IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Cater, 2011 NSPC 80

Date: November 10, 2011

Docket: 1997518 to

1997550; 2035773 - 2035784

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

Kyle Cater, Paul Cater and Torina Lewis

JUDGE:	The Honourable Anne S. Derrick
HEARD:	November 8 and 9, 2011
DECISION:	November 10, 2011
CHARGES:	Sections 86(1) x3; 88(1) x3; 95(1) x 2; 92(1) x 2; 92(2) x 1of the *Criminal Code* (Cater, Cater and Lewis); Sections 100(2) x 6 ; 99(2) x 6 (Kyle Cater)
COUNSEL:	Shauna MacDonald and Richard Hartlen, for the Crown
DEFENCE:	Elizabeth Cooper, for Kyle Cater
	Alfred Seaman, for Paul Cater
	Cameron MacKeen, for Torina Lewis

By the Court:

Introduction

[1] Kyle Cater, Paul Cater and Torina Lewis were jointly charged on January 15, 2009 with eleven (11) charges. Their joint information lists the charges as: the unlawful storage of a sawed off Cooey 84 shotgun, a Lakefield Mark II rifle, and an AA Arms Model AP 9 handgun, and ammunition, in a careless manner (contrary to *Criminal Code* section 86(1) x 3), unlawful possession of the sawed off Cooey 84 shotgun, the Lakefield Mark II rifle and the AA Arms Model AP 9 handgun (contrary to *Criminal Code* section 88(1) x 3), unlawful possession of a loaded prohibited weapon – the AA Arms Model AP 9 handgun, and unlawful possession of a loaded prohibited firearm – the sawed off Cooey 84 shotgun (contrary to *Criminal Code* section 95(1) x 2), unlawful possession of the sawed off Cooey and the AP 9 handgun, knowing that possession is unauthorized (contrary to *Criminal Code* section 92(1) x 2), and unlawful possession of two (2) over capacity magazines, a prohibited device (contrary to *Criminal Code* section 92(2)).

[2] Kyle Cater was subsequently charged with twelve (12) firearms trafficking charges pursuant to sections 100(2) and 99(2) of the *Criminal Code*, for the between dates of November 18, 2008 and January 16, 2009.

[3] Kyle Cater is seeking to have the charges against him stayed due to a violation of his section 11(b) *Charter* right to be tried within a reasonable time. He bears the burden of establishing this violation. The parties agree that if he is successful the appropriate remedy is a stay of proceedings under section 24(1) of the *Charter*.

[4] I will note that I was advised at the start of this application by counsel for Paul Cater and Torina Lewis that they have not joined in Kyle Cater's application. As a consequence they did not participate but were in attendance with their clients. It should be noted that in these reasons when I refer to "Mr. Cater" I am referring to Kyle Cater, not Paul Cater.

Overview of Procedural History

[5] The Caters and Ms. Lewis first appeared in court on January 15, 2009. On January 16, 2009, all three accused appeared again after consenting to remand. Ms. Lewis was released on a recognizance with a surety. Paul Cater consented to be remanded to January 19. On that date he was released on a recognizance with a surety.

[6] Kyle Cater consented to his remand to January 21 when he was released on a recognizance with a surety. The surety was his mother, Barbara Cater. After a number of court appearances and requests for adjournments for election and plea, on November 16, 2009, Kyle Cater elected to be tried by a Supreme Court Judge alone. This election applied to his co-accused, Paul Cater and Torina Lewis, and November 24 was scheduled for the purpose of setting Preliminary Inquiry dates. A further adjournment was requested on November 24 to January 8, 2010 when Preliminary Inquiry dates were set for June and July 2010.

[7] On May 7, 2010, Kyle Cater's lawyer, Geoff Newton withdrew as Mr. Cater's counsel due to a conflict. With Kyle Cater unrepresented so close to the Preliminary Inquiry, it was decided new dates would have to be found. The Caters and Ms. Lewis were scheduled to return on July 19 to set new dates.

[8] By July 19, 2010, Kyle Cater had new counsel, Warren Zimmer. Following further adjournments, on September 28, 2010, preliminary Inquiry dates for the joint information were set for June and July 2011.

[9] On April 12, 2011, Kyle Cater's lawyer, Warren Zimmer, was appointed to the Provincial Court of Nova Scotia. Kyle Cater was once again without counsel.

[10] On May 13, 2011, Kyle Cater's release on the joint charges was revoked by Chief Judge Curran following a bail revocation hearing. Kyle Cater was remanded into custody.

[11] The June/July 2011 Preliminary Inquiry dates were abandoned.

[12] By August 2, 2011, Kyle Cater had Ms. Cooper representing him. New Preliminary Inquiry dates were set for November 2011.

[13] On September 6, Kyle Cater re-elected Provincial Court with Crown consent. The Crown consented to the re-election of Paul Cater and Torina Lewis. The Preliminary Inquiry dates were converted to trial dates.

[14] On September 28, 2011 a lengthy pre-trial conference was held and dates were earmarked for pre-trial motions. Additional trial dates were set for December 2011, February 2012 and March 1, 2012. It was anticipated the pre-trial motions would be dealt with on the November dates.

[15] Pre-trial motions began on October 24, 2011 with the issue of plea negotiation privilege, reported as *R. v. Cater, [2011] N.S.J. No. 561*. This delay motion is the second pre-trial motion advanced by Kyle Cater.

Legal Principles that Apply to Charter Delay Applications

[16] The primary purpose of section 11(b) is the protection of the individual rights of the accused. These rights are (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial. (*R. v. Morin, [1992] S.C.J. No. 25, paragraphs 26 and 27*) What is encompassed by these rights is articulated in *Morin*:

> The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right of liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh. *(Morin, paragraph 28)*

[17] Society's interests, while secondary, are also served by section 11(b). There is a strong societal value in the fair and humane treatment of accused persons. Promptly-held trials "enjoy the confidence of the public." (*Morin, paragraph 29*) There is also "a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law." (*R. v. Askov, [1990] S.C.J. No. 106, paragraph 44*) *Morin* noted that: "As the seriousness of the offence increases so does the societal demand that the accused be brought to trial." (*Morin, paragraph 30*)

[18] Determining an unreasonable delay application involves a careful assessment of a number of factors: the length of the delay, waiver of time periods, and the reasons for the delay.

The Length of the Delay

[19] The length of the delay is customarily calculated from the date on which an Information is sworn to the end of the trial. (*Morin, paragraph 35*) An inquiry into whether there has been unreasonable delay should only be undertaken if "the period is of sufficient length to raise an issue as to its reasonableness." In Mr. Cater's case, the Crown concedes that an inquiry is warranted.

Waiver of Time Periods

[20] The length of the delay will be reduced by express or implied waivers by the accused of his or her rights under section 11(b). Waivers "must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights…If the waiver is said to be implicit, the conduct of the accused must comply with the stringent test for waiver…"(*Morin, paragraph 38*) *Morin* explored this issue carefully:

> Waiver requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver. Such conduct may be taken into account under the factor "actions of the accused" but it is not waiver..." (*Morin, paragraph 38*)

[21] Consent to a trial date "can give rise to an inference of waiver" (*Askov, paragraph 65*) but only if the consent is not merely "acquiescence in the inevitable." (*Morin, paragraph 38*)

Reasons for the Delay

[22] In *Morin*, the Supreme Court of Canada identified categories to describe the reasons a case may be delayed as it moves from the laying of the charge to trial. Delays occur because of inherent time requirements, actions of the Crown and accused, and due to the limitations on institutional resources. (*Morin, paragraphs*

41- 58) There may also be other reasons for the delay that cannot be neatly pigeon-holed. (*Morin, paragraphs 59 and 60*)

Inherent Time Requirements

[23] It is inevitable that all cases have inherent time requirements which lead to delay. Complexity of the case will be a factor: "…the more complicated a case, the longer it will take counsel to prepare for trial and for the trial to be conducted once it begins." Cases that involve "numerous intercepted communications which must be transcribed and analyzed" will also take longer and in such cases, longer periods of delay will be more excusable than in less complicated cases. (*Morin, paragraph 41*)

[24] "Intake requirements" are also a factor in the inherent time requirements for almost all cases. These intake requirements are described in *Morin* as "activities such as retention of counsel, bail hearings, police and administration paperwork, disclosure etc." And as with inherent time requirements generally, the more complexity involved in the intake activities, the longer the tolerable delay will be. (*Morin, paragraph 42*) Each case has to be assessed on its facts.

Actions of the Accused

[25] The accused may contribute to the delay in a case by virtue of the perfectly legitimate choices he or she makes in how the case should be conducted. The decision to advance *Charter* motions is an example of how the voluntary actions of an accused are relevant to the determination of what length of delay is reasonable. An accused person is not expected to sacrifice "all preliminary procedures and strategy" but his or her approach to the case and the delay that causes is to be taken into account in the unreasonable delay analysis. (*Morin, paragraph 44*)

Actions of the Crown

[26] The Crown's conduct is also subject to scrutiny in section 11(b) applications. Delays occasioned by the Crown, for entirely appropriate reasons, cannot be relied on by the Crown "to explain away delay that is otherwise unreasonable." Crown induced delays may be the result of Crown adjournment requests and failure or delay in disclosure, to name a couple of examples. (*Morin, paragraph 46*)

Limits on Institutional Resources

[27] In *Morin* it is noted that institutional delay is "the most common source of delay and the most difficult to reconcile" with the requirements of section 11(b) of the *Charter*. Institutional delay is found in the time period between when the parties are ready for trial "but the system cannot accommodate them." (*Morin, paragraph 47*) Acknowledging the reality of busy trial courts, some amount of delay has to be accepted as being within constitutional limits although "There is a point in time at which the Court will no longer tolerate delay based on the plea of inadequate resources." This is where the "administrative guideline" developed by the Supreme Court of Canada in *Askov* and *Morin* is intended to assist. (*Morin, paragraph 48*)

[28] The guidelines established by *Morin* contemplate a trial occurring in Provincial Court within 8 – 10 months of the charges being laid with an additional 6 – 8 months being tolerable for cases proceeding to trial following a committal at preliminary inquiry. The additional time allowable following a preliminary inquiry is intended to reflect the fact that "after committal the system must cope with a different court with its special resource problems." (*Morin, paragraph 55*)

[29] It is to be noted that inherent time requirements are not part of institutional delays. This is commented on in *R. v. Sharma, [1992] S.C.J. No. 26*: "As the accused at no time indicated that he was prepared for trial or that he wished the first available trial date, it is not possible to determine when he was ready for trial." (*Sharma, paragraph 24*)

Prejudice to the Accused

[30] Another dimension of the unreasonable delay analysis is that of prejudice to the accused person. This is addressed in *Askov* and *Morin.* It is also a factor in the analysis of delay in *Sharma*, a decision released concurrently to *Morin*. Sopinka, J. writing the majority reasons in both cases, considered prejudice along with the other relevant factors in determining that the delay in the case was not unreasonable. In both cases – *Morin* and *Sharma* – McLaughlin, J. (as she then was) posited prejudice as an issue to be addressed once the threshold issue of whether the accused has made out the case for unreasonable delay had been

resolved. In discussing the issue of unreasonable delay, McLaughlin, J. commented as follows:

> **87** The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. In the final analysis the judge, before staying charges, must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial.
>
> **88** The factors to be considered include the length of the delay, any waiver by the accused of the delay, the reasons for the delay and prejudice to the accused. But simply listing factors does not resolve the dilemma of a trial judge faced with an application for a stay on grounds of delay. What is important is how those factors interact and what weight is to be accorded to each. In this connection, we must remind ourselves that the best test will be relatively easy to apply; otherwise, stay applications themselves will contribute to the already heavy load on trial judges and compound the problem of delay.
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> **…**
>
> **90** If this threshold or prima facie case is made out, the court must proceed to a closer consideration of the right of the accused to a trial within a reasonable time, and the question of whether it outweighs the conflicting interest of society in bringing a person charged with a criminal offence to trial. The question is whether, on the facts of the particular case, the interest of society in requiring the accused person to stand trial is outweighed by the injury to the accused's rights and detriment to the administration of justice which a trial at a later date would inflict. The interest of society in bringing those charged with criminal offences to trial is of constant importance. The interest of the accused, on the other hand (and the correlative negative impact of delay on the administration of justice) varies with the circumstances. It is usually measured by the fourth factor -- prejudice to the accused's interests in security and a fair trial. It is the minimization of this prejudice which has been held to be the main purpose of the right under s. 11(b) of the Canadian Charter of Rights and Freedoms to be tried within a reasonable time: R. v. Conway, [1989] 1 S.C.R. 1659, at p. 1672.

[31] In an unreasonable delay application, the onus is on the accused to establish prejudice although it may be inferred from the length of the delay. (*R. v. Godin, [2009] S.C.J. No. 26, paragraphs 34 – 35*) A certain degree of prejudice will inevitably be experienced by all persons charged with a criminal offence. (*Askov, paragraph 115*) For it to be relevant to the section 11(b) analysis, the prejudice experienced by an accused must be in relation to the delay, not simply from the fact of being charged. (*Askov, paragraph 118, Lamer, C.J.*)

[32] Prejudice may attach to any of the three interests of the accused that section 11(b) protects:

> …liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence. (*Godin, paragraph 30*)

[33] An accused person's actions will be relevant in assessing whether there has been prejudice as a result of delay. As observed by Sopinka, J. in *Sharma*:

> …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…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 may also be taken of the fact that the appellant was not altogether unfamiliar with the criminal justice system. This may reduce the stress and anxiety of pending proceedings. (*Sharma, paragraphs 31 - 32*)

The Length and Nature of the Delay in Kyle Cater's Case

[34] The task I must now undertake is that of examining and categorizing what occurred over the period of time since Mr. Cater was charged with the offences before me. I have done this by careful examination of the transcripts for the court appearances between January 16, 2009 and September 6, 2011.

<u>The Length of the Delay</u>

[35] I find that the length of the delay in this case is 38.5 months: from the laying of the joint Information charges of weapons possession on January 15, 2009 to the presently-scheduled conclusion of the trial on March 1, 2012. (The weapons trafficking Information on which Mr. Cater is charged alone was laid on April 29, 2009.) While what could happen between the start of his trial – arguably October 24 when I dealt with the plea negotiation privilege issue – and its scheduled conclusion on March 1, 2012 - is speculative, this is the timeframe I am considering as relevant.

[36] It is really the period of January 15, 2009 to October 24, 2011 that requires scrutiny. The length of time for the completion of Mr. Cater's trial, just over 4 months from October 24, 2011 to March 1, 2012 is a relatively short period of time, especially in light of Ms. Cooper's indications that she has found the trial preparation period from when Mr. Cater re-elected to Provincial Court on September 6, 2011 to now and going forward to be quite compressed. I will note that when Mr. Cater's re-election converted the preliminary inquiry dates scheduled for November 2011 into trial dates (by consent) and it was indicated that the time allocated would be insufficient for trial purposes, obtaining additional trial time in December and February 2012 (and March 1, 2012) represents very little, if any institutional delay. My point is that the Defence complaints about delay have been focused on the months leading up to the start of the trial, not the time after it commenced.

The Nature of the Delay

[37] As is typically the case, no single cause explains the delay in Mr. Cater's case.

[38] Mr. Cater first appeared in court on January 16, 2009, the day after the charges in the joint Information were laid. He consented through counsel appearing with him for bail purposes to be remanded to January 19, 2009 for a bail hearing. The Court was asked by the Crown to impose a prohibition pursuant to section 516(2) of the *Criminal Code* on contact with his father and co-accused, Paul Cater, and declined to do so.

[39] On Monday, January 19, 2009, Kyle Cater's bail hearing was put over to January 21, at which time there were agreed-upon release conditions and Mr. Cater

was released on a recognizance with his mother, Barbara Cater, as surety. Although he was prohibited from contact with Torina Lewis, the recognizance did not prohibit contact with his father, Paul Cater. Mr. Cater's election and plea were set over to February 4, 2009.

[40] On February 4, 2009, with Torina Lewis and Paul Cater present in court and having made Legal Aid applications, Nicole Campbell, of Nova Scotia Legal Aid, indicated that she was appearing "as a friend of the court today just to see about the issue of representation." She advised that Nova Scotia Legal Aid was "certainly looking into the matter of representation and looking into conflicts as well." She agreed when the Court observed that it was "probably reasonable to think that this matter isn't going to be sorted out until early May." Kyle Cater arrived at this juncture and was able to advise that he had an appointment with Nova Scotia Legal Aid for April 17. Consequently, the Court put election and plea over for all three accused to May 7, 2009.

[41] On April 30, 2009 Mr. Cater appeared in court on the weapons trafficking Information that had been laid the day before. He was represented by duty counsel and released on a recognizance with the same surety and conditions as the recognizance from January 21 applying to the joint Information. He had no questions when the conditions, including the house arrest provisions, were read to him. The new matters was set over to May 7 with duty counsel indicating that Mr. Cater was "in the process of getting a lawyer."

[42] Mr. Cater appeared before Judge Beach in Courtroom #1 on May 7, 2009 represented by Geoff Newton. His co-accused were present and represented. Paul Cater's counsel, Alfred Seaman, spoke on behalf of all accused and requested that the matters of election and plea be set over to May 28 as there were "still issues regarding disclosure that need to be looked at." The Crown concurred with Judge Beach's observation that it looked likely to be a lengthy matter. As a lengthy matter it would have to be set for trial in the long trial court which led to Judge Beach noting that if it required a date-setting on May 28, "we may not be able to set a date."

[43] On May 7, 2009, Mr. Newton also had to appear for Mr. Cater in Courtroom #4 on the weapons trafficking Information. He was unsuccessful in securing a return date for May 28 and the #4 matter was set for May 26.

[44] On May 26, 2009, Mr. Newton appeared with Mr. Cater before Judge Digby in Courtroom #4 on the weapons trafficking Information. He indicated there was "a significant amount of disclosure, including wiretaps, in this matter, and I haven't received it yet." He advised of his understanding that the Crown would be seeking dates in the long trial court, Courtroom #6. Judge Digby noted that Mr. Cater "really should have an election before you go there" to which Mr. Newton responded: "I need the disclosure before I can make the election."

[45] Christopher Harmes appearing for the Crown advised Judge Digby that he did not have disclosure and confirmed there was a significant amount of it. He speculated that "perhaps some preliminary disclosure can be made" which he hoped would "be sufficient to allow an election to be made…" He suggested a "relatively short" adjournment of 2 – 3 weeks. A return date of June 15 was docketed.

[46] The older matter, the joint Information, came back to Courtroom #1 on May 28, 2009 as scheduled. Counsel representing both Caters and Ms. Lewis requested to have election and plea put over to June 29. When asked if that was agreeable to everyone, Mr. Newton for Kyle Cater said it was "fine." The reason for the request was provided by counsel for Paul Cater: "We're looking to reference some disclosure and such."

[47] On June 15, the weapons trafficking Information was back in Courtroom #4. There was still no disclosure on these charges. Crown counsel advised that he did not have the disclosure himself and that he believed "…part of the problem is that it's connected or may be connected to other investigations so they're trying to weed through it on what can be disclosed and what can't be." Mr. Newton suggested a return on June 26 but readily agreed when it was suggested by the Court that the date was "probably optimistic." He agreed with the Court's suggestion to return in late August and August 25 was set.

[48] The joint Information returned to Courtroom #1 and Judge Beach on June 29, 2009. Mr. Newton was unable to attend and Mr. MacKeen, counsel for Paul

Cater, advanced his request to have Kyle Cater's election and plea set over to August 25. Mr. MacKeen indicated his understanding that Mr. Newton was "having some issues with disclosure" and that this underpinned the request for a further adjournment. Paul Cater and Torina Lewis were also set over to August 25. Mr. Seaman indicated that with regard to Paul Cater, there were some discussions ongoing for "a joint resolution on this matter."

[49] On August 25, 2009, at the appearance on the joint Information, Mr. Newton advised the Court that he had just spoken to the Crown with the result that they were expecting the disclosure of "a disk around mid-September, so we have agreed to September 21…for election and plea."

[50] The weapons trafficking Information was spoken to in its originating courtroom, Courtroom #4, on August 25 and put over to September 28, 2009.

[51] Still waiting for disclosure on September 21, Mr. Newton asked that the joint Information be put over to October 22. Appearing in Courtroom #4 on the weapons trafficking Information on September 28, he had that matter put over to October 22 as well.

[52] On October 22, Mr. Newton advised Judge Digby in Courtroom #4 that he wanted to schedule a preliminary inquiry on all the weapons charges – the joint Information and the weapons trafficking Information – but was trying to coordinate with the Crown having these matters heard together. He had discussed the issue with the assigned Crown and she was considering the request. He asked to adjourn the matter "for about a month." He made the same point to Judge Beach when he appeared for Mr. Cater in Courtroom #1 on the joint Information, telling her: "What I'm trying to arrange, Your Honour, is a preliminary inquiry. Since they're similar in nature, they flow together, similar wiretaps, speaking to my friend about organizing it so the preliminary inquiry would be held at the same time in one courtroom…That's where I'm going with Kyle anyway and I need some more time." He asked to put the matter over to November 16, 2009. Judge Beach noted that no election had been made yet and Mr. Newton advised that he was "still working with the Crown to get Crown's consent to do that in any event…" obviously referring to his interest in combining the two preliminary inquiries that Mr. Cater would be entitled to if he made an applicable election.

[53] By November 16, agreement had been reached with the Crown for a consolidated preliminary inquiry to be set in the long trial court, Courtroom #6. Mr. Cater elected Supreme Court, judge alone on the joint Information which was then the deemed election of his co-accused. The matter was set over to Courtroom #6's next intake date on November 24 so that the dates for the preliminary inquiry could be set.

[54] Mr. Cater also appeared with Mr. Newton on November 16 in Courtroom #4 on the weapons trafficking information, elected Supreme Court, judge alone, and requested the matter be sent into Courtroom #6 on November 24 to schedule a preliminary inquiry. The time estimate for each matter was one week. They were described as lengthy, involving intercepted communications.

[55] At intake in Courtroom #6 on November 24, the presiding judge, Judge Campbell, recommended adjourning the setting of dates until January 8, 2010 in the hopes that earlier dates would have come available by then. Counsel for all accused agreed with this suggestion.

[56] On January 8, 2010, Courtroom #6 was able to offer dates in February and March, following which the next available dates were in June and July. Mr. Newton was late arriving so court was recessed. When Mr. Newton appeared he indicated that counsel had conferred and "resolved the date issue", choosing to set the preliminary inquiries to start on June 21 for two weeks as well as a further week in the middle of July. The Crown advised that "if everything was in issue" for the weapons trafficking preliminary inquiry, that matter alone would take 10 days. The Crown and Mr. Newton offered that they might be able to shorten some aspects of the preliminaries and proposed returning in March to advise if they had achieved any success in doing so. March 4 was set, effectively as a focus hearing, with everyone's agreement.

[57] On March 4, there was a joint request for the focus hearing to be set over to March 11. At the March 11 appearance the Crown indicated there was agreement amongst counsel to have the focus hearing adjourned again, to April 7.

[58] Mr. Newton appearing with Mr. Cater on March 11 indicated an intention to seek a "minor adjustment" to his client's release conditions as he was "coming to the end of the school year." He advised the Court: "I've provided information to

[the Crown] that he's been successful at school and what we're proposing is a two hour window period after school." Moments later, Mr. Newton stated that "…we'll have to wait a little bit more." No explanation was provided as to why the proposed variation was being abandoned.

[59] On April 7, the Crown and counsel for all three accused were apparently still making progress. The Court was advised that there was a joint request to have "the matter" put over to April 27 which would "still give us time to focus things if there's the necessity of a preliminary inquiry."

[60] Mr. Newton advised the Court on April 27: "We're really, really close to resolving this." He indicated that he needed one more meeting with his client and wanted to return on May 7, 2010 on all the Informations, which included the joint Information and the weapons trafficking Information.

[61] On May 7 Mr. Newton had "bad news" for the court. He advised: "Some negotiations have been entered into which put me in a position that I can't continue to represent Mr. Cater." He went on to say: "We thought we could resolve it but we can't. All parties know that and we wanted to let the Court know as soon as possible…So at least some of those dates can hopefully be salvaged." Mr. Newton indicated that Mr. Cater "understands the reasons" and was consenting to his withdrawal. The Crown noted that it was clear in the circumstances that there had been "a breakdown in the solicitor-client relationship to the point that there had been representations made, that there had been a negotiated resolution made that is now not going to happen."

[62] Mr. Newton advised that at his client's request he had spoken to one lawyer about assuming carriage of the cases "but everybody basically is in agreement that it would be very difficult to get up to speed by this point." Mr. Hartlen for the Crown agreed, saying: "Realistically speaking…I can't speak for any counsel, but I can't imagine a person being able to get in at this late stage, get through the material that's needed to get through and be in a position to proceed on either of the dates that are available in June or July."

[63] Mr. Hartlen also indicated that he had booked himself into another trial on some of the Cater dates because he understood the Cater matter to be resolved.

This was a view he believed to have been shared by counsel for Mr. Cater's co-accused.

[64] Mr. Hartlen advised that were the preliminaries to be re-scheduled, the hearing dates would not need to be continuous so that they could be parceled out over time.

[65] Mr. Newton indicated Mr. Cater would need some time to contact new counsel. I confirmed that "Everybody is saying let those dates [referring to the June/July 2010 dates] go." The matters were set over to May 21.

[66] On May 21, Mr. Cater was able to advise that he had an appointment with Warren Zimmer on May 26. The lawyers proposed a return date of June 21 as the first available date "we can all appear again". Mr. Seaman, as spokesperson on the matter observed: "…that should give Mr. Kyle Cater plenty of time to get a lawyer and…then for that lawyer to get up to speed on what's going on, we think."

[67] At the June 21 appearance it was indicated that Mr. Zimmer would be representing Mr. Cater. Mr. MacKeen, appearing for Ms. Lewis, spoke on behalf of Mr. Zimmer who was in another court and advised that, "We were wanting to put it to [July] 16." As the date was not feasible for the Crown, July 19 was set, for what was expected to be a short appearance only. The intention was to set dates, according to the Crown, either "for a preliminary…or dates for sentencing…"

[68] On July 19 there was no judge available for Courtroom #6 at 9 a.m. The parties appeared and agreed that the matter be set over to August 16.

[69] On August 16 there was a joint request to set new preliminary inquiry dates. The Crown proposed a focus hearing be set to try and narrow the issues before looking for dates, which had previously meant 3 weeks of court time. As Mr. Hartlen put it: "…if we could have a meaningful focus hearing, narrow the issues down, and then perhaps we're not looking at reserving three weeks next June, we might be just looking for a couple of days here and there." Counsel for Paul Cater and Ms. Lewis thought this to be a constructive suggestion. Mr. Zimmer appearing for Kyle Cater, concurred. September 9 was offered as a return date. Mr. Zimmer advised that would not give him "a chance to look at what I'm going to have to look at." Therefore September 28 was scheduled for the focus hearing.

[70] At the focus hearing on September 28, 2010, Mr. Zimmer indicated that everything was in issue for the preliminary – committal, voice identification, and the various technical aspects of the implementation of the authorization. It was agreed that 3 weeks should be set for the preliminary inquiries.

[71] The preliminary inquiries were set for June and July 2011. May dates for one of the preliminary inquiries were not feasible for Mr. Zimmer. The possibility of another focus hearing was left open.

[72] At the conclusion of the proceedings on September 28, Paul Cater obtained a by-consent variation to his release conditions.

[73] On April 12, 2011, as luck would have it for Kyle Cater, Warren Zimmer was appointed to the Bench. Mr. Cater was once again without a lawyer. I precipitated an appearance to address this development by corresponding with all counsel and sending a letter to Mr. Cater.

[74] Although Mr. Cater did not receive my letter, the matters were set down for May 4 with all counsel and Mr. Cater in attendance.

[75] Mr. Cater advised that he had an appointment with Nova Scotia Legal Aid on May 12. He was anticipating being issued a certificate and having to find a lawyer willing to represent him on a certificate basis.

[76] The Crown and counsel for Paul Cater and Torina Lewis expressed their views that Mr. Cater was very unlikely to have up-to-speed counsel at the ready for the start of the preliminary inquiries on June 20. Mr. Hartlen put it this way: "…There's no chance we're going to have a preliminary, unless Mr. Cater was in a situation where he was quite simply saying, "I'm proceeding without counsel at this point," and that does not seem to be his choice, nor should it be in the circumstances." I then had the following exchange with Mr. Cater:

> **THE COURT**: …Mr. Cater, essentially what all the lawyers are saying is that if you want to be represented at a preliminary inquiry, and it's certainly your right to be represented at a preliminary inquiry, nobody is suggesting otherwise, then it's not realistic to think that we can proceed on the dates that were set that start on June the 20th, the dates I just reviewed with you. And the reason for that is, as I indicated a moment ago, you not only have to have Legal Aid agree that you qualify for Legal

Aid, they -- so you have to go through that process, which is the purpose of the May 12th appointment.

MR. K. CATER: Yeah.

THE COURT: Then you have to take that certificate that they issue you with and you have to go find a lawyer who'll represent you, and then that lawyer has to review the disclosure in order to prepare to represent you, and then that lawyer would also have to be available for those dates. And myself and, as you've heard from Mr. Hartlen and the other lawyers, all think it's extremely unlikely that a lawyer would have those dates free this close to those dates. So all that being said, I can't see how it's realistic to keep those dates. I think if we sit on those dates and as we get closer and closer to those dates, we're going to find the preliminary is not going to be able to go ahead because you're going to come back and say, "I'm still looking for a lawyer," or, "I found a lawyer. My lawyer is still reviewing the disclosure," or, "My lawyer's viewed the disclosure but is not available for those dates." So one way or the other, we're not going to be able to make [use] of those dates.

MR. K. CATER: Yeah.

THE COURT: So the only -- and I'll put this out to you. I'm not in any way suggesting that this is an option that you have to agree to and I would certainly strongly encourage you to have legal representation, but it would be your right to have an inquiry proceed on those dates without representation. In other words, you would represent yourself.

MR. K. CATER: Well, I would like to have a lawyer.

THE COURT: Yes, fair enough. And I just wanted to say that to you because nobody had actually put that question to you.

MR. K. CATER: Okay.

[77] After advising Mr. Cater that his new lawyer would need to review the disclosure, I proposed to him that he come back “in the week of May 16” to advise on the status of his efforts to get a lawyer. I asked him: “Does that sounds like a plan?” to which he replied, “Sure does.”

[78] A return date of May 17, 2011 was set.

[79] At the May 4 appearance Mr. Cater advised that he wanted to vary his house arrest conditions so he could move from his mother's residence. He pointed out that he did not have an exception that permitted him to work or allowed him out for four hours a week to attend to personal needs. He said he didn't really care if he was allowed to work, he just needed to get out of his mother's house, something he hoped to be able to achieve by securing social assistance.

[80] Mr. Cater was arrested on May 4 after court. A bail hearing was held and on May 13, he was remanded into custody on new charges and had his release on the Courtroom #6 charges revoked.

[81] Mr. Cater appeared on May 17 and then again on June 2 which provided information on the status of a certificate from Nova Scotia Legal Aid. Ms. Cooper first appeared on June 17 to advise that she had received and accepted a limited certificate from Nova Scotia Legal Aid. She confirmed she would be prepared to represent Mr. Cater if a full certificate was granted. The issue of facilitating her access to disclosure was explored and a return date of August 2 was set for Ms. Cooper to confirm if she was retained or not.

[82] Mr. Cater was asked if he understood what was happening to which he replied, "Clearly." He agreed with my assumption that he wanted the matters before the court to advance.

[83] On August 2, Ms. Cooper was retained and had started reviewing "some" of the "large volume of disclosure" with Mr. Cater.

[84] At the August 2 proceeding, I indicated my intention to set new preliminary inquiry dates. Ms. Cooper wanted more time before I did so but I said that I anticipated she would have ample time between the setting of the dates and the start of the preliminary inquiries. I pointed out that Mr. Cater had as one of his options, a waiver of his preliminary inquiries which would put him before the Supreme Court to get trial dates. I found no persuasive reason not to set dates and stated:

> …I want to give Mr. Cater the earliest possible preliminary inquiry dates I can, and then within the envelope of time prior to the start of that preliminary inquiry, counsel are obviously at liberty to have any discussions they want about…how the case goes forward.

[85] I set preliminary inquiry dates for November 2011 with a focus hearing for September 6.

[86] On September 6, Mr. Cater re-elected to Provincial Court with Crown consent. The Crown consented to the re-election of Paul Cater and Torina Lewis. The preliminary inquiry dates in November were converted to trial dates. Subsequently, additional dates in December, 2011, February 2012 and March 1, 2012 were added.

How to Characterize the Delay in This Case

[87] By all accounts, this is a more complicated case with voluminous disclosure in the nature of intercepted communications. As *Morin* held, in such cases longer periods of delay will be more excusable than in less complicated cases. (*Morin, paragraph 41*) I find that disclosure was slow in coming: the wiretap disclosure appears to have reached Mr. Newton only by the October 22, 2009 court date. For the joint Information, this was a delay of 9 months. For the weapons trafficking Information, this was a delay of 6 months. However, there is nothing to indicate that the Crown lacked diligence in getting the disclosure to Defence: on June 15, in relation to the weapons trafficking charges, Crown counsel indicated that the wiretap evidence was connected to other investigations and it was being reviewed for a determination of what could be disclosed.

[88] The extent of the disclosure can be gleaned from the 247 page Affidavit and Information to Obtain filed in relation to the intercepts authorization application in November 2008. It states that: “The investigation has utilized the following police techniques: numerous confidential sources; an undercover agent; physical surveillance on the main targets and associates of those targets; search warrants; dial number recorder warrants; production orders and CDSA search warrants.” Kyle Cater was one of 13 named targets of the investigation, code-named “Operation Intrude.”

[89] I do not think that the evidence supports a clear finding that Mr. Cater waived his section 11(b) rights during the period when his counsel was awaiting the wiretap disclosure. However, it would have been possible for an election to have been made to start the process of getting dates, which as the record indicates, were not going to be obtained until some months out from the setting-down date.

The Defence knew the anticipated disclosure was intercept evidence: in the joint Information there had been initial disclosure which, according to *R. v. Stinchcombe, [1991] S.C.J. No. 83*, is what should be provided "before the accused is called upon to elect the mode of trial or to plead." (*Stinchcombe, paragraph 28*) Had Mr. Cater been especially concerned about the time that was passing as he waited to make his election, he could have taken steps to advance the charges on the joint Information. As it was, he exercised a choice he was fully entitled to make by waiting for the wiretap disclosure before entering his election. So, if his conduct during the wait for disclosure was not waiver it was a decision he made around how to prioritize his options: wait for the wiretap disclosure before making an election or elect and get dates.

[90] The disclosure delay in this case can be distinguished from what the Supreme Court of Canada confronted in the *Godin* case. In *Godin*, described as "a straightforward case", there was no Crown explanation for the delay in providing a crucial piece of disclosure to Defence. (*Godin, paragraph 16*) Here, the Crown indicated the wiretap disclosure was connected into other investigations and had to be reviewed. That review was a necessary step in a multi-target investigation. Another distinction between *Godin* and this case is the fact that Mr. Cater and his counsel did not protest the disclosure delay. In *Godin*, Defence counsel was agitating for earlier dates. Although the delay may have been frustrating for Mr. Cater and his lawyer, which is not disclosed in the transcripts, there was no express or implied suggestion that the delay was viewed as unreasonable.

[91] The decision about election does not appear to have taken long to make once the Defence had the wiretap disclosure. By October 22, 2009 Mr. Cater had plainly resolved what his election would be as he was looking to consolidate the preliminary inquiries for both sets of charges.

[92] I do not find, in the circumstances of this case, this initial period of delay, which can properly be characterized as intake delay and part of the inherent time requirements of a more complicated case, to have been unreasonable.

[93] No one could have predicted that there would be significant delays as the case progressed, for reasons that could not be foreseen.

[94] There was a further delay between October 22 and November 16, 2009 while Mr. Newton waited for the Crown to decide on his request to consolidate the preliminary inquiries. This delay cannot be attributed to the Crown. The Crown was entitled to reflect on the appropriateness of having these cases heard together. Agreement was reached on this approach by November 16, Mr. Cater made his elections, and the Informations were sent into Courtroom #6 for intake on November 24.

[95] I do not accept, as Ms. Cooper has suggested, that putting the date-setting over to January 8, 2010 constituted an unreasonable delay. This occurred at the Court's suggestion and all parties agreed to it. While not necessarily waiver, Mr. Cater went along with what the Court indicated was the better option for obtaining earlier dates. Indeed, on January 8, 2010, the Court offered February and March dates. Counsel, including Mr. Newton on Mr. Cater's behalf, chose June and July dates. This did not represent any institutional delay: it was a reflection of Defence counsel choosing dates they deemed to be more suitable.

[96] The record indicates that in the lead-up to the scheduled preliminary inquiry dates, Mr. Newton was engaged in discussions that had the apparent potential of making the preliminary inquiries unnecessary. This was said on April 7, 2010. On April 27, Mr. Newton advised that the parties were "really, really close to resolving this." None of these efforts, whatever they may have involved, suggested that the preliminary inquiries would have to be adjourned. I do not find that any delay was being occasioned in the time leading up to the scheduled preliminary inquiries.

[97] Instead, a most unfortunate development occurred: the withdrawal of Mr. Newton. This had the effect of de-railing the preliminary inquiries. This can only be characterized as an "other" reason for delay under the *Morin* categories. It cannot be attributed to any party or to a systemic limitation. Mr. Cater's relationship with his counsel broke down and Mr. Newton had to withdraw from representing him.

[98] Mr. Newton's withdrawal effectively triggered the inherent delay that occurs when an accused person has to find a new lawyer in the midst of a case. Mr. Cater was successful in securing replacement counsel quite quickly: by June 21 the court

was advised that Mr. Zimmer would be representing him. It does not amount to unreasonable delay that Mr. Zimmer had to get up to speed on the charges. At an appearance on August 16 he agreed to return with Mr. Cater on September 28 for a focus hearing, advising that this would give him “a chance to look at what I’m going to have to look at.”

[99] With Mr. Cater choosing to put everything in issue for the preliminary inquiries, dates were set for June and July 2011. In a case sufficiently complicated that it required 3 weeks for Mr. Cater’s two preliminary inquiries, a delay of 9 months from the setting-down to the start of the preliminaries is not unreasonable. I do not find that this represents a delay occasioned by unacceptable resource limitations given the reality of busy Provincial Court dockets. Furthermore, the Crown had continued to indicate that the preliminary inquiries might be shortened if agreements could be reached. It was Mr. Cater’s counsel who was putting everything into issue. He was entitled to do so, on Mr. Cater’s behalf, but having made this strategic choice, Mr. Cater cannot now complain that this constituted an unreasonable delay, justifying a stay of the proceedings.

[100] Judge Zimmer’s appointment to the Bench, like Mr. Newton’s withdrawal, was certainly a stroke of bad luck for Mr. Cater. I find that it once again subjected Mr. Cater’s charges to the inherent time requirements that flow from his need to find a new lawyer. On May 4, 2011 at an appearance animated by me, when told he had the right to proceed on the scheduled preliminary inquiry dates without a lawyer, Mr. Cater was clear that he wanted to be represented. By August 2 he had replacement counsel, Ms. Cooper, who was already reviewing disclosure. New preliminary inquiry dates were set for November 2011. At the time of Mr. Cater’s re-election from Supreme Court to Provincial Court on September 6, it was agreed that these preliminary inquiry dates would be trial dates.

[101] The Court and parties responded quickly to Judge Zimmer’s appointment. The issue was being addressed with Mr. Cater at an appearance on May 4, just three weeks after his lawyer had gone to the Bench. Three months later he had a new lawyer and by September 6, 2011, he had trial dates in November. The time from his first appearance after Judge Zimmer’s appointment and the start of his trial is approximately 6 months, a wholly reasonable delay in the circumstances

and one that enabled Mr. Cater to secure new representation and still have his trial start on a timely basis after the set-back of losing another lawyer.

Summary of Conclusions on the Matter of the Delay

[102] I do not find this to be a case where there has been unreasonable delay occasioned by the Crown's actions or systemic problems. There was delay in producing the wiretap disclosure in the first instance, notably with respect to the joint Information, but, given the nature of the case and the fact that it emerges from a major investigation, "Operation Intrude", with numerous targets and the use of varied investigative techniques, I do not find that the delay in providing disclosure was unreasonable.

[103] There are instances where it was Mr. Cater's own choices that led to adjournments of date-settings. An example of this was the request by Mr. Newton on October 22, 2009 to have the matter of election put over in order to see if the Crown would agree to the consolidation of the two preliminary inquiries. In any event, Mr. Cater's elections were made not even a month later on November 16, 2009. Through his then-counsel, Mr. Zimmer, Mr. Cater chose, in September 2010, as was his prerogative, to contest all issues at the prospective preliminary inquiries. This meant lengthier preliminary inquiries had to be accommodated in the Court's docket. The 3 weeks required were found in June and July 2011. In May 2011, after he lost Mr. Zimmer to the Bench, Mr. Cater chose to find new counsel over proceeding with the scheduled preliminary inquiries on the basis of representing himself. The June/July 2011 preliminary inquiry dates were abandoned and he subsequently was given new dates in November 2011.

[104] Mr. Cater was entitled to act as he did and make the choices he made, including the prudent one of obtaining new counsel. However he cannot exercise autonomy in conducting his case and then complain that the delay occasioned by those choices is delay that violates his constitutional rights.

[105] I find there were no institutional delays. Mr. Cater has not shown that the postponement of date-setting for the preliminary inquiries in Courtroom #6 from November 24, 2009 to January 8, 2010 resulted in any delay in getting dates. Getting 3 weeks in June and July 2010 for the preliminary inquiries did not constitute an unreasonable delay. When the preliminary inquiries were re-

scheduled on September 28, 2010 to June and July 2011, this was also not an unreasonable delay. And the further scheduling of the preliminary inquiries on August 2, 2011 to November 2011 was not unreasonable either.

[106] Given the unique developments in this case of Mr. Cater twice finding himself having to replace lawyers, I do not find that the *Morin* guidelines have any useful application to the delay analysis.

Prejudice to Mr. Cater

[107] As it is not clear to me that prejudice to the accused is only to be considered once unreasonable delay has been established, the approach approved by MacLaughlin, J. (as she then was) in *Morin*, (*see paragraphs 89 and 90*) I intend to consider the issue of the prejudice Mr. Cater has experienced during the delays in his case. The evidence I heard on the issue of delay came from Mr. Cater's mother, Barbara Cater. She testified to the strict bail conditions he lived under for approximately 28 months. His house arrest did not include a four hour exception to attend to personal needs. Ms. Cater's evidence was that after he finished high school (which he was allowed to attend as an exception to his house arrest), there was no exception that permitted him to work and therefore he could not support himself. Apparently Mr. Cater did not see this as a particular hardship. I note that at his May 4, 2011 court appearance he said he did not really care if he could not go to work.

[108] Evidence was also provided that Mr. Cater had been an excellent student in high school, at least in English. I can infer that he was otherwise academically successful as he was accepted to the Nova Scotia Community College for a Business Administration programme. It was suggested that he has been prejudiced because he was not able to take up the NSCC offer for September 2011. This suggestion must be examined.

[109] By September 2011, after a bail hearing in May 2011, Mr. Cater was in custody on new charges and as a result of having his recognizances revoked. It was due to his being remanded that Mr. Cater was unable to attend NSCC and had nothing to do with delay.

[110] Mr. Cater's remand has in itself been advanced as an example of the prejudice he has suffered.

[111] I do not accept that Mr. Cater's remand in May 2011 can be regarded as a prejudice due to delays in his case. He was remanded because the Court was satisfied he should be detained in custody and have his existing bail revoked. His present status as a bail-denied accused is a function of him losing his liberty due to new charges and related factors. Had those new charges not arisen, and he had continued to follow his bail conditions, presumably he would not now be on remand.

[112] In relation to his strict bail conditions I find that Mr. Cater had some responsibility, if he was prejudiced by the restrictions on his liberty occasioned by the house arrest provisions, to return to court for a variation of his conditions or a bail review. Ms. Cater testified that she did not know he had that option and also that he had been advised not to pursue a variation. There are however indications that Mr. Cater was aware he could seek a variation: Mr. Newton started to raise the issue on his behalf at a court appearance on March 4, 2010. On May 4, 2011, Mr. Cater made a variation request to the court himself. On September 28, 2010, he was present in court when his father obtained a by-consent variation in his house arrest conditions.

[113] There is no question that Mr. Cater was on stringent house arrest conditions for many months that restricted his liberty and interfered with aspects of his family and social life. House arrest meant he was subject to frequent compliance checks by police. He was unable to visit his ailing grandmother or attend her funeral. He missed out on seeing his extended family. According to his mother he could not sustain his relationship with his girlfriend as he was unable to participate in normal activities with her. However, Ms. Cater's evidence confirmed that friends and family, including his father, did come to visit him so it was not an entirely austere existence.

[114] I have no doubt that Mr. Cater's bail conditions, particularly his house arrest, made aspects of his life difficult and stressful and curtailed many of his normal routines. The delay in his case meant he carried the burden of his bail longer than he would have if these matters had proceeded on the basis of Mr. Newton

representing him throughout. Instead, Mr. Cater was confronted by having to twice find replacement counsel. I have already concluded that these unprecedented events – the loss of representation through no fault of any party – did not result in delay that was unreasonable.

[115] Given the delays that did occur, Mr. Cater could have sought changes to his bail conditions. In *Sharma*, Sopinka, J. held that if Mr. Sharma had been seriously prejudiced by the delay, he could have made some effort to vary his bail conditions. (*Sharma, paragraph 31*) And, furthermore, even conceding that Mr. Cater has suffered some prejudice to his liberty and security of the person rights, this prejudice does not weigh the balance in favour of a stay of proceedings over the public interest in having these serious offences tried on their merits.

[116] Finally, on the issue of prejudice and Mr. Cater's fair trial rights, I note that there is no evidence before me that Mr. Cater's fair trial rights have been compromised by the delay in this case. As was found in *R. v. Ryan, [2004] N.S.J. No. 158 (N.S.S.C.)*: "There is no indication of any witness or evidence having been adversely affected, lost or diminished by the passing of time." (*Ryan, paragraph 43*) Submissions by Ms. Cooper that witnesses who might be called at trial to discuss telephone conversations captured by the intercepts do not constitute evidence and are speculative.

Conclusion

[117] Mr. Cater has been waiting a long time for trial. That fact alone does not mean he has experienced an unconstitutional delay. Most of that time he was proceeding on the basis of an election to the Supreme Court and intending to have a full-blown preliminary inquiry on each set of charges. Mr. Cater exercised his entitlement to make decisions and choices that influenced the conduct of his case. The transcripts of proceedings disclose that concerted efforts were made throughout by all parties, the Court, and Legal Aid to keep the matters moving ahead. The loss of Mr. Cater's first two lawyers was confronted with resolve. Any prejudice he has experienced as a result of the delay does not come close to tipping the scales in favour of a stay of proceedings over the societal interest in seeing these charges proceed to trial. There is no evidence of any impairment of his right to make a full answer and defence. I do not find there has been any unreasonable

delay in bringing Mr. Cater to trial, his *Charter* rights under section 11(b) have not been violated, and his application for a stay of proceedings is dismissed.