

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Kennedy 2010 NSPC 8

Date: January 18, 2010

Docket: 1848740, 1848741, 1848742
1848743, 1848744, 1848745

Registry: Sydney

Between:

Her Majesty the Queen

v.

James Kennedy

Judge:

The Honorable Judge Jamie S. Campbell

Decision:

January 18, 2010

Charge:

Section 78 of the Fisheries Act

Counsel:

Gerald Grant, counsel for the crown
Ralph Ripley, counsel for the defendant

Introduction

1) On December 6, 2007, James Kennedy was charged with failing to ensure that the Vessel Monitoring System on his fishing boat was operational. The offense is under ss. 22(7) of the Fishery (General) Regulations, SOR/93-186. The case is not the stuff of compelling legal drama.

2) Two years have gone by since the charges were laid and the trial has not yet been heard. It is now unlikely that the matter will be set for a trial within at least the next six months. Mr. Kennedy has made an application to have the charges stayed because his right to a trial within a reasonable time has been breached.

The Forest Not the Trees:

3) The issue to be decided is whether the proper balancing of interests requires that the charges be stayed. The interests are those of society in the prosecution of the case and the those of the accused of having a trial within a reasonable period of time.

4) The Supreme Court of Canada, in *R. v. Morin* (1992), 71 C.C.C. (3d) 1, set out a number of factors to be considered:

- (1) the length of delay
- (2) waiver of time periods
- (3) the reasons for the delay including,
 - (a) inherent time requirements
 - (b) actions of the accused
 - (c) actions of the Crown
 - (d) limitations on institutional resources, and
- (4) prejudice to the accused.

5) A list of factors can come to be interpreted as a precisely and mechanically applied algorithm rather than a guide. The big picture is the balancing of the interests. The focus on the calculation of periods of delay and reasons for them, can shift the focus away from that big picture concern. Justice Cromwell, in *R. v. Godin*, [2009] S.C.J. No. 26, emphasized the importance of maintaining the focus on that balancing of interests.

“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 delays occurred. It is important, however, not to lose sight of the forest for the trees, while engaged 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 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.”

6) The application of the factors does not produce the answer. The factors serve as a way to make sure that the situation is viewed having regard to a number of considerations or perspectives.

7) This matter has already been ongoing for two years. Enough time has elapsed from the charge to the date of application to justify closer scrutiny.

Process to Date:

8) There is no dispute with regard to the chronology of events. The charge was laid on December 6, 2007. Mr. Kennedy was in court with his counsel on January 23, 2008 to enter a plea of not guilty. Trial dates were fixed for the 19th and 20th of

November, 2008. To that point nothing had taken place that was in any way out of the normal course. The trial dates selected were, though some months distant, the next available time slot. Neither counsel was unavailable for any other dates put forward.

9) On November 19, 2008 the trial was set to begin. The Crown brought forward a document that it sought to have admitted in evidence despite not having given notice under the *Canada Evidence Act*. Mr. Ripley, as Mr. Kennedy's counsel objected. A voir dire was held, on the dates set for the trial and a decision on that voir dire was rendered on December 10, 2008.

10) On that date, new trial dates were set for the 2nd and 3rd of September 2009.

11) On August 19, 2009 Mr. Ripley filed this application. The Crown was not in a position to respond to the application using the dates for trial just about two weeks later. The matter was then set down for argument on December 9, 2009.

Waiver:

12) Mr. Grant for the Crown has provided a helpful chart setting out the number of days that have elapsed at each stage of the process.

13) The largest block of time is the time between the initial appearance and the original trial date. That amounts to 301 days. The Crown asserts that Mr. Kennedy through his counsel Mr. Ripley waived that time by agreeing to the November date in the January 2008 appearance. Mr. Ripley on behalf of his client accepted the dates offered by the court. In doing so, without raising the issue, he is said to have consented to those dates and waived any right to complain later. The Crown has suggested that the manner in which those 301 days are characterized could well be dispositive of the case.

14) On Mr. Kennedy's behalf Mr. Ripley argues that he simply took the first available dates. When dates are given, counsel do not make it a practice to argue with the judge or the clerk for an early date.

15) Any waiver of a Charter right must be "clear and unequivocal ... with full knowledge of the rights the procedure was enacted to protect and of the effect the

waiver will have on those rights in the process.” *Korponoy v. A.-G. Canada* (1982), 65 C.C.C. (2d) 65 at p. 74., *R. v. Clarkson* , [1986] 1 S.C.R. 383

16) Waiver must be expressed in some manner. A trial judge must be satisfied that counsel understands the matter and has made an informed decision to waive.

Park v. The Queen (1981), 59 C.C.C. (2d) 385, at p.392-3.

17) So, the starting proposition is that a waiver must be clear, unequivocal and expressly made.

18) But, saying the words that one agrees to trial dates is more than silence. In *R. v. Smith*, [1989] 2 S.C.R. 1120 Sopinka J. stated at p. 109:

“Agreement by an accused to a future date will in most circumstances give rise to an inference that the accused waived his right to subsequently allege that an unreasonable delay has occurred. While silence cannot constitute waiver , agreeing to a future date for a trial or a preliminary inquiry would generally be characterized as more than silence. Therefore, absent other factors, waiver of the appellant’s 11(b) rights might be inferred based on the foregoing circumstances.”

19) Then again, not always. Waiver means that a person has options. If there were no options, there can be no waiver. Justice Sopinka in *R. v. Morin*, [1992] 1 S.C.R. 771 said at p. 790:

“As I stated in *Smith*, supra, which was adopted in *Askov*, supra, consent to a trial date can give rise to an inference of waiver. This will not be so if consent to a date amounts to mere acquiescence in the inevitable.”

20) But yet again, not always.

“Acquiescence to dates and to adjournments cannot always be construed as simple resignation to the inevitable. In some instances, the acceptance of a trial date more than eight months away may indicate a recognition by counsel that such a time lapse, in all the circumstances is not unreasonable.” *R. v. Bennett* (1991), 3 O.R. (3d) 193, 64 C.C.C. (3d) 449 (C.A.), aff’d [1992] 2 S.C.R. 168

21) There should be some evidence that agreement to suggested dates is to be characterized as acquiescence in the inevitable. *R. v. Nuosci*, [1993] 4 S.C.R. 283, p. 284, *R. v. Brassard*, [1994] 4 S.C.R. 287, *R. v. Stewart* [2000] B.C.J. No. 1333 (C.A.)

22) In summary, waiver must be clear and unequivocal. But, it may be inferred from an agreement to trial dates. But it cannot be inferred if the agreement is merely an acquiescence in the inevitable. But, unless there is evidence that the agreement was a mere acquiescence in the inevitable it will not be found to be so.

23) Provincial Courts tend to be busy places. Scheduling issues require the balancing of a variety of issues every day. Trials are often double booked and sometimes triple booked in an effort to play the odds that some will not proceed. If that were not done, the backlog of cases awaiting trial would grow significantly. Individuals in custody must be given priority so that sometimes scheduled trials are bumped to accommodate bail hearings. Sometimes trials are bumped to allow the trial of a person in custody. People arriving for trials on a set date and time may find themselves waiting while sentencing hearings in other matters are completed. People are frustrated when they attend for trials that are adjourned when a subpoenaed witness fails to show up.

24) Dates for trial are often not set in an atmosphere of serene and dignified quiet but most often in a full arraignment court where many others may be awaiting their turn or sometimes even waiting for a seat.

25) Dates for trial are offered by the clerk or the judge based on the available dates in that courtroom. Lawyers who attend more or less regularly are aware of the lead times generally available for trials in that courtroom.

26) Mr. Ripley would know, as would Crown counsel, that a request for an earlier date on a matter such as this one would have almost certainly not have been accommodated. The accused was not in custody and not even facing criminal charges. The date given was within the range of when trial dates were being offered in the courtroom at that time. There is no direct evidence before me as to that, but to fail to take note of it would require a wilful lack of awareness as to the court's own process and procedures. Granting an early trial date for someone accused of not having an operational Vessel Monitoring System, under the Fishery (General) Regulations, would be unlikely to happen in any Provincial Court.

27) Requiring counsel to utter what would amount to meaningless words or pro forma objections in order to avoid the inference of waiver would add nothing of value to the process.

28) If the date set were somehow outside the range of what would normally be expected in that courtroom at that time, the acceptance of that date could well result in the inference of waiver. If counsel presented the court with a proposed date, that too, in the absence of other evidence, might lead to the inference of waiver. If earlier dates were offered and refused that too might found the inference.

29) Mr. Ripley, on his client's behalf, did not, by accepting the dates as offered, waive the right to argue that the time from plea to trial was either unreasonably long or would eventually become part of a longer delay that was, in total, unreasonable.

Voir dire:

30) The matter was set for trial on the 19th and 20th of November 2008. On the day before the trial, while preparing a witness, the Crown counsel received a document that he wished to have admitted into evidence. There was not sufficient time for notice to be given to have the document admitted under the business records provisions of the *Canada Evidence Act*. A voir dire was held to determine whether the document could be admitted in any event. The days for trial were consumed with the voir dire.

31) The Crown asserts that the voir dire was part of the inherent time requirements of the case. Those requirements will normally include intake requirements that are common to most cases, such as retention of counsel, police and administrative paperwork, disclosure requirements and case preparation.

32) The document that gave rise to the voir dire was received the day before the trial from Nicole Bourgeois, of JouBeh technologies. The evidence of Fisheries Officer Donald Horne was that he had spoken with Ms. Bourgeois by telephone as part of the preparation of the case but had not met with her to conduct a formal interview. When the document was provided, it was disclosed in a witness preparation interview on the day before the trial. It is difficult to characterize this as anything other than late disclosure and counsel appeared to agree, at the time to that characterization of the matter.

33) Given that the trial in this matter was set 301 days after the plea was entered, the Crown would have had more than ample time to have interviewed in a full way, each witness and obtained any and all relevant documents from those witnesses. The delay arising from the loss of the trial dates in November 2008 cannot be considered inherent delay and should be attributable to the actions of the agents of the Crown entrusted with the investigation of the matter.

34) Had Mr. Ripley wished to play for a delay, he would have been justified in requesting an adjournment to address the legal issue raised. Instead, he offered to return the following day, November 20, 2008 to complete the voir dire.

Charter Application:

35) The decision on the voir dire was rendered on December 10, 2008. At that time trial dates were set for the 2nd and 3rd of September 2009, almost 9 months away. At that point Mr. Ripley asked specifically whether earlier dates were available. Give that almost two years would have passed from the charge to the potential trial dates that is not surprising. Also not surprising, to anyone probably including Mr. Ripley, was the fact that he was told that there were no earlier dates.

36) Mr. Ripley filed this application on August 19, 2009. The matter was back before the court on the scheduled trial date. At that time the Crown requested an adjournment to be able to respond to the application, which had been received not quite two weeks before. That adjournment was granted. Counsel are aware that Charter applications are not handled in a summary fashion. Briefs are filed and often, in cases of this kind, transcripts are prepared. While the filing of the Charter notice was not outside any established time requirements it was at best, “just in

time” filing.

37) Mr. Ripley was available to have the matter dealt with on October 6, 2009. Mr. Grant for the Crown was not confident that the date would give enough time for the preparation of the transcript.

38) The Charter application itself was made at the last possible time. That meant that the application could not be heard in September of 2009 and had to be set over until December 2009. That delay is not attributable to the Crown.

Summary:

39) The consideration of the reasons for delay does not involve the apportioning of blame. It is simply a recognition that the actions of parties can cause a proceeding to be delayed. If an accused person causes the delay, he or she cannot later complain that the matter took too long to be heard.

40) The causes for delay do not form water tight compartments. The considerations are more subtle than that. Delays may be caused by a combination of factors that may result from the actions of both parties to different degrees. The

delay in setting down the matter cannot be attributed to the accused. Only some portion of that delay can be attributed to the inherent time requirements of the case. The delay resulting from the late disclosure which pushed the trial dates out into September of 2009 are clearly attributable to the actions of the Crown. The delay resulting from the just in time filing of the Charter application is to some extent the result of the actions of both parties.

41) In most simple terms, the time set for the original trial was distant. Because of that it was incumbent on the Crown to be ready to proceed. It's failure to have the matter fully ready on the date set for trial meant another lengthy delay. Those two delays combined take this matter out of the range of what might otherwise be expected.

Prejudice:

42) In order for the application to succeed the accused must show prejudice arising from the delay.

43) In *R. v. Godin* (supra), Justice Cromwell confirmed the court's view, in *R. v. Morin* (supra), that prejudice in this context must be considered in light of the

three interests protected by s. 11(b). The liberty interest involves a consideration of pre-trial custody or release conditions. Obviously those considerations would weigh heavily. The interest in security of the person involves being free from the “stress and cloud of suspicion that accompanies a criminal charge.” **Godin** (supra), para. 31. The right to make full answer and defence involves the consideration of the prejudice to the ability of the accused person to lead evidence, cross examine witnesses or to raise other defences.

44) Justice Cromwell noted that the issue of prejudice cannot be considered separately from the length of the delay. Prejudice can be inferred from the length of the delay and the longer the delay, the more likely that inference is to be drawn.

45) The careful and methodical analysis of the delays, and the assessment of which party caused them, followed then by the consideration of prejudice and the evidence of that prejudice provides a neat linear logical model. The Supreme Court of Canada appears to be suggesting that the analysis should not be quite so linear. If the various factors are kept and considered in sealed compartments without consideration to how they relate to each other, the linear model can lose sight of that big picture. Prejudice relates to the length of delay and the extent of evidence required to show prejudice relates to the length and reasons for the delay.

46) If the delay has been very long, evidence of actual prejudice may not be required to the same extent as if the delay were less remarkable. The reasons for the delay may also be such that the requirement for actual prejudice may be reduced. Time, reasons and prejudice are not kept in hermetically sealed conceptual compartments.

47) In *R. v. Godin* (supra) the case was delayed for 30 months. Virtually all of that delay was attributable to the Crown and was largely unexplained. Critical evidence was disclosed nine months after the tests that produced it. The accused person requested earlier dates and was ignored. The matter was set for a preliminary inquiry which did not proceed. The accused was subject to fairly strict bail conditions for more than two years. There was evidence that the ability to cross-examine witnesses had been diminished with the passage of time. Those factors were all considered.

48) In this case, the length of delay, the causes of that delay, the nature of the charges and evidence of actual prejudice should be considered. They should be considered not individually but considered as part of the balancing of interests.

49) Mr. Kennedy has filed a statutory declaration setting out that the outstanding

charges in this matter have caused him a “great deal of embarrassment” in his business dealings. He values his reputation.

50) Mr. Kennedy has also noted that the passage of time has affected his ability to present his defence. Steps have been taken to find one particular witness, to no avail.

51) There is evidence of some prejudice. It is not substantial however. Mr. Kennedy is not subject to any conditions with respect to his liberty. There are no bail conditions that impact upon him in any way. He is not required to operate under any commercial restrictions.

52) The stigma that might attach to his having charges outstanding against him would not be great given the nature of the charges. The charge might indeed cause people to inquire as to when the matter will be finally be resolved. It would hardly be seen as placing some kind of provisional blemish on his character. People almost certainly do not cross the street to avoid contact with James Kennedy because he is accused of not having an operational Vessel Monitoring System.

53) There may be some impact on the ability to present a defence. The

difficulties in locating a witness however, may or may not relate directly to the delay. There is no evidence to suggest that if the matter had proceeded to trial promptly this witness would have been any more available or traceable than he is now.

Conclusion:

54) The length of time that has gone by is substantial. It warrants a review.

55) There has been no wilful delay or frivolous action or inaction on the part of the Crown. The entering of a plea has not been delayed by repeated disclosure delays on the part of the Crown for example. Had that been the case, that would have to be considered.

56) There are no delays in this case for which no real explanation has been put forward. There have not been a series of court appearances in which nothing has happened. This is not a case where time has been taken up with the “churn” of repeated court appearances.

57) The delay here has been caused, for the most part, by three things. The first,

is the institutional delay. That meant a 301 day time from plea to first scheduled trial date. All of that time is not institutional delay. Institutional delay is the responsibility of the Crown. Had the trial gone ahead on the first date set, there would have been no application.

58) The second is the failure of the Crown to be able to present its case on the first day set for trial. The Crown's application on the first day scheduled for the trial resulted in a delay not only of a few weeks or months but resulted in the case being set over for one month for decision, then for a further nine months for trial.

59) That one action had, to some extent, disproportionate consequences in terms of timing. Any delay turns out to be a long one.

60) The third is the filing of the Charter notice just before the rescheduled trial dates. Had that filing been earlier, the dates for trial could have been used for the Charter application instead of having those dates "lost".

61) This is not a case however where a series of actions on the part of the Crown have built a record of delay.

62) The societal interest in prosecuting a regulatory matter of this kind is not as great as the interest in prosecuting serious criminal charges.

63) At the same time, the implications for the person who stands charged are not as serious either. Mr. Kennedy is not subject to restrictions on his liberty nor does he wait in fear of a potential period of incarceration. The prejudice arising from the delay to Mr. Kennedy's liberty and security rights is not substantial. The prejudice to his ability to mount a defence is perhaps more significant but is still not substantial.

64) Prejudice may be inferred from the length of the delay and the circumstances that gave rise to it. Prejudice need not be so clearly shown if other circumstances are present that affect the balance. Neither the length of the delay nor the reasons for that delay are such further significant prejudice should be inferred.

65) Staying a charge is a statement that the process in a particular case has gone so wrong that the merits of the case should not be tried. While there are grounds for concern with respect to this delay, this is not a case in which the process concerns can justify a decision to stay the charges.

