IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Fraser, 2013 NSPC 14

Date: 20130204

Docket: 162626

Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

-and-

Daniel Fraser

Defendant

DECISION on *Charter* Application

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: January 16, 2013

Decision: February 4, 2013

Charge: Section 77 *Fisheries Act*

Counsel: David Iannetti and Theresa O'Leary, for the Crown

Duncan MacEachern, for the Defence

Introduction

[1.] Mr. MacEachern filed a brief and supporting caselaw, his client, Mr. Daniel Fraser, gave evidence and counsel made oral argument on the *Charter* application.

[2.] Mr. Iannetti filed a brief and caselaw in response, cross-examined the defendant, and made oral argument. As part of the Crown's brief, at Tab 12, there is a copy of the Information setting out the charge and the endorsements.

[3.] Mr. MacEachern did not file a transcript of the proceedings between January 6, 2011 and October 24, 2012.

[4.] The defendant raised five issues, namely: delay, late disclosure, abuse of process, bias and continuity of evidence.

Review of Evidence

[5.] Mr. Daniel Fraser testified after being served in December, 2010 he appeared in court on January 6, 2011, entered a not guilty plea, and the matter was set for trial on November 22, 2011. His nephew, Chris Fraser, was charged as well and his trial was set for the same day.

[6.] After he got a lawyer he stated "we decided to proceed with one case on the assumption it would save money and determine the outcome of [my case]."

[7.] It was Mr. Fraser's understanding that if his nephew was found not guilty, the proceedings against him would "probably" not go ahead. He also testified if Chris Fraser was found guilty, he would plead guilty even though he felt he was not guilty.

[8.] Mr. Fraser testified that the Crown did not make any representations to him, that it was never disclosed to him, that the Crown would not go to trial against him. Yet he testified he was surprised when Mr. Iannetti told J. Ross the Crown was still proceeding against him.

[9.] Mr. Fraser testified Mr. Iannetti requested J. Ross recuse himself. There was no objection by the defendant (or his counsel). When it was suggested the parties go before J. Willison, Mr. Iannetti suggested J. Whalen because he thought they could get an earlier trial date and wanted to expedite the matter.

[10.] Mr. Fraser wanted an earlier date and agreed to attend on February 14, 2012 to set a new trial date. When he was offered October 4, 2012 he said he "was disappointed, it was going to cost him more money." He also thought the Crown was "looking for an advantage of some sort." Yet, Mr. Fraser, through his counsel, accepted the trial date. [Counsel did not ask the court for an earlier date.]

[11.] Mr. Fraser testified a few days before the pre-trial scheduled for September 6, 2011, they received "new evidence" from the Crown on the GPS (global positioning system). He said he felt "at a disadvantage" and "thought it wasn't right."

[12.] The defendant testified he "had to get an expert witness to rebuff", which cost him "more time and delay of the October trial."

[13.] On cross-examination, Mr. Fraser acknowledge that he and his nephew, Chris Fraser, were charged separately but had the same trial date.

[14.] He also acknowledged that the "idea" that his charges would be dropped came "through my lawyer." He "assumed" it came from Mr. Iannetti.

Chronology of Court Appearances

[15.] I have reviewed the Information and gleaned the following:

Date	Endorsement	Comment
Jan.6/11	Defendant appearance, pled not guilty, set matter for trial	Defendant was self represented at this point
Nov.22/11	Trial adjourned for status and hearing to set trial date	Mr. Fraser testified, after he got counsel, "we decided to proceed with one name with the assumption it would save money and some confirmation and perhaps the outcome of that case would determine his case.

Dec.2/11	Adjourned to Jan.29/12 to set trial date	
Jan.24/12	Adjourned by court to Feb.7/12	
Feb.7/12	Adjourned to Feb.14th - J. Ross recused as he heard Chris Fraser trial	J. Ross found C. Fraser not guilty. Crown asks J. Ross to recuse. Crown thought could get earlier trial with J. Whalen
Feb.14/12	Trial set Oct.4/12 Pre-trial Sept.6/12	Defendant did not ask for an earlier date – consented to trial date. No Charter argument arose
Sept.6/12	Defence counsel gives notice of a possible Charter argument on date set for trial	Mr. Fraser said got new evidence a few days before a pre-trial date
Oct.4/12	Trial adjourned to Oct.24/12	
Oct.24/12	Disclosure given to counsel, now wants to give to expert to review Charter application Jan.16/13	

The Law

[16.] **Delay –**

Section 11(b) of the *Charter* states:

> Any person charged with an offence has the right…(*b*) to be tried within a reasonable time;….

[17.] The party alleging the breach has the burden of proof and presenting evidence. That could include documentary and *viva voce* evidence, and should include trial transcripts.

[18.] Justice S.D. Frankel in *R. v. Baldine* [2012] B.C.J. No. 976 at para. 59 and 60 stated:

> **59** As discussed in *R. v. Allen*, [1997] 3 S.C.R. 700, aff'g (1996), 110 C.C.C. (3d) 331 (Ont. C.A.), an accused (or appellant) who contends that there has been constitutionally unreasonable delay has an obligation to place before the court hearing the application (or appeal) the full record of the proceedings. In *Allen*, a stay entered at trial was set aside by the Court of Appeal for Ontario for the reasons written by Mr. Justice Doherty. A further appeal was dismissed from the bench by the Supreme Court of Canada. That Court adopted Doherty J.A.'s reasons, which include the following statement (at p. 344):
>
> When s. 11(b) is in issue, this court has come to expect that full transcripts of the proceedings under review will be placed before it. A fair assessment of an alleged breach of s. 11(b) is best made after a review of all available transcripts pertaining to the challenged proceedings.
> [Emphasis added.]
>
> **60** *R. v. Fagan* (1998), 115 B.C.A.C. 106, is also pertinent. In that case, a stay for delay was set aside by this Court. The principal judgment was written by Mr. Justice Esson. Under the heading "Absence of Notice", Esson J.A. referred to a number of authorities and, in particular, quoted with approval (at para. 52) from the judgment of Madam Justice Bennett, as she then was, in *R. v. MacPherson*, [1998] B.C.J. No. 1690 (S.C.), rev'd on other grounds, 1999 BCCA 403, 127 B.C.A.C. 49:
>
> > [5] For the assistance of applications of this type in the future, the minimum material required is an affidavit setting out the chronology and the reasons for the delays and transcripts of every appearance before a court. It is common practice for courts or counsel to address the issue of delay at interim appearances. Unless the judge hearing the application has full information in order to consider the

> most drastic of remedies available, that is a stay of the proceedings, it is unlikely that these applications will be given consideration.
> [Emphasis added.]

The other member of the division in *Fagan* preferred not to express an opinion on the issue of notice (see para. 57). However, I too, agree with Bennett J. that a complete history, including transcripts, is required.

[19.] In *R. v. Firth* [1992] N.S.J. No. 72 J. Hallett stated at p. 5, para. 2:

> The factors to be considered by a court in determining if an accused's Charter right to be tried within a reasonable time has been infringed have been authoritatively decided by the Supreme Court of Canada in the Askov decision and are well known. Likewise, since the decision of the Supreme Court of Canada in R. v. Rahey, [1987] 1 S.C.R. 588, 33 C.R.R. 275, 33 C.C.C. (3d) 289, 57 C.R. (3d) 289, 39 D.L.R. (4th) 481, 75 N.R. 81, 78 N.S.R. (2d) 183, 193 A.P.R. 183, where a violation of Section 11(b) of the Charter has been established the minimum remedy is a stay of proceedings. Furthermore, the Supreme Court of Canada stated that the power to stay proceedings against an accused should only be exercised in the clearest of cases and the authority for that is R. v. Jewitt, [1985] 2 S.C.R. 128.

[20.] The leading case on the issue of delay is *R. v. Morin* [1992] 1 S.C.R. 771.

Justice McLachlin outlined the process to be followed at paras. 89-90:

> **89** In my opinion, the task of a trial judge considering an application for a stay of charges may usefully be regarded as falling into two segments. The first step is to determine whether a prima facie or threshold case for unreasonable delay has been made out. Here such matters as length of delay, waiver and the reasons for the delay fall to be considered. [page811] If the delay is reasonable having regard to similar cases, the application will fail. If the

> accused has waived his or her right to an early trial date, the application will fail. If the reasons for the delay are in large part attributable to the accused, the prima facie case will not be made out and it is unnecessary to proceed further. Where waiver or accused-caused delay are not factors, the determination of whether a prima facie or threshold case has been made out may in many cases resolve itself by reference to "norms" representing the time reasonably taken to bring the offence charged to the point of trial in all the circumstances.
>
> **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.

[21.] J. Sopinka, writing for the majority in *Morin (supra)* set out the factors to be considered:

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 [page788]
(e) other reasons for delay; and

4. prejudice to the accused.

[22.] In *R. v. Aglukkag* 91990 43 C.R.R. (33) (N.W.T.S.C.):

> The court held s.11(b) should be read as requiring not only that there be a trial or hearing within a reasonable time, but also that there be an adjudication or decision within a reasonable time.

Abuse of Process

[23.] In R. v. M. (R.N.) (2006), 213 C.C.C. (3d) 107 J. Hill sets out the abuse of process doctrine beginning at para. 35 to 41:

> **35** The modern Canadian formulation of the abuse of process doctrine resides in *R. v. O'Connor* (1996), 103 C.C.C. (3d) 1 (S.C.C.), at pp. 34-5, 39-40:
>
> > Conversely, it is equally clear that abuse of process also contemplates important individual interests. In "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991), 15 Crim. L.J. 315 at p. 331, Professor David M. Paciocco suggests that the doctrine of abuse of process, in addition to preserving the reputation of the administration of justice, also seeks to ensure that accused persons are given a fair trial. Arguably, the latter is essentially a subset of the former. Unfair trials will almost inevitably cause the administration of justice to fall into disrepute ... What is significant for our purposes, however, is the fact that one often cannot separate the public interests in the integrity

of the system from the private interests of the individual accused.

In fact, it may be wholly unrealistic to treat the latter as wholly distinct from the former. This court has repeatedly recognized that human dignity is at the heart of the *Charter*. While respect for human dignity and autonomy may not necessarily, itself, be a principle of fundamental justice (*Rodriguez v. British Columbia (Attorney General)* (1993), 85 C.C.C. (3d) 15 at p. 67, 107 D.L.R. (4th) 342 at p. 394, [1993] 3 S.C.R. 519, *per* Sopinka J. for the majority), it seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused. It would violate the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in my view, the individual who is the subject of such treatment is entitled to present arguments under the *Charter* and to request a just and appropriate remedy from a court of competent jurisdiction.

As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the *Charter*. Depending on the circumstances, different *Charter* guarantees may be engaged. For instance, where the accused claims that the Crown's conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(b) of the *Charter*, to which the jurisprudence of this court has now established fairly clear guidelines (*Morin, supra*). Alternatively, the circumstances may indicate an infringement of the accused's right to a fair trial, embodied in ss. 7 and 11(d) of the *Charter*. In both of these situations, concern for the individual rights of the accused may be

> accompanied by concerns about the integrity of the judicial system. In addition, there is a residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

36 Generally speaking, the individual and systemic elements of abuse of process identified in *O'Connor* exhaust the definitional contours of the doctrine - as observed in *R. v. Henderson*, [2006] NICA 9, at para. 8 citing *Re D.P.P.'s Application*, [1999] NI 106, at p. 116, "We do not consider there's a third category of generalised unfairness ...".

37 While the *dicta* from *O'Connor* has been consistently applied (*R. v. Regan* (2002), 161 C.C.C. (3d) 97 (S.C.C.), at pp. 121-2; *Canada (Minister of Citizenship and Immigration) v. Tobiass* (1997), 118 C.C.C. (3d) 443 (S.C.C.), at pp. 471-2; *R. v. Jageshur* (2002), 169 C.C.C. (3d) 225 (Ont. C.A.), at p. 233), other judicial descriptions have contributed to our understanding of the doctrine:

> ... central to our judicial system is the belief that the integrity of the court must be maintained.
>
> It is my view that in criminal law the doctrine of abuse of process draws on the notion that the state is limited in the way it may deal with its citizens.
>
> (*R. v. Mack* (1989), 44 C.C.C. (3d) 513 (S.C.C.), at p. 539)
> ... prosecutors ... must be held accountable ...
>
> (*Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9, at para. 4)
> The doctrine [abuse of process] is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our

> fundamental values as a society" ... It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. (*R. v. Conway* (1989), 49 C.C.C. (3d) 289 (S.C.C.), at p. 302)
>
> ... the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.
> (*R. v. Horseferry Road Ct., Ex parte Bennett*, [1994] 1 A.C. 42 (H.L.), at p. 62)

38 "Every court has an inherent power and duty to prevent abuse of its process ... This is a fundamental principle of the rule of law": *R. v. Loosely*, [2001] UKHL 53 (H.L.), at para. 1.

39 The burden is upon the defendant to establish, on a balance of probabilities, the alleged abuse of power. "The circumstances in which abuse of process can arise are very varied": *Hunter v. Chief Constable of West Midlands*, [1982] A.C. 529, at p. 536. A "claim of abuse of process is necessarily fact specific as it expresses society's changing views about what is unfair or oppressive": *R. v. D.(E.)* (1990), 57 C.C.C. (3d) 151 (Ont. C.A.), at p. 161. The subcategories of abuse of process are not closed: *R. v. D.(E.), supra*, at p. 161; *R. v. J.*, [2004] UKHL 42, at para. 38; *R. v. Latif*, [1996] 1 W.L.R. 104 (H.L.), at p. 113.

40 Although M.(R.)'s respective counsel have not assigned an oblique or improper motive as driving the prosecutorial repudiation decision, the defence in effect submitted that the Crown's position appeared, on the existing record, to be *arbitrary* in the sense of based on "unrestricted will ... not according to a scheme or plan" (*The Canadian Oxford English Dictionary* (Oxford University Press, 2001), at p. 62) - in other words, a decision entirely at odds with the breach-of-an-undertaking test found in Recommendation 53 and its equivalents.

41 During the argument of the motion, and again in his reasons for judgment, the trial judge erred in holding that prosecutorial bad faith, flagrant impropriety, or "conspicuous evidence of improper motives" must be shown by the appellant to establish an abuse of process. In *R. v. Keyowski, supra*, at pp. 482-3, where there was "no suggestion of misconduct", the court specifically disagreed with the Saskatchewan Court of Appeal that "prosecutorial misconduct must be demonstrated in order to give rise to an abuse of process" - "[p]rosecutorial misconduct and improper motivation are but two of many factors to be taken into account". This principle has consistently been affirmed so as not to overly restrict the abuse of process doctrine: *R. v. Conway, supra,* at p. 302; *R. v. O'Connor, supra,* at p. 42; *R. v. Regan, supra,* at pp. 160-1 (*per* Binnie J. dissenting in the result); *R. v. D.(E.), supra,* at p. 160.

Apprehension of Bias

[24.] R. v. S. (R.D.) [1997] 3 S.C.J. 484 at p. 486, para. 4, the majority wrote:

> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for

such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The test applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic.

Continuity of Evidence

[25.] This is an issue that should be raised if the matter proceeds to trial.

Disclosure of GPS Evidence (September 2012)

[26.] In *R. v. Budge*, 2012 N.S.P.C. 69, J. Whalen cites J. Ross in *R. v. MacLellan* at paras. 74 to 80:

> **74** In R. v. Watt [2008] N.S.J. No. 108 at para 23 the Nova Scotia Court of Appeal noted:
>
> In R. v. Dixon, [1998] 1 S.C.R. 244, the Supreme Court of Canada considered the Crown's duty to disclose and stated:
>
> In R. v. Stinchcombe, [1991] 3 S.C.R. 326, it was held that the Crown has an obligation to disclose all relevant material in its possession, so long as the material is not privileged. Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown. ...
>
> The obligation resting upon the Crown to disclose material gives rise to a corresponding constitutional right of the accused to the disclosure of all material which meets the Stinchcombe threshold. As Sopinka J. recently wrote for the majority of this Court in R. v. Carosella, [1997] 1 S.C.R. 80, at p. 106:
>
> The right to disclosure of material which meets the Stinchcombe threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the Charter. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.

Thus, where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his Charter right to disclosure.

75 In Watt the following appears at para 13 and 14:

> In R. v. Regan (1999), 179 N.S.R. (2d) 45 at para. 100, Cromwell, J.A. for the majority described a stay as "a drastic remedy because its effect is that the state is permanently prevented from prosecuting the alleged criminal act." The Supreme Court of Canada affirmed this characterization in Regan (S.C.C.), [2002] 1 S.C.R. 297, at para. 2.
>
> That a stay of proceedings is an exceptional remedy reserved for exceptional circumstances is clear from R. v. Taillefer, [2003] 3 S.C.R. 307 where the Supreme Court of Canada stated:
>
> > 117 This Court has frequently underlined the draconian nature of a stay of proceedings, which should be ordered only in exceptional circumstances. A stay of proceedings is appropriate only "in the clearest of cases", that is, "where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued" (O'Connor, supra, at para. 82). It is a "last resort" remedy, "to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted"

76 In Watt our Court of Appeal, overturning a stay of proceedings entered by the trial judge, stated at para 19 *et seq*:

> I turn then to my analysis of the decision granting a stay of proceedings. The judge held that the respondent's s. 7 Charter rights not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice, had been infringed. Moreover, the conduct of the Crown had damaged the integrity of the judicial system. In para. 68 of

his decision, he quoted the criteria that must be satisfied before a stay of proceedings will be granted, as set out in Canada (Minister of Citizenship and Immigration) v. Tobias, [1997] 3 S.C.R. 391. With respect, he misdirected himself by failing to consider all aspects of the analysis essential in determining whether a stay should be granted. Had he done so, it would have been apparent that this was not the sort of case which called for the drastic remedy of a stay of proceedings.

For convenience, I repeat the test set out in para. 90 of Tobiass, supra:

> If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
> (2) no other remedy is reasonably capable of removing that prejudice.

Watt continues at para 31 *et seq*:

Furthermore, the prejudice described by the judge which persuaded him to issue a stay does not impair the respondent's ability to make full answer and defence to the extent required for a stay. His decision referred to several types of prejudice:
(a) The extra preparation and related expense preparing for two trials;
(b) The respondent continuing to be under release conditions;
(c) The effect of the passage of time on the memory of witnesses and the locations of potential witnesses;
(d) The stress of awaiting trial; and
(e) The adjournment of two trials and the delay before the hearing of a third.

However, showing some prejudice is not enough to support a determination that s. 7 of the Charter has been breached ...

77 R. v. Andrews, [2009] N.S.J. No. 654, is a case of lost evidence. The decision thus references R. v. La, [1997] 2 S.C.R. 680, and R. v. F.C.B. (2000), 182 N.S.R. (2d) 215 (N.S.C.A.). There are nevertheless passages which are instructive here. At para 18 the following passage of Sopinka, J. in R. v. Stinchcombe (No. 2), [1995] 1 S.C.R. 754, is cited with approval:

> What is the conduct arising from failure to disclose that will amount to an abuse of process? By definition it must include conduct on the part of governmental authorities that violates those fundamental principles that underlie the community's sense of decency and fair play. The deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose the material will, typically, fall into this category. An abuse of process, however, is not limited to conduct of officers of the Crown which proceeds from an improper motive. See R. v. O'Connor, [1995] 4 S.C.R. 411 (S.C.C.), at paras. 78-81, per Justice L'Heureux-Dubé for the majority on this point. Accordingly, other serious departures from the Crown's duty to preserve material that is subject to production may also amount to an abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established. In some cases an unacceptable degree of negligent conduct may suffice.
>
> In either case, whether the Crown's failure to disclose amounts to an abuse of process or is otherwise a breach of the duty to disclose and therefore a breach of s. 7 of the Charter, a stay may be the appropriate remedy if it is one of those rarest of cases in which a stay may be imposed, the criteria for which have most recently been outlined in O'Connor, supra. With all due respect to the opinion expressed by my colleague Justice L'Heureux-Dubé to the effect that the right to disclosure is not a principle of fundamental justice encompassed in s. 7, this matter was settled in Stinchcombe, supra, and confirmed by the decision of this Court in R. v. Carosella, [1997] 1 S.C.R. 80 (S.C.C.). In Stinchcombe the right to make full answer and defence of which

the right to disclosure forms an integral part was specifically recognized as a principle of fundamental justice included in s. 7 of the Charter. This was reaffirmed in Carosella. In para. 37, I stated on behalf of the majority:

> The right to disclosure of material which meets the Stinchcombe threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the Charter. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice. To paraphrase Lamer, C.J. in Tran [1994] 2 S.C.R. 951], the breach of this principle of fundamental justice is in itself prejudicial. The requirement to show additional prejudice or actual prejudice relates to the remedy to be fashioned pursuant to s. 24(1) of the Charter.

78 With respect to the timing of a stay application Sopinka, J. is quoted at para. 19 of Andrews as follows:

> The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit. This is the procedure adopted by the Ontario Court of Appeal in the context of lost evidence cases. In R. v. B.(D.J.) (1993), 16 C.R.R. (2d) 381 (Ont. C.A.), the court said at p. 382:
>
> > The measurement of the extent of the prejudice in the circumstances of this case could not be done without

> hearing all the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal.
>
> Similarly, in R. v. Andrew (1992), 60 O.A.C. 324 (Ont. C.A.), the court found at p. 325 that unless the Charter violation "is patent and clear, the preferable course for the court is to proceed with the trial and then assess the issue of the violation in the context of the evidence as it unfolded at trial". See also: R. v. François (1993), 65 O.A.C. 306 (Ont. C.A.); R. v. Kenny (1991), 92 Nfld. & P.E.I.R. 318 (Nfld. T.D.).
>
> I would add that even if the trial judge rules on the motion at an early stage of the trial and the motion is unsuccessful at that stage, it may be renewed if there is a material change of circumstances. See R. v. Adams, [1995] 4 S.C.R. 707 (S.C.C.), and R. v. Calder, [1996] 1 S.C.R. 660 (S.C.C.). This would be the case if, subsequent to the unsuccessful application, the accused is able to show a material change in the level of prejudice.

79 As noted, F.C.B., *supra*, was a lost evidence case. Nevertheless, if certain parallels may be drawn between a duty to preserve evidence and a duty to disclose it, between lost evidence and non-disclosed (or late-disclosed) evidence, the following extract from our Court of Appeal at para 10 *et seq* may be instructive:

> The basic principles applicable to the analysis of all three grounds of appeal raised in this case were summarized by Sopinka, J. in R. v. La, supra, commencing at para. 16.
>
> (1) The Crown has an obligation to disclose all relevant information in its possession.
>
> (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
>
> (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.

(4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.

(5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.

(6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 Charter rights.

(7) In addition to a breach of s. 7 of the Charter, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation.

(8) In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in O'Connor.

(9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.

(10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.

80 The O'Connor criteria referred to in the eighth point are as stated by Justice L'Heureux-Dubé at para. 82 of O'Connor:

> It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

Analysis

(A) Delay

[27.] Upon examining the Information, it states the date of the offence as August 18, 2010 and it was sworn October 12, 2010. Mr. Fraser's first appearance was January 6, 2011.

[28.] There is no evidence and thus I find there is nothing to suggest that this portion of the time frame did not follow "the inherent time requirements of the case."

[29.] On January 6, 2011 Mr. Fraser pled not guilty and accepted a trial date of November 22, 2011. There is no transcript, and there is no evidence that after accepting this trial date and retaining counsel that Mr. Fraser returned to court seeking an earlier trial date. I find the date given is within the range given by the courts and considered reasonable.

[30.] On November 22, 2011 Mr. Fraser, through counsel, requested an adjournment of his trial because as he stated:

> "Yeah, well after I retained counsel, and then it was decided that we would proceed with the court case, perhaps in just one name with the assumption maybe that it would save us some money, some confusion, you know, and perhaps then the outcome of that would determine the outcome of the next case."

[31.] Based on the evidence before me, I find that this was a strategic move on Mr. Fraser's part and there is absolutely no evidence he did this based on anything the Crown did or did not say. His surprise that the Crown was going to proceed with his trial was based on his own false assumptions arising out of discussions with his counsel:

> A. And then on the word… if he had been found not guilty that my charges would be….
>
> Q. Where did you get that idea?
>
> A. Ah, through my… lawyer.
> Q. You didn't get it from me, did you?
> A. Not directly from you, no.
> Q. No?
> A. But I, I assume that's what it was.

[32.] Later:

> Q. I'm going to suggest to you that no where on the record, no where in court did I ever say, did the Crown ever say they would withdraw the charge if your nephew was acquitted?
>
> A. Not directly to me no.

[33.] Mr. MacEachern during his oral submissions stated that at "no time did the Crown communicate specifically that 'they' were not proceeding against" Mr.

Fraser. He suggested that the Crown's silence created an ambiguity and there was an obligation to tell the defendant the Crown was not proceeding.

[34.] Absolutely not, because they were proceeding. Mr. Fraser could have requested another date for trial on November 22nd, but he did not because he was awaiting the decision by J. Ross regarding his nephew.

[35.] The decision was set for January 24, 2012. On that date the endorsement states the matter was adjourned by the court to February 7, 2012. There is no indication the defendant did not consent.

[36.] There is no evidence before the court to suggest that the defendant takes exception to the two and a half month adjournment or suggests this was not reasonable. I find, based on the circumstances regarding the "onboard GPS" and expert evidence, the decision was rendered within a reasonable time.

[37.] On February 7, 2012 J. Ross found the defendant's nephew not guilty. Based on his decision regarding the GPS, Mr. Iannetti met with his witnesses and concluded Mr. Fraser's matter would continue to trial. Whether or not J. Ross was surprised is irrelevant. It is the Crown's prerogative to review its cases and decide whether or not to prosecute.

[38.] There is absolutely no evidence of a negotiated plea agreement, an undertaking, either written or verbal from Crown counsel to not proceed to trial.

[39.] J. Ross agreed to recuse himself and the matter was set for February 14, 2012 to set a new trial date. It ended up before me, J. Whalen, because Mr. Iannetti thought earlier trial dates could be obtained from me. Mr. Fraser agreed to this adjournment.

> Q. Well what was your reaction first of all, with the representation that you'd get a much quicker date before J. Whalen?
>
> A. Well I thought yes, I could get this finished up by…
>
> Q. You wanted to get it over with?
>
> A. April or May, get it over with.

[40.] Mr. Fraser was offered a trial date of October 4, 2012 and although he said he was "quite disappointed" he agreed. I find this date was within the acceptable guidelines. There is no evidence and Mr. MacEachern admitted that he did not request an earlier trial date from the court or another judge.

[41.] Mr. Fraser stated:

> A. … I thought the Crown was looking for an advantage of some sort because it was no earlier, it was the same date that J. Williston could have done… it kind of left… a sour taste in my mouth….

[42.] However, no earlier date was requested before any other judge.

[43.] As stated earlier, Mr. MacEachern did not file a transcript of all the relevant court appearances. Based on Mr. Fraser's testimony, and on Mr. MacEachern's submissions, and the endorsements on the Information, I find that a *prima facie* case for unreasonable delay has not been made out:

(a) The delay is reasonable having regard to similar cases;

(b) The defendant waived his right to an early trial date (by not requesting an earlier date);

(c) The reason for delay of the first trial are directly attributable to the defendant's "strategy" approach to his trial on November 22, 2011.

Abuse of Process

[44.] There is absolutely no evidence that Crown counsel's suggestion that an earlier trial date could be obtained from this court establishes:

(1.) Prosecutorial bad faith;

(2.) Flagrant impropriety; or

(3.) Improper motives which would lead this court to find:

(a) That there was a violation of the defendant's right to a fair trial or/and an impairment of [his] procedural rights; and or

(b) That the Crown's conduct was so unfair and vexatious as to undermine the integrity of the judicial process.

[45.] There is absolutely no evidence of any abuse of process on Crown counsel's part.

Apprehension of Bias

[46.] Mr. Fraser testified:

> Q. …in terms of the selection of J. Whalen, I guess it's a little less than subtle that you're suggesting that somehow the judge… or the Crown is judge shopping?
>
> A. …. No well just a….
>
> Q. Is that your impression?

A. Well initially the reason for going with Her Honourable Judge Whalen was for a speedier trial.

[47.] Later at p. , line 1 to 17:

Q. Hmm-mm?

A. Well then I just wonder why

Q. Okay.

A. Why was that… why would you have to skip over one judge to get another where it was the same time frame.

Q. Okay, so do you think, I'm putting the question to you directly… do you think that we got in Judge Whalen's court because she would be more likely to convict you?

A. I wouldn't… I wouldn't disrespect Her Honour like that but it leaves a sour taste in my mouth… being a lay person to the proceedings of the court…

Q. Hmm-mm?

A. Why would you do that.

Q. Well I put the question to you again, is that what you believe?

A. Yes. Like…

Q. That she's more likely to convict than Judge Williston would be?

A. No disrespect to Mrs., to Her Honour, no.

Q. That's what I thought, okay. Thank you sir.

[48.] The Court asked Mr. MacEachern, given his client's testimony, whether or not he had any issue with me hearing this *Charter* application and he said that he did not.

[49.] The test for the apprehension of bias has not been made out.

D. Disclosure of GPS Evidence

[50.] The Crown stated it disclosed the "fixed" GPS evidence to both Mr. Chris Fraser and Mr. Daniel Fraser. It is the disclosure of the "hand held" GPS evidence to Mr. Daniel Fraser on September 1, 2012, two days before a pre-trial conference scheduled on September 6, 2012. That is the subject of this *Charter* application.

[51.] Mr. Iannetti stated that the Crown met it's obligation regarding notice of an expert. That was not challenged by the defendant. However, the defendant argues that because of late disclosure, he has suffered prejudice and the matter should be stayed.

[52.] Based on the evidence before me, I find:

(1.) Disclosure of hand held GPS evidence was on September 4, 2012;

(2.) There is no explanation by the Crown as to why this was not disclosed before September 4, 2012.

(3.) The defendant says this evidence existed on August 18th, 2010. There is no evidence of this fact. No Fishery Officers were called, no reports were tendered on the application. However, that assertion was not challenged by Crown counsel.

(4.) Counsel's disagreement was whether or it was the same evidence and whether or not it was exculpatory.

(5.) This is a summary matter. There was no election. This is a regulatory matter.

(6.) Mr. Fraser is not on any "bail conditions."

(7.) Mr. Fraser argues he has suffered prejudice because of the stress of being charged and awaiting trial. However, a certain degree of prejudice will:

> "…eventually be experienced by all persons charged with an… offence…. For it to be relevant to s. 11(b) analysis, the prejudice experienced by an accused must be in relation to the delay, not simply from the fact of being charged."

(8.) Despite the Crown giving notice to the defendant to call an expert witness and complying with s. 657.3(3)(a), the disclosure of the "hand held" GPS evidence was late. However, Mr. Fraser was able to "have an expert" review the disclosure prior to the start of his trial.

[53.] Is this one of those "clearest of cases" where a stay is appropriate?

[54.] The court has considered:

1. The nature of the information not disclosed. I do not know the exact contents because I have not seen the "disclosure", but defence counsel

says it contains information on latitude and longitude, way points and times.

2. Whether it might affect the outcome. The Crown says it is not exculpatory, the defendant says it is. The court cannot say definitely without examining the "disclosure" at issue.

[55.] The trial has not begun, Mr. Fraser can prepare for his trial. There is no evidence Mr. Fraser's strategy was affected by this late disclosure (eg. an election or preparation of a particular defence to the charge). I am not convinced, based on all of the above, that this is one of those clearest of cases where a stay of proceedings should be entered.

_____

The Honourable Judge Jean M. Whalen