CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF ANTIGONISH

C. AT. NO. 2690
C. AT. No. 2691
C. AT. NO. 2692

IN THE COUNTY COURT FOR DISTRICT NUMBER SIX

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

LAWRENCE LEGERE

Respondent

Ronald J. MacDonald, Esq., Solicitor for the Appellant
R.E. O'Blenis, Esq., Solicitor for the Respondent

1992, October 1, MacLellan, J.C.C.:

This is an appeal filed by the Crown from a decision of Judge Clyde MacDonald, a Judge of the Provincial Court of Nova Scotia, whereby he dismissed the charge against the Respondent Lawrence Legere.

The Respondent was charged that he did:

> "On or about the 14th day of December, 1990, at or near Dunmaglass, Antigonish County, Nova Scotia, did unlawfully commit the offence of hunting moose out of season contrary to Section 5(2), Moose Regulations."

The order of dismissal of the said charge was made by Judge MacDonald on the 11th day of April, 1991, in Antigonish, Nova Scotia, and a Notice of Appeal was filed on the 10th day of May, 1991. The Notice of Appeal indicated that the Appellant was seeking an Order setting aside the Order of Dismissal and ordering a new trial.

In addition to the charge indicated above, the Respondent was charged with the following two charges under the **Wildlife Act**:

> "1. That he did on or about the 14th day of December, 1990, at or near Dunmaglass, Antigonish County, Nova Scotia, did unlawfully commit the offence of possessing in a wildlife habitat a shotgun loaded with ball or slug contrary to the Regulations 4(5), Wildlife Regulations.
>
> 2. That he did on or about the 14th day of December, 1990, at or near Dunmaglass, Antigonish County, Nova Scotia, did unlawfully commit the offence of hunting moose out of season contrary to Section 5(2), Moose Regulations."

At the trial of these matters, the Court proceeded with the first charge of hunting moose out of season contrary to Section 5(2) of the Moose Regulations.

The evidence at trial consisted of a voir dire hearing to determine the admissibility of evidence seized by the wildlife officers from Mr. Legere. At the conclusion of that hearing, Judge MacDonald ruled that the items of evidence seized by the wildlife officers was done in violation of Section 8 of the **Charter of Rights** and he excluded the evidence under Section 24(2) of the **Charter**.

As a result of that ruling by the Trial Judge, the Crown did not call any evidence on the trial itself and the charge was dismissed for want of prosecution. It was then agreed by the parties that in light of the Judge's ruling on that charge, and since the same issue would come up in the other two charges, the Crown would simply accept the ruling in relation to the other charges and therefore offered no evidence on these charges. Accordingly, the charges were dismissed for want of prosecution.

The Crown have appealed from the acquittals on all three charges and at the appeal the parties once again agreed that the same issues were involved and that this Court should hear all three matters together. In fact the parties have agreed that the decision of this Court in regard to the charges against Mr. Legere will also apply to three identical charges against one Wallace Stanley Murray who was a co-accused with Mr. Legere and charged with three identical charges. The decision made by Judge MacDonald on Mr. Legere's case was applied at the time of trial to Mr. Murray's case and all his charges were also dismissed for want of prosecution.

At the hearing of this appeal it was agreed that the Court would hear a Charter application brought by the Respondents under Section 11(b) of the **Charter** prior to the hearing of the merits of the appeal itself.

The sequence of events is important and therefore it will be set out in point form:

1. December 14th, 1990 - charges laid by

wildlife officers. S.O.T.s issued to both accused.

2. January 10th, 1991 - not guilty pleas entered in Provincial Court.

3. April 11, 1991 - Trial held and all charges dismissed.

4. May 10th, 1991 - Notice of Appeal filed and served on Respondents.

5. June 9th, 1992 - Appeal comes on County Court docket and is set down for hearing on Charter motion to September 22nd, 1992.

6. September 22nd, 1992 - Appeal is heard and briefs submitted by parties in relation to Section 11(b) application.

It is also to be noted that the Notice of Appeal filed by the Crown did not contain a Chambers date for the setting down of the appeal hearing as required by the Summary Conviction Appeal Rules No. 1(f).

It is apparent that the reason for the absence of a setting down date in the Notice of Appeal was because in March of 1991, Judge Hugh J. MacPherson retired as Judge of the County Court of District Number Six and at the time of filing the appeal, which was directed to the

County Court of District Number Six, there was no Judge in that position.

In May, 1991, Counsel for Mr. Legere wrote to the Crown inquiring about the procedure on the appeal in light of the absence of a Judge of the County Court of District Number Six. There was no response from the Crown until November 4th, 1991, when Defence Counsel received a letter from the Crown indicating that if the Defence would consent to proceeding by way of written brief, a Judge could be available to hear the appeal. Mr. O'Blenis, on behalf of Mr. Legere, wrote back suggesting that there was already unreasonable delay on the matter and indicated that he would not consent to proceed as suggested by the Crown. He also suggested the Appeal Rules had not been complied with.

In May, 1992, an appointment was made to the County Court of District Number Six and this matter came before the Court on June 9th, as set out above.

At the hearing of this matter, the Defence took the position that the Court should enter a stay of proceedings because the Respondent's right to be tried within a reasonable period of time has been violated.

Under Section 11(b) of the **Charter**:-

> "Every person charged with an offence has the right
>
> (b) to be tried within a reasonable time."

In **R v. Cusack**, (September 4th, 1992, unreported) this Court has already decided that an appeal time is

to be considered when deciding a Section 11(b) application. The Appellant has also conceded in his factum that appellate delay may give rise to a violation of Section 11(b) of the **Charter.**

In **Cusack,** the accused was convicted and appealed. The appeal was not heard until some 25 months later because of the lack of a Judge to hear the appeal. This Court in that case made a finding that there was a prima facie violation of Section 11(b) but found that because there was no prejudice suffered by the accused, his **Charter** rights under Section 11(b) had not been violated.

In **R v. Conway,** (1989) 49 C.C.C. (3d) 289, the Supreme Court of Canada dealt with a Section 11(b) application. There the Court had to deal with a situation where the accused was charged with murder and at his first trial was convicted. He successfully appealed that conviction and a new trial was ordered. The accused's second trial ended in a mistrial when the jury was unable to reach a verdict. When the accused came to trial for the third time he made application under Section 11(b), because at that point there was five years from the date of the original charge. The Trial Judge ordered a stay of proceedings and on final appeal to the Supreme Court of Canada, the Court vacated the stay and ordered that the trial proceed.

The majority decision in **Conway** was written by L'Heureux-Dubé J., where in dealing with the question of appellate delay, she said at page 305:

> "In R **v. Rahey,** (1987), 33 C.C.C. (3d) 289, 39 D.L.R. (4th), [1987] 1 S.C.R. 588 (S.C.C.),

> there were some comments suggesting that the application of s. 11(b) to further proceedings such as appeals and retrials flows from the purpose of the guaranteed right. This is consistent with the views of the Supreme Court of the United States that the speedy trial guarantee extends to delays "occasioned by an unduly long appellate process": **United States v. Loud Hawk**, 474 U.S. 302 at p. 312 (1986), Lamer J. (the Chief Justice concurring) stated that the computation "must continue until the end of the saga, all of which must be within a reasonable time": **Rahey** supra, at p. 304. La Forest J. (McIntyre J. concurring) remarked that the word "tried" used in s. 11(b) "means 'tried' in the sense of 'adjudicated' and thus clearly encompasses the conduct of a judge in rendering a decision" (p. 321). The parties argued this appeal on a footing consistent with the above views expressed in **Rahey**. Assuming without deciding that these views support the position adopted by the parties in this appeal, I am disposed to proceed on this basis."

In **R v. Askov**, (1990) 59 C.C.C. (3d) 449, the Supreme Court once again dealt with the issue of unreasonable delay and set out the factors which a Court should consider in deciding on such an application.

Cory J., said in writing the majority decision (p. 483):

> "From the foregoing review it is possible, I think, to give a brief summary of all the factors which should be taken into account in considering whether the length of the delay of a trial has been unreasonable:
>
> (i) The length of the delay
>
> The longer the delay, the more

difficult it should be for a court to excuse it. Very lengthly delays may be such that they cannot be justified for any reason.

(ii) Explanation for the delay

(a) Delays attributable to the Crown

Delays attributable to the action of the Crown or officers of the Crown will weigh in favour of the accused. The cases of **Rahey** and **Smith** provide examples of such delays.

Complex cases which require longer time for preparation, a greater expenditure of resources by Crown officers, and the longer use of institutional facilities will justify delays longer than those acceptable in simple cases.

(b) Systemic or institutional delays

Delays occasioned by inadequate resources must weigh against the Crown. Institutional delays should be considered in light of the comparative test referred to earlier. The burden of justifying inadequate resources resulting in systemic delays will always fall upon the Crown. There may be a transitional period to allow for a temporary period of lenient treatment of systemic delay.

(c) Delays attributable to the accused

Certain actions of the accused will justify delays. For example, a request for adjournment or delays to retain different counsel.

> There may, as well, be instances where it can be demonstrated by the Crown that the actions of the accused were undertaken for the purposes of delaying the trial.

(iii) Waiver

> If the accused waives his rights by consenting to or concurring in a delay, this must be taken into account. However, for a waiver to be valid it must be informed, unequivocal and freely given.. The burden of showing that a waiver should be inferred falls upon the Crown. An example of a waiver or concurrence that could be inferred is the consent by counsel for the accused to a fixed date for trial.

(iv) Prejudice to the accused

> There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time.
>
> Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay."

In **The Queen v. Francis W. MacMaster**, a decision

of MacDonnell J.C.C. (An Additional Judge of the County Court of District Number Six) dated February 27th, 1992, the issue of appeal delay was dealt with. There the accused had been acquitted in Provincial Court and the Crown had appealed. The appeal was delayed because of the lack of availability of a Judge and the appeal decision was not rendered until 13 months after the filing of a Notice of Appeal. The Court in that case found that this period of time was excessive but because there was no prejudice suffered by the accused, there was no **Charter** violation.

The Crown argue that the **MacMaster** case is on all fours to this case because the time periods are about the same and the reason for the delay here is the same. In **MacMaster**, the date of the charge was August 31st, 1990, and the trial was held on January 17th, 1991. The Notice of Appeal was filed on January 29th, 1991, and the appeal was finalized on February 27th, 1992. There was a total period of 16½ months from the date of the charge to the final decision on appeal and 13 months from the date of the Notice of Appeal to the final decision.

In this case, there is 21 months from charge to hearing of the appeal. There is 16 months from Notice of Appeal to hearing of the appeal.

It is to be noted, however, that in the **MacMaster** case the appeal was from a decision of the Trial Judge who had heard all the evidence at trial. Therefore, the Appeal Court could and in fact did deal with the merits of the appeal and confirmed the acquittal entered by the Trial Judge. Here the Crown is requesting that a new

trial take place assuming that the Court finds at a subsequent hearing that there is merit in the Crown appeal.

Applying the factors set out in **Askov** to this case, I find as follows:

1. The Length of the Delay

Here the delay is now a period of 21 months from charge and 16 months from the filing of the Notice of Appeal. I find that prima facie these periods are longer than expected for such a case.

2. Waiver of Time Periods

There appears to be no evidence that the Respondent in any way waivered any time periods.

3. Reasons for the Delay

It is clear that the only reason for the delay in the hearing of this appeal was the lack of a Judge to conduct the appeal hearing. This failure on the part of the Government of Canada must therefore weigh against the Crown. This is a Summary Conviction matter which would normally be dealt with within a period of three or four months.

4. Prejudice to the Accused

The Crown take the position that there is no prejudice

to the accused and that the Court should not infer prejudice. In **R v. Morin**, (1992), 12 C.R. (4th) 1, the Supreme Court of Canada dealt with Section 11(b). On the issue of prejudice Sopinka J. said (p. 22):-

> "Section 11(b) protects the individual from impairment of the right to liberty, security of the person, and the ability to make full answer and defence resulting from unreasonable delay in bringing criminal trials to a conclusion. We have decided in several judgments, including the unanimous judgment in **Smith**, supra, that the right protected by s. 11(b) is not restricted to those who demonstrate that they desire a speedy resolution of their case by asserting the right to a trial within a reasonable time. Implicit in this finding is that prejudice to the accused can be inferred from prolonged delay. In the American concept of this principle, expounded in **Baker v. Wingo**, the inference is that no prejudice has been suffered by the accused unless he or she asserts the right. While the observation of Dubin C.J.O. in **Bennett** that many, perhaps most, accused are not anxious to have an early trial may no doubt be accurate, s. 11(b) was designed to protect the individual, whose rights are not to be determined on the basis of the desires or practices of the majority. Accordingly, in an individual case, prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn. In circumstances in which prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined."

I find in this case that prejudice to the accused can be inferred. Twenty-one months have gone by and as yet his trial has not been held. If the Crown appeal

is successful on the merits more time will pass before he has his trial. This is not a situation like the **MacMaster** case where the trial was completed and all the evidence presented. In that case, no prejudice could be inferred and since no prejudice was proven, the Court denied the **Charter** application. This case is also not like the **Cusack** case where the trial also had been completed and a conviction had been entered. Mr. Cusack had had his day in Court and therefore the Court could not infer that his rights were prejudiced because of the delay in the hearing of his appeal.

In **R v. Rahey**, (1987), 33 C.C.C. (3d) 289, a delay of 11 months, caused by adjournments by the Trial Judge was considered excessive and led to a stay of proceedings.

In conclusion I would find that the Respondent's rights under Section 11(b) have been violated and I would under the provisions of Section 24(a) of the **Charter** enter a stay of proceedings.

Judge Douglas L. MacLellan
County Court Judge
District Number Six