

IN THE ONTARIO COURT (PROVINCIAL DIVISION)

HER MAJESTY THE QUEEN

VS

JAMES HENRY WOOD

PROCEEDINGS AT MOTION TO STAY

heard before The Honourable Judge M. Omatsu, on April 21, 1998 at Toronto, Ontario

APPEARANCES:

J. CRAWFORD, MS.

COUNSEL FOR CROWN

C. MARTIN, Q.C.

COUNSEL FOR DEFENCE

This transcript is certified only if the Reporter's original signature (not a photocopy) appears on the final page.

College Park
502 Court 10:00 a.m.

MS. CRAWFORD: Good morning, Your Honour. It is Crawford, initial "J", appearing on behalf of the provincial Crown. Your Honour will recall the last date, Ms. Delgado was here from our office. The case has been passed along to myself as she is not available.

THE COURT: Okay.

MS. CRAWFORD: I understand on the last occasion, Mr. Wood was arraigned and there was the beginnings of a stay application which was adjourned to this date to get the applicable transcripts which I understand we now have.

THE COURT: Okay.

MS. CRAWFORD: So, I would, at this point, be suggesting that Mr. Martin commence with his submissions with regards to stay application. The only thing I would like to do before that is I do have a book of authorities for Your Honour and I have given my friend a copy of it. There is about five cases in it on the stay application which I will hand up. I apologize I didn't get it to you before today.

THE COURT: Have you had an opportunity to take a look at the transcripts?

THE COURT: I have, yes, Your Honour. THE COURT: Okay.

MS. CRAWFORD: I had Mr...

THE COURT: On the previous date, Mr. Martin's position was that all of the delay was institutional and so we

had the transcripts prepared and I just wondered if you have any argument about that?

MS. CRAWFORD: About all the delay being institutional?

THE COURT: Yes.

MS. CRAWFORD: I have a few submissions to make on it but I think the transcript speaks for itself.

THE COURT: Yes, well, I having just gotten it one second ago, I thought rather than having Mr. Martin go through each date, it would be quicker if you had already gone through it, if you would just tell the Court which ones you think are not institutional and then we could come down to a kind of number figure.

MS. CRAWFORD: Okay.

THE COURT: Because he was attributing, as I understand it, was it over 19 months to institutional delay?

MS. CRAWFORD: I think it was 16 months to institutional delay.

MR. MARTIN: It was 19.

MS. CRAWFORD: Was it 19? THE COURT: M'hmm.

MS. CRAWFORD: All right, there is--just let me get my copy.

THE COURT: Or, another way to approach it is that we just take a break, I read the cases and I will read the transcripts, or we can just sit here and you can go through it.

MS. CRAWFORD: I am in Your Honour's hands. Whatever you prefer, I am happy...

THE COURT: How do you want to go, Mr. Martin?

MR. MARTIN: Well, it won't take long to flick through it, Your Honour. They are only short transcripts, I think, about a page each.

THE COURT: I know but is there any way that you could just--if there is no issue about a date between the two of you, we could just say, "All right, X, you have got..."

MS. CRAWFORD: All right, well, perhaps I could try and go through it quickly for Your Honour and then my friend can assist as we go along. I should just indicate with regards to the case book, Your Honour, I don't think you are going to need to sit down and read the cases. They are all the leading Supreme Court of Canada cases which you are, likely, very familiar with.

MR. MARTIN: That is going to be going up to...

MS. CRAWFORD: So, perhaps if I could just have--could I have the transcripts? Just right here?

MR. MARTIN: Oh, I am sorry, yes. I will bring it back to you.

MS. CRAWFORD: Okay. There is an additional transcript that Mr. Martin gave me today. Does Your Honour have a copy of that?

THE COURT: Yes, thank you very much.

MR. MARTIN: I have just handed that to Your Honour and when I was reading the transcripts yesterday, I noticed that I had not put that in any of the material. It was a four-day adjournment to pick a trial date from the 8th to the 12th of January and so I didn't have the 12th of January and we just got it this morning.

THE COURT: Okay, thank you.

MS. CRAWFORD: So, if we start at the first tab, one-I will just go through them very quickly Your Honour, just to try and make it clear for the record. The first date is obviously...

THE COURT: Well, maybe Mr. Martin should then. I mean, it is his--I just wondered if it would save time, rather than Mr. Martin going through all 18 days, if you could just tell him which ones there is no issue about and then he can just deal with the ones where there is an issue but maybe...

MS. CRAWFORD: Well, I think--okay, this is probably simpler, I don't think there is any issue...

THE COURT: Maybe we should have Mr. Martin do his Motion and...

MS. CRAWFORD: There is no issue with regards to that the transcripts reveal that the delay, for the most part, was for the purpose of getting a pre-trial and disclosure and getting the case on the rails in that sense. There is one adjournment where, I believe it is September of 19--I will refer Your Honour to the tab when I locate it--at September, it is tab 12. September 10th, 1997, where the--it looks as though the matter is sent over to the--sorry, the 19th of November.

MR. MARTIN: It is the 14th of October.

MS. CRAWFORD: Sorry, Your Honour, the 14th of November.

MR. MARTIN: October.

MS. CRAWFORD: October, yes. I am just looking for the--just your brief indulgence, Your Honour. Yes, it is at tab 12 as I indicated before on September 10th. The only issue as far as institutional delay is that the Crown's position will be that disclosure is indicated on the record that it is available on the 10th and that counsel is not present on that set date and so it is remanded at counsel's request to the 14th to set a date. So, that the Crown's position will be that that disclosure could have been provided at that occasion. It was available and that there is about a month lag where disclosure isn't picked up and no further pre-trial is booked as is required, in my submission, because Counsel hadn't appeared on that date to get the disclosure. So, that is about the only one that would suggest is...

THE COURT: Okay, so that is one month. Do you have any issue in that regard?

MR. MARTIN: Yes, I couldn't come that day, so I sent my client with a letter saying we hadn't had disclosure yet and we needed a pre-trial. He got disclosure. My client got disclosure and gave it to me and then we made arrangements to have a pre-trial.

THE COURT: All right. So, just based on what was said last time and today, the position, and I take it, of the defence is it is 19 months institutional delay and the Crown is saying it is 18 months institutional delay?

MS. CRAWFORD: Well, I think 19 months institutional delay--it seems as though--I guess the position is that I can concede that, of all the adjournments, there is nothing on the part of Mr. Martin or Mr. Wood that would seem to have delayed this, i.e. there were no frivolous applications, there was no applications for a change of venue, none of those things which, as Your Honour knows, the case law sets out is a factor to consider. The delay is largely a product of the fact that the case, as Your Honour can probably tell, is rather complex and that disclosure, although initially given on--it indicates on the back of the Crown brief, it was prepared in January of 1997 and a first pre-trial was held in March of 1997. The difficulty was at that pre-trial, Mr. Martin posed a number of questions to the officer in charge and there was a number of adjournments for that information to be made available to Mr. Martin and when that information was ultimately given in September of 1997, then the case got back on the rails in the sense of setting another pre-trial and then, ultimately, judicial pre-trial which is required for a matter that is more than a day long and then the setting of the trial date. So, it is all institutional delay in the sense that it all--all of the adjournments are as a result of this simply process in the case, disclosure, court's space as far as setting a trial date three months away and whatnot. So, in that sense, I guess we are in agreement that it is institutional delay. So, perhaps I will let Mr. Martin make his submissions.

THE COURT: So, just before you make your submissions, please, is it agreed that the Crown's position is that there is 18 months institutional delay and the defence's position, it is 19 months institutional delay? Is that the position and then we will just hear submissions as to whether there is still any cause of prejudice to Mr. Wood?

MS. CRAWFORD: Well...

THE COURT: I don't mean to rush you and I am sorry and perhaps it is unfair to Mr. Martin not to have him go through each of the 20 tabs in the transcript and do you want to do that, sir?

MR. MARTIN: I think my friend was saying that my client and myself were blameless and that the whole thing was institutional delay. I think that is what my friend is saying.

THE COURT: Except for one month.

MR. MARTIN: Well, I am not even sure that she is saying that because we got the disclosure...

THE COURT: Okay, well, I asked the parties if this was the issue. Is it 18 or 19? I know you are saying 19, sir. Is the Crown's position 18 months or 19 months?

MS. CRAWFORD: I think, Your Honour, the Crown's position is going to be that that the entire amount of all 19 months is largely--is institutional. The only submission I will alert the court to will be that our position is that

there is no attempt in those 19 months to get this matter moved along by the defence and that that one month that I alerted the court to, in fact, was a situation where disclosure was ready and there was no attempt to pick it up when it was ready. He wasn't alerted that it was ready which is not his fault. He wasn't here but, I mean, I just don't want to be in a position where we are being, in essence, blamed for taking this long to give disclosure when my position will be that disclosure was ready on earlier dates and it wasn't picked up until later. But I agree that the 19 months is institutional as it is defined in the cases, if that helps.

THE COURT: Thank you very much. Okay.

MR. MARTIN: And I will say, with respect to that, that disclosure, in fact, was provided to my client that day. He gave it to me and I arranged for a pretrial at the earliest which turned out to be November the 5th and the brief with the transcripts in it, at the end of the brief, Your Honour, with respect to what my friend says about attempts made to expedite to get it, I have as exhibits to my client's further affidavit, the three faxes I sent; one at the beginning, one that is behind tab 19. I sent a fax as soon as I got the case asking for disclosure so we can get on with our pre-trial conference and I wasn't getting too much disclosure so--any disclosure--so on tab 20, on February the 4th, I sent another fax saying that I wanted disclosure. I got it shortly after that and we had our pre-trial and then more disclosure was required and it wasn't happening so on August the 12th, I sent another fax that is behind tab 21--August the 12th, saying that I had asked for disclosure twice and the Crown agreed to give me more disclosure and I hadn't got it yet and then I got it on--I got the disclosure on the September adjournment and I was able to get a pre-trial conference on November the 5th. And so that is me sending faxes. I sent three faxes with respect to this. Does Your Honour want me to start my submissions now?

THE COURT: Did you have anything that you wanted to say before the submissions will be started?

MS. CRAWFORD: No, I think, Your Honour, it would be helpful if Mr. Martin just starts. I don't think it is going to be a very long application. So, if we can just get into it and then we will get moving.

THE COURT: Okay, thank you, very much. Thank you?

MR. MARTIN: Well, Your Honour, in the first application record I had a chronology. So, the chronology indicates that up from the time of the charge to the time of the trial date, which I believe was March the 5th, the time expired was a little bit over 19 months. And, as my friend says, the number of adjournments while adjourning from month to month was to get the disclosure and when disclosure was got, you can see from the chronology that we had our pre-trial conferences.

THE COURT: Well, where is the chronology, please?

MR. MARTIN: The chronology is in the first application record binder, wire bound, and it has Exhibit A, the chronology, on page 8.

THE COURT: Did you give me two of these, or just one, of the wire bound?

MR. MARTIN: I think there was a case--there was a wire bound as well; the Morin case.

THE COURT: Yes, the Morin case.

MS. CRAWFORD: Perhaps, Your Honour, I made a photocopy, or I have an extra copy of this, so if--I will I hand it up. If you don't have it then you are welcome to use my copy. I will just get the other one.

THE COURT: Thank you, very much.

MR. MARTIN: There was a copy submitted at the last...

THE COURT: I am sure you did submit it, sir. It is probably in my office. Thank you.

MR. MARTIN: So, that is the chronology and...

MS. CRAWFORD: Sorry, if Counsel will just wait, I am just going to grab my copy.

MR. MARTIN: And I set it up in spreadsheet form so it calculates the number of months from the time of the charge, which is August the 15th, 1996.

THE COURT: One moment. The Crown is coming. Okay.

MR. MARTIN: So, we have the date of the alleged infractions on August the 15th, '96 and he came to court on August the 19th and I came into it and sent a fax before September the 23rd, as is in the other record and then we have a series of set dates and we have the date I received the first disclosure, 6.3 months after the charges and the pre-trial conference is shortly after that and then we have a delay while the further disclosure is not coming and, finally, on September the 10th, I received that disclosure and the pre-trial conference was November the 5th for that, so. And then it was decided since it was going to take at least a day or more, that we had to have a judicial pre-trial and that was set for January the 6th and we put the new set date over to January the 8th to deal with it and you can see from this chronology, I had forgotten about the January the 12th when I actually set the date for trial. That is the further transcript I filed this morning. You just got it this morning. The reporter was good enough to make it for us overnight when I realized I hadn't put it in. And so we have--but we have 19--a little over 19 months from the date of the charge to the date of the trial and at that time, Your Honour was good enough to grant an adjournment for production of the transcripts and, of course, I waived any further time after that because we are getting into ... So, what we have, in my submission, is a 19-month delay that was not caused by myself or Mr. Wood. It was caused by the normal process and the abnormal delay in disclosure. And, as I have pointed out, I sent faxes three times asking for disclosure and suggesting we needed disclosure to have first a pretrial and then a second pre-trial.

So, that my submissions have to do with the Morin case and the court does look at whether or not the accused or his counsel has waived any right to the blame for the delay and I am submitting that we have not. And in the Morin case, the institution--the delay that was supposed to be flagged was eight to 10 months. In that case, they took the outside of 10 months and there was a delay of 14 and a half months in that case, where it was not stayed. They talk about prejudice saying that you can impute prejudice and the Chief Justice says that even in the Morin case, prejudice should have been imputed.

THE COURT: Should have been prejudiced?

MR. MARTIN: Should have been imputed. But the thing about on page 41 of the Morin case, that failure to provide disclosure in a timely way is one of the institutional factors to take into consideration. And, if I might point out to Your Honour, other than imputing prejudice and behind tab 18, a further affidavit by Mr. Wood, my client, where he attached as exhibits the three faxes I sent, asking for disclosure. I had him go into the prejudice that, other than imputed prejudice that he feels he has undergone and that is in paragraph 2, where he had to go to court 17 times and lost time from work and used up holiday time. He feels he may not be able to adequately recall matters as to what the police might say about the condition of his premises at the time of his arrest on August 15th. The charges hanging over him have made him anxious and depressed. He feels his life has been put on hold since his arrest. His health has been affected. He had an angina attack two weeks ago. His hobby is gun collecting and shooting and since August of '96, he has been cut off from that hobby because of the bail conditions. He was told, I am not sure it was in the bail conditions, but he was told and accepted--told by the police and accepted, he couldn't leave Metro Toronto. So, he did not and, of course, there is prejudice because people are wondering why he is arrested and charged. So, there is basically, more prejudice in a case with this much a delay than just the imputed prejudice that is allowed by the Supreme Court of Canada in Morin. So, this case, I might say then, goes far beyond any time that I know of where, through no fault of the accused or his counsel, we haven't got to trial. The police have got to learn how to do disclosure faster if disclosure is going to be the problem. There is no reason why they couldn't have done disclosure faster but this--they have got to learn to do it faster because obviously one needs disclosure to have pretrial. Disclosure is a good idea. It is better than a preliminary hearing and I chose not to have a preliminary hearing because of the uses of the disclosure. So, those are my submissions. It has gone beyond the normal, far, far, beyond the normal delay and therefore, the case ought to be stayed. I might say that this is not a case involving moral turpitude or I would probably be one of the first to say, if someone murders somebody, you shouldn't pay as much attention to staying but this is not a moral turpitude case. This is a house cleaning case where there the police obviously feel that Mr. Wood is not storing his guns properly and breaches of those sections of the Code are not breaches of moral turpitude. Sections of the Code like murder, rape, robbery, theft, burglary, that sort of thing. So, those are my submissions, Your Honour.

THE COURT: Thank you, very much.

MS. CRAWFORD: Your Honour, again, as I indicating before, I apologize for not giving you the case book in advance but as I indicated all of the cases are the leading cases. There is nothing recent in here. It is the Supreme Court of Canada and one Ontario Court of Appeal decision which I have handed up to you. So, I will just through some of the principles as I make my submissions.

First of all, I think, Your Honour, at the outset we asked about the question of what the length of the delay was and it is agreed that it is 19 months from the time of arrest to the time of the first trial date. The only caution I would add is that the case law is quite clear that this is not, unlike what was initially the view after Askov was decided. It is not a situation where the courts are to apply a mathematical formula and say it is an excess of 10, therefore it is unreasonable, therefore there is a stay. It is a discretion that Your Honour has which is to look at the case, look at the circumstances and to make a decision whether or not it is reasonable in light of the case. Now, in Morin which is located at tab 3, and my friend also gave Your Honour a copy of it at page 20, the court makes it quite clear that that is not the situation. They state:

"...A number of considerations enter into the adoption of a guideline and its application by trial courts. A guideline is not intended to be applied in a purely mechanical fashion. It must lend itself and yield to other

factors. This premise enters into its formulation; the court must acknowledge that a guideline is not the result of any precise legal or scientific formula. It is the result of the exercise of a judicial discretion based on experience and taking into the account the evidence, the limitations on resources, the strain imposed on them, statistics from other comparable jurisdictions and the opinions of other courts and judges, as well as any expert opinion..."

This principle is set out throughout all the cases. I don't think, Your Honour, I need to go through each and every one of them but each of the cases I have handed to you makes reference to this principle which is very important, that ultimately, it is an issue of discretion. The difficulty was after Askov, as Your Honour knows, courts were saying to themselves, this is the range that the Supreme Court of Canada set out, is what is to be followed and anything in excess of that we will grant stays on and the court, since that decision has come around to say that is not what we intended. What we intended was to give a guideline but to recognize that the guidelines can be flexible and that that is a determination for the trier of fact to make, the presiding judge. In proof of this is evidence by the cases that have come out since Askov. For example, in the first case that is in the brief of authorities at tab 1, it is Regina vs Faulds, that is spelled F-a-u-l-d-s. Also, it is also indexed as Regina vs Tyler. That is located, for Madame Reporter, at 111 ccc. 3rd, page 39. In that case, the delay was 39 months to trial and the court said that they were not going to grant a stay for a number of reasons. First of all, at page 46 of that decision, the court looked at the complexity of the case and at the bottom of page 46, they note:

"...The Supreme Court in Morin supra recognized that the inherent requirements of complex cases will serve to excuse longer periods of delay than would be acceptable in less complex cases. Furthermore, I am not persuaded the appellants have sustained sufficient prejudices from the delay to warrant the imposition of a stay of proceedings. They were not in custody. Their bail terms did impose certain restrictions, however the appellants did not make serious efforts to have the restrictive terms varied..." So, the court, in Faulds found that 39 months--now, I appreciate it is not--none of the decisions are exactly on point as far as facts go. This is a situation where it is a determination of fact but it is illustrative of a the principle that post Askov, courts are allowing greater and greater delays, depending on the circumstances of the case. Now, clearly, if this was a simple theft under, the court would have taken a different view of things but the court was saying it was a conspiracy to import traffic in narcotics and they were saying in that case they did not think 39 months was unreasonable for those, in particular, for those two reasons.

Likewise, in Sharma which is at tab 2. Sharma vs the Queen et al and that is located at 71 CCC 3rd, page 184. That is a decision of the Supreme Court of Canada. It is only 13 months which is somewhat shorter than the delay we have here today but none the less in that case, it was simple--well, I shouldn't say simple, but it was impaired driving causing bodily harm, over .80 and obstructing a police officer. Not the most complex of cases but nonetheless sufficiently complex that the court said that they were not satisfied that the 13 months was unreasonable and they refused to grant a stay and in doing so, at page 193 of that decision, they note about --at the end of the first large paragraph there:

"...This complexity will be reflected in more time being necessary both for the prosecution to prepare its case and for the defence to prepare to meet that case..."

Now, in that case, the complexity of it they are talking about is the situation that, as Your Honour knows in impaired causing bodily harm cases, there is often time required for the preparation of accident reports and victims or witnesses need to give statements and whatnot. Today, you have a situation of a case that involves 10 counts of weapons offences and it is not dissimilar. It is a situation where measurements had to be taken on weapons. There was a need for some consultation with the Centre of Forensic Sciences. There was well over 200 weapons seized which, in and of itself, although there is only 10 counts before the court, because a lot of the weapons were lawfully possessed, that in and of itself requires a lot of detailed work; cataloguing the weapons, going through each and every weapon and insuring that the weapon possessed does meet the law and that they are not in violation of the law. There is a great, thick list of the property. The property report in this case is well over 100 pages long and that certainly required some work. My friend makes note of the issue of the disclosure problem. Granted, disclosure did take some time in this case but I note that the first disclosure was first made available in the early months of 1997. This offence occurred in August of 1996, or is alleged to have occurred. That, in my submission, is not an unreasonable delay given the complexity of the case, the number of weapons seized and the allegations or the counts on the information.

The difficulty is the time that started to run from that period on. But as my friend has quite correctly pointed out, there is a pre-trial and at that pre-trial a number of questions or a number of issues arose which needed answering and it was the view of the Crown at that first pre-trial which was held in March, that there was--the questions were sufficient that they should be answered. That they had enough merit that they required an answer and that pre-trial was held on March the 6th, 1997. So, those questions were posed. The officer was aware of them and there is the delay until September when it appears as though the--from the transcript at least, that the disclosure is made available to the court or to--it is made available in court. There is an indication counsel is not present. Unfortunately, it is not a practice to give out--well, I shouldn't say "unfortunately", because, in my submission, it makes sense but it is not a practice to give out disclosure to accused persons when they have counsel, for obvious reasons. Without maligning Mr. Wood, not every person that comes before the court is necessarily diligent when it comes to their case and often times we are in a position where we give out a screening form and then the next appearance we are giving out a second screening form and with disclosure, particularly in a case of this--where serious charges like this are before the court, the concern would be to hand him disclosure would be running the risk that it never does reach itself to Mr. Martin and that ultimately we are in a position where a few months later we are having to prepare it again. So, that is the reason why it was not handed to Mr. Wood himself. It was waited for Mr. Martin. In addition, there is the further requirement that, as Your Honour knows, in our office, people have to sign for their disclosure because in light of all the case law that has come out post Stinchcombe regarding the Crown's obligation to make a full disclosure, without keeping track of what we have in fact disclosed, we, unfortunately, open ourselves up to the allegation that we never disclosed the material and I am certainly not suggesting Mr. Martin would have done that but we have to take policy where we treat all counsel alike and that means that they sign for whatever they get. So that at sometime down the road if there is an issue as to whether or not disclosure was given, we have proof of giving that disclosure.

So, that is the reason why it would not have been given out on that date. But nonetheless there is a delay from March until September to get the additional information. That additional information related to, in my understanding, Mr. Martin was at the pre-trial so he might have some different submissions to make on this point but I believe it was largely in relation to some questions about how the Crown intended to prove its case. There was a question about where certain weapons were located and whatnot and from what I can ascertain having received the case, not being a party to any of the pre-trials, there was ultimately about a one-page response given to Mr. Martin which detailed the questions that had been posed at the pre-trial with sufficient clarity that we were then in the position to set further pre-trial and ultimately judicial pre-trial to get the matter

before the courts.

And then we get into the situation where we have to have a pre-trial which is, again, institutional delay but it is, as Your Honour knows, necessary given the fact that matters are set for lengthy periods of time and they don't end up taking that long or they get resolved or there are issues that can be focused and my submission is that judicial pre-trial certainly assists the court in alleviating the load that is on the court and that any delay in getting a judicial pre-trial is ultimately a worthy one because at the end of the day, it does tend to focus the issues at the trial.

And then, of course, we had to set the trial date and two days--to get two clear days in this courthouse is not always a simple thing and so we went from--it was set in--I believe it was set on January--well, January the 18th, counsel appeared prepared to set the date. There was the issue that a new cycle was about to begin and, as Your Honour knows, the new cycle means that there is often more available dates and so it was the suggestion of both the Crown and the court at that time that Mr. Martin and Mr. Wood come back when the new cycle had started and that they would likely be getting earlier dates as a result of that. So, there was a subsequent attendance and that was the separate transcript that Your Honour received on January the 12th where we set the date for March and the date was set actually in light of the fact that it took two days, I guess, because it was a new cycle. It was set relatively quickly following that set date, March 23rd. I am sorry, March the 9th was when it was set for. March 9th and 10th. So, you have about two months following the two month wait for trial which, in my submission, is not unreasonable given that it required two full days and that it is in a very busy courthouse in a large metropolitan centre.

With regards to the other factors, clearly Your Honour is familiar with Morin. I am not going to go through it in any great detail. At the end of the day, there is the issue of prejudice to the accused and my friend suggests that there can be an inferred prejudice. I would submit that the inferred prejudice that the court talks about in Morin is a situation where clearly the longer the delay the greater the court can make that inference, can infer that there was some prejudice but there is still an obligation on Mr. Wood to prove the prejudice and it is, ultimately, the accused's burden in establishing that there has been an unreasonable delay and that there has been a contravention of his 11(B) rights and to simply--there is an affidavit before Your Honour but I note that, in my submission, a lot of the prejudice that has been outlined in that affidavit comes from the simple fact of the charges as opposed to the delay and clearly there is an issue of the attendance in court 17 times. In my submission, that is not unreasonable given the charges, given the time it took for this matter to get going. The Crown did proceed by indictment so Mr. Wood was required to attend on each of those occasions but 17 times, in light of the number of charges before the court and the complexity of the case is, in my submission, not an unreasonable number of appearances. The issue of not being able to adequately recall matters, I can't really make many submissions on that other than to say it is not--August 15th, 1996 is not that long ago. It is less--19 months, this is certainly a memory that would linger in Mr. Woods' mind having been arrested for these offences and having had all of his property, some 200 plus weapons, taken in a rather detailed search. Now, he indicates that he would have, in his affidavit, he would have difficulty recalling matters about what the police might say about his condition. In my submission, if that is the case that would be an issue that Your Honour could determine at trial when assessing his evidence and if he does decide to testify which certainly he is under no obligation to do so. But to say at this point that without hearing what the evidence is that he cannot remember the state of the apartment, there is only three counts before the court on the information that deal with careless possession, and in my submission that would be the only counts where the actual state of the weapons or how they were being stored would be relevant. The other counts relate to simple possession. Did he have the

weapons or didn't he? And that is something that time, in my submission, would not affect his memory of. You are not going to forget if you had two sawed off weapons in your house, in my submission. Especially someone like Mr. Wood who is, as my friend put, a collector. He has a lot of weapons and clearly someone who is so interested in collecting weapons would, in my submission, have knowledge as to what exactly he has in his possession. With regards to the clause number C regarding his distress of the arrest. Again, that stems largely from the charge. Nineteen months is not, and I have already indicated my position, unreasonable and it is unfortunate that this incident has caused Mr. Wood some anxiety but that is the position that most people who find themselves charged with criminal offences are in. Mr. Wood is not unique in that and where the presence of anxiety or any sort of tension, the only requirement that a person have to establish before a stay would be granted, it would likely be granted in a lot of cases and in my submission, that simply is not sufficient. That comes from the charge itself as opposed to the delay.

Now, with regards to the bail condition, the courts have, on a number of occasions, talked about prejudice and the courts are quite clear in stating that obviously the clearest of cases of prejudice is where you have a person who is in custody. There is no doubt that if someone sits in custody for 19 months, there better be a fairly good explanation for that.

This is not the case. Mr. Wood was out on bail. His bail, as he indicates was, in his view, restricts his hobbies but this is a principle that the courts have dealt with in a number of the cases. Again, I will refer you to Faulds at page 47, where the court says:

" ... The bail terms do not impose certain restrictions and that the appellant did not make serious efforts to have these restrictive terms varied..."

In Sharma, at page 195, again, the court is dealing with prejudice to the accused and in that case there was a condition that he not drive an automobile which is a fairly significant bail clause and at the bottom of that, the court indicates that Mr. Sharma made no mention of the bail condition at any of his set dates and that he made no attempt to have the bail condition removed despite receiving specific information from the court concerning how that might be accomplished. Again, in this situation, there is nothing in any of the set dates that indicates that Mr. Wood is having difficulty with the bail. There is never an instance where Mr. Martin stands up on behalf of his client and says, "I take issue with the delay. My client is on bail, it is restrictive, we need to something about this". Also, there is no situation where an application to have the bail varied was made which is certainly within Mr. Wood's ability in light of the fact that he has counsel.

Now, in Morin they talk about, at page 24--they start at page 23 and they go until page 25 of that decision. They are talking about the prejudice to the accused and how the court should consider that and they do talk about an inferred prejudice but they also talk about, at page 24, that:

"...The Section 11(B) right is one which can often be transferred from a protective shield to an offensive weapon in the hands of an accused..."

I am certainly not suggesting that Mr. Martin did anything improper or did Mr. Wood but there are some concerns that there is nothing stated at any point in the record along the way about the delay, and clearly the case

law is quite clear that for there to be a waiver, it has to be clear and unequivocal and Mr. Wood had to know the consequences of waiving his 11 (B) rights and I am not suggesting to the court that there was, in fact, a waiver but in Sharma, at page 196, the court does indicate the same concern where they state, at the top of the page:

"...The trial judge found that the appellant had suffered some prejudice as a result of the delay by reason of the bail conditions. This conclusion must have been derived from the circumstances that I have outlined above. While these circumstances are consistent with the appellant having suffered some prejudice, I conclude that it was minimal. If the appellant was being seriously prejudiced by the delay, he would either have pressed to have his case tried or made some effort to vary the bail conditions. As for inferred prejudice, I am unwilling to infer more than nominal prejudice as a result of the mere passage of time. Mr. Sharma's inaction, from his set date appearance to his scheduled trial date, shows a noticeable lack of concern with the pace of litigation. Some account must also be taken of the fact that the appellant was not altogether familiar with the criminal justice system..."

So, that is a situation where we have an unrepresented accused and the court is saying, in essence, that there is nothing done to expedite matters despite the fact that now, at the stay application, Mr. Sharma was maintaining that he was severely prejudiced and that he wanted the matter dealt with quickly. It is one thing to say that at a stay application. It is another thing to maintain that position as the matter moves along and, in fact, as Your Honour, you haven't had the benefit of reading all the transcripts but I would point out that at tab--just give me your brief indulgence. I will find the location. It is tab 7. It appears to be the only part in the transcript that someone twigs to the fact that this case is taking a long time to get going and Ms. Freedman who is the 505 Crown on that day for the Crown says at the bottom, when counsel suggests an adjournment for over--to May the 7th, which is about a two-month adjournment, Ms. Freedman, as you can see near the bottom, sort of hesitates and she says:

"...And did the Crown consent to that long of a remand?..

And Mr. Martin says that it was suggested and Ms. Freedman seems to have a bit of difficulty with it but ultimately acquiesces when this is what Mr. Martin says is the plan. There is no indication at any other point in the proceedings that anyone made any mention that they were being prejudiced or that they were dissatisfied with the pace at which it is taking. In fact, I would submit that in the transcripts, Mr. Martin shows up, suggests dates and it is remanded to that date, and certainly I am not suggesting that there has been a waiver but I think, in fairness, that there has to be some obligation to put on the record that there is a concern regarding the delay and that for defence to go for 19 months, you know, from set date to set date, himself suggesting the remands, albeit in response to awaiting disclosure or meetings he has had with other Crown attorneys, in my submission, is misleading because then, 19 months later, there is a position that this has all be unreasonable and this took far too long. But how is anyone ever to know that if nothing is mentioned along the way and if it appears to the court as though the defence as acquiescing to the adjournments then there is no... the bells don't go off. In fact, on one date, I believe it is--I will find the location. It is at tab 11. Judge Pickett appears to have been very perceptive in noting that this matter has gone on for some time and His Honour states that--he asked some questions about disclosure, the matter is held down and His Honour, before that, indicates that he is looking for an answer from the Crown regarding disclosure and that if it is not the right answer it would be preemptory to the Crown. The matter is held down. The vet Crown in 505 court would have reviewed the matter and then it is brought back up. The matter is spoken to again and it goes over to September the 10th. Mr. Martin, on that date, in my submission, never availed himself to the clear

offer by Judge Pickett to make this matter preemptory on the Crown and get it going quickly. At some point, it is my submission, that Defence had an obligation to do that and to say, "This has gone on long enough" and if it is truly a concern and if truly Mr. Wood feels that prejudice then to say, "Ultimately, it is the Crown's obligation to prove the case. This has taken too long. Make it preemptory on the Crown. If they are not ready to go, so be it."

The other result is that defence goes along set date to set date and seems to be agreeing to the set dates and there is no one's mind a problem regarding the delay until the ultimate trial date and then that is the first that anyone hears about it. Now, Mr. Martin says, "Well, I sent letters". Well, I would submit that the letters are, two of them, the first one at tab 19, which is dated September 19th, 1996 and the second one at tab 20, which is dated February 4th, 1997, both relate to the first instance of disclosure which was ultimately given in early 1997. Though the time delay from March of 1997 when the first pre-trial is held until September of 1997 when the additional disclosure is made available, there is only one letter and that is on August 12th, 1997, the summer of 1997. In my submission, that is not being diligent in exercising a position that his client is being prejudiced and that this matter has to get moving quickly and that he is waiting for the disclosure. There is one letter and that is--and the disclosure subsequently came within about a month of that letter. Ultimately, Your Honour, I am not going to go on much more because, at the end of the day, it is a discretion for Your Honour whether or not you think the delay is reasonable. The Crown's position is that in light of the complexity of the case, the number of counts before the court, the number of weapons that were seized, my friend says that these are not serious criminal offences in the sense that it is not a murder. Nonetheless, it is serious in the sense that weapons offences are traditionally taken very seriously by the courts, particularly firearms offences, and my position is that this is a serious set of charges with a number of counts. As I have indicated on the cases that Your Honour has before you, Sharma dealt with an impaired causing bodily harm case and that is not a homicide and the court clearly didn't feel that 13 months was inappropriate. Faulds dealt with a trafficking in narcotics case, again, not a homicide, 39 months was not inappropriate. Morin was a simple impaired driving and, in that case, they said 14 and a half months was not inappropriate and they did not grant the stay. In Bennett, which is at tab 4, that is a case at the Ontario Court of Appeal, cited at 64 CCC 3rd, page 449 and I don't know if, Your Honour, if I inserted it but I hope there is a looseleaf page. It says:

"...Preliminary version indexes, R. vs Bennett." The Court of Appeal decision was appealed to the Supreme Court of Canada and that is the one-page judgment of the Supreme Court of Canada which is taken off Quick Law and in that judgment, they basically affirmed the Court of Appeal decision and dismissed the appeal, or they dismissed the appeal, upholding the Court of Appeals decision to set aside a stay. So, in essence they are agreeing with what the Court of Appeal did in Bennett.

In Bennett, it is, as I indicated, 13 and a half month delay for an assault bodily harm charge. The delay is due to a number of different factors and, again, in that case the court reiterates the principle that the guidelines, the institutional delay guidelines are not to be applied in a mechanical way. At page 470 of that decision, halfway down the--it is about the third paragraph down at the bottom. The court states:

'...Judges should be particularly wary of relying on nothing more than their own information and perceptions as to the current state of the Criminal Justice system and, more significantly, of the causes of the state of affairs . . .
"

But they go on. Above that they state:

" ... Moreover conclusions about systemic delay and it is unreasonable that it should not rest exclusively on judicial notice..."

And so in that case, they are saying that the court has to look at a number of factors and not just simply apply a formula that was set out in Askov but most importantly, in my submission, Bennett stands for a principle that--it deals with the issue of prejudice at page 477. And it is quite helpful. It says at the bottom of page 477:

"...The trial judge properly took into account the inferred prejudice to the respondent's security interest in referring to the apprehension, concern and life disruption that the respondent must have suffered while awaiting trial. In my view, he was correct in concluding that there was no further significant, real prejudice incurred by the respondent which related to the delay, rather than to the mere fact that he had been charged with a criminal offence..."

And it goes on to talk about the bail condition and, again, it states at the bottom, near the bottom of that paragraph:

"...While this is true, the respondent could have applied to have these conditions varied. Some forms of prejudice are so readily apparent, such as pre-trial custody, that the system is expected to, and does routinely, take into account in setting early trial dates. However, if an accused is being prejudiced by delay in a less apparent way, he or she must bear the responsibility for taking the initiative in alleviating that prejudice..."

And then the court goes on to state that that in their view is not inconsistent with the Section 11(B) rights. Ultimately, Your Honour, it is a situation where the court is being asked to stay the proceedings for what Mr. Martin says is an unreasonable delay. The Crown's position is that it is not unreasonable in light of the complexities of the case. Furthermore, that there has not been sufficient proof of prejudice to Mr. Wood and, finally, that although there was never any waiver by Mr. Martin or Mr. Wood, that the defence had some obligation to, if they have truly felt there was a prejudice and that Mr. Wood's 11(B) rights were being violated, that there was an obligation to move matters along or at least attempt to move matters along and that, other than one letter, that was never done. And that one letter, I would add, was responded to within a month.

Your Honour is familiar with the case law on the issue of stay of proceedings and I will just direct you quickly to page 462 of Bennett. The court reviews that case law, namely, Keyowski, that is spelled K-e, Jewitt, J-e-w-i-t-t and Young. The cases which I haven't given Your Honour but Your Honour is, likely, very familiar with. All those cases advise the court that a stay is an extraordinary remedy which is only to be given in the clearest of cases and, in my submission, this is not a situation where it is the clearest of cases and I submit that in all the circumstances it is not an appropriate case to grant a stay of proceedings.

Subject to any questions, those are my submissions.

THE COURT: Thank you. Anything further, sir?

MR. MARTIN: Just by way of a brief reply, I would remind Your Honour that my friend refers to one fax or one letter. When the case started, I asked for disclosure right away and I sent that fax. Then I sent two others, including the one after, I believe it is Judge Pickett talked about the matter being preemptory. I once again reminded the disclosure clerk and the Crown that we hadn't yet got the disclosure and that we needed it.

THE COURT: Thank you. Perhaps we will take a morning recess and I will read the five or so volumes of materials that have been given to me.

MS. CRAWFORD: If Your Honour wants to take until about 12 o'clock, Counsel and I have some matters that we could discuss that would probably be helpful.

THE COURT: Yes, I think that is a good idea. Thank you.

MS. CRAWFORD: Okay.

RECESS
UPON RESUMING

THE COURT: Are we ready? MS. CRAWFORD: Yes.

THE COURT: Thank you. This is a Section 11(B) application by the defence under the Charter. The right to be tried within a reasonable time. The remedy sought is a stay. We began the matter on March the 9th, '98. It was put over to today's date for a transcript of the dates in court and for argument and I thank counsel for the preparation of the materials and the case law.

There is no issue that the defendant, Mr. Wood, is a gun collector. That there was some 19 months of institutional delay, from August the 19th, 1996 to March the 9th, 1998. That none of this delay was caused by the defendant as is normally the case when defence asks for time to obtain legal aid, get a lawyer, change lawyers or asks for adjournments for some purpose. That is not the situation in this case. There is no issue that the defendant made some 17 court appearances, the Crown having elected to proceed by way of indictment. There is no issue that the defendant attended at two pre-trials. The first, on March the 6th, 1997 when some disclosure was given to the defence counsel. The second pre-trial on November the 5th, 1997, some 13 months later when final disclosure was given to defence counsel. There is no issue that a judicial pre-trial was required, given the administrative procedures at this courthouse, in that this matter was going to be a two-day hearing and there is no issue that any of this delay was waived explicitly by the defendant or his counsel.

Regarding the prejudice to the defendant, that is set out at tab 18, where there is an affidavit from the defendant and he cites that he had to attend court 17 times, his health was affected, that he suffered an angina attack, his life was affected negatively and that visits to his mother were limited and enjoyment of his hobby of gun collecting was restricted and that he felt his reputation in the community was damaged and he cited that his employer of 30 years acts suspiciously regarding him.

The Crown said that the defence had some kind of obligation to move matters along, even in spite of a non-explicit waiver and I instruct myself in that regard in the case of R. vs Franklin, Ontario Court of Appeal decision, 1991 66 CCC 3rd at 114. In that case, it is an impaired case, 13 months institutional delay was held to be excessive and a stay was granted and in the head note on page 115, the Court of Appeal felt the trial judge misdirected himself by placing primary emphasis on the failure of the accused to assert in court a right to an earlier trial.

The Crown also pointed to an obligation on the defendant to alleviate prejudice to himself and cited the case of

the Ontario Court of Appeal in Bennett. It is at tab 4 in the Crown's materials and, on that regard, the defendant did not make any bail variation application, nor did he bring to the attention of the court, on any of the set dates, problems that he was having or prejudice he was suffering as a result of conditions that he was undergoing.

Now, I appreciate that obviously any application under Section 11(B) is not a mechanical, mathematical application of time and that there is an obligation on the court to balance all the concerns put before the court. I take into account the inferred prejudice and I am quoting from the Bennett decision at 477:

"...To the inferred prejudice to the respondent's security interest in referring to the apprehension, concern and life disruption that the respondent must have suffered while awaiting trial..."

I take into consideration, as well, the prejudice that he suffered as set out at tab 18 and in that regard, I consider the Supreme Court of Canada decision in E, vs Maracle, M-a-r-a-c-1-e, 1998, Supreme Court judgment number 7. In that case, the Supreme Court decided that some 13 months institutional delay was excessive and a stay was granted in a sex assault allegation and they appeared, to my mind, to weigh the prejudice suffered by the defendant in that case which included 40 days pre-trial custody, which I appreciate is not at issue in this matter, missed work and business opportunities and significant stigma in his community as a result of the sexual assault charges.

It is difficult to obviously weigh prejudice to an individual in any specific, scientific fashion but I do find that the defendant has set out that he was prejudiced by this institutional delay of some 19 months and, therefore, I find that there is a breach of Section 11 (B) of the Charter.

The next process, of course, is whether or not the remedies sought should be granted and the remedy of a stay is discretionary and is available only in the clearest of cases. Obviously, there is public concern over firearms in the community and the social policy concerns were addressed in this case when the police responded and investigated and I think they did this properly, in that they did respond and investigate and I understand that, as a result, some 200 guns were seized. From the informations before the court, having seized some 200 guns from a gun collector, and then having gone through these guns to see those that were authorized and stored properly, et cetera, on the information before me, the defendant is charged with possession of a prohibited weapon, a sawed-off shotgun with a serial number, careless storage of a Browning rifle and careless storage of 20 rifle cartridges.

There is another information which is before the court but on which the defendant is not arraigned, alleging that he stored a pistol, a Stern (phon.) Luger pistol carelessly. That he possessed a prohibited weapon, a sawed-off rifle without a serial number. That he possessed some three cartridge magazines which are prohibited weapons and that he had two counts of possession of blasting caps.

Having found that there was a breach to the defendant's Section 11 (B) rights and having found that that breach was clear, I also determined that the defendant suffered personal prejudice to his reputation, his health and his family life and that he did not cause any of the 19 months delay. Therefore, I do not do this lightly, given the nature of the charges, however, in this case, a stay will be granted.

MR. MARTIN: Thank you, Your Honour.

MS. CRAWFORD: Thank you, Your Honour, that was a well reasoned judgment. I think there is a matter that

my friend might have to address but I don't think we have to do it today. Is that right, Mr. Martin? The return of the weapons.

MR. MARTIN: Yes, we are going to address--yes, Your Honour, we are going to address the return of the weapons and I am going to say to my friend that we will agree that his storage facilities are approved by a police FAC inspector before they are returned, just for the record.

MS. CRAWFORD: Right, Your Honour, we did canvass the possibility of if a stay was entered, what would be done with the weapons and I think that is agreeable.

The only condition that there be an FAC examiner have contact with Mr. Wood, approve a plan and insure that they will be safely stored when they are returned and that proof of that contact be given to Detective Constable Hesse. That is H-e-s-s-e. Upon that being done, the weapons will be returned except for...

MR. MARTIN: Yes, I...

MS. CRAWFORD: ...I don't think, lawfully, we can return the prohibited weapons.

MR. MARTIN: And I also agree that the, without fighting about them, that the weapons that are alleged to be prohibited will not be returned.

MS. CRAWFORD: Thank you.

THE COURT: Thank you.

MR. MARTIN: There are arguments to be made about them but I am prepared to obviously drop those arguments at this point.

THE COURT: Okay.

MS. CRAWFORD: Right.

THE COURT: Now, there is another information, I understand.

MS CRAWFORD: Yes, the first information has three counts and the second information is seven and, at the last occasion, I understand that there was a proposal that the first information be dealt with and the proceedings apply, the evidence apply to the second, so I would ask that the stay that Your Honour has just granted, apply to both the first information and the second. It is the same set of facts.

THE COURT: All right, so applied.

MS. CRAWFORD: So, agreed then?

MR. MARTIN: Yes.

THE COURT: The charges on the second information will be stayed.

MS. CRAWFORD: And, likewise, any weapons on the second information that are prohibited or alleged to be prohibited, again, will be forfeited; is that correct?

MR. MARTIN: Yes.

MS. CRAWFORD: All right. So, then that means that if I, just to make it clear for the record, on the information that has seven counts on it, count number 5, 6 and 7, the large capacity magazines, will all be forfeited. Count number 4, the prohibited weapon, that being a sawed-off rifle, that will be forfeited. Count number 1 and 2, the explosive substance, that will be forfeited and that only leaves count number 3. That is a careless storage allegation so, again, that will be returned once there is the appropriate approval has been in place from the FAC examiner. On the other information, count number 1 relates to a prohibited weapon. That will be forfeited and counts number 2 and 3, the ammunition and the Browning .22 calibre rifle, again, those relates to careless storage, so once there is an FAC examiner that has approved the plan in place to safely store these weapons in compliance with the Criminal Code and related regulations, those will be returned, as well. Right?

MR. MARTIN: Yes, I agree.

MS. CRAWFORD: Okay, and, Your Honour, there is also a Charter challenge before the court and I guess that will be dismissed or disposed of at this time.

MR. MARTIN: I will withdraw it.

MS. CRAWFORD: Right, thank you.

THE COURT: Thank you.

MS. CRAWFORD: All right, Your Honour. That is the Wood matter. I thank my friend for his assistance.

This is to certify that the foregoing is a true and accurate transcript to the best of my skill and ability.

Shelley Moorhead
COURT REPORTER