

CANADA / JUDGMENT

R. v. CIP Inc.

[1992] 1 SCR 843

COURT

Supreme Court of Canada

DECIDED

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R. v. CIP Inc.

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Report

[1992] 1 SCR 843

Case number

22025

Judges

Lamer, Antonio; La Forest, Gérard V.; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Stevenson, William; Iacobucci, Frank

On appeal from

Ontario

Subjects

Constitutional law

Notes

SCC Case Information: 22025

Decision Content

R. v. CIP Inc., [1992] 1 S.C.R. 843

CIP Inc. Appellant

v.

Her Majesty The Queen Respondent

and

The Attorney General of Canada Intervener

Indexed as: R. v. CIP Inc.

File No.: 22025.

1991: June 27; 1992: April 9.

Present: Lamer C.J. and La Forest, Gonthier, Cory*, McLachlin, Stevenson and Iacobucci JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Trial within a reasonable time -- Delay of 19 months in bringing accused to trial owing to lack of court facilities -- Whether corporation can rely on guarantee of trial within a reasonable time -- If so, whether delay unreasonable -- Canadian Charter of Rights and Freedoms, s. 11 (b).

On May 27, 1986, an employee of CIP Inc. was fatally injured in an industrial accident on the company's premises. A coroner's inquest was held in August of that year and on March 26, 1987, CIP was charged with committing an offence under the provincial Occupational Health and Safety Act. Both sides were ready to proceed to trial in April, but the trial was scheduled for November 10 because of a lack of court facilities. On that date the parties appeared and all witnesses were in attendance, but the case was adjourned to the next available day, May 24, 1988, owing to the carrying over of other trials. Counsel for CIP stated that it had "no choice" but to adjourn. On May 24 the trial was again adjourned to the next available date on the grounds that an already scheduled criminal matter took precedence. Counsel for CIP objected to the adjournment, claiming that the delays were in violation of his client's right to be tried within a reasonable time pursuant to s. 11 (b) of the Canadian Charter of Rights and Freedoms, and moved for a stay of the prosecution. The hearing of the motion was adjourned, and both the trial and the motion were rescheduled for October 11, 1988. The motion was argued on that date and three weeks later the Provincial Court judge granted the stay. The Crown's appeal to the District Court was allowed and the stay set aside. The Court of Appeal upheld this decision. This appeal raises the issue of whether a corporate accused can rely upon the protection afforded by s. 11 (b) of the Charter and, if so, whether the delay in this case was unreasonable.

Held: The appeal should be dismissed.

Corporations are included in the phrase "Any person charged with an offence" and can thus rely on the protection of s. 11 (b) of the Charter. The appellant has a legitimate interest in being tried within a reasonable time. The right to a fair trial is fundamental to our adversarial system and

has been accorded constitutional protection. That protection should be extended to all accused. The societal interest also protected by s. 11 (b) applies to corporate offenders as well as individual accused. To hold otherwise would be to suggest that the community is somehow less interested in seeing corporations brought to trial, and that the status of an accused can determine whether that accused is to be accorded "fair" and "just" treatment.

The factors to be taken into account in determining whether the delay was reasonable are (i) the length of the delay; (ii) waiver of time periods; (iii) the explanation for the delay; and (iv) prejudice to the accused. The 19-month period between the laying of the charge and the third trial date in this case was *prima facie* excessive. Waiver is not an issue here, and the whole of the 19-month period is to be taken into account. The main reason for the delay was the shortage of court facilities, and the Crown has the onus of justifying such systemic or institutional delay. The allowable time frame for bringing an accused charged with a regulatory offence to trial is the same as it would be in the case of a Criminal Code offence. The interest of an accused in the availability and reliability of substantiating evidence exists irrespective of the nature of the offence. This matter was not complex, and the appellant did not request any of the adjournments. The explanation for the delay in this case must therefore weigh against the Crown.

The appellant cannot, however, rely on the presumption of prejudice to the accused resulting from the passage of time. The inference of prejudice is linked to the liberty and security interests of an accused, not the fair trial interest, and a corporate entity does not have the right to liberty and security of the person within the meaning of the Charter . A corporate accused must therefore be able to establish that its fair trial interest has been irremediably prejudiced. In this case the appellant has not argued an actual impairment of its ability to make full answer and defence. In the absence of some evidence of prejudice, the courts below were not in error in removing the initial trial stay.

The delay after the stay was granted on November 1, 1988 is appellate delay, and the bulk of that delay is attributable to the appellant's decision to pursue appeals. The appellant invoked the processes of which it now complains and must accept the burdens inherent in full appellate review.

Cases Cited

Considered: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Askov*, [1990] 2 S.C.R. 1199, rev'g (1987), 37 C.C.C. (3d) 289; referred to: *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Morin*, [1992] 1 S.C.R. 000, aff'g (1990), 55 C.C.C. (3d) 209; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Amway Corp.*, [1989] 1 S.C.R. 21; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, aff'g (1983), 147 D.L.R. (3d) 420, rev'g (1982), 136 D.L.R. (3d) 133; *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. 741290 Ontario Inc.* (1991), 2 O.R. (3d) 336; *United States v. Loud Hawk*, 474 U.S. 302 (1986); *Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. New*

Buffalo Amusement Corp., 600 F.2d 368 (1979); R. v. Stensrud, [1989] 2 S.C.R. 1115; R. v. Bennett (1991), 3 O.R. (3d) 193.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 2 (b), 7 , 8 , 9 , 10 , 11 (b), 12 to 14 , 24 .

Interpretation Act, R.S.C., 1985, c. I-21 .

Occupational Health and Safety Act, R.S.O. 1980, c. 321, s. 37(2)(c).

Provincial Offences Act, R.S.O. 1980, c. 400, s. 99.

R.R.O. 1980, Reg. 692, s. 80.

United States Constitution, Sixth Amendment.

APPEAL from a judgment of the Ontario Court of Appeal affirming the judgment of Lang Dist. Ct. J. setting aside the stay granted by Foster Prov. Ct. J. Appeal dismissed.

Michael L. Phelan and A. Stitt, for the appellant.

Kenneth L. Campbell, Norman Farrell and Andrea E. Esson, for the respondent.

S. R. Fainstein, Q.C., and R. J. Frater, for the intervener.

//Stevenson J.//

The judgment of the Court was delivered by

Stevenson J. -- This case examines the right of a corporate accused to rely upon the protection afforded by s. 11 (b) of the Canadian Charter of Rights and Freedoms , which reads as follows:

11. Any person charged with an offence has the right

...

(b) to be tried within a reasonable time;

There are two issues to be resolved:

1.whether the appellant has a right to be tried within a reasonable time pursuant to s. 11 (b); and

2.if the appellant can rely upon s. 11 (b), whether there has been unreasonable delay in the circumstances of this case.

The appellant has also raised concerns over appellate delay and its relevance to a s. 11 (b) analysis. Those concerns will be addressed in the context of the second issue.

Facts and Procedural History

On May 27, 1986, an employee of the appellant CIP Inc. was fatally injured in an industrial accident occurring on the appellant's premises. A coroner's inquest was held in August of that year. On March 26, 1987, the respondent Crown (Ontario's Ministry of Labour) charged the appellant and three individual employees with committing an offence contrary to the Occupational Health and Safety Act, R.S.O. 1980, c. 321, as amended. It was alleged that the appellant had failed to ensure that the control switches or other control mechanisms on a die press were locked out, in violation of s. 80 of R.R.O. 1980, Reg. 692. Summonses were issued that same day.

Both sides were ready to proceed to trial after April 15, 1987. The matter was not exceedingly complex and it was estimated that the trial would take a half day or a maximum one day of court time. The trial was nonetheless scheduled for November 10, 1987 because of a lack of court facilities. It was to be heard before a judge of the Ontario Provincial Court (Criminal Division) sitting as a judge of the Provincial Offences Court.

Both parties appeared on November 10 and all witnesses were in attendance. However, the case was adjourned to the next available day (May 24, 1988) due to the carrying over of other trials. Counsel for the appellant stated that the appellant had "no choice" but to adjourn.

On May 24, 1988, the trial was again adjourned to the next available day on grounds that an already scheduled criminal matter took precedence. Counsel for the appellant objected to the adjournment, claiming that the delays were in violation of his client's right to be tried within a reasonable time pursuant to s. 11 (b) of the Charter . He moved that the prosecution be stayed. Belobradic Prov. Ct. J. adjourned the hearing of that motion. Both the trial and the motion were rescheduled for October 11, 1988. On that same day (May 24), the charges against the three individual employees were withdrawn.

The motion for a stay was fully argued on the new date before Foster Prov. Ct. J. Judgment was reserved until November 1, 1988, at which point the stay was granted on grounds that the delay was excessive and unreasonable.

The respondent appealed that decision pursuant to s. 99 of the Provincial Offences Act, R.S.O. 1980, c. 400, as amended. The appeal was heard by Lang Dist. Ct. J. on May 25, 1989. Judgment was delivered the same afternoon. The appeal was allowed and the stay set aside. Lang Dist. Ct. J. ordered that the trial proceed on an expedited basis.

The appellant was granted leave to appeal that decision to the Court of Appeal for Ontario by Zuber J.A. on July 5, 1989. It was ordered that the appeal proceed on an expedited basis. The appellant filed all of its material by August 11, 1989. The appeal was scheduled to be heard on May 29, 1990. It was dismissed by the Court of Appeal on May 30, 1990.

The appellant then applied for leave to appeal the Court of Appeal decision to this Court. It filed all of its material by August 2, 1990. On October 17, 1990, counsel for the respondent served the appellant with a notice of motion to extend the time for filing a reply to the leave application. The appellant consented to the motion on the condition that the respondent bring its motion at the earliest available opportunity and that the respondent serve and file its materials without delay. The respondent served its materials on the appellant on October 26, 1990.

Leave to appeal to this Court was granted on January 25, 1991.

Judgments Below

1. Ontario Provincial Court (Criminal Division)

Foster Prov. Ct. J. found that the main reason for the delay in bringing the appellant to trial was the shortage of court facilities. He nonetheless concluded that "bringing into consideration all the circumstances", the delay was excessive and unreasonable. Foster Prov. Ct. J. held that the right of the appellant as a "Corporate person" to be tried within a reasonable time had therefore been infringed. He ordered that the proceedings be stayed.

2. District Court of Ontario

Lang Dist. Ct. J. acknowledged that the 19-month delay between the laying of the charge and the third trial date resulted solely from the lack of court facilities, a "systemic failure in the system". In rendering her decision, she took into account the following factors:

- (1) both counsel were ready to proceed to trial after April 15, 1987;
- (2) the delay in the trial was through no misconduct on the part of either the crown or defence but was solely due to the lack of court facilities to hear the matter;
- (3) the matter was a serious charge in that there was a fatality;
- (4) the matter involved concerns of the employees and the reputation of the Corporation;
- (5) the matter was not an exceedingly complex one as it was estimated to take a half day or the maximum one day of court time;
- (6) the Corporation does not argue that it was actually prejudiced by the delay;
- (7) there was a five day inquest arising out of the same incident;
- (8) on the first trial date adjournment, the Corporation stated that it had "No choice" but to adjourn;
- (9) and on the second trial date it objected strenuously and notified the court of its intent to argue delay and in fact, did so on the next available date;
- (10) it is now almost three years to the day since the fatality occurred and over two years since the charge was laid.

Lang Dist. Ct. J. was referred by counsel to the decisions of this Court in *Mills v. The Queen*, [1986] 1 S.C.R. 863, and *R. v. Rahey*, [1987] 1 S.C.R. 588. She considered herself bound by the decision of Grange J.A. of the Court of Appeal for Ontario in *R. v. Askov* (1987), 37 C.C.C. (3d) 289, in which those two decisions were considered and a specific framework adopted for unreasonable delay applications. She noted the four factors to be taken into account: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his or her right (or waiver); and (4) prejudice to the defendant.

Lang Dist. Ct. J. agreed with the motions judge that the delay of 19 months was *prima facie* excessive. She further acknowledged that "[p]rejudice can be inferred or presumed from such a delay and need not be actually proven". Lang Dist. Ct. J. nonetheless opined that while a corporation "no doubt can suffer anxiety" from the stress of charges such as those laid in this case, it is not "naturally subject" to the same stresses that would be suffered by an individual accused. In her view, while the motions judge "gave great care to his decision", he nonetheless "erred in principle" in granting a stay. Lang Dist. Ct. J. concluded with the following:

Given the systemic delays inherent in our court system, one must still consider the importance of this type of case and in particular, the importance of safe work standards for employees.

The respondent's appeal was allowed and the matter referred back to the Provincial Court for a hearing "to be heard as soon as possible".

3. Court of Appeal for Ontario

The Court of Appeal stated that in light of its reasons for judgment in *R. v. Morin* (1990), 55 C.C.C. (3d) 209, it was unable to find any error on the part of Lang Dist. Ct. J. in concluding that the appellant's s. 11 (b) Charter right had not been infringed. The appeal was dismissed and the court ordered that the outstanding charges against the appellant be dealt with at the "earliest possible date".

Analysis

R. v. Morin is itself under appeal to this Court, and judgment was delivered March 26, 1992: [1992] 1 S.C.R. 000. It is therefore necessary to review the issues raised below in light of that ruling.

1. Does a Corporate Accused Have the Right to be Tried Within a Reasonable Time Pursuant to s. 11 (b) of the Charter ?

The respondent submits that because of its corporate status, the appellant has very limited recourse to the Charter . It contends that the appellant can invoke s. 11 (b) only if it does so for the purpose set out in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, in which this Court held that a corporate accused can rely upon the Charter when challenging the constitutional validity of the statute under which it has been charged. The majority stated that in those situations, "[i]t is the nature of the law, not the status of the accused, that is in issue" (p. 314).

In support of its position, the respondent points to the subsequent decision of *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, in which the corporate respondent was precluded, in the absence of penal proceedings, from asserting an infringement of the right to life, liberty and security of the person as guaranteed by s. 7 of the Charter. Dickson C.J. and Lamer and Wilson JJ. stated the following at p. 1004:

"Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings. [Emphasis added.]

In my opinion, the respondent's argument on this first issue overlooks the generally accepted contextual and purposive approach to Charter analysis. In *Irwin Toy Ltd.*, it was not the absence of penal proceedings per se that precluded the respondent corporation from invoking s. 7. Rather, the Court focused on the language of the right in combination with the nature of the specific interests embodied therein, and concluded that in that context, s. 7 could not logically apply to corporate entities. I do not read that decision as ruling out the possibility of corporations asserting other Charter guarantees. On the contrary, *Irwin Toy Ltd.* went only so far as to establish an appropriate analytical framework: whether or not a corporate entity can invoke a Charter right will depend upon whether it can establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision.

That was the approach taken by this Court in *R. v. Amway Corp.*, [1989] 1 S.C.R. 21, where it held that a corporation cannot be a witness and therefore cannot come within s. 11 (c) of the Charter. Sopinka J. (on behalf of the Court) stated the following at p. 40:

Applying a purposive interpretation to s. 11 (c), I am of the opinion that it was intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth. [Emphasis added.]

It is worth noting that in *Amway Corp.*, Sopinka J. was not prepared to assume that under no circumstances could a corporation avail itself of the s. 11 guarantees (at p. 37).

In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, the appellant corporation was found to have unjustly dismissed the respondent employee. An adjudicator ordered, pursuant to s. 61.5(9)(c) of the Canada Labour Code, R.S.C. 1970, c. L-1, as amended, that the appellant provide the respondent with a letter of recommendation containing certain facts. It was also ordered that the appellant be prohibited from answering a request for information about the respondent except by sending the letter of recommendation. One of the issues raised before this Court was whether that prohibition infringed the corporate employer's freedom of expression contrary to s. 2 (b) of the Charter. This Court held that it did (per Dickson C.J. on behalf of the majority, at p. 1050):

Adjudicator Joliffe's order that Slaight Communications Inc. answer any reference inquiry exclusively by sending the specified letter is an infringement of s. 2 (b) freedom of expression. The government is attempting to prevent Q107 from expressing its opinion as to the qualifications of Mr. Davidson beyond the facts set out in the letter. [Emphasis added.]

The prohibition was ultimately held saved by s. 1 of the Charter , but for the purposes of this case, that is of little significance. What is of importance here is the fact that the corporate appellant was unanimously recognized as having the right to invoke s. 2 (b) in circumstances other than those set out in *R. v. Big M Drug Mart Ltd.* No one took issue with the appellant's standing. Beetz J. (dissenting) stated the following at p. 1064:

I would not like it to be thought that I condone the highly reprehensible conduct of the appellant. But under the Charter , freedom of opinion and freedom of expression are guaranteed to "everyone", employers and employees alike, irrespective of their labour practices and of their bargaining power.

Lamer J. (as he then was), dissenting in part, agreed (at p. 1080) that:

The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant's freedom of expression.

A second argument put forward by the respondent is based on the connection between s. 7 and ss. 8 through 14 of the Charter . The respondent relies upon *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, for the proposition that s. 11 (b) is simply illustrative of a specific s. 7 deprivation, and contends that the scope of the right can therefore be no greater than that of the s. 7 guarantee. In other words, if a corporation cannot rely upon s. 7 pursuant to *Irwin Toy Ltd.*, it stands to reason that it also cannot invoke s. 11 (b). It is true that in *Re B.C. Motor Vehicle Act*, Lamer J. (as he then was), on behalf of the majority, was of the view that it would be "incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14 " of the Charter (at p. 502). He saw the latter (at p. 502) as:

... examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice.

However, the concern over incongruity related to the scope of the principles of fundamental justice, not that of life, liberty and security of the person. Establishing a deprivation of life, liberty or security of the person is not a prerequisite to relying upon the protection afforded through ss. 8 to 14 . Section 7 does not define the scope of the rights contained in the provisions that follow it. A clear example of that is the right of a witness to the assistance of an interpreter as provided for in s. 14 . In my opinion, it is therefore not inconsistent with *Re B.C. Motor Vehicle Act* to hold that s. 11 (b) can encompass interests in addition to those that have been recognized as falling within s. 7 .

In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, a corporation applied for an interim injunction to prevent a search of its premises made pursuant to the Combines Investigation Act, R.S.C. 1970, c. C-23. As one of the bases for its application, the plaintiff invoked the right to be secure against

unreasonable search or seizure enshrined in s. 8 of the Charter . The trial judge held that the word "everyone" in the context of s. 8 includes "all human beings and all entities that are capable of enjoying the benefit of security against unreasonable search", but nonetheless dismissed the application (*Southam Inc. v. Hunter* (1982), 136 D.L.R. (3d) 133, at p. 141, emphasis added). The Alberta Court of Appeal allowed the corporation's appeal, holding that the statutory provisions authorizing the search were inconsistent with s. 8 of the Charter (*Southam Inc. v. Hunter* (1983), 147 D.L.R. (3d) 420, at p. 437). That decision was unanimously affirmed by this Court. Neither the Court of Appeal nor this Court took issue with the noted conclusion of the trial judge.

It should be kept in mind that "person" includes a corporation under the general provisions of the Interpretation Act, R.S.C., 1985, c. I-21 . We must also remember that corporate criminal liability is essentially vicarious liability based upon the acts and omissions of individuals: "a corporation may only act through agents " (*Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, at p. 675). Extending Charter guarantees to corporations will, in some circumstances, afford a measure of protection to those individuals. See *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, per La Forest J. at pp. 521-22.

In *R. v. Askov*, [1990] 2 S.C.R. 1199, this Court examined the purpose and scope of the right to be tried within a reasonable time. Cory J. (on behalf of the majority) held that "the primary aim of s. 11 (b) is the protection of the individual's rights and the provision of fundamental justice for the accused" (p. 1219). Section 11 (b) protects the right to security of the person, the right to liberty and the right to a fair trial. With respect to the latter of those three, Cory J. noted the following at p. 1220:

There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time, but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employer; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost.

In making those comments, Cory J. aligned himself with the position of Wilson J. in *Mills v. The Queen*, *supra*, where she stated (at p. 968) that:

... one of the more significant forms of impairment which can flow from delay in bringing an accused to trial is its impact on the accused's ability to make full answer and defence to the charge. [Emphasis added.]

See also *R. v. Rahey*, *supra*, per Wilson J. at p. 622, and per La Forest J. at pp. 643-44.

The Occupational Health and Safety Act, under which the appellant is charged, provides pursuant to s. 37(2)(c) that it "shall be a defence for the accused to prove that every precaution reasonable in the circumstances was taken". The availability of witnesses and the reliability of their

testimony could have a significant impact upon the appellant's ability to put forward that defence. I am of the view that the appellant has a legitimate interest in being tried within a reasonable time. The right to a fair trial is fundamental to our adversarial system. Parliament has seen fit to accord that right constitutional protection. I can find no principled reason for not extending that protection to all accused. To that end, I find apposite the comments of MacDonnell Prov. Div. J. in *R. v. 741290 Ontario Inc.* (1991), 2 O.R. (3d) 336, at pp. 351-52:

Any accused, corporate or human, can be denied full answer and defence by reason of delay. A corporation is just as vulnerable to the deterioration of recollection which can prejudice any person on trial for an offence. Its witnesses, like those of any accused, can die, move away, or disappear. If, as seems clear, the right of an accused to make full answer and defence is a fundamental principle of the Canadian system of justice, and if that system regards corporations as being susceptible to the same criminal process as humans, it would seem to follow that protection of the fairness of a corporation's trial is a concern which is well within . . . s. 11 (b).

In the United States, the right to be tried within a reasonable time is constitutionally entrenched in the speedy trial clause of the Sixth Amendment: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." (as cited in *United States v. Loud Hawk*, 474 U.S. 302 (1986), at p. 304). The purpose of that right is three-fold:

. . . (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. [*Barker v. Wingo*, 407 U.S. 514 (1972), at p. 532, emphasis added.]

In *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368 (1979), two of the three accused were corporations. One was charged with knowingly using a common carrier for carriage in interstate commerce of an obscene film contrary to 18 U.S.C. {SS} 1462, and the other with knowingly taking the film from the carrier (at p. 372). Both were convicted at trial. On appeal, they alleged a denial of their right to a speedy trial. The United States Court of Appeals (Second Circuit) held that the appellants' Sixth Amendment right had been violated, and reversed the convictions with instructions to dismiss the indictment (at p. 380). Fifty-four months had passed between the indictment and the date of trial, the bulk of which was "chargeable to the government's inaction . . . overcrowded dockets . . . and the trial court's failure to rule expeditiously on appellants' motions" (at p. 377). An uncontradicted affidavit filed with the court established that certain witnesses could no longer be located (at p. 379). There was also expert evidence indicating that public attitudes toward sexually explicit films had changed since the time of the indictment to the detriment of the appellants (at p. 379). On those bases, the majority concluded that the appellants' ability to present a defence had been impaired by the delay. In so ruling, the court implicitly accepted the application of the speedy trial right to corporate entities.

Cory J. was also of the view in *Askov* (at pp. 1219-20) that there is a "community or societal interest" in s. 11 (b):

That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest.

In his opinion (at p. 1221):

. . . it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. [Emphasis added.]

In my view, the societal interest applies to corporate offenders as it does to individual accused. To hold otherwise would be to suggest that the community is somehow less interested in seeing the former brought to trial. It would also suggest that the status of an accused can determine whether that accused is to be accorded "fair" and "just" treatment. I am not prepared to accept either of those propositions.

I therefore conclude that the phrase "Any person charged with an offence" in the context of s. 11 (b) of the Charter includes corporations.

2. Has There Been Unreasonable Delay in this Case?

The appellant seeks a remedy under s. 24 of the Charter . Apart from any delays arising in the appeal process, the relevant period of time for consideration is the 19-month period between the laying of the charge and the third trial date (March 26, 1987 to October 11, 1988). The factors to be taken into account in determining whether that delay was reasonable are those set out by this Court in a series of cases culminating with the decision in Askov: (i) the length of the delay; (ii) waiver of time periods; (iii) explanation for the delay; and (iv) prejudice to the accused.

(i) The Length of the Delay

Askov emphasized that "[t]he longer the delay, the more difficult it should be for a court to excuse it" (at p. 1231). Both the Provincial and the District Court found that the 19-month delay in bringing the appellant to trial in this case was *prima facie* excessive. They were clearly in the best position to make that assessment. The Ontario Court of Appeal did not take issue with that finding. As was stated by this Court in *R. v. Stensrud*, [1989] 2 S.C.R. 1115, at p. 1116:

The provincial courts of appeal are generally in a better position than this Court to assess the reasonableness of their province's institutional limitations and resources.

In the absence of evidence to the contrary, I am not prepared to disturb the findings below on this first factor. I note that in *Rahey*, a stay of proceedings was ordered where the impugned delay lasted for 11 months.

(ii) Waiver

The "burden of showing that a waiver should be inferred falls upon the Crown" (Askov at p. 1232). For a waiver to be valid, it "must be informed, unequivocal and freely given" (Askov at p. 1232). When the trial in this case was adjourned for the first time, counsel for the appellant stated that it had "no choice" but to agree to the adjournment. On the second trial date, it "objected strenuously and notified the court of its intent to argue delay" (per Lang Dist. Ct. J.). In my opinion, waiver is therefore not an issue in this case, and the whole of the 19-month period is to be taken into account.

(iii) Explanation for the Delay

Under this heading, a court must distinguish between delays attributable to the Crown, systemic or institutional delays, and delays attributable to the accused (Askov at p. 1231). Because it is the Crown that is responsible for bringing an accused to trial, the first two factors weigh in favour of the person alleging the s. 11 (b) violation.

In this case, the Provincial and District courts found that the main reason for the 19-month delay was the shortage of court facilities. That makes the delay "systemic or institutional" in nature, and the respondent bears the onus of justifying the inadequate resources (Askov at p. 1231). The appellant's trial was adjourned twice, apparently because of priority being given to Criminal Code matters. The respondent submits that the delay is justified solely on that basis. If I understand that argument correctly, the respondent is suggesting that because the appellant was charged with a regulatory offence, the allowable time frame for bringing it to trial should somehow be greater than it would be in other circumstances. I am not persuaded by that argument. The right to be tried within a reasonable time is engaged when a person is "charged with an offence". The Charter does not distinguish between types of offences, and it seems to me that doing so for the purposes of assessing the reasonableness of delay would unduly stretch the principles of contextual analysis. The interest of an accused in the availability and reliability of substantiating evidence will exist irrespective of the nature of the offence with which that person is charged.

This matter was not complex, and it was estimated that it would take a maximum one day of court time. We are therefore not dealing with a situation in which the nature of the case necessitated "longer time for preparation, a greater expenditure of resources by Crown officers, and the longer use of institutional facilities" (Askov at p. 1231). Furthermore, there is no indication that the appellant misconducted itself during the course of the proceedings (as affirmed by Lang Dist. Ct. J.). The appellant did not request any of the adjournments. It was ready to proceed to trial after April 15, 1987.

In light of the above factors, it is my opinion that the explanation for the delay in this case must weigh against the respondent.

(iv) Prejudice to the Accused

In Askov, this Court held that there is a "general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time" (p. 1232). In my opinion, this is the key requisite to a successful s. 11 (b) application. A court

may infer or presume prejudice, or it may be proven. The appellant relies upon that presumption in this case. The respondent contends that it cannot. It submits that the inference of prejudice is linked to the liberty and security interests of an accused, not the fair trial interest. Because a corporate entity does not have the right to liberty and security of the person within the meaning of the Charter, the argument goes that it therefore cannot invoke the presumption referred to in Askov. The respondent submits that in order to succeed on its s. 11 (b) claim, the appellant must persuade the court that its ability to make full answer and defence has been impaired.

I find the respondent's argument on this particular issue persuasive. As was recently noted by MacDonnell Prov. Div. J. in *R. v. 741290 Ontario Inc.*, supra, at p. 353:

The most compelling argument which has been mounted for a presumption of prejudice has been with respect to the effects of delay on security of the person. Once concern about that factor is nullified, as it is when dealing with a corporation, the greatest part of the basis for a presumption of prejudice collapses. [Emphasis added.]

In Askov, Cory J. appears to have placed much emphasis on the "exquisite agony" experienced by accused persons and their families while awaiting trial (at p. 1219). Lamer C.J. echoed that concern in his reasons. He observed that the purpose of s. 11 (b) is to put an end to the process giving rise to the "anxieties" of the accused (at p. 1249). In so holding, Lamer C.J. essentially reiterated his position in *Mills v. The Queen*, supra, where he stated (at pp. 919-20) that:

... under s. 11 (b), the security of the person is to be safeguarded as jealously as the liberty of the individual. In this context, the concept of security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (A. Amsterdam, loc. cit., at p. 533). These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction. These forms of prejudice cannot be disregarded nor minimized when assessing the reasonableness of delay.

In my view, none of these concerns -- with the exception of legal costs -- logically applies to corporate entities. In order properly to assess the reasonableness of delay, a court has to balance the various interests at stake. The interests of the accused must be weighed against the interest of the community in ensuring that those who have allegedly transgressed the law are brought to justice. The balancing process must be fair. There is no room for artificiality. It seems to me that allowing a corporation to rely upon a presumption of prejudice would offend that principle. It is therefore my opinion that with respect to this fourth factor, a corporate accused must be able to establish that its fair trial interest has been irremediably prejudiced. I use the phrase "irremediably prejudiced" because there are some forms of prejudice that a court can remove, notably by making specific orders regarding the conduct of the trial.

In this case, the appellant has not argued an actual impairment of its ability to make full answer and defence. That fact was expressly noted by Lang Dist. Ct. J.: "the Corporation does not argue that it was actually prejudiced by the delay". I am of the view that in the absence of some evidence of prejudice, the courts below were not in error in removing the initial trial stay.

The appellant urges that the appellate time should be included in an assessment of the s. 11 (b) right.

In this case the accused has not been tried, and in that sense, may say to an appellate court, as he does to a trial court, you have taken too long getting me to trial, it is now unreasonable. I do not propose discussing post-trial appellate delay in this judgment, as we are here dealing with an interlocutory process.

The intervener Attorney General of Canada stressed the societal interest in bringing an accused to trial, "except where that would be fundamentally unfair". It emphasized prejudice as the touchstone. Mr. Fainstein, Q.C., also raised the question of onus with respect to proving prejudice to the fair trial interest. He said "it is rather difficult for the Appellant to complain that for the last two years at least he [it] has been deprived of his right . . .". He urged the Court to find a compelling case before imposing what he termed the draconian remedy of a stay tantamount to acquittal without trial. I agree with the comment of Arbour J.A. in *R. v. Bennett* (1991), 3 O.R. (3d) 193 (Ont. C.A.), at p. 206: "By granting a stay, the court in effect stands between the accused and the state to prevent what otherwise would be the just resolution . . ." by trial. That is a decision that cannot be taken lightly.

One may argue for the proposition that in a case of this kind it is for the trial court to make the assessment. It can receive evidence. The parties are left with further appellate review, whereas a decision made by a final court of appeal removes that right and also leaves the appellate court, in part, a judge in its own cause. It is a judge, moreover, ill equipped to handle factual controversy. For the purposes of this case, however, I will assume that we have that jurisdiction.

This appeal, as I noted, is akin to an interlocutory appeal. The accused is still "charged". The imposition of a stay is, to all intents and purposes, an acquittal. The judicial stay will only be invoked where the court is satisfied under s. 24 of the Charter that the particular right has been infringed. It is in this context that the intervener proposed the availability of lesser remedies for delay that is approaching demonstrable unreasonability. This case is an illustration of that point, in that two other courts found against the appellant but mandated an expedient trial.

We are reviewing the decision that was made on November 1, 1988. The delay after that motion was granted is appellate delay. The bulk of that delay is attributable to the appellant's decision to pursue appeals. The appellant invoked the processes of which it now complains and must accept the burdens inherent in full appellate review. There is no evidence or argument to support a finding that some extraordinary factor lengthened that review process.

Disposition

I would dismiss the appeal. I would direct that the intervener pay the costs the appellant incurred by reason of responding to the intervener's written material, that question having been reserved to this Court.

Appeal dismissed.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the respondent: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener: John C. Tait, Ottawa.

* Cory J. took no part in the judgment.

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