IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. MacNeill, 2006 NSSC 355

Date: 20061121
Docket: Cr. S.AT. No. 242507
Registry: Antigonish

Between:

Laurie Etta MacNeill

v.

Her Majesty the Queen

D E C I S I O N
R E: A P P L I C A T I O N

Judge:	The Honourable Justice Douglas L. MacLellan
Heard:	Friday, September 29, 2006 at Antigonish, Nova Scotia
Written Decision:	November 21, 2006
Counsel:	**Craig Clarke, Esq.,** sitting in for Hector J. MacIsaac, Esq., counsel for Laurie Etta MacNeill **Allen Murray, Esq.,** counsel for the Crown

By the Court: (Orally)

[1] This is an application by the accused, Laurie MacNeill, under Section 11(b) of the ***Canadian Charter of Rights and Freedoms*** in which she alleges that her right to be tried within a reasonable period of time has been violated and she asks that the Court grant a judicial stay of proceedings as a remedy under Section 24(1) of the ***Charter.***

[2] Section 11(b) of the ***Charter*** provides:

> Section 11(b) Any person charged with an offence has the right
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> (b) to be tried within a reasonable time.

[3] Section 24(1) of the ***Charter*** provides:

> Section 24(1) - Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[4] The accused was charged with the offence that she did:

> Between the 9th day of January, A.D., 2004 and the 23rd day of April, 2004, A.D., at or near Antigonish, in the County of Antigonish, Province of Nova Scotia did steal money, of a value exceeding five thousand dollars contrary to section 334(a) of the Criminal Code of Canada.

[5] The Information alleging the charge against the accused was sworn on May 14th, 2004. The accused, Ms. MacNeill, appeared in Provincial Court in Antigonish on May 25th, 2004 at which time she entered an election to be tried before a Judge and Jury. Her case was adjourned to January 6th, 2005 for a preliminary inquiry. On January 5th, 2005, she appeared in Provincial Court and asked, through counsel, that her preliminary be adjourned and it was adjourned to January 11, 2005.

[6] On January 11, 2005, the preliminary inquiry was held and the Provincial Court Judge adjourned his decision to February 2nd, 2005 to receive submissions from the Crown on the issue of whether the evidence presented at the preliminary disclosed the charge laid against the accused or an included offence.

[7] On February 2nd, 2005, the Provincial Court Judge committed the accused to stand trial on a charge of theft under $5,000.00. She was advised to appear in Supreme Court on March 8th, 2005 to have her trial date set. It should be noted that

charges for alleging the offence of theft under $5,000.00 are within the absolute jurisdiction of the Provincial Court. However, here because of the earlier election by the accused to Judge and Jury she was committed to stand trial in accordance with that election.

[8] On March 8th, 2005, she appeared in Supreme Court Chambers in Antigonish. At that time her defence lawyer indicated that the accused wanted her trial scheduled as quickly as possible. He, in fact, agreed to have her case backed up to a case already scheduled for trial on May 2nd, 2005. The accused was advised to return to Supreme Court on May 10th, 2005, if her case did not proceed as a backup on May 2nd, 2005.

[9] On May 10th, 2005, the accused appeared in Supreme Court Chambers, and again, after some discussion about the time needed for the trial which at that point was suggesting seven days, her trial was set to commence on February 13th, 2006.

[10] On October 11, 2005, the accused appeared in Supreme Court Chambers in Antigonish on notice from the Crown indicating that it wanted her trial date adjourned.

[11] At that time, Crown counsel indicated to the Court that it was requesting an adjournment of the accused's trial so that another trial, which had been scheduled for the Fall of 2005, but which had been adjourned because of a disclosure issue, could be put into the time slot previously committed to the accused's case.

[12] At that time defence counsel advised the Court that he was not consenting to the adjournment requested by the Crown and that he would be raising a Charter issue about unreasonable delay.

[13] Based on submissions of Crown and Defence counsel, the Court granted the Crown's request to adjourn the accused's case and it was so adjourned from February 13th, 2006 to commence instead on October 2nd, 2006.

[14] Prior to this scheduled trial date, the accused gave notice of this application and it was agreed that it would be heard today prior to the scheduled trial date of next Monday.

[15] I have heard both counsel and I have received the materials submitted in support of the application and a response filed by the Crown.

[16] Both counsel agree that the law on this type of motion is relatively clear. In ***R v. Morin*** [1992] 1 S.C.R. 771, the Supreme Court of Canada set out the procedure by which a trial court should consider this type of Charter motion. In that case, the Court held the following factors should be considered:

1. The length of delay;

2. Any waiver of time periods;

3. 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) any other reasons for the delay; and

4. Prejudice to the accused.

[17] Based on these factors, I must assess the facts here:

1. LENGTH OF DELAY

[18] The time from the laying of the charge on May 14th, 2004 to October 2, 2006 is 28 and one-half months. Clearly, here, such a delay warrants the Court to investigate the reasons for such a delay. The Crown agrees that is the case.

2. WAIVER OF TIME PERIODS

[19] Based on the facts here I conclude that the only waiver of time periods by the accused would be the period January 6th, 2005 to January 11th, 2005. That was a request for an adjournment by the defence of the preliminary inquiry. This waiver would reduce the total time by one week or 28 months one week.

[20] I reject the suggestion here that there was more waiver by the accused by accepting a trial date in Supreme Court. I feel that the case law is clear that any such waiver must be clear and unequivocal with full knowledge of the right one is waiving. That was the case set out by the Supreme Court of Canada in the ***Morin case*** *(supra)* and I believe has recently been adopted by our Court of Appeal.

3. **REASONS FOR THE DELAY**

(a) Inherent time requirement -

[21] The first factor on reasons for the delay is inherent time requirements. Based on the fact that the accused here elected to be tried by Judge and Jury the Court must recognize that the two stage procedure of having a preliminary inquiry followed by a Jury trial involves more inherent time as compared to the single stage procedure of having a trial in Provincial Court. Here, the time from the laying of the Information to the start of the Preliminary was just about eight months.

[22] The preliminary inquiry proceeded on January 11th, 2005, and a committal to trial on the included offence of theft under $5,000.00 was on February 2nd, 2005, or about nine months after the laying of the charge.

[23] The time from the committal and the first appearance in Supreme Court on March 8th, 2005 to the scheduled trial date in February 2006 was just under 12 months.

[24] When the trial was adjourned from February 13th, 2005 to October 2nd, 2006 it added over seven months of pre-trial delay making the time from the committal to the time of the trial to be 20 months.

(b) ACTIONS OF THE ACCUSED

[25] In this case, the accused, at first appearance in Supreme Court , requested an early trial date. She objected to the adjournment of her trial from being adjourned from February to October, 2006.

(c) ACTIONS OF THE CROWN

[26] The Crown in this case made a decision to adjourn this trial in favour of another trial which it felt should be heard more quickly because of its seriousness being two counts of aggravated assault and the availability of certain witnesses.

[27] The Crown at no time requested special arrangements to be made for the scheduling of this trial or the other more serious matter.

(d) LIMITS ON INSTITUTIONAL RESOURCES

[28] There appears to be no issue of lack of institutional resources. The significant delay here was caused by the Crown's request.

4. PREJUDICE TO THE ACCUSED

[29] The accused in her affidavits which has not been challenged alleges that she has suffered actual prejudice. I accept that here in that she could not take the course she wanted to start in September 2006 because of her trial date being set for October 2nd, 2006. In addition here, there is the inferred prejudice which all accused faced if their trial dates are delayed.

[30] I conclude here that had the accused's trial proceeded in February of 2006 there would be no serious issue of unreasonable delay. A period of 21 months

from charge to trial, while being at the outer limit, is not unreasonable considering the election to judge and jury trial. Accused persons who elect judge and jury and have a preliminary can expect delays in that range in light of the jury term system in this area which involves three jury terms per year of three weeks each.

[31] The central issue, here, I believe before me, is whether the time between February ‘06 and October ‘06 makes this case a case of unreasonable delay.

[32] In the ***Morin case*** *(supra)* from the Supreme Court of Canada, the Court in that case commented and confirmed the earlier position of the Court in ***R v. Askov*** [1992] 2 S.C.R. 1199, that a period of delay from six to eight months from committal to the actual trial would be an acceptable range. Here, the time, that is, February ‘05 to October ‘06 is in fact 20 months.

[33] Some of the cases that have dealt with this issue in this Province, and I believe that the Court should look more closely at cases from this Province then from out of other Provinces in dealing with the issue of unreasonable delay. It seems it is more relevant that the Court consider what is happening in Nova Scotia since the Courts here are aware of the practices in our Courts.

[34] In the case of ***R v. Christie*** [2001] N.S.J. No. 396, the Nova Scotia Court of Appeal affirmed a trial decision which held that a 27 month delay from charge to trial was unreasonable.

[35] In the case of ***R v. Farler*** (2006), 243 N.S.R. (2d) 237, the Nova Scotia Court of Appeal held that a delay of 29 months and 17 days was not unreasonable. However, in that case, the Court was dealing with a significant delay of eight months between the time of conviction and sentence. The Court was dealing with a combined time to get the matter to trial and to be sentenced.

[36] In the case of ***R v. Abbass***, [2004] N.S.J. No. 154, the Nova Scotia Provincial Court held that a 14 ½ month delay on an impaired driving charge in Provincial Court was excessive and granted a judicial stay under the ***Charter***.

[37] In the case of ***R v. Ryan*** [2004] N.S.J. No. 158, the Nova Scotia Supreme Court, Justice Goodfellow, dealt with a 29 month time span from charge to trial but in dealing with the matter Justice Goodfellow, in fact, made a finding that the total

time he should consider was only 15 months because of waiver by the accused. In that case, the accused's application for a stay was denied by Justice Goodfellow.

[38] In ***R v. Coughlan*** [2003] N.S.J. No. 222, a Nova Scotia Provincial Court Judge found that a 21 month delay was unreasonable on an impaired driving charge. It granted a stay of proceedings.

[39] In addition to the factors set out in the ***Morin case*** *(supra)* it seems to me that the Court must also do a balancing of interests. The case law I have reviewed clearly holds that the Court should look at the balance of interests in dealing with this kind of Charter motion.

[40] I have already referred to the ***Christie case*** *(supra).* The ***Christie case*** started off being ***R v. Christie***, but when the matter went to the Supreme Court of Nova Scotia it became known as ***R v. W.H.M.C.*** [2001] N.S.J. No. 390, and in that case, Justice Saunders dealt with Justice Cacchione's decision to grant a stay of proceedings. In that case Justice Cacchione granted a stay because of a 27 month delay. Justice Saunders, writing for our Court of Appeal said the following: [paragraph 13]:

> While not touched upon by the Crown in its factum, we did urge counsel during argument to address a matter that concerned us, specifically whether the trial judge had neglected to weigh the rights of the respondent, against the community interest in having the offences with which he was charged prosecuted in a court of law. I had in mind the comments of Sopinka, J. in Morin, supra, at para. 30, where Justice Sopinka said:
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> "There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In Conway, a majority of this Court recognized that the interests of the accused must be balanced by the interests of a society in law enforcement. This theme was picked up in Askov in the reasons of Cory, J. who referred to "a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law". As the seriousness of the offence increases so does the societal demand that the accused be brought to trial.

[41] Justice Saunders then went on to quote from Chief Justice McLachlin's decision in Morin where she said at pag 87 of that decision:

> The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. In the final analysis the judge, before staying charges, must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial.

[42] The charges here against the accused involve an allegation against her of embezzlement from her employer. This type of case, I suggest, while serious is certainly not at a high level as compared to the charges dealt with by our Court of

Appeal in the ***R v. W.H.M.C. case*** *(supra)*, where the accused was charged with two counts of sexual assault on young patients of the accused.

[43] Based on the information before me, I conclude that the accused here, Ms. MacNeill, has shown on a balance of probabilities that her right to be tried within a reasonable period of time has been infringed.

[44] I also conclude that the actual and inferred prejudice to the accused, here, justifies a remedy under Section 24(1) of the ***Canadian Charter of Rights and Freedoms*** and therefore I would grant a judicial stay of proceedings in regard to the charge.

J.