Citation: Regina v. George
2002 BCPC 0207

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Registry: Vanderhoof

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA
v.
IDA GEORGE and ALFRED GEORGE

DECISION ON DEFENDANT'S APPLICATION UNDER SECTION 11(b)
OF THE CHARTER OF RIGHTS & FREEDOMS
OF THE
HONOURABLE JUDGE M. J. BRECKNELL

Counsel for the Crown:	R. Gamble
Counsel for the Accused:	L. Mandell, Q.C. and T. Gludo
Place of Hearing:	Vanderhoof, B.C.
Date of Hearing:	May 14, 2002
Date of Judgment:	June 10, 2002

INTRODUCTION

[1] The Defendants, Ida George and Alfred George, are charged that on August 15, 2000, near Vanderhoof, British Columbia, they contravened Section 35(2) of the ***Fisheries [General] Regulations*** and Section 78 of the ***Fisheries Act of Canada*** by unlawfully buying, selling, trading, bartering or offering to buy, sell, trade or barter fish.

[2] At the commencement of their trial, the Defendants made application under Section 11(b) of the ***Charter of Rights and Freedoms*** for a judicial stay of the charge, based on unreasonable delay in the matter proceeding to trial.

BACKGROUND

[3] Ida George is a 70-year old First Nations person from the Nadleh Whuten First Nation; she is described as an elder. Her son, Alfred George, is 45 years old.

[4] On the day in question, the Defendants are alleged to have offered salmon for sale without the appropriate licenses and authority from the Government of Canada. Twenty-three fish were seized by Fisheries Officers at the time.

[5] The penalty for such a violation of the ***Fisheries Act*** can range up to $100,000 for the first offence if the Crown proceeds by summary conviction (as it has here); or $500,000 for a first offence if the Crown proceeds by indictment. Although penalties of such magnitude are properly described as serious, in this case, the Crown seeks the penalty of only $1.00.

[6] The very minor penalty sought by the Crown is in recognition of the fact that this case has very little to do with the actual sale of fish, (it is but the method to get the larger issues before the court); and far more to do with who should have authority over the regulation and conservation aspects of the salmon resource:

(a) the Federal Government alone;

(b) cooperative co-management between the Government and First Nations; or

(c) First Nations alone.

[7] The Defendants have their legal defence funded by their First Nation to allow for the thorough ventilation of all of the constitutional issues that may arise between them and the Federal Government over the fisheries resource.

[8] The Georges are necessary defendants to allow the court process to proceed. However, at the commencement of this trial, by admission of their counsel, they do not contest the facts of what occurred on August 15, 2000. They acknowledged that the Crown can prove its case concerning the breach of the ***Fisheries Act*** and ***Regulations*** beyond a reasonable doubt.

[9] The much larger issue to be resolved, if this case proceeds, is the constitutional issues raised in Section 35 of the ***Constitution***, namely, whether or not First Nations aboriginal rights extend to the management of this fisheries resource in these circumstances.

DELAY ISSUES

[10] Before the important constitutional matters can be addressed, the Defendants have raised the ***Charter*** issue of "delay" between the time the Information was sworn and the date of trial.

[11] They seek a judicial stay of proceedings under Section 24 of the ***Charter*** on the basis that their rights to be tried within a reasonable time under Section 11(b) of the ***Charter*** have been violated.

[12] In such applications, the onus is on the Defendants to establish unreasonable delay on a balance of probabilities. **R v. Gordon** (1999) 130 C.C.C. (3d) 129 (Ont. Ct. Gen. Div.).

[13] If the Defendants meet that onus, then the proper relief is a judicial stay of proceedings. **R v. Morin** [1992] 1 S.C.R. 771.

[14] **Morin** sets out the analysis the court must apply in determining whether delay should result in Section 11(b) ***Charter*** relief. That procedure has been commented on and further delineated in later cases from the Supreme Court of Canada and various appellate and trial decisions across Canada, but it remains the starting point of any analysis of the issue.

[15] These factors are:

(a) length of delay;

(b) waiver of time periods;

(c) reasons for delay including:

(i) inherent time requirements;

(ii) actions of the accused;

(iii) actions of the crown;

(iv) limits on institutional resources, and

(v) other reasons for delay;

(d) prejudice to the accused.

[16] Each of the factors must be examined in each case and related to the particular facts of that case in coming to any conclusions about whether or not Section 11(b) ***Charter*** relief should be granted.

[17] **Morin** was a refinement of the earlier decision of the Supreme Court of Canada in **R v. Askov** [1990] 2 S.C.R. 1199. The Supreme Court of Canada's refinement of **Askov** in **Morin** if often described by courts by referring to an annotation of Professor Stewart in **R v. Collins** (1995) 40 C.R. (4th) 273 where he says:

> *"The record is clear that the torrent of successful S.11(b) challenges under R v. Askov, . . . has become a trickle under R v. Morin . . . the right has been substantially curtailed.*
>
> *Reported case law since **Morin** makes it clear that successful S.11(b) challenges are now rare and highly unlikely to succeed unless the accused demonstrates serious prejudice. "*

EVIDENCE BEFORE THE COURT

[18] In support of their application, the Defendants rely on the Affidavit of Constance MacIntosh, an associate in the Defendants' counsel's office. There is no affidavit evidence from the Defendants themselves.

[19] The affidavit of Ms. MacIntosh is very helpful in providing a chronology of the events that have unfolded since the Information was sworn, and include the transcripts of many of the proceedings.

[20] That affidavit also states in Paragraph 37:

> *"These delays have caused our clients, one of whom is an elder, considerable expense both in legal fees resulting in attending the extra various pre-trial hearings, and emotional hardship in having to wait almost 21 months from the time of the alleged offence to the first day of trial."*

[21] There is no evidence in the affidavit detailing any of the following:

(a) the implications of one of their clients being an elder; that term is not defined;

(b) the amount of the "considerable expense" for attending at extra pre-trial hearings, given that their defence is paid for by others;

(c) what the "emotional hardship" suffered by the Defendants is, and how that may have affected the Defendants' more than any other accused persons.

CHRONOLOGY OF EVENTS

[22] A chronology of the important events in this proceeding, and where necessary the details surrounding those events, are as follows:

(a) **August 15, 2000** - The alleged offence occurs;

(b) **October 2, 2000** - The original Information was sworn. This Information was later replaced by Informations sworn February 12, 2000 (sic) and February 12, 2002;

(c) **October 2000 to January 2001** - The Defendants were summonsed and re-summonsed to court;

(d) **January 18, 2001** - The Defendants retain Ms. Mandell as their legal counsel;

(e) **January 22 and February 5, 2001** -The Defendants request adjournments to provide instructions to their counsel;

(f) **February 9, 2001** - The Defendants' counsel writes to the Court Registry and advises that the trial will take 7 days, and Ms. Mandell will not be ready for trial until dates after October 1, 2001;

(g) **February 12, 2001** - The Defendants plead not guilty and arraignment reports are filed, but no trial date is set because court dates unavailable. The matter is adjourned to March 5, 2001.

(h) **March 5, 2001** - Pre-trial conference - Mr. Wagner of Hope Heinrich appears as Crown Counsel (the "Crown"), and advises that Mr. Pakenham of his office will be trial counsel.

Ms. Mandell sets out for the court the reasons for the 7-day estimate which include the defence of aboriginal right to sell fish, whether or not the Crown can justify the interference with such a right, whether or not counsel will be able to agree on the facts of

the case by admission, and the desire to obtain further disclosure from the Crown.

The court advises that a 7-day trial before October 2001 is unlikely, and the matter is adjourned to April 9, 2001 for a telephone conference to fix trial dates.

(i) **March to April 2001** - Correspondence is exchanged between Defendants' counsel and the Crown concerning issues of disclosure, proof of the Crown's case, defence of aboriginal fishing rights, and Crown justification issues. The Crown refuses to name any experts until Defence counsel gives specific notice of any constitutional or treaty issues.

(j) **April 9, 2001** - Trial confirmation hearing - Mr. Kemp appears on behalf of the Crown, and Ms. Mandell appears by telephone. Trial dates of October 2, 3, 4, 23, 24, 25 and 26, 2001 are fixed.

Court requests expert lists immediately from both sides to ensure that the trial judge will not have any conflicts with the experts. The matter is adjourned to May 14, 2001 for a further trial confirmation hearing concerning the issue of experts and other matters.

(k) **May 10, 2001** - Mr. Pakenham writes to Court Registry and advises of trial date problems, and that the Defendants' counsel, Ms. Mandell, is not available on May 14, 2001.

(l) **May 14, 2001** - Mr. Wagner appears for the Crown and advises that Defence counsel is not appearing. He further advises that Mr. Pakenham has a trial date conflict due to a Supreme Court trial.

The court adjourns the trial and advises Mr. Wagner to see about March 2002 dates, the next available dates to the court. Askov issues are discussed and the matter is adjourned to June 11, 2001.

NOTE: Defence counsel in fact had an associate ready to participate in a telephone call with the court, but no call was made to allow for that participation until after the Crown had appeared before the court.

(m) **May to June 2001** - Further correspondence to the Crown by Defence counsel regarding issues outstanding in the proceeding, including discussion of **R v. Gladstone** and **R v. Sparrow**, and seeking further disclosure.

(n) **June 11, 2001** - Further trial confirmation hearing - Adjourned because of Registry refusal to permit counsel to participate by telephone, although counsel had up until that point participated regularly by telephone. Matter adjourned to June 25, 2001.

(o) **June 25, 2001** - Further trial confirmation hearing - Adjourned due to Mr. Pakenham withdrawing and no further Crown being appointed. Matter adjourned to July 19, 2001.

(p) **July 18, 2001** - Defence counsel corresponds with Department of Justice concerning the appointment of a new Crown. Defence counsel confirms Department of Justice's request for an adjournment to September 2001. Defence counsel raises issues of delay arising from the lack of a Crown to deal with the matter.

(q) **July 19, 2001** - Pre-trial conference - Adjourned to September 19, 2001 to allow the new Crown to be appointed.

(r) **July to September 2001** - Several attempts made by Defence counsel to ascertain the name of the new Crown.

(s) **September 19, 2001** - Defence counsel advised by Court Registry that Mr. Gamble would be acting as the new Crown, and the matter was further adjourned to October 1, 2001.

(t) **September 2001** - Correspondence between Crown and Defence counsel concerning issues to be resolved in this proceeding.

(u) **October 1, 2001** - Mr. Gamble not available; matter adjourned to October 17, 2001.

(v) **October 17, 2001** - Trial confirmation hearing - New trial dates of May 7, 8, 9, 10, 14, 15, 16, 17, 23 and 24, 2002 fixed. Defence counsel advises the court that a delay argument will be advanced.

(w) **November 20, 2001** - Defence file a Constitutional Question Act Notice concerning infringement of the Defendants' aboriginal rights under Sections 35 and 52 of the ***Constitution Act.***

(x) **February 11, 2002** - Trial confirmation hearing - Trial dates confirmed. Discussion between court and counsel about experts and defence cultural lay witnesses. Court urges counsel to try to resolve expert issues and admissions surrounding the events of the alleged offence.

(y) **March 11, 2002** - Further pre-trial conference - Defence counsel confirms a delay argument will be raised.

(z) **April 12, 2002** - Defendants file a second Constitutional Question Act Notice regarding the delay issue, and infringement of their rights under Section 11(b) of the ***Charter of Rights and Freedoms***.

(aa) **April 16, 2002** - Further pre-trial conference - Continued disputes between counsel over who should disclose what information concerning the Defendants' aboriginal rights defence. An agreement between counsel and the court that the best use of court time would be to reduce present time estimate to 4 days and address the delay and substantive facts of the Crown's case only, and adjourn issues of the aboriginal rights defence and justification to a later date. Matter adjourned to May 14, 2002 for 4 days.

(bb) **May 14, 2002** - Trial commences. The Crown advises they are seeking a $1.00 penalty.

Defence counsel advises that the Defendants admit the facts of the Crown's case concerning the events of August 15, 2000.

Section 11(b) delay argument presented to the court and court reserves decision.

Crown advises that he only received the Defendants' experts report and supporting documents within the 2 weeks immediately proceeding the trial date.

(cc) **May 23, 2002** - Hearing to fix date for delay decision; decision set for June 10, 2002.

(dd) **June 10, 2002** - Decision on delay argument.

ARGUMENT

Defence Argument:

[23] Defence counsel provided a written argument and supplemented that with additional oral arguments. The summary of the Defence argument is as follows:

(a) The time between the swearing of the Information and trial (19.5 months) infers prejudice.

(b) Since February 5, 2001, the Crown has been responsible for five adjournments and obtained an order vacating the earlier trial dates without consulting Defence counsel's office.

(c) A further two adjournments have been due to Court Registry difficulties.

(d) The Defendants have done nothing to waive their right to a trial within reasonable time.

(e) The primary purpose of Section 11(b) is to protect the rights of the accused, including the right to minimize any anxiety concern or stigma of exposure to criminal proceedings.

(f) Prejudice can be inferred based solely on the length of delay, and if the delay is of sufficient length, the accused need not provide evidence to prove that he or she has suffered from this presumed prejudice, but rather the Crown must rebut this presumption.

(g) The offence in this case is not serious, but rather merely a licensing offence.

(h) The security of the person is to be safeguarded as jealously as the liberty of the individual.

(i) The Crown's persistent lack of disclosure has resulted in delays in this proceeding, and an increase in the estimated time for trial from 7 days to 10 days.

(j) A lack of a Crown Counsel for a period of 3 months slowed the process of fixing new trial dates after the initial dates were cancelled.

(k) One of the accused is an elder, and an elderly person, and that delays in the court process more affect her than others. Furthermore, as an elder, one of the Defendants is a respected person in their community, and facing these proceedings weighs more heavily upon her.

Crown Arguments:

[24] The Crown did not provide a written argument, but raised the following issues in oral argument:

(a) The offence itself is not serious on the face of it, as it is not criminal but regulatory. However, the court must look at the totality of all the issues to be raised in such a proceeding when the Defendants raise Section 35 ***Constitution Act*** rights. That type of defence makes the matter serious not only for the Defendants as individuals, but as members of their community, not to mention the importance for all citizens of Canada.

(b) The "trial" of the matter is only the time necessary to prove the actus reus. The Defendants constitutional defence is not part of the trial, but rather part of a collateral proceeding.

(c) The length of trial, be it 7 days or 10 days, is not due to the Crown's case which would take a day of less to prove, but rather the complexity of the defence raised.

(d) There is no evidence in the Defendants' affidavit material to show that there is any prejudice to the Defendants, or any undue stress to them personally. In fact, one could argue that Ida George, if an elder of her band, would be respected as a folk hero.

(e) The Defence was not diligent in pulling together its case and in providing information on its expert or its cultural lay witnesses. As late as February 11, 2002, the Defence had not named persons from the community who would give cultural evidence.

(f) The Defendants' experts report was not prepared and delivered until early May 2002, supplementary documents arriving as late as May 10th, 2002; as such, the Defendants would not have been ready to proceed to trial in October 2001 in any event.

(g) The Defendants' Constitutional Questions Act Notice concerning aboriginal rights was not filed until November 2001 after the first trial date, and the Constitutional Questions Act Notice on Section 11(b) ***Charter*** delay was not filed until April 2002.

DELAY DISCUSSION

Length of Delay:

[25] **Morin** prescribes the period to be scrutinized in assessing the length of delay as the period from the laying of the Information to the end of the trial.

[26] That is not possible in this case, as the trial is just beginning. The length of time from the laying of the Information to the commencement of the trial is 19.5 months.

[27] Given the Defence's estimate of the length of trial required for the aboriginal rights defence and any justification reply by the Crown, this trial may not conclude until the late fall or early winter of 2002, or perhaps early 2003 if it continues.

Waiver of Time Periods:

[28] Having carefully considered all the various periods of delay, I am unable to find any periods which can be laid at the feet of the Defendants' as a waiver.

[29] In fact, although Defence counsel was unable to fix the first trial date before October 2001, there were no court dates available until that month in any event.

[30] There were no periods of acquiescence by the Defence, nor any attempts by them to delay the process. The regular correspondence from Defence counsel to the Crown seeking disclosure and an exchange of ideas on how the case could be organized was met with indifference by the Crown.

Reasons for Delay Including:

(i) Inherent Time Requirements

[31] **Morin** and many subsequent cases acknowledge that there are inherent time requirements in any proceeding. These may include:

> (a) an intake period to allow a Defendant to get counsel, give instructions, and enter a plea;
>
> (b) local practices and conditions;
>
> (c) the complexity of the case.

[32] All of these factors must be evaluated on a case-by-case basis, keeping in mind that the determination of inherent time requirements is a matter of judgment, and not calculation.

[33] In this case, given that the courthouse at Vanderhoof is operated as a satellite court facility with judges travelling from Prince George, it is more difficult to accommodate a lengthy trial (as this matter has been estimated) than it would be in a larger centre. It requires considerable judicial reorganization to provide a judge in a satellite community for 7 to 10 days in a row.

[34] Furthermore, there are unusual complexities to this case which differ from the situation where Defendants charged with breaches of the ***Fisheries Act*** do not have available to them the defence of aboriginal fishing rights, and the additional necessary expert and cultural evidence such a defence requires. These additional complexities increase the trial time required.

(ii) Actions of the Accused

[35] There are certain steps taken by a Defendant for entirely appropriate and proper purposes which may contribute to the delay. This is not to "blame" the Defendants for certain portions of the delay, but rather simply to recognize that some actions may impact on delay.

[36] In this case, the complex and hence lengthy period of time for the Defendants to present their expert and cultural witnesses had an impact on when trial days could be set, simply by virtue of the fact that the lengthy period of trial needed (7 days and then 10 days) provided more difficulty in scheduling the trial in the Vanderhoof location than would have been occasioned by a shorter trial estimate.

(iii) Actions of the Crown

[37] There are several actions of the Crown in this proceeding which contributed to the delay, including:

> (a) a less than cooperative approach in dealing with Defence counsel in ascertaining the outstanding issues in the proceeding and working to resolve matters that could be resolved by admissions;
>
> (b) a lack of any appointed Crown for a period of approximately three months which interfered with Defence counsel's ability to discuss outstanding issues, receive disclosure, and fix new trial dates after the first date had been cancelled;

(c) miscommunication in the early months of the proceeding between the agents for and the trial Crown, resulting in dates being fixed when the trial Crown was not available;

(d) the Crown's misinformation to the court as to Defence counsel's availability on one of the pre-trial dates which resulted in an adjournment of the October 2001 trial without input from Defence counsel.

All of these actions by the Crown make any delay attributable to either the Defence or the court system pale by comparison.

[38] It is the duty of the Crown to take all reasonable steps to ensure that any prosecution proceeds within a reasonable time. The Crown was not diligent in that duty in this case.

(iv) Limits on institutional resources

[39] The time period for this area of delay, often described as systemic delay, is from the date when the parties are ready to proceed to trial until the system is able to accommodate the parties.

[40] With regard to the October 2001 trial date, the court was ready to accommodate Defence counsel's calendar at the earliest date available to Defence counsel.

[41] With regard to the May 2002 trial date, there were court dates available in March of 2002 when Crown and Defence counsel began discussing new trial dates, and there is no indication on the file as to why a date in May was chosen rather than March.

[42] It might be suggested that an earlier trial date than October 2001 could have been obtained from the court. That could have been accomplished only if the complexity and hence length of the trial had been greatly reduced. Simply put, longer trials take longer to fix into the court schedule in satellite courthouses.

(v) Other reasons for delay

[43] **Morin** briefly discusses some other reasons for delay which cannot be categorized in the four specific sub-headings described above. In this case, some of the delay occasioned was as a result of the complexity and necessary evidence required to address the Defendants' aboriginal rights defence and the Crown's reply of justification.

[44] It is also important to keep in mind that the court must consider the total period of delay, and not just the various incremental periods in coming to a conclusion as to whether or not the delay is unreasonable. In **R v. Bennett** (1991) 64 C.C.C. (3d) 449 (Ont. C.A.), Madam Justice Arbour notes at page 467:

> *"Ultimately, it is the reasonableness of the total period of time that has to be assessed in light of the reasons that explain its constituent parts."*

[45] In **Morin**, Madam Justice McLaughlin sets our a procedure that should be followed in determining whether there is a breach of a Defendant's Section 11(b) rights. She states at pages 810 - 811:

> *"The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. In the final analysis the judge, before staying charges, must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial. . .*
>
> *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 of reasonable delay has been made out. Here such matters as length of delay, waiver and the reasons for the delay fall to be considered. If the delay is reasonable having regard to similar cases, the application will fail. If the accused has waived his 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. . .*
>
> *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 of the accused's rights and the 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."*

[46] In examining the delay in the present case, I conclude that the length of the delay raises a threshold or prima facie case of unreasonable delay. That conclusion now requires a closer examination of the Defendants' right to a trial within a reasonable time, and whether that right outweighs the conflicting interest of society in bringing a person charged with an offence to trial.

[47] The court has already examined the delay issues in some detail, and it is now necessary to turn to what Madam Justice McLaughlin describes as the fourth factor - prejudice.

OTHER ISSUES

[48] Prior to dealing with the matter of prejudice, it is necessary to address some of the other arguments raised by counsel.

[49] The charges the Defendants face are not criminal, but rather are regulatory in nature. However, they do attract as a maximum penalty a fine of $100,000 which, to most citizens would be a serious consequence. Defence counsel attempted to convince me that this matter is not serious. With respect, I disagree.

[50] Even though the Crown here is seeking a penalty of only $1.00, the maximum penalty available combined with the approach the Defendants are taking concerning their defence, makes this matter serious on many levels; for the Defendants themselves, for their aboriginal community, and for the citizens of Canada in general.

[51] In its argument, the Crown suggested to the court that the "trial" of this matter consisted only the calling of the necessary evidence to prove the constituent elements of the actus reus. Crown further suggested that the Defendants' aboriginal rights defence, and the Crown reply on the issue of justification was not part of the trial per se, but part of a collateral or adjunct proceeding.

[52] A trial or proceeding, whether it be criminal or regulatory, commences when opening arguments are made, and does not end until the matter is fully concluded, including the calling of all of the evidence on behalf of both the Crown and the Defence, submissions by counsel on the evidence, a finding of guilt or innocence, and in some cases, sentencing.

[53] The Crown's argument that only its part of the case is the actual trial, and that somehow the Defendants' approach to their defence is separate, is not supportable.

PREJUDICE DISCUSSION

[54] In **R v. Fagan** (1998) 115 B.C.A.C. 106 (B.C.C.A.), Mr. Justice Esson, for the court, found that the **Morin** decision did two things:

> (a) removed the presumption of prejudice and placed the onus back on the appellant; and
>
> (b) treated prejudice as the most significant aspect of delay applications.

[55] The effect of **Morin** and our Court of Appeal's interpretation of it has resulted in a great increase in the significance of prejudice in a Section 11(b) analysis, such that prejudice, whether it be inferred or proven, must be shown by the Defendants to be sufficiently serious.

[56] The issue of whether or not the Defendants have met the onus of showing serious prejudice is one of fact.

[57] A lengthy delay often leads to a conclusion of inferred prejudice. In **R v. C.I.P.** [1992] 1 S.C.R. 843 at 861, Mr. Justice Stevenson said:

> *"In Askov, this court held that there is a "general, and in the case of very long delays, an almost virtual 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."

[58] In **C.I.P.**, Mr. Justice Stevenson also noted that the matter of the security of the person is the most compelling argument in discussing inferred prejudice.

[59] Further, in **Morin**, Mr. Justice Sopinka says as page 801:

> *". . .We have decided in several judgments, including the unanimous judgment in **Smith**, supra, that the right protected by S.11(b) is not restricted to those who demonstrate that the desire a speedy resolution of their case by asserting the right to a trial within a reasonable time. Implicit in this finding is that prejudice to the accused can be inferred from prolonged delay."*

[60] An inference is described by Webster's Dictionary as: *"the act of passing from one proposition, statement or judgment considered as true to another whose truth is believed to follow from that of the former"*.

[61] Section 11(b) of the ***Charter*** is meant to protect a Defendant's security interests as described in Section 7, including the following the rights:

(a) security of the person;

(b) liberty;

(c) a fair trial.

[62] The Defendants here do not suggest that the delay has affected their rights to liberty (as they were not placed on any bail conditions), or a fair trial. Their argument rests on the delay affecting their rights to security of the person.

[63] In dealing with the security of the person, I am guided by the words of Mr. Justice Lamer in **R v. Mills** [1986] 1 S.C.R. 863 at 919 where he says:

> *"... 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 appending criminal accusation" ... 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 the delay."*

[64] On the facts of this case and given the nature of the Defendants' defence which has in itself lengthened the time for trial, and hence the ability to schedule the trial, any inference of prejudice due to delay which exceeded the guidelines set out in **Morin** can be explained by reference to the various topics outlined by Mr. Justice Sopinka (as I have done here), and result in only minimal and not serious prejudice to the Defendants.

[65] Therefore, in this case as in many, the Defendants must show prejudice by providing evidence of it.

[66] In dealing with the issue of actual prejudice, Mr. Justice Sopinka in **Morin** says at page 802:

> *"Apart, however, from inferred prejudice, either party may rely on evidence to either show prejudice or dispel such a finding. For example, the accused may rely on evidence tending to show prejudice to his or her liberty interest as a result of pre-trial incarceration or restricted bail conditions. Prejudice to the accused's security interest can be shown by evidence of the on-going stress or damage to reputation as a result of over-long exposure to "the vexations and vicissitudes of appending criminal accusation" to use the words adopted by Lamer J. in **Mills**, supra, at p. 919. The fact that the accused sought an early trial date will also be relevant. Evidence may also be adduced to show that delay has prejudiced the accused's ability to make full answer and defence."*

[67] In that same decision, Madam Justice McLaughlin says at page 811-812:

> *"An accused person may suffer little or no prejudice as a consequence of a delay beyond the expected normal. Indeed, an accused may welcome the delay. On the other hand, an accused person can suffer great prejudice because of the delay. Where the accused suffers little or no prejudice, it is clear that the consistently important interest of bringing those charged with criminal offences to trial outweighs the accused's and society's interest in obtaining a stay of proceedings on account of delay, because the consequences of delay are not great. On the other hand, where the accused has suffered clear prejudice which cannot be otherwise remedied, the balance may tip in the accused's favour and justice may require a stay."*

[68] Although the Defendants' security interest is equal to their liberty interests, I am not satisfied that they have shown on the evidence that they have suffered on-going stress or damage to reputation as a result of this proceeding. In fact, it is just as possible, as suggested by the Crown, that particularly Ida George, being an elder in her community, may have gained additional respect and prominence arising from her decision to defend her activities in furtherance of her claimed aboriginal and constitutional rights.

[69] Furthermore, I am not satisfied that there has been any interference with the Defendants' ability to make full answer and defence. In fact, it would appear from the submissions made to the court on May 14th, 2002 and from the pre-trials in the months proceeding, that the Defendants' counsel was unprepared to proceed with the defence in its entirety until a matter of days before the trial date.

[70] Issues surrounding the time and expense in defending the charge is somewhat universal, and it is therefore incumbent upon the Defendants to show that they have suffered serious prejudice as a result of additional legal costs. A mere statement that there was prejudice is not sufficient to establish serious prejudice. Evidence should be called to support such allegations.

[71] In that regard, Madam Justice Smith said in **R v. Martin** 2000 B.C.S.C. 1043 at paragraph 19:

> *"For example, evidence of business statements showing a decline in revenue, or doctor's report outlining the symptoms of stress or anxiety experienced by an accused after being charged with an criminal offence, or the significant legal fees an accused paid to defend himself, would have to be produced and causally linked to allegations of prejudice in order to establish actual prejudice caused by the delay."*

[72] In examining the various aspects of prejudice as described in **Morin**, and in applying them to the case at bar, I am unable to find that the Defendants have been prejudiced by the delay to the point where this court should impose a stay of proceedings.

[73] A judicial stay of proceedings is an extraordinary remedy which should only be granted if the Defendants can satisfy the court that they have suffered sufficiently serious prejudice as a result of the delay. They have not done so in this case.

[74] Therefore, the application by the Defendants for a judicial stay of proceedings on the basis that their Section 11(b) ***Charter*** rights have been infringed by unreasonable trial delay is dismissed.

PREPARATION FOR TRIAL

[75] At the pre-trials in February, March and April 2002, the Crown persistently stated that it was unable to gather its experts together to deal with the Defendants' aboriginal rights defence until they knew the substance of the Defendants' case.

[76] The Crown now has the Defendants' expert report and supporting materials. The Defendants should supply the names of the cultural lay witnesses and a "will say statement" from each of them, so that the Crown is not caught unaware by their evidence at trial.

[77] If that is done, it would seem that there would be little reason for the Crown to require an additional adjournment when this trial recommences.

[78] I would urge counsel to discuss between themselves the time necessary to conclude the remainder of the trial which would include:

> (a) the reading in of the facts of the alleged offence, which the Defendants are now prepared to admit;
>
> (b) the calling of the Defendants' aboriginal rights defence evidence;
>
> (c) the calling of the Crown's justification evidence.

[79] This matter is adjourned to the Judicial Case Manager to fix further dates for trial, either in Vanderhoof if that court remains open, or alternatively, to Prince George.

[80] If counsel require further pre-trials or applications prior to trial, they can be arranged with the Judicial Case Manager.

M. J. BRECKNELL, P.C.J.