Cite as: R. v. Harris, 1991 NSSC 4

1990 S.H. No. 75287

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

SUSAN HARRIS

APPLICANT (ACCUSED)

- and -

HER MAJESTY THE QUEEN

RESPONDENT (CROWN)

HEARD: At Halifax, Nova Scotia, before the Honourable Mr. Justice David W. Gruchy, on December 19, 1990

DECISION: January 14, 1991

COUNSEL: Mr. Joel Pink, Q.C.,
Ms. Heather MacKay, Counsel for the Applicant

Mr. Adrian Reid
Ms. Jean Whalen, Counsel for the Respondent

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GRUCHY, J.

The applicant, Susan Harris, was charged on or about December 22, 1989, with the offences of impaired operation of a motor vehicle and operating a motor vehicle while having a blood/alcohol content in excess of .80. She was required to attend Court at 9:30 o'clock in the morning of February 6, 1990, in Dartmouth, Nova Scotia. She attended Court that morning and entered a plea of 'Not Guilty' to both offences. A date was set for trial. More will be said concerning that appearance below. The Court was unable to proceed with the trial at that time. There then occurred further delay in the matter and eventually the applicant brought this application for a stay of proceedings on the ground of unreasonable delay.

I will set out chronologically in more detail the events leading to this application:

1. The alleged offence occurred on or about December 22, 1989, and the applicant was charged with the following offences:

"CHARGE:

At or near Dartmouth in the County of Halifax, Nova Scotia, on or about the 22nd day of December, 1989, did unlawfully have the control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood contrary to Section 253(b) of the Criminal Code.
AND FURTHER that she at the same time and place aforesaid, did unlawfully have the control of a motor vehicle, while her ability to operate a motor vehicle was impaired by alcohol or a drug, contrary to Section 253(a) of the Criminal Code."

2. On February 6, 1990, Joel Pink, Q.C., appeared in Provincial Court on behalf of the applicant. His Honour, Judge R.B. Kimball, presided over the matter. I set forth the portion of the transcript of the proceedings of that appearance relevant to the present application:

"THE COURT: Mr. Pink, you have a couple of matters I understand.

MR. PINK: Yes, I have three matters if Your Honour pleases. The first one is The Queen versus Susan Harris. It's a 253(a) and 253(b). I will waive the formal reading of the charges and there will be not guilty pleas entered to that one.

THE COURT: Does she appear in person?

MR. PINK: No, I'm here on her behalf, if Your Honour pleases.

THE COURT: All right. Two counts, a breathalyzer and impaired driving.

MR. PINK: Yes.

THE COURT: Trial date, please.

MR. ALLEN: There'll be a double, double booking, there will be an expert witness for this one, Your Honour.

THE COURT: Double booking, the Crown requests.

THE CLERK: Thursday, October the 18th at 10:30.

MR. PINK: That's fine.

THE COURT: Do you want anything earlier, Mr. Pink?

MR. PINK: If that's the first possible day, I'll take October the 18th.

THE COURT: We can find something earlier, if you want.

MR. PINK: No, that's, I mean, fine.

THE COURT: All right. October 18 ...

MR. PINK: Oh yeah, if I can get an earlier date because she's a little upset about the whole matter. If I can get an earlier date.

THE COURT: All right. Give him something a little earlier.

THE CLERK: I'll have to put him in on one of those preliminary dates, Your Honour.

THE COURT: Put it on one of those last days of June, Youth Court week. Just pick a day, one of those days.

THE CLERK: Wednesday, April the 25th at 10:30?

MR. PINK: Just a minute now, I got to be careful.

THE COURT: I was thinking of the June. The week in June. I'm going to take a couple of days there for Adult Court matters. Let me suggest, Thursday, June the 28th at 9:30. Would you doublecheck and see that we've got nothing booked at that time.

MR. PINK: That'd be fine.

THE COURT: Is that all - satisfactory other to the Crown?

MR. ALLEN: Yes, Your Honour.

THE COURT: June the 28th, then, double booking, at 9:30 for the Harris file."

It should be noted that the phrase "double booking" has a particular meaning. Jean M. Whalen, a Crown Attorney who was directly involed in this prosecution, has filed an affidavit wherein she has said:

> "That the words 'double booking' mean that only one trial will be set down at a given time, instead of the usual two trials. That one matter will take up two slots or a 'double booking'. If a given matter is set for a 'double booking' at 9:30 a.m. on a given date, it would be the only matter scheduled for that time, with two other matters being scheduled for 10:30 a.m. on the same date, unless counsel should request extra time in respect of the 10:30 a.m. matter."

3. On June 28, 1990, the Crown, its witnesses and the accused, with her witnesses, appeared before Judge Kimball and were all ready and prepared to proceed. All of the evidence before this Court of the occurrences of that day are set forth fully:

(a) The affidavit evidence of the applicant is as follows:

> "6. On June 28, 1990, the trial did not proceed because the Court was unable to hear my case due to scheduling problems, and workload. At that time, the trial was adjourned to the first date for which all parties were available: November 26th, 1990."

(b) The affidavit evidence of Jean M. Whalen, above referred to, is now set forth in full:

> "1. That I am employed as a Crown Attorney by the Nova Scotia Department of Attorney General and as such have personal knowledge of the matters deposed to herein except where stated to be by way of information and belief.

2. That on June 28, 1990, I was the Crown Attorney assigned to conduct the trial of Susan Harris on charges pursuant to s.253(a) and (b) of the Criminal Code.

3. That on the above date, I interviewed all of the Crown witnesses and was prepared to proceed to trial as scheduled. At no time did I state that the Crown was not prepared to proceed on that date.

4. That I have been assigned to the Dartmouth Courthouse since June 18, 1990. His Honour Judge Kimball usually sets two trials at 9:30 a.m., two trials at 10:30 a.m. and two trials at 1:30 p.m., per day, unless otherwise advised by counsel that more time is needed for a matter.

5. That the words 'double booking' mean that only one trial will be set down at a given time, instead of the usual two trials. That one matter will take up two slots or a 'double booking'. If a given matter is set for a 'double booking' at 9:30 a.m. on a given date, it would be the only matter scheduled for that time, with two other matters being scheduled for 10:30 a.m. on the same date, unless counsel should request extra time in respect of the 10:30 a.m. matter.

6. That on occasion matters do start later than their scheduled time. However, despite the late start they are usually completed on the same date.

7. That had the trial of Susan Harris commenced on June 28, 1990, it could have begun at approximately 11:30 a.m. on that date. It is my belief that in all likelihood the trial, if commenced on June 28, 1990, could have been completed on that date."

(c) The affidavit evidence of Joel E. Pink, Q.C., paragraphs 3 to 6 of which bear on the occurrences of that date:

"3. On June 28, 1990, I appeared with Susan Harris and we were prepared to proceed with the trial. Also attending that day were the witnesses for the Defence: Troy Snider, of Halifax; Leo Wall, of Sydney, who teaches at the Adult Vocational School in Halifax; Greg Johnstone, a pharmacologist and Kim Tingley, of Halifax. The transcript of the proceedings in Provincial Court in Dartmouth, Nova Scotia, is attached hereto as Exhibit 'A' of this Affidavit.

4. On June 28, 1990, before going into Court, I had discussions with the Crown Prosecutor, who indicated

that there could be a problem with proceeding with Miss Harris' trial on that date. In an attempt to expedite this matter, I requested of the Crown Prosecutor that we appear before His Honour Judge Kimball and request a transfer of Miss Harris' case to Her Honour Judge Potts. Arrangements for the transfer could not be made. The first available date for which all parties could appear was November 26th, 1990.

5. At no time on June 28, 1990, did I waive the Defendant's right to a trial within a reasonable time, pursuant to s.11(b) of the Canadian Charter of Rights and Freedoms.

6. It is my belief that the Defendant, Susan Harris, has suffered real prejudice as a result of the delay in the disposition of the charges against her. Further, it is my belief that this delay was unreasonable in light of the fact that the Defendant was present and ready to go forward with her trial on the date originally scheduled, June 28, 1990."

(d) The transcript of the proceedings of June 28, 1990, in the provincial Court relative to this matter I now set forth in full, even though all the matters referred to do not appear to be germane to the issues. I do so as it sets forth fully the various exchanges amongst the Court and counsel and gives an insight into the give and take which occurred as a result of the effort to reach a mutual accommodation:

"THE COURT: Do we have any other routine matters before we commence our trials? Mr. Smith, what would you be here this morning on?

MR. SMITH: Mine is a later matter Your Honour

THE COURT: Trial?

MR. SMITH: Yes.

THE COURT: Mr. Pink I know is here on a trial and I know Ms. Copeland is.

MR. PINK: Yeah, I am just wondering if Your Honour pleases if I can raise the matter of the Susan Harris matter that was set down sometime ago for trial this morning and I understand that the Court is backed up from yesterday. I have talked to my learned friend, she has three witnesses, we have five witnesses so it is a total of eight witnesses that would have pretty well taken up the morning I figure and I understand because of other matters that you have a full docket this afternoon and I am also committed to be somewhere else this afternoon. It does not appear that we are going to even get to this thing this morning.

THE COURT: I do have a Youth Court trial from yesterday and I did promise the witnesses that I kept waiting for four hours that I would begin this morning and I would hear them. They are back I take it this morning and they are ready to go? And I am told that that will be sometime we'll be at that. So what does the Crown say here? There is a suggestion that perhaps we should face reality and move the Harris matter out?

MS. WHALEN: Well Your Honour the Crown is prepared to do the trial this morning. We didn't know at this time that two trials from yesterday would be backed up. We are, you know we are prepared to proceed this morning. Unfortunately Mr. Pink has made...

THE COURT: Well so is the Defence, but the point is and the suggestion is that there is only so many hours in a day and nothing is breaking so far. Are we going to get to it? Mr. Pink speaks of the commitment that he has in another place, so he is suggesting that if we wait around for one trial to end, he is going to be in difficulty. He will be spreading himself a little thin. So he seems to be suggesting that we hoist this matter. I have no problem with it if I have an agreement here.

MS. WHALEN: Well Your Honour I just want to be on record that the Crown is ready to proceed and if, you know, it is adjourned that we certainly wouldn't want to then be faced with an unreasonable delay argument or anything like that.

THE COURT: Oh, I don't think that is what Mr. Pink has in mind at the moment. We can go to August the 13th, that is the first available...

MR. PINK: I am out of the country from the 13th...

THE COURT: ...the next full day...you are talking about a half a day trial?

MR. PINK: Well we have eight witnesses and I expect it is going to take a good half day.

MS. WHALEN: Your Honour I know that one of the trials at 10:30 is...we will not be proceeding with, the Hammond matter.

THE COURT: Well that is something I didn't know until you just told me.

MS. WHALEN: Sorry.

THE COURT: So Hammond is not going ahead this morning.

MS. WHALEN: No.

THE COURT: Ms. Copeland is on that.

MS. COPELAND: Your Honour I am not sure if it is not going ahead from the Crown's point of view, I just received a call from Miss Hammond who has a migraine and can't be here today.

MS. WHALEN: No it is not going ahead from the Crown's point of view.

THE COURT: All right. What about the Brown matter this morning?

MS. WHALEN: That is scheduled for trial at 10:30 Your Honour and there is only one witness from the Crown's point of view on that Your Honour.

THE COURT: And that is your matter Mr. Smith?

MR. SMITH: It is Your Honour, yes.

THE COURT: So we would be looking at what, a half an hour or forty-five minutes?

MR. SMITH: I suspect yes, a half an hour to forty minutes.

THE COURT: All right. And the Youth Court trial, can you give me an estimate of time? About 5:15 last night we were talking about sitting into 9:00 o'clock if we continued. Is that still a good estimate?

MS. WHALEN: Your Honour there are three witnesses, two civilians and one police officer for the Crown.

THE COURT: Any more voir dires like we got into yesterday?

MS. WHALEN: No there wouldn't be a voir dire on it.

THE COURT: And we have that other matter set over after I heard argument. I haven't adjudicated yet. What do I have by way of a round estimate then on that Youth Court? Are we talking two hours?

MS. COPELAND: I imagine we could get it done in two hours.

THE COURT: So that would mean, that is going to take up the morning then isn't it?

MS. WHALEN: H'm, m'm.

THE COURT: Mr. Smith's matter and that matter. So that is what Mr. Pink is talking about. How are we going to fit in his matter? You see, it is going to take a half a day. Something has to give. Anything going to give this afternoon?

MS. WHALEN: I am not aware Your Honour, I think Mr. Bychok is dealing with the docket this afternoon.

THE COURT: To complete the record, is your other commitment a Court commitment Mr. Pink?

MR. PINK: I committed myself in September of 1989, if Your Honour pleases, to do the graduation address at Yarmouth High and I have to drive to Yarmouth.

THE COURT: I know the feeling. We have some dates in early September that opened up two days ago. What are they the 4th, 5th, 6th and 7th?

THE REPORTER: September 4th, the 5th, 6th and 7th. We have August 22nd we have...

THE COURT: No, we need a half a day.

THE REPORTER: Oh, half a day.

THE COURT: Yeah.

MR. PINK: At least.

THE COURT: So what about the afternoon of Tuesday, the 4th of September?

MR. PINK: That is fine with me. Just let me double check with my client and the other witnesses.

THE COURT: As a matter of fact if you wished, I could book it in after the docket and start at 11:00 just in case there is some roll over.

MR. PINK: That will be fine.

THE COURT: There is nothing at all booked that day is there yet?

THE REPORTER: No recorded response.

THE COURT: So it will just be a routine docket. I should be fully...September the 4th. It should be completely open.

THE REPORTER: There is a sentencing at 11:00 Your Honour which is booked.

THE COURT: Well, that is what kind of a case?

THE REPORTER: At 11:00 o'clock.

THE COURT: No, what kind of a sentencing?

THE REPORTER: A 279(2) and a 267(1)(b).

THE COURT: All right may be 11:30 then we could...

MR. PINK: The 4th is out. Come up here. The 4th I understand is out if Your Honour pleases, one of my clients...witnesses is on vacation.

THE COURT: The 5th?

MR. PINK: The 5th he is on vacation.

WITNESS: Yes I am.

THE COURT: The 6th, 7th?

MR. PINK: You are out for that whole week are you?

WITNESS: I am out for those two weeks.

MR. PINK: Okay, the first two weeks in September?

WITNESS: Yes.

THE COURT: Well that is regretable because the next full half-day I think is in late November, which I got an opening just two days ago, again. That is the only breathing room I have if you are asking for a half a day?

MR. PINK: Yes I am going to need a half a day.

THE COURT: So, what are those dates in November that we got clearance on two days ago?

THE REPORTER: November 26th, 27th and 28th.

THE COURT: Those three dates I have open at the moment. November the 26th is a Monday...

THE REPORTER: Inaudible.

THE COURT: Don't worry about that, those are R.C.M.P. matters that we finally got hoisted out of this Court. They never should have been here in the first place.

MR. PINK: I can od [sic] it the 26th, 27th or 28th.

THE COURT: All right. I will suggest then the...I am going to suggest this, you say a half of day at least?

MR. PINK: Yes.

THE COURT: Then let's begin the morning of Monday, the 26th of November at 9:30...

MR. PINK: Can we book out the day then?

MS. WHALEN: Are you on vacation Constable Verge?

CONSTABLE VERGE: No I am not.

MS. WHALEN: Okay, Monday, November the 26th.

THE COURT: And what I was going to say, that rather than our regular booking practice, I might book one small matter in the afternoon, but no more. But for the moment that is quite agreeable?
No recorded response.

THE COURT: I will ask the Reporter to write in top that this is a one-half to three-quarters of a day case and to book at the most one short case for the afternoon.

So we are agreed. Witnesses find that as convenient as it can be. Always regretable, but what else can be done in the circumstances! All right.

MR. PINK: That is my only matter Your Honour."

4. The matter did not proceed on November 26, 1990, as scheduled. This application was commenced by Interlocutory Notice (Application Inter Partes) dated November 19, 1990. Mr. Pink's affidavit makes clear that this application is taken as a result of alleged unreasonable delay and is taken as a result of an alleged denial of rights given by Chapter 12 Section 11 of the **Canadian Charter of Rights and Freedoms.** That section reads as follows:

"11. Any person charged with an offence has the right...

(b) to be tried within a reasonable time;"

The action is taken to this Court by virtue of Chapter 28 Section 24(1) of the **Charter** which reads:

"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."

Both Applicant and the Crown are agreed that the issues to be addressed by this Court are:

1. Is this Court the appropriate forum to hear this application to stay proceedings in the provincial Court? and
2. Has the Applicant's right to a trial within a reasonable time been violated pursuant to section 11(b) of the **Charter**?

1. APPROPRIATE JURISDICTION

It is appropriate to set out my understanding of [illegible] judicial opinions as to the synopsis of the effect of the decision is found in an annotation in Volume 52 of the Criminal Reports (3d), at page 5, the relevant portions of which are set forth as follows:

"Annotation

The four opinions in **Mills** represent the Supreme Court's first major consideration of the jurisdictional and remedial issues which flow from s.24(1) of the Canadian Charter of Rights and Freedoms of the nature of the right to trial within a reasonable time under s.11(b). Given the complex and uncertain series of divergent views that emerged, it is particularly unfortunate that only seven justices sat. The full court in **Carter**, post, p.100, dealt only with comparatively limited aspects of ss.11(b) and 24(1) (see below).

Section 24

The McIntyre J. judgment represents the conclusions of three judges. Dickson C.J.C. concurs in Lamer J.'s expansive dissenting opinion. Wilson J., in dissent, also agrees with Lamer J. on 'the jurisdictional issues'. The swing judgment is that of La Forest J., who concurs in the result and much of the substance of the McIntyre J. approach but parts company on some points. The general holdings in **Mills** on s.24 would appear to be as follows:

1. A justice at a preliminary hearing is not a court of competent jurisdiction for the purpose of granting a remedy pursuant to s.24(1) of the Charter (all judges). (This ruling was adopted by the full court in **Carter**.) (Lamer J. at p.50 also holds that a justice at a preliminary hearing has no jurisdiction to stay as an abuse of process.)

2. A justice at a preliminary hearing cannot exclude evidence pursuant to s.24(2) of the Charter (McIntyre J. and La Forest J.; cf. Lamer J. at p.41).

3. Trial courts are courts of competent jurisdiction within the meaning of s.24(1) and, consistent with the traditional range of criminal powers, can rely on it to respond to violations of the Charter (all judges).

4. Pre-trial motions to the trial court, including resort to oral evidence when necessary, are the appropriate methods of invoking s.24(1) in respect of Charter issues like unreasonable delay (all judges).

5. The superior court has concurrent original jurisdiction along with trial courts to deal with Charter issues, subject to the discretion to decline to exercise that jurisdiction if the trial court is the more appropriate forum (Lamere J. and La Forest J.; cf. McIntyre J. at pp.19-20).

6. The provincial superior courts, aside from their traditional prerogative jurisdiction, are also 'courts of competent jurisdiction' within the meaning of s.24(1) when no other forum exists to raise a Charter issue (all judges).

7. Appellate jurisdiction is entirely statutory and hence there is no appeal from an unsuccessful pre-trial claim for relief pursuant to s.24(1) until the trial is completed (McIntyre J.; cf. La Forest J. at pp.98-99 and Lamer J. at pp.50-53).

8. The infringement of a Charter right like unreasonable delay does not of itself give rise to jurisdictional error (McIntyre J. and La Forest J.; cf; Lamer J. at pp.47-48).

9. A stay of proceedings will not always be the appropriate response to a given infringement like unreasonable delay (McIntyre J. and La Forest J.; cf. Lamer J. at pp.87-88)."

While the Supreme Court of Canada in **Mills** was dealing primarily with the jurisdiction of Provincial Courts in preliminary hearings, the comments in the various opinions regarding the position and authority of the superior courts are instructive and helpful.

I particularly refer to the opinion of McIntyre, J. (pp.17-21) with which Beetz and Chouinard, J.J., concurred:

"To begin with, it must be recognized that the jurisdiction of the various courts of Canada is fixed by the legislatures of the various provinces and by the Parliament of Canada. It is not for the judges to assign jurisdiction in respect of any matters to one court or another. This is wholly beyond the judicial reach. In fact, the jurisdictional boundaries created by Parliament and the legislatures are for the very purpose of restraining the courts by confining their actions to their allotted spheres. In s.24(1) of the Charter the right has been given, upon the alleged infringement or denial of a Charter right, to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The Charter has made no attempt to fix or limit the jurisdiction to hear such applications. It merely gives a right to apply in a court which has jurisdiction. It will be seen as well that it prescribes no remedy but leaves it to the court to find what is appropriate and just in the circumstances.

The questions then arise as to which of the courts are courts of competent jurisdiction within the meaning of s.24(1) of the Charter and what is the nature of the remedy or remedies which may be given. In attacking these problems, that of jurisdiction and that of remedy, the courts are embarking on a novel exercise. There is little, if any, assistance to be found in decided cases. The task of the court will simply be to fit the application into the existing jurisdictional scheme of the courts in an effort to provide a direct remedy, as contemplated in s.24(1). It is important, in my view, that this be borne in mind. The absence of jurisdictional provisions and directions in the Charter confirms the view that the Charter was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure. There is no need for special procedures and rules to give it full and adequate effect.

A great many Charter questions will arise in criminal cases such as the one before us. My comments will be

confined to such cases. The Criminal Code sets up the framework for the disposition of criminal matters with respect to both indictable and summary conviction offences. A 'summary conviction court', as defined in s.720 of the Code, presided over by a 'justice' or 'magistrate', as defined in s.2 of the Code, is provided for the disposition of summary conviction matters at first instance. For indictable offences, the Code creates both a 'superior court of criminal jurisdiction' (s.2), which has jurisdiction to try any indictable offence (s.426), and a 'court of criminal jurisdiction', as defined in s.2 of the Code, which has a lesser jurisdiction in the trial of indictable offences and which includes a magistrate or judge acting under Pt. XVI of the Code. These courts, together with the summary conviction courts, deal with all criminal proceedings under the Criminal Code at first instance. In addition, where an accused charged with an indictable offence elects trial other than before a magistrate, a preliminary hearing is held in accordance with Pt. XV of the Code. This occurred in the case at bar. Faced with this choice of courts, where does the aggrieved person seek a s.24(1) remedy?

...

Courts exercising criminal jurisdiction other than the provincial superior court

These courts, which include by definition a magistrate under Pt. XVI of the Criminal Code and, for purposes of this discussion, magistrates and summary conviction courts, will deal with by far the greatest number of criminal cases. For practical purposes most of the criminal work at first instance is done in these courts, therefore most of the applications for a remedy under s.24(1) of the Charter will be made to them. These courts will be courts of competent jurisdiction where they have jurisdiction conferred by statute over the offences and persons and power to make the orders sought. It is to be hoped that trial judges will devise, as the circumstances arise, imaginative remedies to serve the needs of individual cases. Such remedies must remain, however, subject to constitutional restraint, that is, they must remain within the ambit of criminal powers. A claim for a remedy under s.24(1) arising in the course of the trial will fall within the jurisdiction of these courts as a necessary incident of the trial process. There will be an exception where a claim for prerogative relief in the nature of

prohibition, certiorari, mandamus or other prerogative matter is raised. Such a claim would fall within the sole jurisdiction of the superior court. Where such relief is sought, or where a claim for relief, if granted, would involve interference in proceedings before another court, there would be no jurisdiction in the non-superior court of criminal jurisdiction.

Provincial superior court

In each province and in the territories the superior court has been created by statute. This court has generally been given all the historic jurisdiction and power of the high court in England in all matters arising between Crown and subject and subject and subject. The jurisdiction of the superior court is derived from the creating statutes and the common law and from its nature as a superior court, a court in which jurisdiction is generally presumed. This court will always be a court of competent jurisdiction under s.24(1) of the Charter at first instance, that is to say, in cases where the issue arises in matters proceeding before it or where the proceeding originated in that court because of the absence of another forum with jurisdiction. The superior court will, of course, continue to have jurisdiction as a reviewing court where prerogative claims are advanced. The superior court jurisdiction will not displace that of other courts of limited jurisdiction. Considerations of convenience, economy and time will dictate that remedies under s.24(1) will ordinarily be sought in the courts where the issues arise. Save for cases originating and proceeding in the superior court, resort to it will be necessary only where prerogative relief is sought.

Procedure

Problems have arisen in connection with the procedure to be followed relating to Charter remedies, and some confusion has existed in various courts. As has been said on many occasions, the Charter was not enacted in a vacuum. It was created to form a part - a very important part - of the Canadian legal system and accordingly must fit into that system. It will be noted at once that s.24(1) gives no jurisdictional or procedural guide. This absence makes it clear that the procedures presently followed must be adapted and used for the accommodation of applications for relief under s.24(1)." (Emphasis added)

Lamer, J., as he then was, made comment on the same subject. He reviewed carefully and historically the matter of section 24(1) jurisdiction, saying in part:

> " I am of the view that a person whose Canadian Charter rights have been infringed or denied has the right to obtain the appropriate and just remedy under the circumstances. A corollary which flows from this is the fundamental principle that there must always be a court available to grant, not only a remedy, but the remedy which is the **appropriate** and **just** one under the circumstances.
>
> A remedy must be easily available and constitutional rights should not be 'smothered in procedural delays and difficulties', to use the words of J.G. Richards and G.J. Smith in 'Applying the Charter' (1983), 4 Advocates Quarterly 129, at p.135. On the other hand, there is no virtue in ignoring established institutions and the practice and 'work habits' of the courts and trying to reinvent the wheel. Courts throughout the country have recognized that the Charter was not enacted in a vacuum.
>
> The rights guaranteed under the Charter are varied. As a result, their enforcement will, to some extent, be similarly varied. In determining from which court remedies may be sought and the procedure to be followed we should strive to achieve uniformity but must accept that there will, of necessity, be some variation, if not always as a matter of law, at least in practice.
>
> Some violations of Charter rights and their remedies are in no way related to a court process. Following a violation, the person aggrieved goes to court to seek a remedy. That person goes to the court which is able to grant the remedy sought. That court is the court of competent jurisdiction, the court which is competent to grant the remedy. If, to give an example, the remedy is in the nature of damages, then, dependent upon the amount sought, the court of competent jurisdiction could be the Supreme Court of a province, the County Court, the Provincial Court, or even the Small Claims Court. If one seeks injunctive relief, one is then precluded from going to the lower courts, and must go to the superior courts. The remedy sought determines which is the court of competent jurisdiction."

Mr. Justice Lamer reviewed the position of judges presiding at a preliminary inquiry and contrasted that to the position of the trial court. He states his opinion at p.42 as follows:

> "For those reasons, and to summarize, I am of the view that:
>
> a court of competent jurisdiction in an extant case is a court that has jurisdiction over the person and the subject matter and has, under the criminal or penal law, jurisdiction to grant the remedy;
>
> as a general rule, the court of competent jurisdiction is the trial court; and
>
> a judge presiding at a preliminary inquiry is a court of competent jurisdiction to determine whether there has been a violation, but only if the order sought is the exclusion of evidence under s.24(2).
>
> For some this would suffice. The trial court would, without exception (for others subject to the exception I am proposing), be the sole court of competent jurisdiction. This view, at first blush, has a certain appeal. It is simple and straight forward, free of a number of cumbersome problems which might otherwise arise. It introduces no additional delays, follows the usual appeal process and avoids any potential jurisdictional conflicts.
>
> Yet what it gains in simplicity it loses in effectiveness. For such a system would not permit early or immediate access to a remedy when such is clearly needed, e.g., under s.11(e), the right not to be denied reasonable bail, or when delay itself is a perpetuation of the Charter violation, e.g., under s.11(b), the right to be tried within a reasonable time. In such instances, denial of early access to a remedy is, in effect, denial of the 'appropriate and just [remedy] in the circumstances'. Denial of early access in such cases must not be countenanced; it would elevate simplicity of procedure above effectiveness of remedy. Simplicity must yield to the greater need for ensuring prompt access to a just, appropriate and effective remedy.
>
> For these reasons, I have come to the conclusion that the preferable, alas somewhat more complex, alternate solution to this problem is to acknowledge:

(1) pre-trial motions to the trial court, and

(2) original concurrent jurisdiction in the superior court, in cases extant before lower courts.

PRE-TRIAL MOTIONS

As soon as the trial court is determined, in cases where a preliminary inquiry is not to be held and, if one is to be held, as of committal, an accused, alleging before the date set for trial that a s.11(b) violation has already occurred, must be given access to a judge of the court where his trial will be held, for the purpose of determining whether such a violation has occurred.

This can be done by a system of pre-trial hearings. This could also be achieved through administrative measures whereby the trial date would be advanced and trials commenced earlier than expected, at least for the limited purpose of making that urgent ruling. That is as much as we should say on the matter. These questions are best dealt with locally. What this court should limit itself to saying is that trial courts should be in some way ready to grant the remedy for a s.11(b) violation as soon as an accused is entitled thereto and is within the jurisdiction of the trial court."

On the same subject, Mr. Justice McIntyre said at p.20:

"**Pre-trial motions**

There will be occasions when it will be advisable to move for relief under s.24(1) of the Charter before trial. In my view, however, it is by no means necessary to erect a new procedural scheme for this purpose. The pre-trial motion and its near relative, the preliminary motion or preliminary objection, are well known in the law and may be employed in seeking s. 24(1) relief once an indictment has been preferred. Pre-trial motions may be made to quash the indictment for defect in substance or in form (s. 510 of the Criminal Code), to sever counts in an indictment (s. 520(3) of the Code),

> for particulars of the indictment (s. 516 of the Code), and to sever trials of co-accused (s. 520(3) of the Code). The general practice of the courts has been to encourage such applications to be brought early so that preliminary matters may be disposed of at the outset, particularly when they are of such nature that they may affect the validity of the proceedings. This principle has been given statutory recognition in s. 529 of the Code, which provides in subs. (1) that an objection to a count of an indictment for a defect apparent on its face shall be taken by a motion to quash before plea and thereafter only by leave of the court. A similar provision relating to summary conviction matters was found in s. 732 of the Code. This subject is conveniently dealt with in Salhany, Canadian Criminal Procedure, 4th ed. (1984), at pp. 209-10. In my view, no great difficulty will be encountered in including in the legal armoury a pre-trial motion for s. 24(1) Charter relief, subject to the existing practice for other motions. It may be that occasions will arise where a trial judge may find it necessary in dealing with a s. 24(1) application to receive viva voce evidence on the question raised to enable him to dispose of the application. In my view, it would be within the discretionary power of a trial judge to follow this practice where, in his view, it was necessary. For the purpose of a pre-trial motion for s. 24(1) relief, the claimant may institute his motion at any time before plea and at any time after he has received or become entitled to receive the indictment or information. Where a court has not been ascertained for trial by committal, election, summons, preferment or arraignment, the application could be made to the superior court for prerogative relief."
> (Emphasis added)

"Constant complete and concurrent jurisdiction in the superior court", concluded Mr. Justice Lamer, was favoured for practical purposes. A compelling reason for this approval "...is to give a person awaiting or during a preliminary inquiry, whose trial court is not therefore within reach, a court able to grant remedy". That is, recourse to the superior courts in such instances give a more immediate remedy, than to the trial court. While such concurrent jurisdiction appears necessary, a clear preference for trial court jurisdiction was expressed in the following terms at p. 45:

"PREFERENCE FOR TRIAL COURT JURISDICTION

In recognizing both original and supervisory jurisdictions in superior courts with respect to s.24(1) and appropriate in the circumstances.

At the same time, however, superior courts will rarely be the only competent court. As a general rule it is the trial court that is not only competent **but to be preferred in matters arising under the Charter.** Viewed in this light, an unrestrained exercise of this jurisdiction by superior court judges is undesirable, in that it could only give way to unnecessary delay or disruption of proceedings.

For these reasons it is necessary that superior courts have a discretion to decline jurisdiction where there is a trial court and that court is competent to award just and appropriate relief. In this way it can be assured that the jurisdiction of superior courts will be invoked only where there is a need for such jurisdiction. The clearest, though not necessarily only, instances when there is a need for the exercise of such jurisdiction have already been suggested: when there is as yet no trial court within reach, and the timeliness of the remedy or the need to prevent a continuing violation of rights is shown; or when it is the process below which is itself alleged to be in violation of the Charter's guarantees, e.g., an allegation of bias in the court below.

Such a discretion is already well-established with respect to prerogative relief: **Harelkin v. Univ. of Regina**, [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 96 D.L.R. (3d) 1, 26 N.R. 364 [Sask.].

It has also been applied with respect to writs within the context of Charter litigation: **R. v. Kendall**, supra.

Such a discretion is also known to the common law with respect to original jurisdiction under the Charter: see, for example, **R. v. S.B.**, supra; **Re Krakowski and R.** (1983), 41 O.R. (2d) 321, 4 C.C.C. (3d) 188, 146 D.L.R. (3d) 760, 5 C.R.R. 16 (C.A.); **R. v. Kohler**, supra; **Pattyson v. B.C. (A.G.)**, supra.

Indeed, while acknowledging this concurrent jurisdiction, I share the views expressed in the aforementioned cases that when there is a court available to grant the just and appropriate remedy, or when the court below has been invited to adjudicate the matter

and has done so, the superior court should generally refrain from interfering and should let matters take their course through the normal appeal process.

....

Indeed, the residual jurisdiction of superior courts ensures that they have such a discretion, and by virtue of s. 24(1) they may and should decline jursidiction where, in the opinion of the superior court, it is the trial court that is best able to assess and grant that remedy which is 'just and appropriate'. Such instances have already been indicated.

The burden should therefore be upon a claimant under the Charter to establish to the court's satisfaction that the case is an appropriate one for the superior court's immediate consideration. When there are proceedings pending or under way in the lower courts, and in the absence of any evidence as to why jurisdiction should be assumed under s. 24, the superior court should generally decline to exercise its jurisdiction."
(Emphasis added)

In **Rahey v. R.** (1987), 57 C.R. 289, the Supreme Court of Canada again addressed the question of whether the Provincial trial court was the appropriate forum for an application for stay of proceedings in a case involving a delay occasioned solely by the court and over the objections of both crown and accused. The Court allowed the application for stay and ruled, **inter alia**, that Glube, C.J.T.D., was correct in her assessment as follows:

"...I find this is not an appropriate application to be heard by the provincial court, which obviously had jurisdiction. I agree that, generally, it is preferable for such applications to be made to the court hearing the matter but on the facts and circumstances of this case, I find that this is a case of unusual or special circumstances, because of the delay in rendering the decision on the directed verdict, and it is appropriately before 'the Supreme Court of Nova Scotia'. I find this Court has jurisdiction."

In commenting on that decision, Lamer, J., (as he then was) said:

"JURISDICTION ON A S. 24(1) APPLICATION

As was decided in **Mills v. R.**, supra, a court of competent jurisdiction for the purposes of s. 24(1) in an extant case is, as a general rule, the trial court. It is the judge sitting at trial who would have jurisdiction over the person and the subect matter and would have jurisdiction to grant the necessary remedy. In **Mills**, it was also decided that the superior courts should have 'constant, complete and concurrent jurisdiction' for s.24 (1) applications. But it was therein emphasized that the superior courts should decline to exercise this discretionary jurisdiction unless, in the opinion of the superior court and given the nature of the violation or any other circumstance, it is more suited than the trial court to assess and grant the remedy that is just and appropriate. The clearest, though not necessarily the only, instances where there is a need for the exercise of such jurisdiction are those where there is as yet no trial court within reach and the timeliness of the remedy or the need to prevent a continuing violation of rights is shown, and those where it is the process below itself which is alleged to be in violation of the Charter's guarantees. The burden should be upon the claimant, in this case Mr. Rahey, to establish that the application is an appropriate one for the superior court's consideration.

The present appeal provides a perfect example of a situation where, although the trial court is a court of competent jurisdiction for the purpose of a s. 24(1) application, it would obviously be preferable that the matter be dealt with by the superior court. The delay in trying the appellant which is being challenged as unreasonable is the result of the trial judge's inaction for 11 months while deliberating on a motion for a directed verdict. It is the presiding judge who is alleged to be the cause of a violation of the appellant's rights under s. 11(b).

Thus Glube C.J.T.D. had jurisdiction to hear the s.24 (1) application that was presented before her, and she was obviously right in choosing to exercise her jurisdiction instead of leaving matters to the trial judge. In passing might I say that her decision to exercise her jurisdiction is not a matter that should

be reviewed on appeal unless that decision was arrived at in a manner and for reasons which traditionally have attracted interference on the part of appeal courts."

Mr. Justice Rogers of the Court examined this subject in **R. v. Latter** (1988), S.C.N.S. S.H. No. 63127. In relation to the question of appropriateness of jurisdiction on the facts of that case, Justice Rogers said:

" In my view, there are two sets of special circumstances in this case to warrant the assumption of jurisidction by this court in preference to the provincial court continuing to exercise its jurisidiction.

One, the obviously crowded docket facing the court on March 11th, 1987, and June 8th, 1987, necessitated the trial date to be set first to August 3rd, 1987, (almost five months away) and then, when it was discovered that a mistake had been made with respect to the August 3rd, 1987 date, to December 14th, 1987 (six months from the June setting down day).

In my opinion, a system that can only provide a trial date five to six months in the future, for what would appear to be a straightforward and routine shoplifting case, requiring at the most two hours to try, is flawed and bespeaks a failure on the part of the authorities to provide adequate facilities and personnel to deal with the cases, at least before this particular provincial court, so as to make it possible for an accused to be tried within a reasonable time, in accordance with S.11(b) of the Charter. It would be unrealistic to think that a provincial court judge would view such systemic delays in his court with complete detachment and impartiality when confronted with an application for a stay of proceedings on the ground of unreasonable delay under the Charter due to such a clogging of the system.

This superior court would, in the circumstances, provide, in my opinion, a more appropriate forum for determination of the issues raised in this case.

It would be better too, and more importantly appear better, that another court, one with the supervisory

role of the Supreme Court, Trial Division, deal with an application for a stay of proceedings, because of unreasonable delay where the court and judge involved are integral parts of the system causing the delay.

A second set of circumstances which, in my opinion, warrants the assumption by this court of jurisdiction to hear this application for a stay of proceedings is the handling of this matter before him on December 14th, 1987, by Judge Atton. What Judge Atton did at that time only further compounded the delay which had already occurred, the fault for which cannot be laid at the door of the system. He viewed the December 14th application in such a way as to impair his ability to look upon an adjourned application to stay with complete dispassion. He failed or refused to entertain a motion of defense counsel that unreasonable delay had already occurred, on the basis that neither he nor Crown counsel had sufficient notice of the motion, and he adjourned the matter for a further two months, declaring at the same time that when the matter was finally considered by him, he would not take into account the additional two month delay, because it had been 'instigated' by the defense.

To have treated the defense motion in such a manner, after four day's notice in fact had been given was wrong. There is no requirement or duty upon an accused to give notice of motions he intends to make at trial. Certainly, given the lapse of time since the accused was charged, both the court and the Crown should have anticipated a motion for a stay of proceedings on the ground of unreasonable delay, in any event. The treatment of the motion by the judge displayed a disposition ill prepared to deal appropriately with it when it is to come before the court again on February 23rd. There is no reason why the judge could not have dealt with the motion on December 14th, giving the Crown time to rebut the defense brief, if necessary, and reserving judgment on the point, if necessary.

In short, the circumstances existed on December 14th, 1987, and still exist, making it more suitable for this court to assume jurisdiction in the matter and assess the defense motion to stay the proceedings, on the ground of unreasonable delay, and to grant a just and appropriate remedy, if a breach of S.11(b) of the Charter is found."

The matter of appropriateness of the Supreme Court assuming jurisdiction was again considered in the Appeal Division of this Court in **R. v. T.S.N.**, 94 N.S.R. (2d) 137. In this case Mr. Justice Pace considered the matter as follows:

> "[4] The Crown advanced two grounds of appeal which are as follows:
>
> > '1. That the learned Supreme Court Judge erred in law in hearing an application for a stay of proceedings before the trial court (Youth Court) made a determination on the issue of a stay of proceedings.'
> >
> > ....
>
> [5] Although the Crown both in its factum and its submissions before us concentrated the argument almost exclusively on the second ground of appeal, I think it only fitting to state that, in my opinion, the youth court was a court of competent jurisdiction to decide the issue and to grant a stay of proceedings if the appropriate grounds were proven to the court's satisfaction. See: **R. v. Jewitt**, [1985] 2 S.C.R. 128; 61 N.R. 159; [1985] 6 W.W.R. 127; 20 D.L.R.(4th) 651; 21 C.C.C.(3d) 7; 47 C.R.(3d) 193; **R. v. Mills**, [1986] 1 S.C.R. 863; 67 N.R.241; 16 O.A.C. 81; 52 C.R.(3d) 1; 29 D.L.R.(4th) 161; 26 C.C.C.(3d) 481; **R. v. Rahey**, [1987] 1 S.C.R. 588; 75 N.R. 81; 78 N.S.R.(2d) 183; 193 A.P.R. 183; 33 C.C.C.(3d) 289; 57 C.R.(3d) 289.
>
> [6] Where the trial court, as in this case, fails or refused to exercise its jurisdiction to hear and determine an application under s.11(b) of the **Charter**, the superior court has jurisdiction to make the determination and to grant such remedy as it considers appropriate and just under the provisions of s.24(1) of the **Charter**, (**R. v. Rahey**, supra.)"

There is no suggestion before me that the trial court here has failed or refused to hear an application under s.11(b) of the **Charter**.

In the instant case the applicant has relied extensively on **R. v. Askov** (October 18, 1990, unreported S.C.C.)

on the question of length of delay and resulting prejudice to the applicant contrary to s.11(b) of the **Charter**. In that case the application for stay of proceedings was heard by the District Court of the District of Peel, Ontario, the trial court. The question of appropriateness of the superior court's jurisdiction, accordingly, did not arise.

I have reviewed the transcripts of the appearances in this matter. It is clear that the identity of the trial court for this matter was established. Access may have been had by the applicant to the Provincial Court, either by way of preliminary motion or at the trial, without incurring delay. It seems clear that in such a case as this, absent other possible overriding considerations, access should be had to the trial court. It has the requisite jurisdiction; it is the most convenient; in considering that this application was taken on November 22, 1990, when the trial date had been set for November 26 since June 28, 1990, it was the speediest course of action then available. In the words of Chief Justice Lamer, in instances such as this, "...superior courts will rarely be the only competent court. As a general rule it is the trial court that is not only competent but to be preferred in matters arising under the Charter." In fact, it appears that this application has merely compounded the problem by creating additional delay.

There are exceptions to this general rule. Such exceptions as have been noted by Chief Justice Lamer, do not appear to apply herein; that is, a trial court was within reach, a motion could have been made to the trial court in a more timely fashion to this court, the instant application was not needed to prevent a continuing violation of rights and there has been no allegation of bias in the court below. Indeed, with regard to the latter point, the opposite appears to have been true in that the trial court clearly did its utmost to accommodate

the applicant and counsel. Such position adopted by the trial court is to be contrasted sharply with that confronted by Mr. Justice Rogers in **R. v. Latter** (supra).

In view of the law, as I perceive it to be, concerning the appropriateness of this Court's assuming jurisdiction herein, I decline jurisdiction in this matter.

That is not to say or to imply that I have reached a negative conclusion on the second question posed by this application. It is my opinion that it would be entirely inappropriate for me to express any opinion on that question. That is for the trial judge to determine when he hears the application or motion at the trial or at such earlier time as may be arranged.

I accordingly dismiss the application, with costs if requested by the Crown. I will hear the parties, if so requested, in the matter of costs.

J.

Halifax, Nova Scotia.
January 14, 1991