PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacDonald*, 2012 NSPC 132

Date: 2012-11-01
Docket: 2324987, 2324988, 2324989
Registry: Pictou

Between:

Her Majesty the Queen

v.

Earl Victor MacDonald

DECISION ON APPLICATION FOR STAY OF PROCEEDINGS

Judge: The Honourable Judge Del W. Atwood

Heard: 1 November 2012, in Pictou, Nova Scotia

Written judgment: 7 August 2015

Charge: Subsections 163.1(3), 163.1(4)CC, 163.1(4.1) of the Criminal Code of Canada

Counsel: Craig Botterill Q.C. for the Nova Scotia Public Prosecution Service
Rob Sutherland for Earl Victor MacDonald

By the Court:

[1] I gave oral reasons for judgment in this case on 1 November 2012. At that point, I advised counsel that I would be issuing a written judgment which would expand upon my oral reasons. Through no one's fault other than my own, I forgot to compose my written reasons, and remembered this case as I was preparing my judgment in R. v. C.N.T.[1] I apologize to counsel for this delay in issuing written reasons, for which I am to blame entirely.

[2] Earl Victor MacDonald is charged with possessing, accessing and making available child pornography. The charges are proceeding summarily. Mr. MacDonald has applied to the court for a judicial stay of proceedings, alleging that his constitutional right to a speedy trial has been infringed.

[3] The court heard, during the course of submissions yesterday, agreed statements regarding evidence collected by police; however, none of that evidence—heard in the course of a sub-section 24(1) *Charter* hearing—displaces in any way the presumption of innocence to which Mr. MacDonald is assured constitutionally under paragraph 11(d) of the *Charter*.

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[1] 2015 NSPC 43.

[4] For the reasons that follow, I find that Mr. MacDonald has discharged the burden of proving that a para. 11(b) *Charter* breach occurred in his case because of delay in the state making available to Mr. MacDonald basic and fundamental disclosure; this, in turn, delayed the trial of Mr. MacDonald's charges unduly. I conclude that the only appropriate remedy under sub-s. 24(1) of the *Charter* is a judicial stay of proceedings of those charges.

[5] To give context to the chronology in this case, I will review briefly the agreed statement of facts put before the court yesterday by the prosecution and defence, particularly with respect to the investigative procedures undertaken by police in collecting evidence against Mr. MacDonald.

[6] The lead investigator in this case is a member of the New Glasgow Policing Service assigned to the Integrated Child Exploitation Unit. One of his duties involves the detection of persons in this county who access and distribute child pornography by means of the internet. This investigator employed software known as the Child Protection System (CPS), which functions by scanning remotely the hard drives of computers which are likely being used to access or distribute child pornography.

[7] Computer users who access and distribute child pornography will often do so using peer-to-peer file-sharing software. This software allows digital-image files stored on one computer to be accessed and downloaded by other computer users running the same peer-to-peer file-sharing application.

[8] The Integrated Child Exploitation Unit investigator, using CPS, is able to zero in on computers that are used for peer-to-peer file sharing in a selective fashion; that is, CPS geographically discriminating, as an investigator using CPS can narrow a scan to hone in on only those internet addresses assigned to users in a particular locality. In this case, the ICEU investigator limited his CPS scans to Pictou County.

[9] A scan for peer-to-peer file sharing can be fine-tuned even further. It can identify whether a peer-to-peer shared file is a child-pornographic digital image. This sort of technological sleuthing can be accomplished with great accuracy, as every digital image possesses a unique algorithm or value—an equivalent of data DNA—known as a hash value. Based on the description I heard, a hash value seems to be very similar to what is known as checksums in linear algebra.

[10] Hash values for known child pornographic images (identified as such through successful prosecutions in Canada, the United States and elsewhere) are

catalogued by investigative agencies such as the FBI, the RCMP, INTERPOL and others. Those agencies make their hash-value catalogues available to local law-enforcement agencies, such as the ICEU in Pictou County.

[11] With access to those hash-value catalogues, investigators can focus their CPS searches to target precisely the trafficking of known child-pornographic images.

[12] Once a child-pornographic image has been identified as having been exchanged by peer-to-peer users, an investigator can get CPS can do one thing more. It can collect from remotely scanned drives the unique serial number which is generated by the installation of peer-to-peer file sharing software on the hard driver of a computer user. I was informed that, when a computer user installs on a hard drive proprietary file-sharing software, the drive gets imprinted digitally and indelibly with a unique alphanumeric that gets created when the software is installed, presumably to prevent illegal duplication of software in contravention of copyright law and customary licensing agreements which protect the intellectual property of software developers.

[13] This unique alphanumeric—known as the globally unique identifier or "GUID" value—is an essential component in the investigation of internet-child-

pornography cases. That is because, once a computer system suspected of having been used to access child pornography has been seized and secured, an investigator can search the hard drive for a GUID value; if able to be recovered, it can be compared to the GUID value collected during a CPS scan; if the values are congruent, the congruency would constitute strong circumstantial evidence of illegal use of the seized system. What would remain then in forging the inferential chain would be evidence identifying the computer user.

[14] Here is the chronology in this case: In **November, 2010**, the ICEU member began an investigation after he observed that an automated CPS scan had recorded the collection of child-pornographic images from a peer-to-peer file-sharing computer behind an internet address in Pictou County.

[15] The investigator then used his police computer to connect remotely to that computer in Pictou County. The investigator was able to access files in a shared folder located on the computer located behind that Pictou County internet address.

[16] The investigator was able to view within the shared folder a list of titles indicative of child pornography based on descriptive file names. The officer downloaded two to three files. This was done in **November, 2010** and the officer

was able to open those files. They consisted of a short video, as well as still images, all depicting children engaged in explicit sexual activity.

[17] After conducting this stage of the investigation, the ICEU investigator became engaged in other duties involving a high-priority missing-persons case and discontinued his investigation temporarily. However, before doing so, the investigator contacted Eastlink, a local internet-service provider. The investigator knew from his experience that the internet address used by the computer he was targeting was one that had been assigned by Eastlink. The investigator wished to ensure that Eastlink would preserve the records associated with that internet address so that they would be available once he was able to resume his investigation.

[18] In early **2011**, the investigator returned to the case. He checked his automated CPS records. He determined that in **December 2010 and January 2011** the peer-to-peer computer that he had targeted earlier had been involved in the downloading or transfer of even more suspected child pornographic images.

[19] In **February 2011**, the officer again viewed remotely the contents of the shared folder he had examined earlier and found child pornographic images. At that point, the officer obtained a search warrant which he served on the internet

service provider and was able to identify a residential address and an account name associated with Mr. MacDonald's place of residence and that of his common-law girlfriend.

[20] The police then obtained a warrant to search Mr. MacDonald's home. That warrant was executed on **17 February 2011**. Police detained the accused. They seized an HP desktop computer, external hard disk drives, as well as an Apple Mac notebook. Although the investigator was qualified to analyze computer equipment running Windows-based systems, he was not qualified to analyze Apple devices.

[21] The property seized from the accused included computer equipment used in the accused's photographic business. The seizure of this equipment worked a significant economic impact upon the ability of the accused to earn a livelihood.

[22] In **March, 2011**, ICEU investigator completed a request for assistance to have the Mac notebook analyzed, which he forwarded to the Atlantic Region Tech Crime Unit in Dartmouth, Nova Scotia. Sometime after submitting the request, the investigator packed up and sent the Mac notebook to the tech unit for the completion of a forensic analysis.

[23] The ICEU investigator arrested Mr. MacDonald on **9 June 2011** and the information alleging the charges before the court was sworn by the investigator on

13 June 2011; the investigator released Mr. MacDonald on a highly restrictive form 11.1 undertaking, which, among other things, limited Mr. MacDonald's ability to have access to computers and the internet. This, coupled with the equipment seizure, essentially shut down Mr. MacDonald's photography business. At that point in time, nothing had been done by the tech unit with the seized Mac notebook to determine whether it had been used in connection with any crime. Mr. MacDonald entered into a promise to appear, requiring him to attend court for arraignment on **6 September 2011**. This was slightly more than 6 months following the seizure of Mr. MacDonald's Mac notebook. I am satisfied that the reason the ICEU investigator selected this date to have Mr. MacDonald attorn to the jurisdiction of the court was that it dovetailed with the typical 6-month turnaround required by the tech unit to generate a forensic report on computer equipment submitted to it for analysis. However, there is no evidence that the ICEU investigator ever checked with the Atlantic Region Tech Crime Unit to verify that the tech unit would be able to have a report completed within that timeframe.

[24] On **19 June 2011**, the special prosecutions unit of the Nova Scotia Public Prosecution Service received a letter from Mr. MacDonald's former defence counsel, Mr. Joel Sellers, requesting full and complete disclosure. Mr. Sellers

drew to the attention of the Prosecution Service the implications that the seizure of the computer equipment had had on Mr. MacDonald's business as a photographer; Mr. Sellers described Mr. MacDonald's business as essentially having had to have been shut down.

[25] Mr. Sellers requested disclosure in order to ascertain what of the seized material might be able to be returned to Mr. MacDonald under the provisions of s. 489.1 of the *Code* so that he might resume his business.

[26] The prosecutor, Mr. Botterill, responded to Mr. Sellers that he was unaware of Mr. MacDonald having been charged as he had not received any material from the police. However, Mr. Botterill undertook diligently to make inquiries.

[27] On **4 August 2011**, fully 169 days following the initial seizure, the tech unit advised the ICEU investigator that it was not going to provide a forensic analysis of the Mac notebook and that the ICEU investigator should take it off their hands. That same day, the ICEU investigator travelled to the tech unit, retrieved the Mac notebook, and placed it in an exhibit locker in New Glasgow.

[28] On **23 August 2011**, Mr. Botterill received a letter from Ms. Jennifer Cox of Nova Scotia Legal Aid advising that she would be Mr. MacDonald's successor

solicitor of record. Ms. Cox repeated the request that had been made by Mr. Sellers over two months earlier for full and complete disclosure.

[29] Mr. Botterill responded to Ms. Cox that he had just received that day two DVDs with image files, which had been downloaded remotely by the ICEU investigator in February of 2011. Mr. Botterill offered to make immediate but controlled disclosure available to Ms. Cox. Note that these were images that the ICEU investigator had retrieved remotely using CPS; nothing as of that point in time had been recovered from Mr. MacDonald's Mac notebook as it remained unexamined in the exhibit locker in New Glasgow and gathering dust.

[30] On **6 September 2011**, Mr. MacDonald was arraigned in this court; the prosecution requested an adjournment of its election on these hybrid offences. That request was granted by the court. The only inference which I find I might make reasonably from the request by the prosecution to put off its election was that it had no idea what might be found on Mr. MacDonald's notebook computer. The case was adjourned to **7 November 2011**.

[31] On **7 November 2011**, Ms. Cox appeared with Mr. MacDonald. Ms. Cox raised diligently the issue of delay and withdrew as solicitor of record due to the fact the Mr. Macdonald did not qualify financially for legal-aid services. This did

not stop Ms. Cox from asserting Mr. MacDonald's constitutional rights, and reflects very positively on Ms. Cox's commitment to her professional duties. The case was adjourned to **16 January 2012**.

[32] On **16 January 2012**, the case was called, and Mr. Sutherland appeared as defence counsel. The prosecution declined to elect mode of process. Indeed, there was no Crown election made then or on any subsequent dates until **4 April 2012**; the prosecution elect summary process on that date, after which Mr. MacDonald pleaded not guilty. By this time, Mr. MacDonald had been represented by three lawyers: Mr. Sellers, Ms. Cox and Mr. Sutherland, and he had commenced but then discontinued an application for state-funded counsel.

[33] The agreed statement of fact informed me that the ICEU investigator had resubmitted the Mac notebook to the tech unit at some point in time in **February 2012**. However, as of **4 April 2012**, nothing had been done to analyze it. In fact, nothing was done by the tech unit until **August of 2012**. Sometime during that month, Mr. Botterill gave the tech unit an ultimatum: analyze the Mac notebook and complete a forensic report without delay, or the charges against Mr. MacDonald would be withdrawn. Lo and behold, a forensic report from the tech unit got disgorged in short order. It was then, and only then--fully **one year, five months and fifteen-plus days** following the seizure of the Mac notebook--that the

forensic analysis was done and constitutionally obligated disclosure was turned over to Mr. MacDonald. Further, there had elapsed **one year, one month and nineteen-plus day**s from the date the charges had been laid by the ICEU investigator.

[34] Paragraph 11(b) of the *Canadian Charter of Rights and Freedoms* states:

> 11. Any person charged with an offence has the right
> . . .
> (b) to be tried within a reasonable time;
> . . . .[2]

[35] I was guided considerably by the thorough and comprehensive treatment of the subject of unconstitutional trial delay by Scaravelli J. in *R. v. R.E.W.*, and the affirming judgment of the Court of Appeal.[3] Beveridge J.A. recapped the law at para. 20 of his opinion:

> In his decision, the trial judge set out a chronology of the events. He then referred to the factors set out in *R. v. Morin*, [1992] 1 S.C.R. 771 that a court should consider when balancing the interests s.11(b) is designed to protect when considering how long is too long. They are:

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[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[3] 2010 NSSC 78; *aff'd*. 2011 NSCA 18.

1. the length of the delay;

2. waiver of time periods;

3. the reasons for the delay, including

    (a) inherent time requirements of the case,

    (b) actions of the accused,

    (c) actions of the Crown,

    (d) limits on institutional resources, and

    (e) other reasons for delay; and

4. prejudice to the accused.

[36] Furthermore:

> An examination for the reasons for delay occur only after the length of the delay is such to warrant an inquiry. The guidelines for a case to proceed from arraignment to trial were set in *R. v. Askov*, [1990] 2 S.C.R. 1199 and re-visited by the Supreme Court of Canada in *R. v. Morin, supra*. These suggest that the systemic or institutional time frame for provincial courts is 8 to 10 months and from committal to trial of 6 to 8 months for a total of between 14 and 18 months. Obviously the delay in this case far exceeded the norm.

[37] In this case, I believe that it is necessary to examine pre-charge state conduct as did Scaravelli J. in his decision in *R.E.W.* at paras. 33 to 47 and as scrutinized by the Nova Scotia Court of Appeal in paragraph 37 of its affirming judgment. In doing so, I keep in mind that the Crown is indivisible. Accordingly, the court does not distinguish between the actions of the ICEU investigator, the tech unit, and the

Nova Scotia Public Prosecution Service in assessing the causes for delay and the impact of that delay upon the *Charter*-protected interests of Mr. MacDonald.

[38] The ICEU investigator conducted the warranted seizure of the accused's computer equipment on **17 February 2011**. Presumably, it would have been evident to the officer quickly, based on the branding of the Mac notebook computer, that he would not have had the training necessary to recover the contents of that system; yet the officer did not send the exhibit to the Atlantic Region Tech Crime Unit until **8 March 2011**. The tech unit did nothing with the notebook from that date until over a year after the charges were laid. I was not advised of any staffing or work-overload issues that might have accounted for this singular lack of diligence.

[39] Mr. MacDonald, in contrast, was highly assiduous. He retained counsel promptly following his arrest. That counsel, Mr. Sellers, was also diligent. He contacted the Prosecution Service promptly seeking disclosure. He drew to the attention of the prosecution the serious economic impact the seizure of Mr. MacDonald's computer equipment had had upon his business. It is clear that Mr. Sellers sought timely disclosure so that he could ascertain which property of Mr. MacDonald's ought to be returned by police, by way of a sub-section 490(7) *Criminal Code* application, if necessary.

[40] It is important to note that the authority of police to detain other-people's property, whether with or without warrant, is subject to the ongoing duty of police to assess whether that detention is required for an investigative or forensic purpose, as prescribed in section 489.1 of the *Code*; when an officer is not so satisfied, the property must be returned to its owner. That judgment ought not be left in suspension indefinitely but, as governed by the words of the statute, must be carried out "as soon as practicable".

[41] The completion of a timely forensic report by the Atlantic Region Tech Crime Unit was clearly integral to the ICEU investigator making that determination; yet there is no evidence before the court that the investigator ever made any inquiries of the Atlantic Region Tech Crime Unit between 8 March 2011 (the date the investigator sent the notebook to the unit for analysis) and 4 August 2011 (the date the unit informed the investigator it would not carry out an analysis of the notebook) looking for a progress report.

[42] With regard to post-charge delay and its impact upon Mr. MacDonald, it is clear that the ongoing detention of the seized property had a significant effect upon Mr. MacDonald's ability to earn a living; this economic impact affected his choice of counsel. I find I am able to infer this reasonably from the fact that the accused was represented initially by Mr. Sellers, who appeared with the accused on 6

September 2011; a couple months later, Mr. MacDonald sought the services of Nova Scotia Legal Aid and it was Ms. Cox who appeared with him on 7 November 2011.

[43] Ms. Cox too was highly diligent. She asserted Mr. MacDonald's constitutionally protected right to disclosure at the first opportunity.

[44] While the prosecution did offer to give Ms. Cox controlled access to the material that it had been provided by police--coincidentally delivered by the ICEU investigator to the prosecution the same day as Ms. Cox's request--that disclosure was materially deficient as it did not include a forensic report regarding the Mac notebook which was described to me as the essential evidence in the case. Essential, indeed, as it was the forensic analysis that would have shown whether the Mac's hard drive had been branded with the critical GUID value.

[45] When Ms. Cox appeared with Mr. MacDonald in this court on November 7, 2011, she placed on the record very clearly her client's assertion of his paragraph 11(b) *Charter* rights. However, just as at the 9 September 2011 appearance, the prosecution was unprepared to elect a mode of process. With prosecution election being an integral part of the trial process, the prosecution was, essentially, unprepared for trial. This state of prosecution unpreparedness continued after Mr.

Sutherland assumed carriage of Mr. MacDonald's defence. When I say that the prosecution was unprepared, I wish to make one thing clear. Mr. Botterill's conduct in this case is beyond reproach. His candour and commitment to fairness in this hearing reflect commendably on the duty of the prosecution to fulfil a role as a minister of justice. Unfortunately, Mr. Botterill found his hands tied by the inaction of the tech unit.

[46] This requirement of having his defence carried by a number of counsel gives rise to a prejudice I find I can infer reasonably from the facts and it is a prejudice attributable directly to the failure of the state to address on a timely basis the need for the continued detention of Mr. MacDonald's stock in trade.

[47] While I accept that the ICEU investigator wound up being seconded to a serious missing-person investigation in the fall of 2011, that would not have occurred until a full two to three months after the Mac notebook had been returned to him by the Atlantic Region Tech Crime Unit.

[48] Further, I am not satisfied that being seconded to another investigation would have prevented the officer from making brief and pointed inquiries whether a forensic analysis might have been able to have be done by some other unit elsewhere in the country or by a private contractor.

[49] I have been provided with no evidence why the Atlantic Region Tech Crime Unit was unable to do the work between the months of March 2011 to August 2011 when the unit first had custody of the notebook; nor is there an explanation why the Tech Crime Unit failed to conduct a forensic analysis of the notebook at any point in time between February 2012 when the ICEU investigator re-submitted it, until late August of 2012, when the prosecutor presented them with a choice to get the work done or see the charges dropped. All the while, Mr. MacDonald was left in dire holding pattern.

[50] Defence counsel tendered with consent two medical reports on Mr. MacDonald—Exhibits 1 and 2--and I am satisfied that the delay in the timely investigation and prosecution of these charges has resulted in ongoing and undue stress for Mr. MacDonald. The point was conceded very fairly by Mr. Botterill in his very thorough submissions.

[51] Had the Atlantic Region Tech Crime Unit completed its forensic report within the normal six-month timeframe, it is reasonable to believe that the prosecution would have been in a position to have made its election as to mode of process on the arraignment date in September of 2011, police would have been able to assess the need to detain further Mr. MacDonald's seized property, counsel would have been able to have provided effective legal advice to Mr. MacDonald

based on a review of complete disclosure, and the matter would have been dealt with well within the time required in this judicial centre for completing summary-conviction cases, which is in the range of six months.

[52] I am satisfied that the delay in this case is beyond that prescribed in *R.E.W.* for summary-conviction offences and is *prima facie* unreasonable. I find that there has been no waiver by the accused of his paragraph 11(b) *Charter* rights, nor has the accused acted in any way to engender, generate or contribute to that delay.

[53] I find that the reasons for delay in this case are unconnected with any reasonably inherent time requirements of the case or limits on institutional resources. Rather, they are connected entirely with the actions of the state in failing to conduct a timely forensic analysis of Mr. MacDonald's computer system. A failure which remains unexplained. I simply do not know why on two occasions the Atlantic Provinces Tech Crime Unit did not do the job tasked to it within the normal operating timeframe.[4] I have already described the legal, medical and economic prejudice that this has worked on Mr. MacDonald.

[4] I asked Mr. Botterill during the hearing why the police laid charges before they had evidence in hand. It was explained to me that a situation had arisen some years ago of police seizing equipment in a child-pornography investigation from an individual who was an employee of a school board in the province. When it came to light that an investigation was underway, but the suspect was still on the job, putting him in contact with children, a minister of the Crown at the time expressed the firm view that charges in such cases should be laid right away, and that seemed to become the charging policy. While one might question properly a policy that involves the laying of

[54] With respect to the issue of remedy, I turn to the provisions of sub-section 24(1) of the *Charter* which states:

> Any one whose rights or freedoms as guaranteed by this *Charter* have been infringed or denied may apply to a Court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances.

[55] The inquiry that the Court is obligated to make in this case is objective. It invites the Court to consider whether permitting the trial to proceed in the presence of state-sponsored, state-generated undue delay—delay which has resulted in a significant level of prejudice to the accused--would bring the administration of justice into disrepute. That is the criterion I believe is intrinsically involved in the court assessing or determining a remedy that is appropriate and just in the circumstances.

[56] A flagrant para. 11(b) breach causes damage to the administration of justice; certainly, the public have an interest in seeing serious charges being dealt with on the merits. However, that interest is advanced only when charges are tried promptly. I have found that Mr. MacDonald's interests were prejudiced. But there is a concurrent public interest that gets defeated for a whole array of reasons when

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charges without evidence in hand, it is a question for another day, as it was not argued as a basis for a judicial remedy.

charges of this nature languish without explanation: child pornography cases engage highly the interests of child protection; in this instance, nothing was done for over a year to find out whether there were vulnerable children who needed help. Furthermore, there is the inevitable impact upon court dockets of snowballing whenever cases wind up in suspended animation. The public loses confidence in the administration of justice when courts get infected with delay.

[57] The remedy granted by the court should ensure that no further damage to the administration of justice be caused. The court's focus, in my view, ought to be upon systemic concerns. It should not be aimed at punishing police or providing the accused with compensation or material redress.

[58] In my opinion, given the nature of the state conduct which has infringed Mr. MacDonald's section 11(b) *Charter* rights, the only just and appropriate remedy is a judicial stay of proceedings. Accordingly, the court will stay judicially counts 1, 2 and 3 in information #634329, that would be cases 2324987, 2324988 and 2324989. So, those charges are stayed as of this point and that also brings to an end the undertaking that Mr. MacDonald entered into on the 9 June 2011.

[59] I wish to conclude by re-stating my gratitude to Mr. Botterill for the entirely fair-minded and professional manner in which he carried this case in the face of great difficulty. It is indicative of his commitment to a superlative level of professional conduct.

JPC