end of 2005; 25 by the end of 2006; and 30 by mid-2007.

WITNESS INTERVIEWS:

[71] The defendants plead that investigators dragged their feet conducting interviews and that such contributed to the investigative delay. In a June 29, 2004 briefing note (Exhibit #3), Stephen Neville stated, "Extensive interviews of key witnesses have been completed and the primary ITO has been drafted." In a December 15, 2004 briefing note (Exhibit #20), he stated, "The team is finalizing a standard approach to preparing witness chronologies to be used in this case." In a June 28, 2007 briefing note (Exhibit #56), Inspector MacDougall reported:

> There have been 150+ interviews completed… All interviews have been transcribed, scanned, prepped and put into the "can say" format with related linkages completed.

There have been a few recent interviews that grew out of prior statements.

[72] The schedule of interviews is as follows:

- 2005 – 36 interviews
- 2006 – 43 interviews
- 2007 – 24 interviews
- 2008 – 7 interviews

The defendants question why these interviews started so late and took so long to complete.

EXPERT WITNESSES:

[73] The defendants plead that the RCMP hesitated in locating and retaining an expert witness. In November, 2008 Sgt. Murdock contacted Mr. Lang Evans in British Columbia and provided him with a hard drive containing all the evidence to date. Mr. Evans finalized his report on February 2, 2010, some 15 months later. In Exhibit #67 (Task re: Lang Evans) it is evident there were several delays occasioned by Mr. Evan's position with the British Columbia Securities Commission. The defendant's complaint is not about the 15 months but rather the timing of Mr. Evans' retainer.

[74] In an operational plan dated April 6, 2004 (Exhibit #1), Stephen Neville reported knowledge of a Mr. Shahviri, a MICA expert, who was capable of

conducting the analysis necessary to support the investigators with detailed market analysis reports. In an April 30, 2004 operational report (Exhibit #7), Stephen Neville indicates that a MICA trading analysis had been completed. In a June 16, 2004 letter to Stephen Neville (Exhibit #11), the following was sent to him:

- A hard copy of the MICA report;
- A Trading Analysis including Bid Summary Schedules prepared by investigator, Alexis Meanchoff;
- TSX Cats Input logs from December 1999 to May 2001;
- RS Trade Order and Quote Reports (TOQ) from June to August 2001;
- TSX Equity Trade Report; and
- TSX Prices.

These materials came from Market Regulations Services (MRS) who partnered with the NSSC during the regulatory proceeding. Exhibit #78 indicates that MRS had "completed its investigation into the shares of Knowledge House Inc. (KHI)" and provided the investigative team with the report.

[75] The defendants question why Lang Evans was required when the investigators already had the data. The initiative to seek out a new expert was the product of the federal Crown taking over the prosecution and identifying the need for a new trial expert.

[76] Obviously Lang Evans required access to the technical data before conducting his analysis and filing a report. The defendants take the view that the raw data was available well in advance of 2008. In a March 20, 2008 briefing note (Exhibit #35) investigator Buzza stated:

> The RTCC (Report to Crown Counsel) was to be submitted this week (after nearly four years of investigation) but is now being held back to await direction from the new Crown.

The significance associated with Lang Evan's retainer must be measured against the fact that an expert report was written by one Neil Winchester in 2004. Obviously the Crown felt this report was insufficient for trial.

[77] Investigator Black acquired a match trade report (Exhibit #131). He testified that "Mehran (Shahviri) prepared this report, I got the first copy in December, 2004 and the final copy later in 2005." He also testified that he obtained documents from the investigative team "very early on, the same time as the match trade report, later in 2005."

[78] An exhibit report dated July 26, 2004 (Exhibit #101) states the following:

> Report dated July 6, 2004 showing the "trading history of an issuer" Knowledge House Inc. common shares. Attached to the report includes *Ontario Securities Act* Part XXI concerning insider trading and self dealing.

[79] Investigator Robinson prepared exhibit reports dated July 19, 2004 and November 9, 2004 (Exhibit #62). It indicates receipt of the following from MRS:

One (1) Compact disc labelled "KHI – MICA".
One (1) Compact disc labelled "KHI".
One (1) Compact disc labelled "KHI IMET".
One page document dated June 14, 2004 originating from Jane P. Ratchford (Chief Counsel Easter Region – RS) addressed to Mr. Mehran Shahviri.
One bound document (MICA Report) re KHI Titled "Match Trade" containing data from case range: 12/06/99 to 09/13/2001.
One page document dated June 16, 2004 originating from Jane P. Ratchford (Chief Counsel Easter Region – RS) addressed to Mr. Stephen Neville.
One compact Disc titled: "KHI Search Warrant RS-Nov 8, 2004".
"NBFL Trade Tickets Re: Knowledge House Inc. Jan 2000 – Aug 2001".
"Scotia Capital Transaction Records Re Knowledge House Inc."
"BMO Trade Tickets"
"RBC Trade Tickets"
"TD Waterhouse tickets Nov & Dec 2000 plus IOTA NCAF's to show acct names – put in C WADDENTS orders"
"TD Waterhouse tickets & IOTA acct statements to match acct# or tickets – entered into all trading July 7/03"
"Technology report referred in March 14/03"

In fact in an April 10, 2002 letter from MRS to the Ontario Securities Commission (Exhibit #78), the author stated:

> Market Regulation Services has completed its investigation into the trading in the shares of Knowledge House Inc. (KHI). Enclosed for your information is a copy of the investigation report and its appendices.

In a July 24, 2004 briefing note (Exhibit #17), Stephen Neville wrote, "A review of MRS findings supports allegations of market manipulation by the suspect group of insiders."

KHI SERVERS AND EMAILS:

[80] The KHI servers were seized by the RCMP on April 14, 2005. As of October 2, 2007 the RCMP recovered 145,216 emails from the mailboxes of 10 targets. A review of the emails was completed by November 21, 2007. The following exchange occurred between Mr. Colpitts' counsel and investigative team member Sgt. Murdock:

> Q: And, if I could just take you to one last entry in this Task 221 Sargeant Murdock I'd ask you to go to page 914 of 1519 and the last entry, November 21, 2007. Inspector Jim MacDougall received, or sorry reviewed the 8 partially redacted emails on Searchlight and did not identify any of the emails that would benefit the investigation. All emails have been reviewed to date and emails that met our chosen criteria have been printed, prepared, coded to ER 3.5.5. All the emails received from Searchlight have been uploaded to our internal server, copies of all the emails received via Searchlight have been filed at the Supreme Court of Nova Scotia. Task concluded no further action required. Is that correct?
>
> A: That's correct.
>
> Q: So can I conclude from that that the whole process with the KHI server emails and all the emails was fully completed at that time.
>
> A: Fully completed as of the 21st of November.

The federal Crown's appointment in 2008 led to the second "keyword" search. It was completed in 2010 but did not result in anything of value to the investigation.

[81] The email protocol was designed and implemented by Justice Scanlan. It took thirty months to complete. The investigators stress that these emails led to other appropriate investigative steps. Clearly the process delayed the investigation substantially. The *viva voce* evidence before me was that the process was out of the investigator's hands and, as such, they were not in a position to accelerate it.

THE LAW ON PRE-CHARGE DELAY:

[82] In *Mills v. The Queen*, [1986] 1 S.C.R. 863 the Supreme Court determined that pre-charge delay cannot ground a *Charter* challenge on the basis of a violation of section 11(b). Instead such relief is found in section 11(d) and section 7. The Court set forth this principle at paragraphs 230-231:

> 230 Pre-charge delay is relevant, however, to the right to a fair trial protected by ss. 7 and 11(d) of the Charter. I am in substantial agreement with the following passage from McKay J.'s judgment in Attorney General of *British Columbia v. Craig Prov. J.* (1983), 36 C.R. (3d) 346 (B.C.S.C.) in which he stated, at p. 353:
>
> > I have no doubt that relief is available under s. 11(d) or s. 7 and possibly by way of a finding of abuse of process if it is demonstrated that pre-information or pre-indictment delay would cause substantial prejudice to an accused's right to a fair trial and that the delay was caused by the police or the Crown for an oblique purpose.
>
> 231 Pre-charge delay is relevant under ss. 7 and 11(d) because it is not the length of the delay which matters but rather the effect of that delay upon the fairness of the trial. Pre-charge delay is as relevant as any other form of pre-charge or post-charge conduct which has a bearing upon the fairness of the trial. In other words, pre-charge delay is relevant to those interests which are protected by the right to a fair trial whereas it is irrelevant to those which are protected by s. 11(b). Similarly, pre-charge delay may be a relevant consideration under the doctrine of abuse of

> process in the same manner as any other conduct by the police or the Crown which may be held to constitute an abuse of process.

In 1990 in *Thompson Newspapers v. Canada*, [1990] 1 S.C.R. 425, the Supreme Court stated the right of an accused to a fair trial hearing is constitutionalized by section 11(d), a right that would in any event be protected under section 7 as an aspect of the principles of fundamental justice.

[83] In *Charter Justice in Canadian Criminal Law* (5th ed.) 2010, Don Stuart discussed pre-charge delay as follows:

> The Supreme Court has determine that pre-charge delay cannot ground a Charter challenge on the basis that there has been a violation of the right to be tried within a reasonable time contrary to s. 11(b). The accused only has a remedy if there has been a violation of the right to fair trial under ss. 7 and 11(d) or an abuse of process. It has indicated that this could be grounded on "deviousness or maliciousness" or "offensive or vexatious conduct on the part of the police."
>
> In *L.(W.K.)* (1991), Mr. Justice Stevenson for a unanimous Court confirmed that delay between the commission of a crime and the laying of the charge cannot without more justify a stay as an abuse of common law or violate the Charter:
>
> > Staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence. In Canada, except in rare circumstances, there are no limitation periods in criminal law. The comments of Laskin C.J. in *Rourke* are equally applicable under the Charter.
>
> The Court further held that the right to a fair trial protected by ss. 7 and 11(d) of the Charter was not "automatically undermined by even a lengthy pre-charge delay." Pre-charge delay was relevant under those provisions not because of the length of the delay but as to the effect of that delay upon the fairness of the trial. The fairness of a particular trial could not be assessed without considering the particular circumstances.

[84] Delay by authorities in charging an individual may breach section 7. A violation of section 7 will be found where the delay by authorities has prejudiced an accused's right to make full answer and defence. The mere possibility of prejudice is insufficient, evidence of actual prejudice is required (*R. v. Cunningham, supra*). Actual prejudice occurs when an accused is unable to put forward their defence due to lost evidence, and not simply when the loss of evidence will make putting forward the position more difficult. Misconduct or an improper motive is relevant but not a prerequisite.

[85] Once a violation of section 7 has been established the Court must determine whether a stay of proceedings under section 24(1) is the appropriate remedy. Delay laying charges cannot, without more, justify a stay of proceedings. A stay of proceedings will be appropriate only when two criteria are met. One, the prejudice caused by the abuse in question will be manifest, perpetuated or aggravated through the conduct of the trial or by its outcome; and two, no other remedy is reasonably capable of removing the prejudice. Where an accused establishes conduct that falls within the residual category of abuse, the first criterion will be met only where the states' misconduct is likely to continue in the future or the carrying forward of the prosecution will offend society's sense of justice. Such a situation will be rare.

[86] The principles affecting pre-charge delay were extensively reviewed by Justice Warner in *R. v. Joudrey*, 2010 NSSC 230. He stated at paragraphs 34 and 73:

> [34] The Supreme Court, in *O'Connor*, at paragraph 73, *Tobiass*, at paragraph 89, and *Regan*, at paragraphs 53-57, recognize the residual category of abuse that will warrant a stay even where the accused could still receive a fair trial, but where the abuse is likely to continue or be carried forward.
>
> …
>
> [73] Only where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases will a stay be appropriate (*R. v. Conway* [1989] 1 S.C.R. 1659).

[87] The issue of the requisite prejudice was reviewed by the Ontario Court of Appeal in *R. v. Lee Valley Tools Ltd.*, 2009 ONCA 387:

> 22 [21] Dubin C.J.O. instructed that there must be more than potential relevance to the evidence and "[t]here must be an air of reality that the missing evidence would in fact and in a material way assist the accused." On this issue, he quoted with approval from a ruling of Campbell J. in *R. v. Finta*, an unreported judgment of the Supreme Court of Ontario, delivered April 24, 1990. In that ruling, Campbell J. explained the parameters of the burden on the accused to show that the lost evidence precluded a fair trial:
>
> > The defence does, however, have a burden to show that the lost evidence is likely to preclude a fair trial. It is a first step in discharging that burden to show what the evidence is, to show that there is more than a basis in speculation to say what, in fact, what the lost evidence is or that the lost witness would, in fact say. A burden to show that the lost evidence is relevant and material. A burden to show that it is substantial or significant in the sense it is not trivial or frivolous or tenuous. *It is a first step of this motion to show that the lost evidence would more likely than not tend to rebut some evidence of the Crown's case or would more likely than not tend to assist the accused.*

> If the evidence points to the innocence of the accused that would, of course, satisfy this pre-condition but it is not necessary the evidence go that far and actually point to the innocence of the accused as opposed to merely assisting the accused or tending to rebut some evidence or some element of the Crown's case.
>
> It is, however, with those cautions, necessary to make some assessment of the potential value to the accused of the lost evidence. *If there is no demonstration that the evidence would help him or if it appears that the evidence might just as easily hurt the accused more than it would help him, that tends to rebut any claim that its loss would preclude a fair trial to the accused.*
>
> There must be an air of substantial reality about the claim that any particular piece of lost evidence or all of it cumulatively together would actually assist the accused in his defence. If there is no such air of substantial reality, it cannot be said the delay which caused the loss of evidence is likely to preclude a fair trial for the accused.

In *R. v. Kalanj*, [1989] 1 S.C.R. 1594, the Supreme Court noted that the pre-charge investigatory period is unpredictable. Circumstances surrounding investigations vary from case to case. The reasonableness of pre-charge delay is analyzed on the basis of when investigators should be in a position to lay a charge.

CONCLUSION:

[88] The evidence satisfies me that the KHI investigation suffered from several deficiencies. The IMET Quick Start Team was to introduce efficiency to a traditionally slow process. Once they ceased to be the leaders of the investigation, and the CCS resumed control, the investigation faltered on many fronts.

[89] The fact that proposed charge dates came and went is strong evidence that the investigation lacked the resources to conduct the investigation initially

envisaged. The priority of this investigation is inconsistent with the fact that it waited until the NSSC completed the regulatory investigation before acting.

[90] The difficulty surrounding obtaining Crown counsel clearly had a stunting effect on the pace of the investigation. I am satisfied that many of the delays grew out of a lack of experienced, fully committed Crown lawyers. If an effective team had been in place search and production orders would have occurred earlier. More resources would have produced earlier results.

[91] The server/email issue was critical to the investigation. The privilege issue presented the Court with a most demanding, time consuming challenge. It consumed the best part of three years. I am satisfied that the investigators had no control over the speed of this process. I accept the RCMP required the emails to advance their investigation. They were not superfluous.

[92] In an October 4, 2004 letter (Exhibit #19), Robert Abells, then counsel to the IMET team, wrote the following letter to Stephen Neville:

> The IMET team has assembled a credible case of market manipulation. In the next six weeks the team will have assembled sufficient information to enable us to confirm the charge, the accused, the theory of the case and the evidence which will prove the case.

The unfolding of the above referenced delay problems betrayed the promise of Mr. Abells' letter. The Crown submit that Mr. Abells was overly optimistic.

[93] I find that charges should have been laid by mid-2008. The issue of permanent legal counsel was resolved by March 20, 2008. Judicial authorizations were completed by May 20, 2008 and interviews by June 6, 2008. The Crown brief was completed by September, 2008. The KHI server/email issue was, for the most part, completed by November 21, 2007. Clearly this investigation took longer than it should. If the above steps were pursued diligently the evidence would have been available much sooner and an indictment would have been possible. I find that the investigative delay was unreasonable prior to 2008.

[94] In 2008 the federal Crown took over the prosecution and were provided with the prosecution brief. The Crown immediately identified three areas that required further investigation. These directions to the investigators amounted to a recognition that charges could not be laid at that time.

[95] The appointment of the federal Crown, and the provision of the prosecution brief, in 2008 amount to a recognition that charges could not be laid at that time. The new Crown ordered three areas of investigation be re-visited and that extended the investigation phase.

[96] The expert report was completed in January, 2010. The additional search of the servers was completed in 2009. NBFL interviews were completed in July, 2009. A more efficient investigation would have produced these tasks prior to the federal Crown taking over the prosecution. The 8 years required to complete this investigation is unacceptable even in a case of this complexity.

[97] *Mills v. The Queen, supra,* directs that it is not the length of the delay that matters but rather the effect of that delay on trial fairness. An accused's rights are not infringed solely because a lengthy delay is apparent on the face of the indictment. Mr. Colpitts asserts the delay has impacted on his fair trial rights as follows:

- The RCMP did not collect and preserve the broader data necessary for determining overall market activity and that data is no longer available to a defence expert.
- Charlie Keating died during the investigation. As a KHI board member he would have information which would assist in making full answer and defence.
- The memories of the witnesses will have faded.
- The loss of records and destroyed RCMP emails.
- The loss of his running notes which would have aided memories.

On the basis of the principles articulated in *R. v. Cunningham, supra,* and *R. v. Lee Valley Tools Ltd., supra*, I conclude that none of the above have the air of reality

that the lost evidence would in fact, and in a material way, assist Mr. Colpitts make full answer and defence. Mr. Colpitts' examples are speculative at best.

[98] In addition to issues surrounding faded memories and lost documentation, Messrs. Potter and Clarke focused on the prejudice associated with lost opportunities and esteem. These items will have greater play in a section 11(b) delay analysis. I have reviewed these submissions and I find they do not affect trial fairness.

[99] I find that the defendant's circumstances are not caught by the residual category. There is nothing to suggest behaviour that is so unreasonable and unfair that it undermines fundamental notions of justice. I am unable to conclude that the investigation eroded the integrity of the judicial process. It was simply delay caused by bona fide choices in an under-resourced investigation. In light of these conclusions, I find that the defendant's section 7 rights were not infringed.

POST-CHARGE DELAY:

INTRODUCTION:

[100] The Crown preferred an indictment against the defendants on March 17, 2011. Any trial will commence on September 14, 2015 and should be completed by February 1, 2016. This 59 month period will be the time considered on the

post-charge delay application. It is helpful to this analysis to list the court appearances thus far:

- April 28, 2011: First appearance at Supreme Court Crownside adjourned with consent.
- May 26, 2011: Second appearance at Crownside. Adjourned to review disclosure.
- September 27, 2011: Third appearance at Crownside. Adjourned to a case management conference.
- December 2, 2011: In court appearance. Adjourned;
- March 5, 2012: Adjourned as Crown alleges Mr. Colpitts' counsel in a conflict and a hearing is requested.
- April 10, 2012: Appearance to set dates for conflict hearing as well as a standing hearing for intervenors;
- April 23, 2012: Jurisdictional appearance.
- June 7, 2012: Standing hearing held – granted.
- August 20, 2012: Conflict motion heard. Decision reserved.
- September 10, 2012: Jurisdictional appearance.
- October 10, 2012: Appearance to discuss Mr. Clarke's application for state funded counsel and the defendant's ability to access disclosure.
- January 24, 2013: Jurisdictional appearance.
- February 19, 2013: Mr. Clarke's *Rowbotham* application heard. Decision reserved.
- April 26, 2013: Adjourned until May 22, 2013 to arrange for disclosure applications and the setting of trial dates.
- May 2, 2013: Mr. Clarke's *Rowbotham* application allowed. Proceedings stayed until counsel in place.
- May 22, 2013: Court sets July 29, 2013 for disclosure applications; the week of August 26, 2013 for 3rd party documents hearing; and the trial set for April 2, 2014.

- June 19, 2013: Mr. Whynot's first appearance as counsel for Mr. Clarke. The week of September 16, 2013 reserved for any outstanding motions.
- July 29, 2013: Jurisdictional appearance. April 2, 2014 trial dates confirmed.
- August 13, 2013: Adjourned by consent until August 30, 2013.
- August 23, 2013: Jurisdictional appearance.
- August 30, 2013: Colpitts' motion for NSSC materials is scheduled.
- September 20, 2013: Colpitts' motion re: NSSC documents adjourned until October 17, 2013.
- October 17, 2013: *McNeil* application heard. Decision reserved.
- November 15, 2013: Oral decision on *McNeil* delivered (written decision released on December 5, 2013). April 2, 2014 trial dates confirmed.
- January 27, 2014: Jurisdictional appearance. Trial adjournment discussed and scheduled for February 15, 2014.
- February 15, 2014: Adjournment application heard. Trial re-scheduled for early January, 2015.
- February 28, 2014: Various issues discussed. Delay application scheduled for November 24 - December 5, 2014. Other defence motions scheduled for April 28-May 2, 2014. August 11-15, 2014 set aside for contingencies.
- April 28-29, 2014: Hearings held on defence applications (1) Task 335; (2) Drafts of expert's report; and (3) seeking particulars. *O'Connor* application scheduled for July 17-18, 2014.
- July 17, 2014: Discussions related to the NSSC documents and how to proceed. No *O'Connor*

applications filed. August 11-15, 2014 retained for defence motions including *O'Connor* applications.

- August 11, 2014: Load file and expert notes applications settled. Hearing held on issue of NSSC communications with the Crown. No *O'Connor* motion filed.
- October 22-24, 2014: Hearing held re: Randy Gass' commitment to provide the Court and defence with NSSC documents. Hearing held for return of NSSC hard drives mistakenly sent to defendants and containing privileged documents.
- December 4, 2014: First recusal motion heard.
- January 5, 2015: Jurisdictional appearance. Filing and hearing dates set for *O'Connor* privilege and likely relevance arguments. Delay applications set for April 14, 2015.
- January 15-16, 2015: *O'Connor* privilege hearing held. Decision reserved.
- February 18-20, 2015: *O'Connor* likely relevance hearing held. Decision reserved.
- March 9, 2015: Delay applications adjourned to April 20, 2015.
- April 14, 2015: Second recusal motion heard.
- April 20 to July 10, 2015: Delay applications heard. Decision reserved.

The time from preferring the indictment against the defendants to the anticipated conclusion of the trial is 59 months. In and of itself, such a lengthy period triggers an inquiry into the reasonableness of the delay (*R. v. Clare*, 2014 NSSC 388).

[101] There are several significant aspects of the prosecution period that must be explored in advance of applying the principles in *R. v. Morin*, [1992] 1 S.C.R. 771.

THE PURSUIT OF NSSC DOCUMENTATION:

[102] No issue has dominated this proceeding more than the defendant's ongoing search for documents created by the NSSC regulatory proceeding. The Crown's disclosure (fruits of the investigation) was provided to the defendants early in the prosecution. The Crown and the defence have never been *ad idem* on the proper route to the NSSC materials. The Crown has maintained the position that the pursued documents were third party records, and as such, it was up to the defendants to apply for the documents through the *O'Connor* process. The defendants took the position that the Crown had the obligation to obtain and vet the documents before releasing them as first party *Stinchcombe* disclosure. These positions have not changed.

[103] As early as August 19, 2011, this subject arose at the first case management conference (CMC). It was the subject of discussion at many CMCs. On an April 26, 2013 CMC hearing dates were proposed for mid-2013 but not all counsel could accommodate that schedule. On July 8, 2013 Mr. Colpitts issued a subpoena to the NSSC without prejudice to his position that the documents were first party records. On January 14, 2014 Messrs. Potter and Clarke issued subpoenas and received the same package of materials from the NSSC as those provided to Mr. Colpitts. A subpoena is the first step in the *O'Connor* process.

[104] Previously on November 15, 2013 Justice Hood conducted a hearing on whether the NSSC documents were first or third party disclosure. A formal decision concluded that the Crown failed in its duty to inquire of the NSSC but that the issue was moot because Mr. Colpitts already had the materials. She concluded the regulatory files were third party records and that the NSSC had additional records and that the procedure to obtain them is through the *O'Connor* process.

[105] In the months that followed it became apparent that there were NSSC documents not yet released for reasons of relevance and privilege. The NSSC continued to argue that they were third party records and that an *O'Connor* application was the proper route to them. The Crown concurred. The defendants took the position that these records should be handed over to the defendants and the Court as a result of an undertaking given by Randy Gass (Scott Peacock's replacement) when he earlier testified. They complained about his tardiness. They resisted the Crown and the Court's urgings to file an *O'Connor* application. The defendants argued the Crown remained in breach of their *McNeil* obligations.

[106] At a CMC on November 10, 2014, all defendants indicated they would be filing a "default" *O'Connor* application returnable on November 24, 2014. The NSSC noted that this application was late in the game and presented many problems around logistics. Such was the case. On January 15-16, 2015 an

O'Connor privilege hearing was conducted. On February 18-20, 2015 an *O'Connor* likely relevance hearing was held. The privilege decision was released on January 30, 2015 (2015 NSSC 26) and the likely relevance decision was released on February 27, 2015 (2015 NSSC 59).

THE CONFLICT MOTION:

[107] In January, 2012 the Crown realized that Mr. Colpitts' counsel, Tyler Hodgson, was the son of James Hodgson, counsel for NBFL. Mr. Hodgson Sr. was also involved in the RCMP/NBFL interviews as well as the civil litigation against these defendants. The Crown brought an application for removal due to a perceived conflict of interest. The Crown also opposed the granting of intervenor status to Borden Ladner Gervais LLP and Norton Rose LLP. On June 7, 2012 a standing hearing was heard and intervenor status was granted. On August 20, 2012 the conflict application was heard and rejected (2012 NSSC 243).

THE *ROWBOTHAM* APPLICATION:

[108] Mr. Clarke brought an application for state funded counsel. The prospect of a drawn out proceeding was more than he could afford. He filed affidavits asserting that he had exhausted all possible avenues to retain counsel and that he feared that he would not receive a fair trial without counsel. The Crown opposed

Mr. Clarke's application. The reason is set forth at paragraph 28 of *R. v. Clarke*, 2013 NSSC 177:

> [28] The Crown does not concede that Bruce Clarke cannot have a fair trial without legal representation. The Crown says this is because of Bruce Clarke's extensive background in the investment business as a "highly experienced securities manager and investment adviser", having dealt in his career with transactions in the hundreds of thousands and millions of dollars. They also say this is so because he was directly involved in most of the transactions at issue. The Crown says he has been in possession of the Crown disclosure for almost two years. The Crown also says he has the literacy skills and communication skills, along with his training and experience, to properly answer the charges against him.

[109] A major requirement for state funded counsel is the complexity of the prosecution. The Crown was not prepared to acknowledge complexity. Consequently, Mr. Clarke had to retain securities lawyer Joseph Groia to review the disclosure and to file an affidavit attesting to the complexity of the case. The application was heard on February 19, 2013 and a written decision was released on May 24, 2013 (2013 NSSC 177). Justice Hood granted the application and stayed the charges against Mr. Clarke until state funded counsel was in place. On June 19, 2013 Barry Whynot commenced acting for Mr. Clarke.

INADVERTENT DELIVERY OF HARD DRIVE:

[110] On July 24, 2014 it was discovered that the NSSC hard drive delivered to the defendants contained privileged materials. On July 28, 2014 this oversight was

brought to the NSSC's attention by Mr. Colpitts' counsel. He confirmed that neither he nor anyone in his firm had viewed the privileged materials. On July 29, 2014 counsel for the NSSC wrote the defendants demanding the immediate return of all copies of the hard drives. The defendants declined to return the hard drives. On August 22, 2014 the NSSC brought a motion seeking return of the hard drives. On October 31, 2014 this Court issued a decision requiring the hard drives be returned to the NSSC (*Clarke v. R.*, 2014 NSSC 392). They were shortly replaced with clean hard drives.

OTHER INTERLOCUTORY APPLICATIONS:

ADJOURNMENT MOTION: On February 15, 2014 the defendants applied to adjourn the trial from April 2, 2014. The Crown opposed the application. The application was successful and the trial was set over until January, 2015 (oral decision). The primary reasons for the adjournment was the recent release of NSSC documents as well as issues accessing these materials. Initially it was the Court's preference to adjourn until September, 2014. However, it was learned that Mr. Colpitts' counsel had adjourned a lengthy Toronto trial from April 2014 until October 2014 to accommodate these proceedings in April, 2014.

DISCLOSURE MOTIONS: In mid-April, 2014 the defendants filed applications seeking disclosure of draft copies of Lang Evans expert report as well as an unvetted copy of his expert report. They also filed an application for particulars. On May 13, 2014 I ruled that the motions around the expert were allowed and the particulars applications were dismissed (2014 NSSC 177).

LOAD FILES/DISCLOSURE: On July 30, 2014 Mr. Colpitts applied for the following relief:

> An order requiring the Crown to produce:
>
> 1. Any notes, working papers and e-mail correspondence with the Crown or the RCMP in the possession of the Crown's proposed expert witness; and
> 2. All communications with the Nova Scotia Securities Commission since August 11, 2011.
> 3. An order requiring the Crown to abide by its undertaking and provide load files in conformity with the *Canadian Judicial Counsel National Model Practice Direction for the Use of Technology in Civil Litigation* (2008-01-31) as the standard for producing load files when exchanging documents in litigation.

Messrs. Clarke and Potter did not file a similar application but indicated their support for Mr. Colpitts. Prior to a hearing Mr. Colpitts settled items one and three. As to the second item I found in my decision (2014 NSSC 314) "that the documents may reasonably assist the defendants to meet the Crown's case, advance a defence or define their trial strategy." I ordered disclosure of the emails/correspondence to the defendants.

RANDY GASS' ALLEGED UNDERTAKING: On September 19, 2014 Mr. Colpitts filed an application to order the NSSC to provide a timeline/deadline for the production of Scott Peacock's emails. The defendants argued that when Mr. Gass testified he had promised to produce these emails to the Court and to the defendants. On the same docket was the NSSC motion for the return of the inadvertently delivered hard drive. While I did not establish a timeline, I did order the release of 1645 non-privileged emails to the defendants (2014 NSSC 392).

FIRST RECUSAL MOTION: On November 21, 2014 all three defendants filed a notice of application "for an order recusing the trial judge… from any further involvement in the proceedings." The following represents their complaints:

> That the trial judge has exhibited actual bias and, at the very least, a fully informed reasonable person would perceive that the trial judge could not impartially adjudicate an issue that he has already decided and subsequently indicated would not change;
>
> That in particular the trial judge has made a finding, in advance of any applications that may be brought by the defendants pursuant to the *Charter*, that the defendants, as opposed to the Crown or the Court, have been the cause of delay associated with the defendants' efforts to obtain production of the NSSC materials;
>
> That the trial judge has made adverse findings with respect to the credibility of the defendants in advance of any testimony that the defendants might provide, either in support of any applications or otherwise in the course of the trial in these proceedings.

This application was dismissed On December 10, 2014 (2014 NSSC 431).

***O'CONNOR* PROCESS:** On November 18, 2014 the defendants filed their *O'Connor* applications. On December 5, 2014, at a CMC, an argument arose as to whether likely relevance or privilege determination should occur first. The Crown felt that likely relevance would be a more efficient way to proceed. The defendants felt the privilege determination should go first. In a December 15, 2014 decision I ruled that "privilege will be the first order of business." (2015 NSSC 441).

SECOND RECUSAL MOTION: On April 7, 2015 Mr. Colpitts filed a second recusal motion. Mr. Potter supported the application. Mr. Clarke did not. Mr. Colpitts articulates his grounds at paragraph 1 of his brief:

> 1. The Applicant, R. Blois Colpitts, brings a second recusal motion out of the reasons issued by your Lordship on February 27, 2015. This recusal application must be considered cumulatively with the first recusal motion that was heard by the court on December 4, 2014 and dismissed on December 8, 2014. The Applicant renews and expands the grounds that formed the basis of the first recusal motion.

That application was dismissed on April 15, 2015 (2015 NSSC 117).

THE LAW OF POST-CHARGE DELAY:

[111] The first major case respecting prosecutorial delay was *R. v. Askov*, [1990] 2 S.C.R. 1199. In that case the accused were arrested in November, 1983. On October 1, 1984 a trial date was set for October 25, 1985, the first available date.

On October 25, 1985 it became clear the case could not be heard during that session. The case was put over until September, 1986. When the trial began on that date the accused moved for a stay on the grounds the trial had been unreasonably delayed. The trial judge granted a stay on the basis that the major part of the delay was attributable to a shortage of institutional resources. He found the accused had been prejudiced due to spending 6 months on remand. The Ontario Court of Appeal reversed the stay.

[112] The Supreme Court of Canada unanimously reinstated the stay. Writing for a 5 person majority Justice Cory conducted a detailed review of previous Supreme Court of Canada decisions on section 11(b) of the *Charter*. He adopted the position of Justice Lamer in *Mills v. The Queen*, *supra*, that the primary purpose of section 11(b) is the protection of the individual interests of liberty and security of the person as guaranteed by section 7 of the *Charter*. This decision resulted in the abandonment of thousands of criminal charges across the country.

[113] Justice Cory commented as follows at paragraph 43:

> 43 …There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental

> level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.

However, Justice Cory departed from Justice Lamer's position in *Mills* by holding that section 11(b) also has a societal or community interest. He stated at paragraph 44:

> 44 Although the primary aim of s. 11 (b) is the protection of the individual's rights and the provision of fundamental justice for the accused, nonetheless there is, in my view, at least by inference, a community or societal interest implicit in s. 11 (b). That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest. A trial held within a reasonable time must benefit the individual accused as the prejudice which results from criminal proceedings is bound to be minimized. If the accused is in custody, the custodial time awaiting trial will be kept to a minimum. If the accused is at liberty on bail and subject to conditions, then the curtailments on the liberty of the accused will be kept to a minimum. From the point of view of the community interest, in those cases where the accused is detained in custody awaiting trial, society will benefit by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law. If the accused is released on bail and subsequently found guilty, the frustration felt by the community on seeing an unpunished wrongdoer in their midst for an extended period of time will be relieved.

Justice Cory summarized the factors to be taken into account in assessing post-charge delay. He states at paragraph 69:

> 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.

Justice Sopinka concluded the delay was not attributable to the Crown or the defendants. He concluded it was caused by insufficient institutional resources.

[114] Justice Sopinka concluded, at paragraph 56, "The right guaranteed by section 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" He spoke of post-charge delay generally at paragraph 90:

> 90 The delay in this case is such that it is impossible to come to any other conclusion than that the s. 11(b) *Charter* rights guaranteed to the individual accused have been infringed. As well, the societal interest in ensuring that these accused be brought to trial within a reasonable time has been grossly offended and denigrated. Indeed the delay is of such an inordinate length that public confidence in the administration of justice must be shaken. Justice so delayed is an affront to the individual, to the community and to the very administration of justice. The lack of institutional facilities cannot in this case be accepted as a basis for justifying the delay.

In restoring the stay, the Court stated that when delay is extensive and beyond justification there is no alternative but to direct a stay of proceedings.

[115] The Supreme Court of Canada revisited the issue of post-charge delay in *R. v. Morin, supra*. Justice Sopinka restated the Court's approach to section 11(b) in

much the same language as that used in *Askov*, but with a revised emphasis on discretion and the need to establish prejudice to the accused. He further stated that section 11(b) seeks to protect the right to security of the person, the right to liberty, and the right to a fair trial. He stated at paragraph 28:

> 28 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.

However, section 11(b) is also designed to protect certain secondary societal issues. Justice Cory identified these interests as (1) society's interest in seeing that individuals accused of crime are treated humanely and fairly; (2) society's interest in ensuring that those who transgress the law are brought to trial and dealt with according to law. He stated the societal demand that the accused be brought to trial increases with the seriousness of the offence.

[116] Justice Sopinka emphasized that there is no mathematical formula for determining the reasonableness of a delay for the purposes of section 11(b). Courts must instead perform a balancing act weighing interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of the delay. The relevant factors were stated at paragraph 31:

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.

Although the accused has the ultimate or legal burden of proof throughout the balancing process, the Crown may have a secondary or evidentiary burden where circumstances show it is solely responsible for a portion of the delay.

[117] Justice Sopinka discussed each of the factors in considerable detail. Under the first factor, the Court must examine the time period from the charge to the end of the trial. Although pre-charge delay is not counted in determining the length of the delay, it may in certain circumstances have an influence on the overall determination as to whether post-charge delay is unreasonable.

[118] The second factor is waiver of the time periods. If the length of the delay warrants an inquiry, the Court should consider any allegation of waiver before conducting a more detailed examination of the reasons for the delay. If an accused has waived in whole or in part their right to complain of delay, such will either end

the matter or allow a deduction of the period to be waived. Justice Sopinka adds that any waiver must be clear and unequivocal.

[119] The third factor is the reasons for the delay. It is broken down into a number of sub-factors. The first sub-factor is "inherent time requirements." All offences have certain inherent time requirements that lead to delay. One such requirement is the complexity of the trial. More complex cases will require more time to prepare and more time to conduct the trial. For this reason longer delays will be excused in these cases than in less complicated matters.

[120] In addition to the complexity of the case, there are intake requirements that are common to almost all cases, including retention of counsel, bail hearings, police and administrative paperwork and disclosure. 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.

[121] A further inherent requirement which must be considered is the need, or lack thereof, for a preliminary inquiry. A longer time must be allowed for complex cases that require a preliminary inquiry.

[122] The next sub-factor, "the actions of the accused," is concerned with actions voluntarily taken by the accused which may have caused delay. There is no necessity to impute improper motives to the accused in considering this factor. Justice Sopinka also stated, "I do not wish to be interpreted as advocating that the accused sacrifice all preliminary procedures and strategy, but simply point out that if an accused chooses to take such action, this will be taken into consideration in determining what length of delay is reasonable." Actions which could be included in this category include change of venue motions, attacks on wiretaps, adjournments, change of counsel and re-elections.

[123] The third sub-factor, "the actions of the Crown," is concerned with such actions as adjournments requested by the Crown, failure or delay in disclosure, change of venue, etc. 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."

[124] The fourth sub-factor is "limits on institutional resources." Justice Sopinka noted that institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of section 11(b). The clock on institutional delay begins to run when the parties are ready for trial. The problem arises when the system cannot accommodate them. Justice Sopinka emphasized that the

limited nature of state resources "cannot be used to render s. 11(b) meaningless" and "there is a point in time at which the Court will no longer tolerate delay based on the plea of inadequate resources."

[125] Stressing that an administrative guideline not be treated as a fixed limitation period, Justice Sopinka suggested a guideline of 8 to 10 months for institutional delay in provincial courts and 6 to 8 months from committal to trial for a total guideline period of 14 to 18 months.

[126] The fifth sub-factor, "other reasons for the delay," anticipates there may be other reasons for delay that should be taken into account. One such example may be the actions of the trial judge. Justice Sopinka states as follows at paragraph 59:

> 59 … One such factor which does not fit particularly well into any other category of delay is that of actions by trial judges. An extreme example is provided by *Rahey, supra*. In that case it was the trial court judge who caused a substantial amount of the delay. Nineteen adjournments over the course of 11 months were instigated by the judge during the course of the trial. Such delay is not institutional in the strict sense. Nevertheless, such delay cannot be relied upon by the Crown to justify the period under consideration.

[127] The final factor in the *Morin* analysis is "prejudice to the accused." Justice Sopinka stated at paragraph 61: "Prejudice may be inferred from the length of the delay. The longer the delay, the more likely that such an inference will be drawn."

[128] Apart from inferred prejudice, either party may present evidence to establish or refute the existence of prejudice. Justice Sopinka offered examples of this type of evidence at paragraphs 63-64:

> 63 … For example, the accused may rely on evidence tending to show prejudice to his or her liberty interest as a result of pre-trial incarceration or restrictive bail conditions. Prejudice to the accused's security interest can be shown by evidence of the ongoing stress or damage to reputation as a result of overlong exposure to "the vexations and vicissitudes of a pending criminal accusation", to use the words adopted by Lamer J. in *Mills, supra*, at p. 919. The fact that the accused sought an early trial date will also be relevant. Evidence may also be adduced to show that delay has prejudiced the accused's ability to make full answer and defence.
>
> 64 Conversely, the prosecution may establish by evidence that the accused is in the majority group who do not want an early trial and that the delay benefited rather than prejudiced the accused. Conduct of the accused falling short of waiver may be relied upon to negative prejudice. As discussed previously, the degree of prejudice or absence thereof is also an important factor in determining the length of institutional delay that will be tolerated. The application of any guideline will be influenced by this factor.

In the *Morin* case, the length of the delay totalled just over 14½ months. Justice Sopinka stated at paragraph 66: "A delay of 14½ months in bringing a case to trial can hardly be described as a model of dispatch. On the other hand 14½ months is a time period which may be excused in suitable circumstances."

[129] The Supreme Court of Canada revisited and confirmed the *Morin* analysis in *R. v. Godin*, 2009 SCC 26. In that case sexual offence trial dates were set for thirty months after the accused was charged. The Supreme Court of Canada restored the

trial level stay. Writing for a unanimous Court Justice Cromwell noted that the delay far exceeded the *Morin* guidelines. He stated at paragraph 5:

> 5 Before reviewing the facts in more detail, it will be helpful to place them in the context of the guidelines set out in *Morin*. Those guidelines refer to periods of 8 to 10 months for institutional delay in the provincial courts and of 6 to 8 months from committal to trial, for a total guideline period of between 14 and 18 months. It is clear that these guidelines were substantially exceeded in this case. That, on its own, does not make the delay unreasonable. The difficulty in this case, in my view, arises from the considerable delay coupled with three additional facts: (1) the case is a straightforward one with few complexities and requiring very modest amounts of court time; (2) virtually all of the delay is attributable to the Crown and is unexplained, let alone justified; and (3) defence counsel attempted, unsuccessfully, to move the case ahead faster.

[130] Although the Court in *Askov* and *Godin* restored stays of proceedings, successful section 11(b) applications are uncommon. In *Charter Justice in Canadian Criminal Law* (5th ed.) 2010, Don Stuart notes at page 392:

> Section 11(b) challenges have been perhaps the most frequent *Charter* attack. There have been literally thousands of cases.

He also points out that in the years since *Morin* successful section 11(b) applications have been few and far between. Professor Stuart further comments at page 407:

> Reported and unreported rulings over the past 18 years make it clear that a s. 11(b) application is highly unlikely to succeed, especially where the charge is serious and the accused cannot produce evidence of serious prejudice.

ANALYSIS:

LENGTH OF THE DELAY:

[131] I have estimated that the time between preferring the indictment and the end of the trial will be 59 months. This amount of time, in and of itself, triggers an inquiry into the reasonableness of the delay (*R. v. Clare, supra*). It far exceeds the *Morin* guidelines. It does not reflect the fact that the indictment was preferred and no preliminary inquiry occurred. Obviously, the length of the delay must be viewed within the context of the reasons for delay.

WAIVER OF TIME LIMITS:

[132] All defendants submit that they have not waived any delay in this prosecution. The only exception is Mr. Colpitts who waived the one month period between March 16 and April 20, 2015.

INHERENT TIME REQUIREMENTS:

[133] The period of time attributable to inherent time requirements is the period of time that would normally be required to process a case, assuming the availability of adequate institutional resources. The period of time attributable to inherent time requirements is neutral and does not count against the Crown or the accused in a section 11(b) reasonableness assessment (*R. v. MacDougall*, [1998] S.C.J. No. 74).

[134] This is a complex prosecution much like the case of *R. v. Shertzer*, 2009 ONCA 742. The Ontario Court of Appeal found that the time taken to bring the accused to trial should have been regarded almost entirely as inherent time required to prosecute such a complex case. In that case Mr. Shertzer's delay was 56 months.

[135] I am setting the period from March 17, 2011 to April 17, 2012 as inherent time required to move this prosecution from charge to applications. It represents 13 months. I am satisfied that this amount of delay is reasonable on a case of this complexity. The initial Crown disclosure was vast and complicated. There were problems accessing these materials.

[136] In April, 2014 the defendants filed three applications. Messrs. Clarke and Colpitts sought particulars pursuant to section 587 of the *Criminal Code*. Mr. Clarke sought disclosure of the expert's draft report as well as an unvetted copy of the expert report. A decision was released on May 13, 2014 (2014 NSSC 177). Success was mixed. Given the lack of a preliminary inquiry, I consider these applications under inherent time requirements.

ACTIONS OF THE ACCUSED:

[137] The circumstances surrounding this factor relates, in part, to the search for the NSSC regulatory file and associated materials. Throughout this prosecution the Crown has steadfastly refused to access NSSC files and have encouraged the defendant to employ the *O'Connor* process. The defendants, in response, argue the Crown has a duty to acquire the NSSC materials pursuant to the *McNeil* process. These positions have never changed and several non-*O'Connor* disclosure applications have been argued by the defendants over the last two years. In the end the defendants made an *O'Connor* application which was finalized on February 20, 2015. Responsibility for that delay will follow responsibility to acquire the NSSC documents. This analysis is further complicated in that the defendants received NSSC materials in dribs and drabs. Some materials were released pursuant to an application. Some materials were released when NSSC personnel changed their minds as to relevance and privilege.

[138] This application is further complicated by Justice Hood's decision at 2013 NSSC 386. The focus of that application is found at paragraph 1:

> 1 Blois Colpitts asks the Court to make a finding that the Crown breached its duty to R. v. McNeil, 2009 SCC 3 (S.C.C.), to make reasonable inquiries with respect to material known to be in the possession of the Nova Scotia Securities Commission. He seeks an Order that the

> Crown vet the Nova Scotia Securities Commission materials and disclose them or, in the alternative, that he be permitted to access the materials.

Mr. Colpitts already had a copy of the NSSC regulatory file but was under a condition to not access it. Justice Hood decided the issue as follows at paragraphs 72-75:

> 72 The Crown knew of the Securities Commission investigation and that the Securities Commission had information. The Crown admits there is relevant information in the Securities Commission's files. Accordingly, the Crown had an obligation to inquire and attempt to obtain that information. I find that it breached that obligation.
>
> 73 It seems clear that had the Crown met its obligation, the forty boxes of material delivered to Blois Colpitts' counsel pursuant to the subpoena would have been delivered to the Crown. The only question is the timing of that delivery had the Crown requested the material at a time before the subpoena was issued.
>
> 74 However, the issue is, in my view, now moot because Blois Colpitts has the Securities Commission material now. Therefore, it is appropriate to grant the alternate remedy sought, which is to grant Blois Colpitts access to the material he now has.
>
> 75 It appears some information is not included in those files and, if Blois Colpitts seeks that information, an *O'Connor* application is the option available to him.

The Crown appear to accept this decision without comment. The defendants argue that the Crown are ignoring this ruling and continue to breach their *McNeil* duty to pursue NSSC materials.

[139] Responsibility to obtain the NSSC regulatory documents has been a major bone of contention between the Crown and the defence. The Crown, and for that matter the Court, have continuously urged the defendants to utilize the *O'Connor*

regime. The defendants have resisted arguing that such an approach amounts to a switching of an onus from the Crown to the defendants. They insist *McNeil* represents the proper regime to obtain production of third party records. While other applications were heard in the interim, the parties maintained a Mexican standoff on the *O'Connor/McNeil* issue. It was my observation that the actual production of the NSSC materials got lost in the approach. The defendants relied heavily on Justice Hood's ruling to argue that the "breached obligation" was ongoing.

[140] An extensive review of the caselaw, as well as several academic reviews of the subject area, leaves me with the view that any distinction between the two regimes is unsettled. The question that follows is whether *McNeil* alters the use of the *O'Connor* process. Paragraph 11 of *McNeil* states, "As I will explain, the procedure set out in *O'Connor* provides a general mechanism at common law for ordering production of any record beyond the possession or control of the prosecuting Crown." Justice Charron commented further at paragraph 13:

> [13] Third, to the extent that the operative terms of the production order below may suggest that records in possession of one Crown entity are deemed to be in the possession of another, this interpretation should be discarded. The notion that all state authorities constitute a single indivisible Crown entity for the purposes of disclosure finds no support in law and, moreover, is unworkable in practice. Accordingly, Crown entities other than the prosecuting Crown are third parties under the *O'Connor* production regime. As I will explain, however, this does not

> relieve the prosecuting Crown from its obligation to make reasonable inquiries of other Crown entities and other third parties, in appropriate cases, with respect to records and information in their possession that may be relevant to the case being prosecuted. The Crown and the defence in a criminal proceeding are not adverse in interest for the purpose of discovering relevant information that may be of benefit to an accused.

And further at paragraph 15:

> [15] As I will explain, records relating to findings of serious misconduct by police officers involved in the investigation against the accused properly fall within the scope of the "first party" disclosure package due to the Crown, where the police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused. The Crown, in turn, must provide disclosure to the accused in accordance with its obligations under *Stinchcombe*. Production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure package is governed by the *O'Connor* regime for third party production.

[141] *R. v. McNeil, supra*, devotes a section of the decision to "the *O'Connor* regime for production of third party records." Justice Charron appears to give clear direction on how to utilize the *O'Connor* regime at paragraphs 26-27:

> [26] In *O'Connor*, this Court was concerned with the manner in which the accused, who was charged with multiple sexual offences, could obtain production of the therapeutic records of the complainants from third party custodians. *O'Connor* has been overtaken by Parliament's subsequent enactment of the *Mills* regime contained in ss. 278.1 to 278.91 of the *Criminal Code* for the disclosure of records containing personal information of complainants and witnesses in sexual assault proceedings. In respect of any other criminal proceeding, however, the *O'Connor* application provides the accused with a mechanism for accessing third party records that fall beyond the reach of the Stinchcombe first party disclosure regime.
>
> [27] Stated briefly, the procedure to be followed on an *O'Connor* application is the following:

> (1) The accused first obtains a *subpoena duces tecum* under ss. 698(1) and 700(1) of the *Criminal Code* and serves it on the third party record holder. The subpoena compels the person to whom it is directed to attend court with the targeted records or materials.
>
> (2) The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in his or her trial. Notice of the application is given to the prosecuting Crown, the person who is the subject of the records and any other person who may have a privacy interest in the records targeted for production.
>
> (3) The *O'Connor* application is brought before the judge seized with the trial, although it may be heard before the trial commences. If production is unopposed, of course, the application for production becomes moot and there is no need for a hearing.
>
> (4) If the record holder or some other interested person advances a well-founded claim that the targeted documents are privileged, in all but the rarest cases where the accused's innocence is at stake, the existence of privilege will effectively bar the accused's application for production of the targeted documents, regardless of their relevance. Issues of privilege are therefore best resolved at the outset of the *O'Connor* process.
>
> (5) Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in *O'Connor*. At the first stage, if satisfied that the record is likely relevant to the proceeding against the accused, the judge may order production of the record for the court's inspection. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused.

These words represent an endorsement of the *O'Connor* regime and does not limit its applicability in any way. This language does not limit the role of the Crown respecting relevant documentation. Justice Charron comments on this point at paragraphs 48-49:

> 6.1 *Crown Counsel's Duty to Inquire*
>
> [48] As stated earlier, the suggestion that all state authorities constitute a single entity is untenable and unworkable. In order to fulfill its *Stinchcombe* disclosure obligation, the prosecuting Crown does not have to inquire of every department of the provincial government, every department of the federal government and every police force whether they are in possession of material relevant to the accused's case. However, this does not mean that, regardless of the circumstances, the Crown is simply a passive recipient of relevant information with no obligation of its own to seek out and obtain relevant material.
>
> [49] The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so.

This language seems to suggest that the search for relevant evidence is a joint responsibility. I see nothing in the *McNeil* decision that alters the *O'Connor* regime. I see nothing in the caselaw to suggest *O'Connor* and *McNeil* cannot peacefully coexist.

[142] In an article by David Paciocco titled "*Stinchcombe on Steroids: The Surprising Legacy of McNeil*" (2009) 62 C.R. (6^{th}) 26, he describes *McNeil* as a "muscled conception of *Stinchcombe*." The author views *McNeil* as an important decision. He states it will become the point of departure in analyzing both *Stinchcombe* and *O'Connor* applications.

[143] David Paciocco commented as follows at page 3 of this article:

> It can safely be predicted that defence counsel are going to exploit the "duty to inquire and attempt to obtain" as an alternative to bringing *O'Connor* applications when seeking information from Crown agencies and departments. Instead of resorting to distracting, costly and time-consuming third party record proceedings, they will put the prosecuting Crown on notice of potentially relevant information and call on the prosecuting Crown to fulfill its duty by trying to track the information down. While prosecuting Crowns are unlikely to see it this way, there is a laudable efficiency in this. It is far simpler, cheaper, and a more rational use of court time for prosecuting Crowns to use their good offices in an effort to secure relevant Crown information than it is to require court applications to be brought.
>
> In spite of this, it is arguable that the *McNeil* Court did not intend this new-found obligation to operate as a surrogate for *O'Connor*. Instead, it may be that the duty to inquire and attempt to obtain was meant to operate as a supplement to *O'Connor*.

It appears as if the following excerpt at page 3 describes the role of the Crown since the decision in *McNeil*.

> In sum, the *Stinchcombe* obligation is now more muscled than it was prior to the *McNeil* decision. The police are to furnish the Crown with more than the investigative file; they are now expected, as a matter of course, to include, in the disclosure package, documents arising out of the incident under investigation, even if prepared for internal police purposes. They are also to include documents relating to serious misconduct by officers performing a material role in the investigation. Crown Attornies [sic] are going to have to take steps to train investigating police forces to do this, or risk breaching their *Stinchcombe* obligations. Moreover, when a prosecuting Crown is put on notice — even by the defence — of the reasonable possibility there is relevant information held by other Crown agencies and departments, the prosecuting Crown must inquire and attempt to secure relevant information. If it cannot do so, it must report this to the defence, who can then initiate an *O'Connor* application.

In the case at bar, the Crown refused to pursue the NSSC materials. Late in the prosecution the defence filed *O'Connor* applications.

[144] The question that emerges is whether the Crown were right or wrong in having nothing to do with the NSSC materials. If it had a legally defensible reason for its position, the defence should have proceeded pursuant to *O'Connor*. If the Crown's position was arbitrary, it should have proceeded pursuant to *McNeil*. It is of some note that Justice Hood's decision suggested that Mr. Colpitts should seek any outstanding documents via the *O'Connor* process.

[145] The Crown rely on *R. v. Jarvis*, 2002 SCC 73 and *R. v. Ling*, 2002 SCC 74 for their legally defensible reason. In these cases the Supreme Court went a considerable way towards settling an important debate in the area of regulatory law and the *Charter*. The debate concerned whether the *Charter* applies with full force to regulatory officials investigating regulatory crimes.

[146] In an article "Crossing the Rubicon: The Supreme Court and Regulatory *Investigations*" (2002) 6 C.R. (6^{th}) 74 at page 76, author David Stratas suggests the debate is settled:

> The Supreme Court's decision in *Jarvis* and *Ling* settle the debate and suggest that when the regulatory officials are pursuing the predominant purpose of determining penal liability they have "crossed the Rubicon" and full *Charter* protections apply. In the words of the Court:
>
> > In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the

> adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.
>
> The Court also set out factors in the tax investigations context that should be used in order to determine the officials' predominant purpose and suggested that the particular mix of factors might be different in other regulatory contexts.

Essentially, the Crown is saying that much of the regulatory evidence is not *Charter* compliant, and if utilized by the Crown, it could bankrupt the Crown's case. This was obviously a guarded position given the Crown has never possessed these materials.

[147] Mr. Clarke's second brief recognizes this dilemma at page 3:

> Mr. Clarke does note that between his submissions and Her Majesty's, an apparent contradiction arises in our law: the Crown has an obligation under *R. v. McNeil* to not only obtain but vet third party materials for disclosure to the defence, but the Crown also has an obligation pursuant *R. v. Jarvis*, [2002] 3 S.C.R. 757 and *R. v. Ling*, [2002] 3 S.C.R. 814, not to view or make use of materials that a third-party state agency has obtained through its compelled investigative powers.

Mr. Clarke suggests this could be overcome by utilizing an uninvolved police officer to vet the materials. I do not see that as a viable solution.

[148] The Crown also relies on *R. v. Freeland*, 2010 ABQB 799 and *R. v. Chowbay*, 2010 ONSC 4083 in support of their position. In *Freeland*, Justice Macklin quoted from *R. v. Ryz*, 2008 ABCA 28 at paragraph 28:

> 28 ...While the defence is entitled to wide ranging disclosure of documents, if the defence wants documents that the Crown has not produced, and that are not obviously of interest, the defence has an obligation to say so in a timely manner, and to bring promptly any court applications when the documents are in the hands of third parties. When the documents are not requested until over four years after the initial Crown disclosure, the Crown cannot fairly be charged with delay.

[149] In *R. v. Dixon*, [1998] 1 S.C.R. 244, Justice Cory discussed the role of the defence in disclosure situations. He commented as follows at paragraph 37:

> 37 In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. In *Stinchcombe, supra,* at p. 341, defence counsel's duty to be duly diligent was described in this way:
>
> > Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.
>
> The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other

> relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure. This was aptly stated by the British Columbia Court of Appeal in *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365, [1996] 3 S.C.R. 1126), at p. 374:
>
> > . . . the disclosure process is one which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. The goal of the disclosure process is to ensure that the accused is not denied a fair trial. To that end, Crown counsel must disclose everything in its possession which is not clearly irrelevant to the defence, but the defence must also play its part by diligently pursuing disclosure from Crown counsel in a timely manner. Further, where, as here, defence counsel makes a tactical decision not to pursue disclosure of certain documents, the court will generally be unsympathetic to a plea that full disclosure of those documents was not made.

These defendants knew early that the Crown would not pursue the NSSC materials. Despite the Court's urging they did not bring *O'Connor* applications until 2015. In the meantime other disclosure type applications were made as an alternative to *O'Connor*.

[150] I accept the above arguments put forward by the Crown. The *Jarvis* and *Ling* line of cases require the Crown to avoid compelled regulatory evidence when conducting a related criminal prosecution. Once that occurred the defendant had an obligation to step into the breach and make an application that had a real chance of addressing their concerns with disclosure and production.

[151] Clearly the defendants should be responsible for delay related to not bringing an *O'Connor* application in a timely manner. The difficult question is

how much of that delay is the responsibility of the defendants. While this debate goes back to August 19, 2011, I am not satisfied that the defendants should wear this much delay. I am attributing delay to the defendants commencing on December 15, 2013, the date of Justice Hood's decision on *McNeil*. It will end as of January 5, 2015, the date when *O'Connor* applications were set for a hearing. Given all the factors, I attribute 12 months delay to the defendants in relation to the *McNeil*/*O'Connor* issue.

[152] In August, 2014 applications were filed by the NSSC and the defendants. The NSSC were seeking return of an inadvertently delivered hard drive containing privileged materials. The defendants did not question the existence of the privileged materials but refused to return the hard drives in the face of strong authority. The defendants brought an application to fulfill a Randy Gass undertaking allegedly made respecting the release of NSSC documents not included in the regulatory file. The defendants also brought a disclosure application primarily in relation to 3000 Scott Peacock emails. All three motions were heard between October 22nd and 24th, 2014 and a written decision was released on October 31, 2014 (2014 NSSC 392). I ordered the return of the hard drive to the NSSC, a non-party. The Randy Gass application was dismissed and the Scott Peacock application was partially successful. I attribute no delay to the

latter two issues as success was mixed. I attribute two months delay to the defendants on the hard drive issue (August 31, 2014 until October 31, 2014). These dates may seem somewhat arbitrary as the issue was on the table for discussion and proposed action for several months. As well these applications fell during the delay attributed to the defendants on the *McNeil*/*O'Connor* issue.

[153] I am of the view that the defendants must be responsible for the adjournment of the trial from April 2, 2014 until September 27, 2014. This was a defence application opposed by the Crown. On January 27, 2014 a trial adjournment was discussed and scheduled for February 15, 2014. The defendants sought the adjournment on the basis they were not able to fully review the regulatory file, as well as other disclosure, prior to April 2, 2014. Another factor was the late arrival of Mr. Whynot as counsel for Mr. Clarke. I granted the adjournment and stated at paragraphs 61-62:

> [61] An adjournment application is highly discretionary. The *Criminal Code* applies. It is my view that an adjournment is warranted notwithstanding the persuasive argument advance by Mr. Martin. While I may find his comments persuasive, I am influenced more by my obligation to ensure Messrs. Clarke, Colpitts and Potter have a fair trial and are given every opportunity to make full answer and defence.
>
> [62] The section 11(b) impact will be for another day.

The adjournment delayed the trial for five months. I attribute that delay to the defendants on the basis they failed to bring a timely *O'Connor* application seeking the NSSC documents.

[154] The issue of the NSSC file first emerged at an August 19, 2011 CMC. It continued to be discussed at all CMCs and court appearances. Throughout 2013 blocks of time were reserved for applications respecting the NSSC files. Those dates were more than often abandoned. Throughout this time the Crown continually raised section 11(b) concerns.

[155] The trial was again adjourned from September 27, 2014 until January 12, 2015. This was caused by Mr. Colpitts counsel's unavailability from September to December. This delay was caused by this Court when Mr. Hodgson was asked to delay a scheduled trial in order to accommodate the April 2, 2014 trial dates. I consider these months to be inherent delay.

[156] When January 12, 2015 arrived the defendants had not argued an *O'Connor* application or this delay application and these applications are important. Those applications have now been heard and those proceedings have pushed the trial to September 14, 2015. For the reasons already stated, I attribute a further eight months delay to the defendants.

[157] Two recusal motions were advanced. The first was brought by all three defendants. It was raised in early November, 2014. The application was filed on November 21, 2014 and a written decision was released on December 10, 2014 (2014 NSSC 431). Mr. Colpitts brought a second recusal motion on April 7, 2015 and a written decision was released on April 15, 2015 (2015 NSSC 117). These applications stalled all steps in the proceeding from the point they were raised until the time they were decided. I attribute three months delay to the defendants in respect of both applications. This might be slightly unfair to Messrs. Clarke and Potter but will make no difference in the final analysis.

ACTIONS OF THE CROWN:

[158] The record satisfies me that the Crown were always quite attuned to the issue of post-charge delay. As early as December 2, 2011 it was urging the Court to set trial dates. On May 21, 2013 the Crown sought dates for a disclosure motion, the *Rowbotham* application and the third party records application. The trial was scheduled to start on April 2, 2014.

[159] The record satisfies me that the defendants showed reluctance to set dates and to generally move things along. Reasons for their reluctance were rooted in their view that the Crown were breaching their *McNeil* obligations.

[160] There are two areas where the Crown have contributed to the delay. One is the Crown's insistence that Mr. Colpitts' counsel was in a conflict position. Two is the application by Mr. Clarke for state funded counsel. In the former the Crown drove the application and opposed standing for those affected. The Crown were unsuccessful on both points. In the latter, the Crown opposed the application and refused to acknowledge the complexity of the case. Mr. Clarke was successful and Mr. Whynot was in place by June 19, 2013. I am not convinced the Crown's positions were warranted and I find these positions unreasonably contributed to the overall delay.

[161] The Crown's allegation of conflict resulted in an adjournment on March 5, 2012. Justice Hood heard the standing issue on June 7, 2012 and the conflict issue on August 20, 2012. A decision was released on November 22, 2012. This application took 8½ months and I attribute that delay to the Crown.

[162] Mr. Clarke's *Rowbotham* application was heard on February 9, 2013. A decision was released on May 2, 2013. These dates were delayed while Mr. Clarke sought out an expert on the complexity of the case. Measuring this kind of delay is difficult. However, I am attributing five months of the overall delay to the Crown. I have no other issue with the Crown so it will attract 13 months of the overall delay.

LIMITS ON INSTITUTIONAL RESOURCES:

[163] This factor does not apply in this application. This Court has provided a full time Justice and courtroom since 2013. There has not been a time when applications have been delayed because time slots were not available. In fact the parties had access to the Court on very short notice.

OTHER REASONS FOR DELAY:

[164] There are no other reasons for the delay in prosecuting this case.

PREJUDICE TO THE ACCUSED:

[165] Mr. Colpitts offers evidence of real prejudice caused by the post-charge delay. He reports depression and isolation. The impact of criminal charges has had a great effect on his young family. The charges have limited his successful law practice. He has suffered financially. Mr. Colpitts listed the items of prejudice at paragraph 109 of his April 2, 2015 brief:

> 109. While prejudice should be inferred from the lengthy delay occasioned in this case, I have submitted evidence of actual prejudice, the details of which is outlined above in paragraphs 77 to 83. In particular:
>
> (a) Following the laying of charges, I became socially and professionally isolated, and my isolation, sense of seclusion and depression grew deeper with each passing year;
>
> (b) The proceedings have been widely publicized in the years since the charges were laid, with real impact on my professional activities;
>
> (c) I have lost clients and had clients tell me my permissible mandates are limited while the charges are pending;

> (d) I have spent a significant portion of my savings in this process, to the extent of approximately $1,600,000, including in excess of $1 million in attempting to obtain proper disclosure;
>
> (e) I do everything I can to isolate myself from the community, both to protect those people I care about and to avoid further reminders of the stigma I carry; and
>
> (f) The fact that the proceedings have been delayed for so long, both before and after the charges were laid, has severely aggravated and prolonged the reputational and consequential psychological effects that I have suffered, with serious consequences for my mental health.

These factors have been aggravated by the fact that Mr. Colpitts is a practicing lawyer.

[166] Mr. Clarke and his spouse have offered evidence as to prejudice. Mr. Clarke has experienced much of what Mr. Colpitts reports. He has lost his job and is unable to find suitable employment. He has been forced to sell his home and rents. He has a reduced income. The media has continuously covered this proceeding and, as such, he suffers from that exposure.

[167] Mr. Potter has also reported on the devastating effect these charges had on his life and his family. Mr. Potter is a prominent businessman. He enjoyed status in his community. The pressures of the regulatory proceeding, the civil proceedings and the criminal prosecution have kept him fully embroiled in the KHI

legacy. Mr. Potter reports many of the same personal consequences as Messrs. Colpitts and Clarke.

[168] I accept, without hesitation, that these defendants have suffered terribly as a result of the KHI proceedings. I cannot imagine what it must be like to live in a small community while facing regulatory, civil and criminal proceedings. Nothwithstanding, I find that the defendants suffered much of their prejudice as a result of the drawn out, high profile civil and regulatory proceedings. The additional prejudice suffered after the criminal charges were laid is not measurable. It must be noted that all persons criminally charged suffer prejudice. In this case I am unable to state that the delay in prosecution exacerbated the prejudice reported. It must be remembered that an accused must demonstrate they have suffered prejudice beyond the prejudice ordinarily suffered as a result of being charged with a criminal offence. The prejudice at issue in a section 11(b) analysis is prejudice resulting from the delay, as opposed to prejudice resulting from the charge.

[169] I have considered the prejudice evidence advanced by Messrs. Clarke, Potter and Colpitts. I find that the nature and seriousness of their prejudice is not sufficient to tilt the balancing of their interest against the public interest in having the charges heard on the merits.

CONCLUSION:

[170] Justice Sopinka in *R. v. Morin, supra,* created a formula of factors to be considered in analyzing how long is too long in a section 11(b) application. The factors that address "the reasons for the delay" invite an arithmetic approach. In many section 11(b) decisions this approach is solely utilized. Justice Sopinka makes it clear there is no mathematical formula for determining the reasonableness of a delay for the purposes of the section 11(b). He states at paragraph 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?".

While I have determined the defendants are responsible for thirty months delay, that figure is but one consideration in assessing their responsibility for extending the prosecution to 59 months.

[171] I have also determined the Crown is responsible for thirteen months delay. Again that figure is but one consideration in assessing its responsibility for extending the prosecution to 59 months. The thirteen months relate to two applications: the conflict motion and the *Rowbotham* motion. Otherwise the Crown were extremely diligent in attempting to move the prosecution along.

[172] Attributing forty three months of delay to the parties limits the inherent time requirements to sixteen months. This is a totally unrealistic number for such a complex case. I would have expected this case to require thirty months to prosecute. The reasons for this dilemma can be found in the extensive record. Often there was overlapping of inherent time requirements, the actions of the accused and the actions of the Crown. In addition scheduled events did not proceed when scheduled. Notwithstanding these factors I am firmly of the view that the defendants are the authors of most of the delay.

[173] I stated earlier that my ruling on the delay caused by the *McNeil*/*O'Connor* debate would figure prominently in these applications. My determination of that issue means the defendants must bear responsibility for delay caused by their position.

[174] The Court and the Crown throughout urged the defendants to utilize the *O'Connor* procedure. The defendants maintained their position that the Crown continued to be in breach of their *McNeil* obligations. This Court went to great lengths to quickly schedule the defendants' applications respecting various aspects of disclosure. Yet many of these applications amounted to unfocused efforts. Others were not perfected. The defendant's strategy was to maintain their position expecting that that the Court would endorse *McNeil* rather than *O'Connor*. They

put all their section 11(b) eggs in that basket. This dynamic was always at play. It had a profound effect on the timing of this prosecution.

[175] In conclusion the defendants are responsible for thirty months delay as per the *Morin* factors. Additionally they have created a pall of inertia around document production which has permeated much of the 59 months. Further, the evidence of prejudice was not such that it significantly factored into the *Morin* formula. I am unable to conclude the defendants' section 11(b) rights have been breached by the state. Consequently all three applications are dismissed.

Coady J.