SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Callender, 2013 NSSC 95

Date: 20130219
Docket: CHR 311461
Registry: Halifax

Between:

Her Majesty the Queen

v.

Mark Anthony Austin Callender

Judge: The Honourable Justice Felix A. Cacchione.

Heard: February 19, 2013, in Halifax, Nova Scotia

Written Decision: March 20, 2013

Counsel: David Schermbrucker and Leonard MacKay, for the Crown
Ian Hutchison, for Mr. Callender

By the Court:

[1] On February 19, 2013, almost five and one half years after his first appearance before the Provincial Court and the first day set for his retrial on a charge of possessing cocaine for the purposes of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, the accused Mr. Callender (the Applicant) brought a motion to stay the proceedings against him alleging a violation of his right to be tried within a reasonable time under s.11(b) of the *Canadian Charter of Rights and Freedoms*. At the conclusion of the hearing on February 19 the application was granted and the proceedings were stayed with written reasons to follow. These are my reasons.

THE LAW

[2] In granting this stay of proceedings I have taken into consideration the Supreme Court of Canada direction in *R. v. Conway* (1989), 49 C.C.C. (3d) 289 that a stay of proceedings should only be granted in the "clearest of cases".

[3] The most recent case regarding the right to be tried within a reasonable time is *R. v. Godin* 2009 SCC 26. In that case the court reaffirmed that the guidelines set out in its decision in *R. v. Morin*, [1992] 1 S.C.R. 771 are still in place. Those guidelines refer to a period of eight to ten months for institutional delay in the provincial courts and six to eight months for institutional delay from committal to trial for a total guideline period of between 14 and 18 months.

[4] In *Godin*, supra at paragraph 18 Cromwell J. set out the framework for the analysis to be conducted in assessing whether s.11(b) of the *Charter* has been violated.

> [18] The legal framework for the appeal was set out by the Court in Morin, at pp. 786-89. Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(b) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important, however, not to lose sight of the forest for the trees while engaging in this detailed analysis. As Sopinka J. noted in Morin, at p. 787, "[t]he general approach ... is not by the application of a mathematical or administrative formula but rather by a judicial determination

> balancing the interests which [s. 11(b)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay."

[5] The remedy for a violation of an accused's right to be tried within a reasonable time was set out by Lamer J. in *R. v. Rahey*, [1987] 1 SCR 588 (S.C.C.) where he stated at paragraph 48:

> ...If an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest possible trial, is permissible. To allow a trial to proceed after such a finding would be to participate in a further violation of the Charter...

[6] In considering how long is too long the factors I have examined, when balancing the interests s.11(b) was designed to protect, were set out in *R. v. Morin*, supra at pages 787-788. These factors are:

(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;

(4) Prejudice to the accused.

[7] In analyzing whether the delay has caused a denial of the Applicant's right to be tried within a reasonable period of time, I have balanced the prejudice suffered by the Applicant with the public interest in seeing a trial on its merits.

[8] Possession of cocaine for the purposes of trafficking is a serious offence. This drug is a plague on our community. It is responsible for countless criminal offences committed by its users in order to obtain money to purchase the drug. It has destroyed the lives of many users and their families. It has also caused irreparable harm to our community. Society has an interest in seeing that those accused of making this drug available are brought to trial.

[9] Society also has an interest in seeing that anyone charged with a criminal offence is treated fairly and in accordance with the rights granted to every citizen under the *Charter*.

[10] It is the responsibility of the Crown to bring an accused to trial and to ensure that an accused's right to a trial within a reasonable period of time is respected. It bears the obligation of ensuring that sufficient resources are available: *R. v. Godin*; *R. v. R.E.W*. 2011 NSCA 18.

[11] An accused is under no obligation to bring himself to trial: *R. v. Askov* (1990), 59 C.C.C. (3d) 449 (S.C.C.).

[12] The Nova Scotia Court of Appeal in *R. v. MacIntosh* 2011 NSCA 111 reaffirmed the Crown's duty to bring an accused to trial and that a lack of government resources cannot justify delays of an inordinate length.

[13] In *R. v. Morin*, at paragraph 48 Sopinka J addressed the issue of government resources and its impact on s.11(b) rights by saying:

> ...While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render s. 11(b) meaningless. The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of

> justice. There is a point in time at which the Court will no longer tolerate delay based on the plea of inadequate resources...

[14] Prejudice to an accused may be inferred or actual. The prejudice referred to concerns the three interests of an accused which are sought to be protected by s.11(b). These interests are: liberty, security of the person, and the ability to make full answer and defence: *R. v. Morin*, at page 801; *R. v. Godin* at paragraph 30. It is reasonable to infer that prolonged exposure to criminal proceedings resulting from the delays gives rise to some prejudice: *R. v. Godin*, at paragraph 34.

[15] In the *Morin* decision Justice Sopinka described the purpose of s.11(b) as follows at paragraph 26:

> The primary purpose of s. 11(b) is the protection of the individual rights of accused.

[16] He described the societal interest of having a case decided on its merits as secondary by stating at paragraph 29:

> The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly...

[17] In *Morin* the court held that prejudice may be inferred from the length of the delay. The longer the delay, the more likely that such an inference will be drawn. This view was repeated by the Supreme Court of Canada in the *Godin* decision where at paragraph 38 Justice Cromwell stated:

> ...Proof of actual prejudice to the right to make full answer and defence is not invariably required to establish a s. 11(b) violation. This is only one of three varieties of prejudice, all of which must be considered together with the length of the delay and the explanations for why it occurred.

[18] To provide the necessary context for what the Crown acknowledged was a substantial delay I will set out in some detail the chronology of the proceedings and identify the reasons why it took five and one half years for this case to be resolved.

[19] On August 31, 2007 the Applicant first appeared before the Provincial Court for an offence alleged to have been committed on August 30, 2007. He was remanded into custody until September 4, 2007 when he was granted bail.

[20] The Applicant was released on a recognizance in the amount of $20,500.00 with one surety to justify. The conditions of the recognizance required him to keep the peace and be of good behaviour; attend court as and when directed; reside at a specific address unless permission to reside elsewhere was obtained from the courts; remain within the Province of Nova Scotia; have no contact with a co-accused at the time except through a lawyer; a prohibition on possessing firearms or ammunition; a prohibition against possessing, using or consuming a controlled substance except in accordance with a physician's prescription; and depositing his passport or not applying for one if he did not have a passport.

[21] The RCMP sent a number of cell phones and computers seized as evidence to their technical unit for forensic analysis on September 5, 2007. This analysis was not completed until October 27, 2008 and a report was prepared on October 28, 2008. The report was disclosed to the defence on November 24, 2008, some fourteen and one half months after the items were sent for analysis. A heavy workload in the RCMP Technological Crime Branch Validation Team was advanced as the reason for the delay in completing this forensic analysis. No explanation was provided for the reason that it took one month after the completion of the report for it to be disclosed.

[22] On November 9, 2007 defence counsel wrote to the Crown asking for disclosure. In response, on November 14, 2007, the defence received a three page Crown brief, together with a copy of the information, the Applicant's recognizance and a copy of the search warrant.

[23] The Applicant's case was adjourned on November 26, 2007 at his request in order to obtain disclosure of the information to obtain a search warrant (the ITO). A written request for disclosure of the ITO was sent to the prosecution on November 27, 2007. An unsealing order was signed by a judge on December 13, 2007.

[24] The Applicant's counsel sent four further written requests for this disclosure between February 15 and September 19, 2008. The ITO was finally disclosed on October 10, 2008.

[25] On January 28, 2008 the Applicant elected to be tried in Provincial Court. A full day trial was set for June 24, 2008 with a pretrial conference to be held on April 8, 2008. This pretrial conference was adjourned at the request of the prosecution in order that counsel for the prosecution could meet with the investigating officers.

[26] On April 30, 2008 the trial was adjourned to November 12 and 24, 2008 because the Applicant's counsel still had not obtained disclosure of the ITO.

[27] An application for disclosure was brought before the Provincial Court on October 9, 2008 but was adjourned because counsel for the Applicant was advised by the Crown that the vetted ITO would be available within a matter of days and the technological evidence within three to four weeks..

[28] The Applicant re-elected on October 20, 2008 to be tried by a court composed of a judge and jury and requested a preliminary hearing. The original trial dates of November 12 and 24, 2008 were used to begin the preliminary inquiry. I am satisfied the re-election was done in order that the scheduled trial dates of November 12 and 24 not be lost thereby causing a further rescheduling and delay of the case.

[29] The preliminary inquiry began on November 12, 2008. Several witnesses testified. An objection to the introduction of a document was made by counsel for the co-accused. The prosecution requested an adjournment to consider the law regarding the voluntariness of an out-of-court statement made by the co-accused and contained in a document generated after arrest. This document had been in the possession of the police since August 30, 2007. The preliminary was adjourned to November 24, 2008 in order for the Crown to research the admissibility of this piece of documentary evidence.

[30] On November 24, 2008 the prosecution requested a further adjournment in order that it could file written argument on this point. The matter was adjourned to December 12, 2008.

[31] The voluntariness of the co-accused statement was argued on December 12, 2008. The statement was ruled to be inadmissible. The Crown then requested a further adjournment to consider whether it would call two further witnesses. The case was adjourned to December 31, 2008.

[32] On December 31, 2008 no further Crown witnesses were called to testify but the prosecution again requested an adjournment in order to interview a potential witness. The preliminary inquiry was then rescheduled to May 15, 2009.

[33] The prosecution elected not to call any further evidence on May 15, 2009 and the Applicant was committed to stand trial. This was some 21 months after the Applicant had been charged.

[34] The Applicant first appeared before the Supreme Court on May 28, 2009. The court was advised by his counsel at the time that he would be retaining new counsel. The Applicant had been represented by a staff lawyer from Nova Scotia Legal Aid. For reasons unknown the matter was referred, on a legal aid certificate, to a lawyer in private practice. The case was adjourned to September 22, 2009 so that the Applicant could retain his new counsel.

[35] On September 22, 2009 the Applicant appeared with his new counsel and November 26, 2009 was set for a pretrial conference. This conference was adjourned at the request of the prosecution. The record is silent as to the reason for this adjournment.

[36] On December 17, 2009 the Applicant re-elected to be tried by a court composed of a judge sitting without a jury. Counsel indicated that two days were required for this trial. The dates of July 19 and 20, 2010 were set for trial.

[37] The case was adjourned on July 19, 2010 to November 15 and 16, 2010 at the request of the Applicant's counsel in order to obtain disclosure.

[38] On November 15, 2010 the prosecution had all its witnesses ready and available for trial, however the Applicant's counsel requested an adjournment for the purpose of making an application pursuant to 11(b) of the *Charter*. The trial

was adjourned and the dates of February 1 and 2, 2011 were set to hear the intended unreasonable delay application.

[39] On February 1, counsel for the prosecution was unable to attend and the matter was again adjourned, this time to February 28, 2011. The record is silent as to the reason for the unavailability of Crown counsel on February 1.

[40] On February 28, 2011 the Applicant's counsel requested a further adjournment in order that he could prepare the unreasonable delay application. The case was adjourned to April 19, 2011. The Applicant's former counsel never proceeded with the unreasonable delay application.

[41] The Applicant's trial finally commenced on April 19, 2011 and the presentation of evidence, including the Applicant's testimony, was concluded that day. The case was adjourned to May 6, 2011 so that the Applicant's counsel could determine whether the defence would present more evidence and for closing submissions.

[42] The matter did not proceed on May 6, 2011 but was adjourned to June 30, 2011. The record is again silent as to the reason for this adjournment or who requested it.

[43] On June 30, 2011 the defence elected not to call further evidence and closing submissions were presented.

[44] On July 27, 2011 Hood J. delivered an oral judgment convicting the Applicant. Her reasons for judgment made it clear that the Applicant's credibility was a big factor in her finding of guilt. She disbelieved the Applicant's evidence.

[45] The Applicant discharged his trial counsel after his conviction and retained new counsel on October 21, 2011. The case was adjourned on October 26, 2011 at the defence request in order that transcripts of the trial could be obtained and reviewed by his new counsel.

[46] On January 24, 2012 the Applicant's new counsel requested an adjournment so that he could apply to reopen the trial. The Crown contested this application. The case was adjourned to April 10, 2012 when the application to reopen the case

was heard. A mistrial was declared that day with written reasons to follow. Those reasons were released on May 9, 2012.

[47] On April 26, 2012 the Applicant appeared before this Court in order to set new dates for his retrial. The matter was adjourned at his request so that he could retain counsel for his upcoming retrial. The case was adjourned again on May 24, 2012 for the same reason.

[48] On June 7, 2012 the dates of February 19 and 20, 2013 were set for the retrial.

[49] There were several appearances between June 7 and December 13, 2012 for the purpose of confirming the status of the Applicant's retention of new counsel. The retainer of new counsel was finally confirmed on December 13, 2012.

[50] Between April 26, 2012 and December 13, 2012 this Court was never advised that the case had been outstanding since August 31, 2007.

[51] The Applicant's retrial was set to commence five years, five months and twenty days after his first appearance before the Provincial Court. The delay in this case exceeded the outer limits of the *Morin* guideline by some 47 months.

[52] This case was not a complicated one, nor was it the result of a long investigation. The fact that the evidence at the preliminary inquiry took less than one day to present as did the evidence at trial attests to this. The Respondent Crown conceded this point in oral argument.

[53] The Respondent Crown conceded at the hearing of this application that this delay was sufficient to warrant judicial scrutiny. The Respondent also acknowledged that there was no explicit or implied waiver of the Applicant's s.11(b) rights.

[54] The Applicant agreed with the Respondent that the period from August 30, 2007 to January 23, 2008 is neutral.

[55] The Applicant agreed that the period from September 22, 2009, when he first appeared before the Supreme Court with his new counsel, to July 19, 2010 is to be regarded as a period of institutional delay.

[56] The case was delayed for one month between February 1and 28, 2011. This was as a result of the Crown's inability to attend. There is nothing on the record to indicate why the prosecution could not attend on the date set for trial or why other Crown counsel could not take carriage of this short and uncomplicated case. I, however, find this delay to be a part of the inherent time requirements of the case and therefore neutral.

[57] I am of the view that the period from July 19, 2010 to February 1, 2011 is a delay attributable to the Applicant. It was the Applicant's former counsel who indicated on July 19, 2010 that he had not received certain disclosure, in particular the ITO. This resulted in an adjournment from July 19, 2010 to November 15 and 16, 2010. I am satisfied based on the materials before me that this ITO had been disclosed to the defence albeit to the Applicant's first counsel. I conclude from this evidence that the Applicant's former trial counsel simply misplaced or lost the disclosure relating to the ITO.

[58] On November 15, 2010, with the Crown ready to proceed to trial, the Applicant's counsel sought a further adjournment in order to make an unreasonable delay application. This resulted in another adjournment. The case was set over to February 1, 2011,but was adjourned that day to February 28, 2011.

[59] The unreasonable delay application which was to be heard on February 28, 2011 had to be adjourned to April 19, 2011 at the Applicant's request. This application was never brought and the trial commenced on April 19, 2011.

[60] The Applicant bears responsibility for the further delay from February 28 to April 19, 2011.

[61] I am of the view that a significant portion of the delay in this case is attributable to the Crown because of its actions or inaction. The Crown's failure to provide timely disclosure; failure to properly prepare for the preliminary inquiry; the presentation of the case against the Applicant at his first trial which resulted in a mistrial and contesting the application to re-open the trial all played a

role in violating the Applicant's constitutional right to be tried within a reasonable time.

[62] As pointed out earlier the Applicant's first written request for disclosure of the ITO was made on November 27, 2007. An order was granted on December 13, 2007 for disclosure of the ITO. Further requests for this information were made on February 13, March 27, April 10, July 8 and September 19, 2008. The ITO was not disclosed until October 10, 2008. Some of the delay in obtaining and disclosing the ITO was as a result of the Justice of the Peace Centre having been given the wrong file number. It took four months for the police or the Crown to identify the mistake regarding the file number. No explanation was provided as to the reason it took this long to identify this error. The delay involved in disclosing the ITO lead to an adjournment of the original trial dates.

[63] Similar disclosure problems arose with respect to the forensic analysis of certain computers and telephone seized from the Applicant's residence. These items were sent for analysis on September 5, 2007, however the results of that analysis were not disclosed until November 24, 2008. A period of over 14 months elapsed from the date of the original request for analysis to the date when disclosure was made.

[64] The Respondent argued that the cause of this delay is inherent and as a result of a lack of police resources. It is important to note, however, that although these items were sent for analysis on September 5, 2007 it was not until March 20, 2008 that the first inspection of these items began. This was a delay of approximately six and a half months from the time the items were sent for analysis until work on them began. Once the analysis began on March 20, 2008 it then took a further seven months to be completed.

[65] An affidavit was filed on this application from Jason Kearley, a senior technical computer forensic analyst with the RCMP Technological Crime Branch Validation Team. Attached to Mr. Kearley's affidavit were his original handwritten notes made at the time he worked on this file. These handwritten notes indicate that the analysis began on March 20, 2008. Between March 20, 2008 and April 11, 2008 Mr. Kearley worked on this file on six occasions. No work on this file was done between April 11 and September 26, 2008, a period of five and one half months. Between September 26 and October 27, 2008 Mr.

Kearley worked on this file on ten different occasions. His report was completed on October 28, 2010 but not disclosed until November 24, 2010.

[66] Despite repeated requests for this information there is no evidence before the Court to indicate that anything was done by the Crown or the police to accelerate the analysis and obtain the information for disclosure. The Applicant was entitled to timely disclosure. He did not receive it.

[67] From the time of the Applicant's arraignment until his committal to stand trial a period of over 21 months elapsed.

[68] The Applicant conceded that the period from February 28 to April 19, 2011 is attributable to the defence but argued that the 22 month delay from April 19, 2011, the date when a mistrial was declared, to February 19, 2013, when the retrial was to begin, should be attributed to the prosecution.

[69] The Respondent Crown denied that this delay should be shouldered by the prosecution and argued that the Crown must be permitted to prosecute matters without threat of the attribution of delay each time it is unsuccessful. It argued that the position taken by the Crown on the application to reopen the case was reasonable.

[70] Shortly after he was convicted, the Applicant retained new counsel who sought to reopen the trial. The Respondent Crown opposed this application. The trial judge on the application to reopen the trial declared a mistrial. In her reasons for ordering a mistrial she commented upon her findings regarding the Applicant's credibility at trial.

[71] At his trial on April 19, 2011 the Applicant testified that he believed what was in a package in his possession when he was arrested was DJ equipment, more particularly an item he referred to as a serato. The Applicant was cross-examined extensively on a statement he gave to the police shortly after his arrest. In an agreed statement of facts, filed with the trial court, it was admitted that the statement was given freely and voluntarily. The statement was not tendered as an exhibit, but used solely for impeachment purposes. In his statement the Applicant told the police about this serato.

[72] The Applicant was represented by senior and experienced counsel at trial. His counsel, however, did not re-examine him to bring out that in fact the Applicant had told the police about the serato.

[73] In her reasons for disbelieving the Applicant Hood J. stated:

> ...When asked why he didn't say what was in the package, that is the Serato that he testified about at trial, his answer was that he did not know what was going on and just kept saying "Yeah." He said he was scared.
>
> ...Being scared and nervous on arrest is understandable, but if he believed then that the package contained computerized DJ equipment, it's surprising, to say the least, that he first mentioned this at trial...

[74] When Hood J. delivered her decision and her reasons for disbelieving the Applicant, neither Crown nor defence counsel brought to her attention that she had misapprehended the evidence and that the Applicant had, in fact, told the police upon arrest about the DJ equipment he called a serato.

[75] In her reasons for declaring a mistrial Hood J. stated:

> As it turns out, Mark Callender did say in his statement to the police that he was expecting the serato. That information, however, was not before the court, since the statement was not in evidence and there was no re-examination of Mark Callender on the issue.

[76] It is noteworthy that the trial judge never attributed the cause of her declaring a mistrial to the defence or to his former counsel. The trial judge was clear in assigning the cause of the mistrial to the prosecution because it was the Crown, through its cross-examination of the Applicant, who caused her to misapprehend the evidence.

[77] In her written reasons Hood J. stated at paragraph 41:

> I conclude that the Crown did not deliberately try to mislead the court. However, the questions on cross-examination and the Crown closing left the court with the mistaken impression that Mark Callender had never mentioned a serato until trial. The portions of the statement referred to on cross-examination only refer to Mark Callender saying he did not know what was in the package.

[78] Further at paragraph 43 she stated:

> Based upon what was before me, I concluded it was apparent that the Crown was alleging recent fabrication as well as wilful blindness. I however did not have a balanced picture of all of Mark Callender's utterances during the police questioning.

[79] The Respondent argued that in order to find that the delay from the time the mistrial was declared until the new trial date is attributable to the Crown this Court must find that the Crown acted deliberately or intentionally in misleading the court. In support of this proposition it cited the case of *R. v. RM* 2003 CanLII 2212 (Ont SC). In that case, the Crown submitted that mistrials are considered part of the inherent time requirements of a trial. The prosecution there relied on the decision in *R. v. Batte* 2000 145 C.C.C. (3d) 498 (Ont.CA). The Court in *R. v. RM*, supra did not agree that the *Batte* decision stood for the general proposition that mistrials and delays caused by them are inherent time requirements. Quinn J. in *R. v. RM* stated at paragraph 37:

> The Crown submits that mistrials are considered part of the inherent time requirements of a case. Reliance is placed on R. v. Batte (2000), 145 C.C.C. (3d) 498 at 520-21 (Ont. C.A.). I do not think that R. v. Batte stands for such a general proposition. In the view I take of the matter, where a mistrial is caused by the actions of the Crown it is open for the court to include any resultant delay in the s.11(b) calculations and count the delay against the Crown.

[80] Once the problem of Hood J.'s misapprehension of the evidence was brought to the Crown's attention the Crown refused to concede that a mistrial should be granted. Once the mistrial was declared the prosecution should have urged an earlier trial date for the retrial. It did not do so. I recognize that the Applicant was in the process of retaining new counsel and that the retainer was not completed until December 2012, however it was incumbent on the Crown to advise the Court that this matter had been outstanding since August 2007.

[81] The Respondent Crown acknowledged in oral argument that if the delay between the mistrial and the retrial date was due to Crown actions, then this delay would be attributable to the Crown and the Applicant's s.11(b) rights would have been violated. The Respondent also conceded, on questioning from the Court, that

there is an obligation on the Crown as a Minister of Justice to bring to the Court's attention any misapprehension of the evidence by the Court.

[82] In this case Hood J.'s reasons were given orally. A reading of her reasons for convicting makes it clear that she did not believe the accused because he had stated for the first time at trial that he was awaiting a piece of DJ equipment. The Crown at trial was aware that the accused had told the police in his statement that he was awaiting such equipment, however the Crown said nothing to the trial judge to rectify her misapprehension of the evidence. When the Crown heard the trial judge's reasons and her misapprehension of the evidence going to the accused's credibility, it had a responsibility to speak up and correct the error. The Crown did not do so. Unfortunately neither did counsel who was representing the Applicant at trial.

[83] If, at the time that Hood J. gave her reasons for convicting the accused, the Crown did not appreciate that she had misapprehended the evidence, it certainly would have been clear that such a misapprehension took place once the application to reopen the case was filed and the transcripts of Hood J's oral reasons were provided to the Crown. Despite having this information with respect to a misapprehension of material particulars regarding the accused's credibility, the Crown continued to contest the application to reopen the case. The delay occasioned by this is directly attributable to the Crown's actions.

[84] While some of the delay was caused by the actions of the Applicant in twice retaining new counsel, I am satisfied that the most significant part of the delay is attributable to the actions of the Crown. Some of the delay was unexplained and some of it was unjustified.

[85] The delay in Provincial Court was well beyond the institutional delay guidelines set out in the Supreme Court decision of *R. v. Morin* for delays in Provincial Court. A large part of this delay is attributable to the Crown's actions or inaction. Many of the Crown requests for adjournments of the preliminary inquiry appear to have been made because the Crown had not prepared its case by interviewing its witnesses in advance.

[86] Further delays were caused by the Crown's request for adjournments to research the law regarding the admissibility of the co-accused's statement to the

police and to file written argument on this point. This was not a complicated evidentiary issue, however it resulted in a delay of one month from November 12 to December 12, 2008. It is expected that the Crown should know what case it will present, what documents it will present and the law surrounding those documents. The fact that the Crown asked for time to consider the law regarding the admissibility of the information found in the document indicates that the prosecution did not know on what basis it would present the document or the information contained in it. The delays between November 12, 2008 and May 15, 2009 rest with the Crown.

[87] The Crown's actions in adjourning the preliminary inquiry to research the law regarding the voluntariness of the co-accused's statement, a matter of basic evidentiary law; the Crown requesting an adjournment of the preliminary inquiry in order to provide written argument on this point; the further adjournment at the Crown's request in order to decide whether to call two more witnesses; and the adjournment caused by the Crown's request to interview a witness that was subsequently not called all caused further delays as this case moved through the Provincial Court.

[88] In the present case there was actual prejudice suffered by the Applicant. As a result of the bail condition that he remain in the Province of Nova Scotia, the Applicant missed an opportunity to go to Newfoundland to do work for his present employer. That condition and the difficulties presented by the requirement of having his surety attend any variation hearing caused him some further difficulty in that his mother lives in Ontario and his children, who would like to visit their grandmother, have been unable to do so. He has also not seen his sister and nephew who live in Toronto since he has been on bail. This bail condition together with the condition that he deposit his passport with the Court or not apply for one also prevented him from attending his great grandmother's funeral in New York State. In fairness, it should be recognized that the Crown consented to all applications brought for bail variations.

[89] I accept the Applicant's evidence that he has been under stress which has made it difficult for him to keep his mind on his work. I also accept that he has not sought medical attention or gone on stress leave because going on stress leave would mean that he would have less income.

[90] The Applicant testified that he earns $12.00 per hour. The Applicant also testified that it cost him $30,000.00 to retain new counsel who brought his application to reopen the case and retrial. In order to do this the Applicant had to borrow this money from family and friends. I am satisfied that the Applicant suffered actual prejudice.

[91] In conclusion I find that the delay in this case was inordinate. The investigation was neither lengthy nor complex. The presentation of evidence at the preliminary inquiry and at trial took less than one day on each occasion. Waiting almost five and one half years for a simple proceeding to be completed is inexcusable.

[92] Accordingly a stay of proceedings is entered.

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Cacchione, J.