IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Farler* - 2007 NSSC 380

Date: 20071129
Docket: CR. No. 272602
Registry: Halifax

Between:

Her Majesty the Queen

-and-

Timothy Charles Farler

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: November 26, 2007 in Halifax, Nova Scotia

Oral Decision: November 29, 2007

Written Decision: January 21, 2008

Counsel: Crown - Alonzo Wright
Defence - Timothy Farler (personally)

Wright J. (Orally)

[1] This is an application by the accused for a stay of proceedings under s.11(b) of the Charter which guarantees the right of an individual to be tried within a reasonable time.

[2] There is an unusually long history to these proceedings. Highlights of the overall chronology can be summarized as follows.

[3] The charges against the accused were first laid on April 5, 2002 alleging the commission of various sexual offences involving six complainants dating back to 1981.

[4] In January of 2003, the accused was committed to stand trial in the Supreme Court following a preliminary inquiry. The accused elected to be tried by judge and jury and trial dates were set during the month of December, 2003. After a 13 day trial, the accused was convicted of 12 out of 13 counts listed in the indictment.

[5] At that point, 20 months had passed from the date of the charges until the end of the trial. Sentencing was then delayed until September of 2004, in large part because of an expert report that had to be obtained. At the sentencing hearing which took place on September 17, 2004 the accused was sentenced to a total of six years incarceration.

[6] The accused then appealed his convictions to the Nova Scotia Court of Appeal. That appeal was not heard until February 8, 2006, after two earlier adjournments. The first date set for the hearing of the appeal in May of 2005 was adjourned because of the delay in obtaining tapes from the trial. The next scheduled date for the appeal in September, 2005 ended up being used for the hearing of certain applications brought by the accused. After the appeal was finally heard on February 8, 2006, the court reserved its decision until April 11, 2006, at

which time it allowed the appeal and ordered a new trial.

[7] At that point, a full four years had elapsed since the date the charges were laid. Another six months then elapsed before the retrial process was started by the issuing of a summons to the accused to appear in Crownside and the preparation of a new indictment under date of October 18, 2006.

[8] At the first Crownside appearance on October 19, 2006, the matter was adjourned for a month to enable the accused to seek legal advice. Ultimately, the matter came back before Crownside on November 30, 2006, when the proper indictment was identified and new trial dates were set. Those new trial dates were scheduled for January 2-29, 2008, with the accused intending to be self-represented. That makes for an overall time span from the laying of the charges to the end of the new trial dates of roughly five years and eight months.

[9] The case law consistently tells us that the period for the court to examine in a s. 11(b) application is from the laying of the charge to the end of the trial. It is important to note, however, that the four year period here from the laying of the charge to the disposition of the appeal has already been adjudicated upon by the Nova Scotia Court of Appeal in its decision rendered on April 11, 2006.

[10] In that decision the Nova Scotia Court of Appeal considered a previous application by the accused under s.11(b), made to that court in the first instance, and

concluded that the delay was not unreasonable. The application was therefore dismissed and a new trial ordered.

[11] The main thrust of the present application brought by the accused is that an additional 20 month delay, from the time a new trial was ordered until the new trial is held, is unreasonable both in terms of the six month period it took the Crown to restart the trial process by preparing a new indictment and issuing a summons to appear at Crownside, and the further 13 month period of institutional delay in waiting for the next available trial dates beginning on January 2, 2008.

[12] The accused argues that this period is well beyond the analogous administrative guideline of six to eight months from committal to trial outlined by the Supreme Court of Canada in the seminal case of *R. v. Morin* [1992] 1 S.C.R. 771. The accused submits that this delay is exacerbated by the four year period that had already elapsed from the date of the charges to the disposition of the appeal. Furthermore, the accused has filed an affidavit deposing to the prejudice that has been inflicted upon his security and liberty interests in the context of the delay in these proceedings (details of which will be reviewed later in this decision). The accused accordingly argues both real and inferred prejudice in support of his application.

[13] The Crown acknowledges that the delay here is a long one, but argues that the

delay is understandable, and not unreasonable, given the inherent time requirements of the case, the actions of the accused, the absence of any prejudice (real or inferred), and the length of time to be expected in securing dates for such a lengthy trial by judge and jury, which the accused selected as the mode of trial.

[14] The proper analysis to be followed in an application such as this is set out in *Morin*. In the majority judgment written by Sopinka J., the court first discussed the purpose of s. 11(b) as being primarily the protection of the individual rights of an accused but also the protection of the interests of society. The protected rights of the individual are:

> (1) the right to security of the person (seeking to minimize the anxiety, concern, and stigma of exposure to criminal proceedings;
>
> (2) the right to liberty (minimizing pre-trial incarceration and restrictive release conditions); and
>
> (3) the right to a fair trial (attempting to ensure trials where evidence is available and fresh).

[15] Society's interest is twofold. First, there is the institutional value of an accused being brought to trial for a decision on the merits of the case (and all the moreso where the charges are serious ones); and secondly, the institutional value of having those trials held within a reasonable time.

[16] The task of the judge hearing a s. 11(b) application is to balance the societal interest in seeing that persons charged with an offence are brought to trial, against the accused's interests in prompt adjudication. As Sopinka J. put it in *Morin*:

> 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?"

[17] This approach is largely a restatement of the Supreme Court's approach to s. 11(b) in the earlier leading case of *R. v. Askov* [1990] 2 S.C.R. 1199, but with a revised emphasis on judicial discretion and, as will be seen later, the amplified need to establish prejudice to the accused.

[18] As conveniently summarized by Justice Cromwell in the Nova Scotia Court of Appeal decision in this matter earlier referred to (reported as 2006 NSCA 42 at para 76):

> The proper analysis of this submission is set out in R. v. Morin, [1992] 1 S.C.R. 771. In deciding whether delay has been unreasonable, "... the period to be scrutinized is the time lapsed from the date of the charge to the end of the trial ... The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused.": Morin at p. 788.

[19] Justice Cromwell then went on to address the various factors in the balancing process set out in *Morin* bearing on the reasonableness of the delay, which are listed as follows:

1. the length of the delay;

2. waiver of time periods;

3. the reasons for the delay, including

   (a) inherent time requirements of the case,

   (b) actions of the accused,

   (c) actions of the Crown,

   (d) limits on institutional resources, and

   (e) other reasons for delay; and

4. prejudice to the accused

[20] I will now do likewise, focussing on the period from April 11, 2006 (when a new trial was ordered) to January of 2008 when the new trial is scheduled to be held.

1. **Length of the Delay**

[21] It was reiterated in *Morin* that in considering this factor, the court is required to examine the period from the laying of the charge to the end of the trial. That requirement is tempered in the present application, however, insofar as the Nova Scotia Court of Appeal has already ruled on the accused's s. 11(b) right as matters stood on the disposition of the appeal on April 11, 2006. While the focus therefore is now upon the additional 20 month period from April of 2006 to January of 2008, the date of origin of these charges (viz. April of 2002) remains relevant. I have no

hesitation in concluding that the delay in this case is of sufficient length to raise an issue as to its reasonableness and hence to merit scrutiny by the court.

2. **Waiver**

[22] Trial courts are directed by the *Morin* case that if the length of the delay warrants an inquiry into the reasons for the delay, as it does here, what must first be considered is whether any waiver of delay can be attributed to the accused. The court noted in *Morin* that in order for an accused to waive his or her rights under s. 11(b), such waiver must be clear and unequivocal with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights.

[23] In the present case, the court has the benefit of the transcript from the Crownside appearance on November 30, 2006 when the new trial dates were set. When informed the new dates would be in January of 2008, 13 months away, the accused asked the presiding judge if those were the earliest possible dates for the trial. The judge answered affirmatively, for that time frame with a jury.

[24] The fact that the accused (self-represented as he was) did not object to these dates to the Crownside judge, or make this application sooner, does not constitute a waiver. As noted in *Morin*, consent to a trial date can give rise to an inference of waiver. However, this will not be so if consent to a date amounts to mere

acquiescence in the evitable. The accused's acquiescence to the new trial dates here does not constitute a waiver.

3. **Reasons for Delay**

[25] Having made these determinations, the next step in the approach prescribed in *Morin* is to consider the explanatory reasons for the delay.

[26] The first of these reasons to be addressed is the inherent time requirements of the case. For purposes of the present application, I am going to consider the factor of the actions of the Crown at the same time. It is to be remembered, of course, that we are here dealing with a retrial, albeit with charges relating to four complainants as opposed to the original six. In correspondence to the accused in August of 2007, the Crown attorney confirmed to him that the Crown would be relying at trial on the same evidence as originally disclosed to him, there being no new statements or information of any kind to be provided.

[27] Nevertheless, Crown counsel points out the different inherent time requirements that arose in this case for retrial. First, it took about seven weeks for the trial to be assigned to a new prosecutor since the original prosecutor had since left the provincial Public Prosecution Service. The case material was extensive, consisting of some eight boxes of documents to be reviewed by a new person. The four complainants, scattered across the country, then had to be contacted and

consulted for their input and co-operation on proceeding with a new trial. Furthermore, the RCMP investigating officer assigned to the file had since been transferred so that a replacement officer had to be appointed who in turn needed time to become familiar with the file. It was soon September of 2006, before the new prosecutor and the replacement investigating officer were able to meet to discuss the file and determine a course of action. That finally resulted in a summons being issued to the accused in October of 2006 for a Crownside appearance and the filing of a new indictment dated October 18, 2006, in getting the trial restarted.

[28] As noted in *Morin*, this factor does not serve to assign blame. It simply serves as a means whereby actions, or inactions, of the Crown which delay the trial may be investigated. In my view, this six month period from the date of the Nova Scotia Court of Appeal order for a new trial until the process for a retrial was initiated in October, was longer than it should have been, especially given the earlier history of delay and the fact that it was a retrial. It should have been made more of a priority in those circumstances. Given the inherent time requirements, however, with all new personnel on the prosecution side, the voluminous materials to be reviewed, and the time needed for consultation and input from the various complainants, it is understandable at least that those six months passed as they did.

[29] As far as the actions of the accused are concerned, there is little to hold sway.

It is the duty of the Crown to bring an accused person to trial so no part of the initial six month delay can be visited upon him. The next one month delay from the first Crownside appearance to get legal advice was by consent where the accused had been served with a summons only a day or two before and, in any event, was an insubstantial period.

[30] Undoubtedly, the election of trial by jury made for a longer wait for trial dates but the accused was left with that mode of trial after his successful prisoner's appeal. His intended constitutional challenge, yet to be heard, does not factor into the 13 month wait for new trial dates. As noted earlier, the accused asked the Crownside judge if any earlier trial dates were available but was informed there were not.

[31] Turning to the limits on institutional resources factor, we are here dealing with the period which starts to run when the parties are ready for trial but the system cannot accommodate them. In the present case, the wait period for a new trial from the last Crownside appearance is 13 months. Undoubtedly, the fact that this is a jury trial, and will require four weeks to be heard, stretched the next available dates at the time.

[32] As the Supreme Court of Canada stated in *Morin*, while account must be taken of the fact that the state does not have unlimited funds, the court cannot simply accede to the government's allocation of resources and tailor the period of

permissible delay accordingly. There is a point at which the court will no longer tolerate delay based on the plea of inadequate resources. This period of time may be referred to as an administrative guideline only, which is not to be treated as a limitation period or a fixed ceiling on delay.

[33] The court in *Morin* went on to suggest that an appropriate guideline for the period running from committal to trial is in the range of an additional six to eight months. The court also stated that 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, to which I now turn.

4. **Prejudice to the Accused**

[34] Generally speaking, prejudice may be inferred simply from the length of the delay (the longer the delay, the more likely that such an inference will be drawn), or it may be established by evidence. In the present case, the accused has filed an affidavit in which he deposes to prejudice from delay to his security and liberty interests which are to be protected by s. 11(b) of the Charter.

[35] As to his security interest, he deposes to his immediate loss of employment in April of 2006 because of his criminal conviction once the publicity surrounding his appeal appeared, even though his appeal was successful. He had also lost his

previous employment in 2004 following his conviction. He was later refused employment as a security guard in July of 2006 because of his earlier conviction, as a result of which he has lost significant income. The accused also refers to the anxiety and stress related illnesses he has experienced from these proceedings as well as the stigma of exposure to criminal proceedings.

[36] As to his liberty interests, the accused points out in his affidavit that once his appeal was successful, he was placed back on his original recognizance with its reporting requirements and his confinement to the Province of Nova Scotia. As a result, he cannot visit his family members out west and has been unable to attend either family celebrations or the funerals of two deceased family members.

[37] This affidavit evidence pertaining to the accused's security and liberty interests has not been challenged by the Crown and there is no reason for the court to doubt its veracity.

[38] The accused is unable to substantiate, however, any real prejudice to his right to a fair trial and to make full answer and defence. There is no indication that any evidence has become lost or unavailable as the result of delay. Nor is the court prepared to infer prejudice where it appears that all potential witnesses are still available and faded memories from the present delay cannot be said to be a material factor when we are dealing with alleged events dating back anywhere from 15 to 25

years ago. In short, the accused has demonstrated some degree of prejudice to his security and liberty interests from the added delay, but not to his right to a fair trial.

[39] As noted earlier, the Supreme Court of Canada in *Morin* appears to have placed a greater emphasis on the prejudice factor in the exercise of the court's discretion. As Sopinka, J. put it, "in circumstances in which prejudice is not inferred and is not otherwise proved, the basis for an enforcement of the individual right is seriously undermined". In respect of the suggested time guidelines above mentioned, he stated that deviations of several months in either direction can be justified by the presence or absence of prejudice.

[40] Having reviewed all the factors identified in *Morin* to be considered, I come back to the overarching principle that before staying charges, the court must be satisfied that the interests of the accused and society in an expeditious trial outweigh the interests of society in bringing the accused to trial for a resolution on the merits. Cases like this one make for a difficult balancing process. On the one hand, we have the accused having to wait an additional 20 months from the ordering of a new trial until its commencement. That is an inordinate delay between the actions of the Crown and the limits on institutional resources, especially where this is a retrial of a proceeding which already had a four year history.

[41] On the other hand, the interest of society in having the accused brought to trial

for a decision on the merits is heightened by the seriousness of the charges, which here involve allegations of various sexual offences against persons when they were children or adolescents. Needless to say, society has a heightened interest in the protection of such vulnerable persons.

[42] I am also mindful of the general principle, consistently stated by the courts in this country, that a stay of proceedings is a rare and exceptional remedy and should only be granted in the clearest of cases.

[43] In the final analysis, I have come to the conclusion that while the additional 20 month delay in question here can be said to be inordinate in light of the *Morin* guidelines, it was not an unreasonable one within the meaning of the s. 11(b) Charter right, having regard to all the surrounding circumstances and the factors that are to be considered. Of those factors, none is more prominent than the scrutiny of prejudice to the accused.

[44] In the present case, I have found that no prejudice has been shown to the fair trial right of the accused as a result of the subject delay. Granted, some prejudice has been shown to his security and liberty interests but only in a relatively limited way and not to such a degree as to tip the balancing process in favour of the accused. The application is therefore dismissed.

J.