COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Florence, 2014 ONCA 443
DATE: 20140606
DOCKET: C56549 and C56740

Sharpe, Gillese and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Derrick Florence

Appellant

and

Terry Carder

Appellant

Matthew Gourlay and Kathleen Heap, for the appellants

Rick Visca and Aaron Shachter, for the respondent

Heard: March 14, 2014

On appeal from the convictions entered on March 19 and March 22, 2012 by Justice Christopher Bondy of the Superior Court of Justice, sitting without a jury, and from the dismissal of s. 11(b) applications on March 15, 2012 by Justice Renee M. Pomerance of the Superior Court of Justice, with reasons dated April 11, 2012.

Rouleau J.A.:

OVERVIEW

[1] The appellants, Terry Carder and Derrick Florence, were among 70 people arrested in connection with drug trafficking, following an undercover police operation in the Leamington area. The appellants were arrested and charged on October 28, 2009, and their trials were ultimately set for March 19, 2012 and March 22, 2012, respectively, a period of just under two and a half years between arrest and trial. Prior to trial each appellant filed an application asking for a stay of proceedings under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, on the ground that the delay violated his right under s. 11(b) of the *Charter* to trial within a reasonable time.

[2] The applications were dismissed and the appellants were subsequently convicted and sentenced. They now appeal on the basis that the application judge erred in dismissing their s. 11(b) applications. Mr. Carder also appeals his six-month sentence.

FACTS

[3] As part of the Leamington-area sting operation conducted by the OPP and Leamington Police Service, Mr. Carder was charged with three counts of trafficking cocaine and two counts of possession of the proceeds of crime, offences allegedly committed between August 5, 2008 and August 26, 2009. Mr. Florence was charged with one count of trafficking marijuana, two counts of

trafficking oxycodone, and two counts of possession of the proceeds of crime, offences allegedly committed between May 29, 2009 and July 14, 2009.

[4] On December 3, 2009, the Crown produced disclosure and Mr. Marley, representing both Mr. Carder and Mr. Florence at trial, requested adjournments until January 7, 2010, in order to review disclosure with the appellants. On January 7, Mr. Marley requested adjournments for a further two weeks, indicating that he was still waiting for disclosure in Mr. Florence's case and still needed to meet with Mr. Carder, who had not been able to make a scheduled meeting with Mr. Marley.

[5] On January 21, 2010, an agent for Mr. Marley offered several dates for the preliminary inquiry of Mr. Florence, the earliest being April 20, 2010. The Crown was available that day, but not Constable Flewelling, whose earliest availability was July 8, 2010. That date was selected for the preliminary inquiry as it was acceptable to both Mr. Marley and the Crown.

[6] Meanwhile, Mr. Carder had been arrested on other charges and appeared in court on January 22, 2010 to request that a bail hearing be set for the following week. On January 27, 2010, that bail hearing was adjourned until February 2, 2010, because Mr. Carder's surety was not available. On February 2, 2010, Mr. Carder was granted bail and his next court appearance was set for February 4,

2010. On February 4, 2010, Mr. Marley asked for an adjournment until March 4, 2010, for Mr. Carder to consider a resolution proposal from Crown counsel.

[7] Early in the proceedings, the Crown had notified Mr. Marley that it intended to conduct the preliminary inquiries in a streamlined fashion by seeking to introduce witness statements and notes in accordance with s. 540(7) of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Code*"), rather than calling *viva voce* testimony. On February 4, the Crown's intention to proceed in this manner was confirmed to Mr. Marley.

[8] On February 5, 2010, Mr. Marley wrote to Dean J. indicating that he was seeking an order under s. 540(9) of the *Code* to compel the Crown to produce Constable Johnston.

[9] On March 4, 2010, Mr. Carder's case was set over to March 15, 2010 (for reasons unclear from the transcript).

[10] On March 15, 2010, Mr. Marley argued his application under s. 540(9) to have the court order the Crown to produce Constable Johnston for cross-examination at either the preliminary inquiry or at a discovery-style examination. This application covered a number of cases including those of Mr. Florence and Mr. Carder. Justice Dean ruled in favour of the appellants and thereafter adjourned all of the cases until April 1, 2010 to set preliminary inquiry dates.

[11] On March 22, 2010, Mr. Marley faxed a message to Crown counsel, Mr. Leardi, indicating that he was open to discussing, prior to April 1, the possibility of conducting discoveries of the witness (Constable Johnston) without having a Justice present. Apparently Crown counsel never responded to this request and, when contacted by Mr. Marley, indicated simply that he was instructed to oppose the request. In the faxed message of March 22, Mr. Marley also asked for disclosure that he had, according to the fax, previously requested.

[12] On March 23, 2010, Mr. Leardi wrote to Mr. Marley asking to adjourn Mr. Florence's preliminary inquiry, set for July 8, 2010, because the courtroom was over-booked with a trial guaranteed to proceed on that date.

[13] On April 1, 2010, Constable Flewelling indicated that he had a number of "preset dates" for the preliminary inquiries, including February 24, 2011. The court accepted that date and scheduled Mr. Carder's preliminary inquiry for February 24, 2011. On the same date, April 1, 2010, Mr. Marley's agent for Mr. Florence's case had received unclear instructions as to dates for the preliminary inquiry and Mr. Florence's matter was adjourned until April 15, 2010. The transcript from April 15, 2010 is missing, but the one from April 29, 2010 indicates that the preliminary inquiry had already been set for March 8, 2011. It appears, therefore, that it was on April 15 that the preliminary inquiry date was set.

[14] There is no transcript of the preliminary inquiries on February 24, 2011 and March 8, 2011, respectively.

[15] On March 4, 2011, Mr. Carder's case was in the Superior Court of Justice (no transcript) and judicial pre-trial was set for July 6, 2011.

[16] On April 8, 2011, Mr. Florence's case was in the Superior Court of Justice and judicial pre-trial was set for July 6, 2011.

[17] On July 6, 2011, judicial pre-trial was completed in both cases.

[18] On July 8, 2011, the trial date for Mr. Carder was set for March 19, 2012. The court offered February 27, 2012, but Mr. Marley was not available. He was also unavailable on March 12, 2012. The third date offered was March 19, 2012, which was acceptable to both Mr. Marley and the Crown.

[19] Apparently also on July 8, 2011, the trial date for Mr. Florence was set for March 22, 2012, although the record does not contain the transcript of the court appearance at which the date was set.

APPLICATION JUDGE'S DECISION

[20] The application judge issued a joint ruling on the s. 11(b) applications of Mr. Carder and Mr. Florence, and of three other defendants who are not appellants herein. The application judge found it to be a "close call", but

ultimately dismissed the applications, noting that "the delay in this case, while technically in excess of the guidelines, is not so excessive as to infringe s. 11(b)". Although it is not always clear from her reasons, the application judge seems to have attributed periods of delay as follows:

Mr. Florence:

From	To	# of days	Application judge's attribution of this period
October 28, 2009 (arrest)	December 3, 2009 (disclosure produced)	36	Neutral intake/inherent time requirements
December 3, 2009 (disclosure produced)	April 1, 2010 (setting of preliminary inquiry date)	119	Neutral intake/inherent time requirements and perhaps (though not entirely clear from reasons) partly Crown delay
April 1, 2010 (setting of preliminary inquiry date)	March 8, 2011 (preliminary inquiry)	341	Institutional delay (though, again, the reasons are not entirely explicit on this point)
March 8, 2011 (preliminary inquiry)	July 8, 2011 (assignment of trial date)	122	Neutral/inherent time requirements
July 8, 2011 (assignment of trial date)	April 2, 2012[1] (trial date)	269	Institutional delay

[21] The application judge therefore found 341 days,[2] or 11.2 months, of institutional delay in the Ontario Court of Justice and 269 days, or 8.8 months, of

[1] The application judge took the trial date for Mr. Florence to be April 2, 2012, by all appearances because Mr. Florence's application record mistakenly included the transcript of a court appearance by another defendant represented by Mr. Marley. That defendant's trial was set for April 2, 2012, while Mr. Florence's trial was set for March 22, 2012.

institutional delay in the Superior Court of Justice, for a total of 20 months of delay, 2 months beyond the outer limit of the *Morin* guidelines: *R. v. Morin*, [1992] 1 S.C.R. 771. She therefore determined that the length of the delay necessitated a consideration of prejudice to the accused and weighing any such prejudice against countervailing interests in seeing the case tried on the merits.

Mr. Carder:

From	To	# of days	Application judge's attribution of this period
October 28, 2009 (arrest)	December 3, 2009 (disclosure produced)	36	Neutral intake/inherent time requirements
December 3, 2009 (disclosure produced)	April 1, 2010 (setting of preliminary inquiry date)	119	Neutral intake/inherent time requirements and perhaps (though not entirely clear from reasons) partly Crown delay
April 1, 2010 (setting of preliminary inquiry date)	February 24, 2011 (preliminary inquiry)	329	Institutional delay (though, again, the reasons are not entirely explicit on this point)
February 24, 2011 (preliminary inquiry)	July 8, 2011 (assignment of trial date)	134	Neutral/inherent time requirements
July 8, 2011 (assignment of trial date)	March 19, 2012 (trial date)	255	Institutional delay

[2] The application judge calculates 342 days for this period, presumably by counting both the start date (April 1, 2010) and the end date (March 8, 2011). I have included the end date, but not the start date, in calculating the length of each period, so as not to double-count days.

[22] The application judge therefore found 329 days, or 10.8 months, of institutional delay in the Ontario Court of Justice and 255 days, or 8.4 months, of institutional delay in the Superior Court of Justice, for a total of 19.2 months of delay, 1.2 months beyond the outer limit of the *Morin* guidelines. She therefore determined that the length of the delay necessitated a consideration of prejudice to the accused and weighing any such prejudice against countervailing interests in seeing the case tried on the merits.

[23] Weighing the factors, the application judge concluded as follows:

> This is a close case. Mr. Marley, on behalf of the accused, took positive steps to expedite the hearing of the preliminary inquiry. While there was some complexity at the outset of the prosecution, it largely evaporated once the cases were set for preliminary hearing. The preliminary inquiry involved one witness testifying for one hour. Similarly, the trials were set for 1-2 days of court time. These factors favour the position of the defence on the s. 11(b) application.
>
> On the other hand, as noted above, the defence has demonstrated no prejudice, above and beyond the inferred [prejudice] flowing from the delay. In addition, the seriousness of the offences must weigh in the balance. In *Tran*, the court observed that: “while not the most serious of drug offences, the allegations in this case include commercial trafficking in marijuana and a hydro bypass in a residential area”. In this case, the charges allege trafficking of various substances such as crack cocaine and oxycodone. There is a public interest in seeing that these charges be tried on the merits.
>
> On balance, having regard to all of the factors, the delay in this case is not so outside the acceptable range or

> guideline that a judicial termination of the proceedings is appropriate.

[24] In the end, neither appellant had a fully contested trial. Mr. Carder invited the trial judge to make findings of guilt based on acknowledged facts introduced by the Crown, resulting in Mr. Carder being convicted. Mr. Florence eventually negotiated a resolution with the Crown and pleaded guilty to a single charge.

ISSUES

[25] On appeal, the appellants submit that the application judge committed the following three distinct but related errors in her ruling on the s. 11(b) applications:

1. she did not penalize the Crown for its unexplained tactical decisions that delayed the proceedings;
2. she erred in her allocation of the various periods of delay as among the Crown, the defence, institutional and neutral; and
3. she mischaracterized the seriousness of the charges and gave decisive weight to the seriousness of the charges in her final balancing exercise.

[26] Mr. Florence also seeks to set aside his guilty plea to the extent necessary to consider his appeal of the application judge's dismissal of his s. 11(b) application. He has submitted fresh evidence to support his claim that he entered a guilty plea on the understanding – communicated without objection to trial

Crown counsel – that his right to challenge the decision on the s. 11(b) application would be preserved.

[27] Mr. Carder also appeals his six-month sentence.

ANALYSIS

[28] Before turning to the issues raised by the appellants, let me briefly set out the framework for a s. 11(b) analysis and the standard of review on appeal.

Framework of a s. 11(b) analysis

[29] In *Morin*, the Supreme Court of Canada set out the factors a court must consider when assessing the reasonableness of delay for purposes of s. 11(b). Writing for the majority, Sopinka J. stated, at pp. 787-88:

> While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:
>
> 1. the length of the delay;
> 2. waiver of time periods;
> 3. the reasons for the delay, including
>   (a) inherent time requirements of the case,
>   (b) actions of the accused,
>   (c) actions of the Crown,
>   (d) limits on institutional resources, and
>   (e) other reasons for delay;
>
> and
>
> 4. prejudice to the accused.

[30] At p. 788, Sopinka J. explained that the "judicial process referred to as 'balancing' requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable."

[31] In *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, at para. 18, the Court gave a succinct summary of the balancing required under s. 11(b): "Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(*b*) seeks to protect." In *Godin*, at para. 18, the Court also reiterated Sopinka J.'s warning in *Morin*, at p. 787, that the "general approach … is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which [s.11(*b*)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay."

[32] The issues raised in this appeal relate principally to the application judge's categorization of the delay periods into the types of delay identified in *Morin*. A brief description of the different categories is set out in the following paragraphs.

Reasons for the delay

(a) Inherent time requirements

[33] The inherent time requirements are to be assessed on a case-by-case basis, though they include “activities such as retention of counsel, bail hearings, police and administration paperwork, disclosure, etc.”: *Morin*, at p. 792.

(b) Actions of the accused

[34] Actions of the accused falling short of a waiver may also be relevant to assessing the reasonableness of delay. In *Morin*, at p. 793, Sopinka J. described the significance of the accused’s actions to this factor:

> There is no necessity to impute improper motives to the accused in considering this factor. Included under this heading are all actions taken by the accused which may have caused delay. … Actions which could be included in this category include change of venue motions, attacks on wiretap packets, adjournments which do not amount to waiver, attacks on search warrants, etc.

(c) Actions of the Crown

[35] In *Morin*, at p. 794, Sopinka J. characterized this factor as follows:

> As with the conduct of the accused, this factor does not serve to assign blame. This factor simply serves as a means whereby actions of the Crown which delay the trial may be investigated. Such actions include adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc. An example of action of this type is provided in *Smith*, *supra*, where adjournments were sought due to the wish

> of the Crown to have a particular investigating officer attend the trial. As I stated in that case, there is nothing wrong with the Crown seeking such adjournments but such delays cannot be relied upon by the Crown to explain away delay that is otherwise unreasonable.

(d) Institutional delay

[36] In *Morin*, at p. 794, Sopinka J. described institutional delay as "the most common source of delay and the most difficult to reconcile with the dictates of s. 11(*b*) of the *Charter*." The period of time to be ascribed to limits on institutional resources "is the period that starts to run when the parties are ready for trial but the system cannot accommodate them": *Morin* at pp. 794-95. At p. 799, Sopinka J. found it

> appropriate for this Court to suggest a period of institutional delay of between 8 to 10 months as a guide to Provincial Courts. With respect to institutional delay after committal to trial, I would not depart from the range of 6 to 8 months that was suggested in *Askov*.

[37] However, as noted, the Court has stressed the need for a flexible approach to weighing each of these reasons for delay, and in particular that the courts should not treat the guidelines on institutional delay with mathematical precision.

[38] Where the guidelines are exceeded, therefore, the court must weigh various factors including the prejudice to the accused caused by the delay and the public's interest in seeing the charges tried on the merits.

Standard of review

[39] On appeal, a correctness standard of review applies to an application judge's characterization of the various time periods between the date the accused was charged and the date of his trial. As Rosenberg J.A. stated in *R. v. Ralph*, 2014 ONCA 3, at para 5:

> The characterization of periods of delay and the ultimate decision on an application for a stay of proceedings on the basis of unreasonable delay are reviewable on a standard of correctness: *R. v. Tran*, 2012 ONCA 18, 288 C.C.C. (3d) 177, at para. 19. The underlying facts are reviewed on a standard of palpable and overriding error: *Tran*, at para. 19.

[40] I turn now to the issues raised on the appeal.

(1) Did the application judge err in not penalizing the Crown for its unexplained tactical decisions that delayed the proceedings?

[41] The appellants argue that the Crown's application under s. 540(7) of the *Code*, the Crown's insistence that Constable Johnston not be produced at the preliminary inquiry, and the Crown's unexplained refusal to consent to a discovery-type cross-examination in lieu of a preliminary inquiry all caused delay. In the appellants' submission, the application judge should have:

(a) attributed some of the period before April 1, 2010 to Crown delay; and

(b) determined that delay caused by the Crown because of its tactical decision to try to avoid having Constable Johnston testify at the preliminary

inquiry should weigh more heavily in the s. 11(b) balance than ordinary institutional delay.

[42] In support of this latter point, the appellants rely on cases such as *R. v. Brown*, 2005 ONCJ 201 and *R. v. Yun*, 2005 CanLII 13454 (ON SC). In these cases the court held that delay attributable to Crown actions should weigh more heavily in favour of finding a s. 11(b) violation than mere institutional delay.

[43] In the appellants' submission, the application judge's treatment of the delay caused by the Crown's decision to invoke s. 540(7) of the *Code* is unclear. The application judge first notes, at para. 19 of her reasons, that "the decisions taken by the Crown caused some delay", but that she is not "prepared to attribute all of that delay to the Crown for purposes of s. 11(b). *Some of it* is more properly characterized as neutral time arising out of the inherent time requirements of the case" (emphasis added).

[44] However, in the same paragraph, the application judge appears to attribute the entire delay caused by the ss. 540(7) and (9) dispute to inherent time requirements of the case. After acknowledging that the Crown application under s. 540(7) was a "tactical decision" that was ultimately challenged successfully by the defence, she goes on to find that the Crown's decisions was "on its face, authorized by the Criminal Code," and that from "the perspective of s. 11(b), the merits of a legal application are usually beside the point. Where there is a

legitimate point to be debated, the debate becomes part of the inherent requirements of the case." As a result, she appears to have concluded that the whole of the delay flowing from these Crown actions is properly characterized as part of the case's inherent time requirements. None of it was attributed to Crown or institutional delay.

[45] In the appellants' submission, the application judge erred both in not specifically allocating some of the delay caused by these tactical decisions to Crown delay and in not weighing that delay more heavily than ordinary institutional delay because it is avoidable delay for which there is "no acceptable excuse": see *Yun* at para. 42.

[46] In my view the application judge erred in her reasoning for attributing all of the delay to inherent time requirements. The fact that "the Crown is under no legal or constitutional obligation to call a witness in a venue other than a courtroom", as the application judge notes at para. 22, does not mean that any delay caused by its refusal to do so will be neutral time in the s. 11(b) analysis. As Sopinka J. explained in *Morin*, at p. 794 (quoted more fully above), many Crown actions that are perfectly legal may count against the Crown for purposes of calculating s. 11(b) delay:

> Such actions include adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc. *An example of action of this type* is provided in *Smith*, *supra*, where adjournments were

> sought *due to the wish of the Crown to have a particular investigating officer attend the trial*. As I stated in that case, there is nothing wrong with the Crown seeking such adjournments but such delays cannot be relied upon by the Crown to explain away delay that is otherwise unreasonable. [Emphasis added.]

[47] It must be remembered that the onus rests on the Crown to ensure that a matter proceed expeditiously to trial: *R. v. Askov*, [1990] 2 S.C.R. 1199, at p. 1225. In my view, therefore, to the extent that the Crown's decision to invoke s. 540(7) of the *Code* rather than produce Constable Johnston for cross-examination at the preliminary inquiry (until ordered to do so by the court) contributed to delay beyond the usual delay encountered in scheduling a preliminary inquiry, this delay should count against the Crown in the s. 11(b) analysis.

[48] I do not, however, agree with the appellants' submission that the Crown should be further penalized for its decision to invoke s. 540(7) of the *Code*. The Crown's decision to invoke the procedure in s. 540(7) and its subsequent decision to refuse to produce Constable Johnston for a discovery-type cross-examination were within the Crown's exercise of discretion in choosing the manner of proceeding with the prosecution. Although it would have been preferable for the Crown to have explained on the record why it chose to proceed with a preliminary inquiry rather than agree to produce Constable Johnston for a

discovery-type cross-examination, I see no basis to infer any improper motive or bad faith on the Crown's part.

[49] The situation in these appeals is quite different from the facts in both *Yun* and *Brown*. Those cases involved the "simple failure of the police to do their job", *Brown* at para. 48, or the "police or Crown fail[ure] to do what they are expected to do [with] no acceptable excuse for the delay", *Yun* at para. 42. In other words, the court in those cases found the conduct of the police or Crown particularly worthy of blame or condemnation. The Crown's tactical decisions in the present case do not warrant any such condemnation. As a result, I would give the delay caused by the Crown's decisions the same weight as institutional delay.

[50] I acknowledge that there may well be cases where the Crown's refusal to cooperate with the defence to accelerate a proceeding will be considered a form of Crown delay that weighs more heavily at the final balancing stage of the s. 11(b) analysis. In the normal course, however, a delay in the setting of a preliminary inquiry date caused by an unsuccessful tactical decision by the Crown will be considered Crown delay and given the same weight as institutional delay. There may also be cases where the Crown's explanation for such a decision will warrant considering the delay as neutral. I expect, however, that such cases will be exceptional in nature.

[51] I turn now to the analysis of the various periods of delay encountered in both the Carder and Florence cases.

(2) Did the application judge err in her allocation of the various periods of delay?

[52] On appeal, the appellants and the Crown both argue that the application judge erred in her characterization of the various periods of delay encountered. However, they adopt, unsurprisingly, contrasting views as to whether the application judge attributed too much or too little time to Crown and institutional delay.

[53] Specifically, the appellants argue that at least part of the period prior to April 1, 2010 (when the preliminary inquiry dates were set) should count as Crown delay. They argue that the period from, at the latest, February 5, 2010, when Mr. Marley wrote to Dean J. to seek an order compelling the Crown to produce Constable Johnston, up until April 1, 2010, should count as Crown delay. This adds two months to the delay and puts the overall institutional and Crown delay beyond what is reasonable and acceptable.

[54] As I have explained, I agree that, to the extent that the Crown's tactical decisions in this case added to the time it would have taken to set the preliminary inquiry dates, that time should be counted against the Crown. Determining the impact of the Crown's tactical decisions on the calculations, however, is not as

straightforward as suggested by the appellants. The impact on Mr. Florence's case is different from the impact on Mr. Carder's and it is not as simple as adding two months to the period of delay. In addition, the Crown points to other errors committed by the application judge which resulted in her overstating the length of the institutional delay. In the Crown's submission, if all of the application judge's errors are corrected, including the addition to Crown delay proposed by the appellants, the period of institutional and Crown delay is in fact shorter than the period calculated by the application judge.

[55] The focus of the Crown's submissions is the application judge's finding that all of the time between setting the dates of the preliminary inquiries and the holding of the preliminary inquiries had to be characterized as institutional delay. As explained by Rosenberg J.A. in *Ralph*, at least some of the delay following the fixing of a date for a preliminary inquiry should be considered neutral delay, as it is time necessary for the defence to review the disclosure and prepare for the preliminary inquiry. In *Ralph*, at para. 8, Rosenberg J.A. determined, in the context of that case's drug trafficking and related charges, that "at least four months of the delay from the end of the intake period until the first date for the preliminary inquiry must be considered either neutral or defence delay."

[56] I will first set out the adjustments that are appropriate in Mr. Florence's matter and then will deal with Mr. Carder's matter.

(a) Adjustments in the Florence matter

[57] In the Florence matter, intake covers the period from October 28, 2009 to January 21, 2010. I would then attribute a period of three months following the setting of the preliminary inquiry date to neutral inherent delay. A three-month period of neutral inherent delay is justified given the size of the undercover operation and the number of arrests made as well as the fact that Mr. Marley represented many of the accused. Counsel would need time to prepare for the preliminary inquiry. In February 2010, Mr. Marley explained that he planned a vigorous defence based on possible *Charter* violations and other common law defences. He made similar submissions on March 15, 2010 attesting to the complexity of the case.

[58] I have selected three months as appropriate for this period of inherent delay, rather than four as was decided in *Ralph*, because the record in this case discloses that on January 21, 2010, Mr. Marley's agent offered April 20, 2010 as the earliest date for the holding of a preliminary inquiry for Mr. Florence.

[59] In Mr. Florence's case, therefore, the breakdown is as follows: disclosure took until December 3, 2009, followed by a period of neutral intake until January 21, 2010 during which Mr. Marley reviewed disclosure and met with his clients, followed then by three months of neutral preparation time, i.e. inherent time

requirements of the case, until April 20, 2010, by which point Mr. Marley was in a position to proceed with the preliminary inquiry of Mr. Florence.

[60] The dispute concerning the Crown's attempt to avoid having Constable Johnston testify at the preliminary inquiry did not ultimately cause any delay in proceeding with the preliminary inquiry. This is because the parties had set the preliminary inquiry date before that dispute arose. As Mr. Florence points out, the progress of his case might have been expedited had the Crown accepted defence counsel's proposal to conduct a discovery-type cross-examination of Constable Johnson in place of the preliminary inquiry. However, the time that might have been saved through such a procedure has in any case been attributed to institutional delay, as it was by the application judge. For reasons explained above, whether such period of time is attributed to institutional delay or re-characterized as Crown delay does not, in the circumstances of this case, make any difference. This is because, as explained above, I see no basis for placing greater weight on Crown versus institutional delay in the final balance.

[61] The period from April 20, 2010 to the preliminary inquiry on March 8, 2011 is then, with one adjustment, attributed to institutional delay. This is institutional delay because Mr. Marley was prepared to proceed as early as April 20, 2010, but the preliminary inquiry could not be scheduled before July 8, 2010. It was

subsequently adjourned at the Crown's request and ultimately rescheduled for March 8, 2011.

[62] The one adjustment to the length of the institutional delay period is a 14-day reduction. This is because on April 1, 2010, when the parties attended court to set a new date for Mr. Florence's preliminary inquiry (because the July 8, 2010 date originally set was no longer available), Mr. Marley's agent had received unclear instructions as to dates for the preliminary inquiry. An adjournment until April 15 was therefore necessary to allow the agent to obtain proper instructions. Had the defence been prepared to set a date on April 1, the date offered by the court would, arguably, have been earlier than March 8, 2011, the date ultimately selected for Mr. Florence's preliminary inquiry. For this reason, I would attribute a 14-day delay to the defence.

[63] The Crown argues that a further adjustment is necessary to the application judge's calculation of institutional delay. I agree. The application judge attributed the entire period from the assignment of the trial date until the trial itself to institutional delay. Again following *Ralph*, I would attribute some of that time to neutral preparation. The defence could not be expected to be ready to start the trial immediately. Some time following the setting of a trial date is necessary to prepare. There is little in the record to assist as to the appropriate length of time

for that preparation. In *Ralph*, Rosenberg J.A. considered one month to be a reasonable length of time. I will do the same.

[64] I note that Mr. Florence accepts the application judge's classification of the four-month period from the preliminary inquiry until the assignment of his trial date as inherent delay. This is the time it took to transfer the matter to the Superior Court, schedule and hold the judicial pre-trial and set the date for trial. In appropriate cases, it may be open to accused to argue that for at least part of such period they were prepared to move forward with proceedings but the system was not able to accommodate them.

(b) Adjustments in the Carder matter

[65] Mr. Carder's situation involves somewhat different considerations. Because Mr. Carder was arrested on other charges before a preliminary inquiry date could be set, additional delay was incurred. This additional delay is attributable to either neutral or defence delay.

[66] As explained earlier in these reasons, delay was caused by Mr. Carder's bail application following his second arrest and by Mr. Marley's request for additional time in order to consider the Crown's resolution proposal. This delay extended the intake period until March 4, 2010. From March 4, 2010 forward, the reasons for delay are not altogether clear. Some of the delay is certainly due to the Crown's decision not to produce Constable Johnston for cross-examination at

the preliminary inquiry and Mr. Carder's successful challenge of this decision. For reasons that are not apparent from the record, it seems that neither the Crown nor Mr. Carder sought to set a date for the preliminary inquiry until after this matter was resolved. Had they done so pending resolution of the matter no delay would be attributable to the Crown. However, because there was delay in setting the date for the preliminary inquiry from March 4, 2010 to April 1, 2010, I consider this period to be properly characterized as Crown delay.

[67] From April 1, 2010 forward, I would, in accordance with the reasoning of this court in *Ralph*, make the same three-month and one-month adjustments as I made in the analysis of the delay incurred in Mr. Florence's matter. That is, the three months from April 1, 2010 until July 1, 2010 are neutral preparation time forming part of the inherent time requirements of the case, as is the month following the assignment, on July 8, 2011, of Mr. Carder's trial date.

[68] One further adjustment is necessary. Arguably, the delay in Mr. Carder's trial from February 27, 2012 to March 19, 2012 should be characterized as defence rather than institutional delay. This is because the court offered the date of February 27, but Mr. Marley was not available. The court also offered the date of March 12, which Mr. Marley refused because he was again unavailable. In my view an adjustment is appropriate but not for the entire period. As the Supreme Court of Canada stated in *Godin*, at para 23: "Scheduling requires reasonable

availability and reasonable cooperation; it does not, for s. 11(*b*) purposes, require defence counsel to hold themselves in a state of perpetual availability." I would not, therefore, attribute the entire period from February 27, 2012 to March 19, 2012 to defence delay. I will attribute only half, i.e. 10 days, to defence delay. I also reject the Crown's submission that, because Mr. Marley was not available on February 27, 2012, the first date offered, we should attribute all of the period from July 8, 2011 to March 19, 2012 to defence delay. This is simply unreasonable. Nothing in the record suggests that Mr. Marley would not have been available prior to February 27, 2012 had dates been offered.

[69] Finally, I note that, like Mr. Florence, Mr. Carder accepts the application judge's classification of the approximately four-month period from the preliminary inquiry until the assignment of his trial date as inherent delay. Again, in appropriate cases, it may be open to accused to argue that for at least part of such period they were prepared to move forward with proceedings but the system was not able to accommodate them.

[70] The results of my calculations are as follows:

Mr. Florence:

From	To	# of days	Attribution of this period
October 28, 2009 (arrest)	December 3, 2009 (disclosure produced)	36	Neutral intake
December 3, 2009	January 21, 2010	49	Neutral intake

(disclosure produced)	(first setting of preliminary inquiry date)		
January 21, 2010 (first setting of preliminary inquiry date)	April 20, 2010 (date first offered by defence for preliminary inquiry)	89	Neutral inherent / preparation time
April 20, 2010 (date first offered by defence for preliminary inquiry)	March 8, 2011 (preliminary inquiry)	322	308 days of institutional delay; and 14 days of defence delay
March 8, 2011 (preliminary inquiry)	July 8, 2011 (assignment of trial date)	122	Neutral intake / inherent time requirements
July 8, 2011 (assignment of trial date)	March 22, 2012 (trial date)	258	227 days of institutional delay; 31 days neutral preparation

[71] The total delay for Mr. Florence is 535 days, or 17.6 months, of institutional and Crown delay, which is within the range set by the *Morin* guidelines, though near their outer limit.

Mr. Carder:

From	To	# of days	Attribution of this period
October 28, 2009 (arrest)	December 3, 2009 (disclosure produced)	36	Neutral intake
December 3, 2009 (disclosure produced)	March 4, 2010	91	Neutral intake and defence delay due to additional charges
March 4, 2010	April 1, 2010 (setting of preliminary inquiry date)	28	Crown delay
April 1, 2010	July 1, 2010	91	Neutral inherent /

(setting of preliminary inquiry date)			preparation time
July 1, 2010	February 24, 2011 (preliminary inquiry)	238	Institutional delay
February 24, 2011 (preliminary inquiry)	July 8, 2011 (assignment of trial date)	134	Neutral intake / inherent time requirements
July 8, 2011 (assignment of trial date)	March 19, 2012 (trial date)	255	214 days of institutional delay; 31 days neutral preparation; 10 days defence delay

[72] The total delay for Mr. Carder is 480 days, or 15.8 months, of institutional and Crown delay, which is within the range set out in the *Morin* guidelines.

(3) Did the application judge mischaracterize the seriousness of the charges and give decisive weight to the seriousness of the charges in the final balancing exercise?

[73] The adjustments I have made to the application judge's calculations bring the delay incurred in both matters within the *Morin* guidelines and well below the delay that the application judge considered acceptable in the circumstances. As a result, even if I were to accept the appellants' submissions that the application judge mischaracterized the seriousness of the charge, I see no basis to interfere with the application judge's decision.

(4) Should Mr. Florence be allowed to set aside his guilty plea?

[74] Mr. Florence's submissions indicated that he sought to have his guilty plea set aside only to the extent that this was necessary in order to challenge the

application judge's ruling on his s. 11(b) application. In light of the conclusion I have reached on Mr. Florence's appeal of the application judge's s. 11(b) ruling, I need not deal with this issue.

(5) Mr. Carder's sentence appeal

[75] Mr. Carder seeks a reduction in his sentence from six months to time served. He argues that, although the sentence was fit at the time it was set, he was granted bail pending appeal and has now been on bail without incident since March 2013. He is 61 years old and, in his submission, the interests of justice would not be served by re-incarcerating him at this time.

[76] The Crown, for its part, maintains that there is no basis to interfere with Mr. Carder's sentence. The sentence imposed was entirely fit, especially in light of Mr. Carder's significant criminal record and admission that he had been dealing drugs regularly as a "job" for a purely commercial motive.

[77] I agree with the Crown's submission, and see no basis to interfere with the sentence imposed.

CONCLUSION

[78] For these reasons, I would dismiss the appeals.

"Paul Rouleau J.A."
"I agree Robert J. Sharpe J.A."
"I agree E.E. Gillese J.A."

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