Indexed as:
R. v. Monk

Between
Her Majesty the Queen, and
Godfrey Monk and Jack Martin

[1989] O.J. No. 522

Action No. 3864/82

Ontario District Court - Peel Judicial District
Brampton, Ontario

Speyer D.C.J.

April 4, 1989

B. Trafford, Q.C., B. O'Marra, and M. Saltmarsh, for the Crown.
M. Rosenberg and W. Trudell, for the Accused, Martin.
David Martin, for the Accused, Monk.

SPEYER D.C.J.:-- This is a pre-trial motion brought by counsel on behalf of both accused for a stay of proceedings in respect of offences alleged in a preferred indictment dated the 7th day of October 1988 and consented to by the Attorney-General of Ontario. This indictment alleges 18 counts of fraud and 3 counts of theft against each accused.

The accused initially appeared on this indictment on November 4, 1988 at which time The Honourable P.J. LeSage ordered a pre-trial conference to take place on December 19, 1988. On December 19, 1988, I was advised that counsel on behalf of both accused desired to bring the present pre-trial motion pursuant to the provisions of s. 645(5) of the Criminal Code. On consent, I adjourned the matter to February 13, 1988 for argument on the motion which took place on February 13, 14, 15 and 16th. I reserved my ruling on the motion until today.

Counsel on behalf of the accused contended that certain rights of the accused guaranteed by the Charter had been contravened. Firstly, that the right of each accused to be tried within a reasonable time, guaranteed by s. 11(b) of the Canadian Charter of Rights and Freedoms had been infringed. Secondly, the right "to be informed without delay of the specified offence" with which one is charged had been infringed contrary to s. 11(a) of the Charter. This contention relates to the three counts of theft alleged in the indictment.

The motion proceeded on the basis of an agreed statement of fact submitted to me as a history of the proceedings to date. In addition, each accused testified on matters relevant to the determination of this motion. Further, certain documents were filed as exhibits to enhance my appreciation of the procedural history of this case.

Procedural History of the Matter.

The accused Martin practiced law in Brampton and carried on a large real estate and mortgage practice. He also invested money on behalf of some of his clients. A very brief sketch of what occurred can be found on p. 5 of the judgment of the Court of Appeal:

> In 1977, the appellant Martin created a pooled fund for the purposes of investing in mortgages. The fund was set up because Martin was having difficulty in placing funds for clients who wanted to invest in mortgages. The fund was called the Mortgage Syndicate Fund. Clients who contributed to the fund were given a brochure which stated that the Fund would be investing in prudent and active investments in mortgages, primarily second mortgages. The Fund was unincorporated and Martin was the sole trustee. The manager of the Fund was a private company, controlled by Martin called Marbro Ltd. Shortly after the creation of the fund, the appellant Monk was appointed general manager of Marbro Ltd. Monk was also de facto manager of the M.S. Fund.

The charges at the first trial focused on four investment ventures, namely, James Sterne, Taylor Gardens Ventures Ltd., Florida State Meat Packers Inc. and Dacam Group Ltd. The M.S. Fund was placed into receivership by the Ontario Securities Commission on July 25, 1980 and the Fund's bank appointed Clarkson Company as its agent and receiver on July 28, 1980. The theory of the Crown was that the accused misused funds advanced to them by investors in the said investment ventures.

The accused Martin was first charged alone on October 2, 1980 with defrauding the public "during the four month period ending November 30, 1978 and related to a mortgage involving Taylor Gardens Ltd." He was also charged with three counts of breach of trust concerning three individual investors.

Monk was charged some four days later jointly with Martin alleging the same offence described above.

Both accused were granted bail subject to a condition in each of their respective recognizances that they not leave the Province of Ontario.

A new information was laid on February 27, 1981 which formed the basis for the preliminary inquiry, alleging a general count of fraud on the public during the three year period ending June 30, 1980.

The preliminary inquiry commenced on June 15, 1981 and the accused were committed for trial on August 30, 1982. This inquiry consisted of 11 days or part days of hearing evidence between these stated dates.

On the evidence before me, the reason that the preliminary inquiry took so long to conclude was the inability to schedule earlier dates because of the lack of court facilities in the Provincial Court for the District of Peel.

Counsel for the accused brought a motion to quash the committal for trial but it was dismissed by Fitzpatrick J. on the 1st of September 1983. An appeal to the Court of Appeal of Mr. Justice Fitzpatrick's order was similarly dismissed on December 31, 1983.

The indictment which was presented following the committal for trial occurred on the 1st of October 1982 and consisted of one general count of defrauding the public specifying 16 particulars. The trial was unable to proceed promptly after the presentation of this indictment because of a proceeding commenced by counsel for the accused to quash the committal for trial.

Both accused re-elected to be tried by judge alone and the trial commenced on March 5, 1984. Before a plea was taken, counsel challenged the indictment on the basis that new offences were alleged in the indictment which contravened the 11(a) rights of the accused guaranteed by the Charter. This motion for a stay of proceedings was denied. Martin refused to plead and a plea of not guilty was entered by Judge West.

Counsel for the accused requested further particulars and an order was made by Judge West. In the result, the Crown presented a new indictment on March 6, 1984 alleging one count of defrauding the public and specifying 62 particulars. Thereafter, counsel on behalf of the accused challenged this second indictment on the basis that it disclosed more than one offence and consequently was not in compliance with the provisions of s. 510(1) of the Criminal Code. Furthermore, it was argued that allegations of fraud alleged in the new particulars given were not disclosed by the evidence at the preliminary hearing. These motions were dismissed by Judge West.

As I indicated the trial commenced before Judge West on March 5, 1984 and proceeded without interruption until June 6, 1984 when the Crown was permitted to amend the indictment by adding four additional particulars. The trial judge re-affirmed his decision as to the validity of the indictment and immediately thereafter counsel, on behalf of the accused, moved for certiorari and prohibition in the Supreme Court of Ontario and the Crown concurrently moved for procedendo. In

the result, the accused's application was dismissed and the case was returned to the trial court on June 29, 1984.

During July and August the trial did not proceed but resumed on September 6, 1984. During argument, I was advised that certain dates in July were not convenient either to counsel or the trial judge due to other commitments or vacation. In any event, I do not find it at all unreasonable that the trial was adjourned over the summer months.

After the trial resumed in early September of 1984 the Crown completed its case on September 23, 1984. On September 24, the trial judge denied a defence motion for a directed verdict. Thereafter, the accused Martin testified on his own behalf. The accused Monk elected not to testify. The evidence and submissions by all counsel were completed on November 7, 1984 and Judge West adjourned the case to December 17, 1984 for judgment. On this date he convicted both accused and remanded each to February 4, 1985 for sentence.

The accused Martin was sentenced to 3 years imprisonment and Monk received two years less a day.

On February 5, 1985 both accused appealed their convictions and were granted bail pending appeal. The appeal was heard by the Ontario Court of Appeal on October 4, 5, and 6, 1987 and February 1 and 2, 1988. On February 3, 1988 a new trial was ordered almost three years to the day when the Notice of Appeal was filed. it is important to examine what happened during this three year period. The proceedings leading up to the judgment of the Court of Appeal are contained in paragraphs 40-50 of the agreed statement of fact as follows:

"40. Following the release on bail Appellant's and Respondent's certificates were exchanged. On March 14, 1985 the transcript of proceedings was ordered by counsel for Martin. It was expected that the transcript would be ready by mid-September, 1985. On July 31, 1985 counsel for the Attorney General, Damien Frost, wrote to counsel for Martin soliciting his views as to when the appeal could be heard and the length of time it would to argue in view of the anticipated completion date of the transcript.

41. On August 26, 1985 a date of January 28, 1986 was set for the hearing of the appeal. This dam was later varied to February 8, 1986.

42. On October 2, 1985 counsel for Martin wrote to Mr. Frost indicating that almost all transcripts had been received but in view of the length of the transcripts [over 25 volumes] it might be appropriate to prepare an agreed statement of facts. Crown counsel agreed and counsel for Martin undertook to prepare the statement.

43. The appeal did not proceed in February 1986 as the transcripts were not completed in sufficient time to prepare for the appeal. A new date of November 3, 1986 was set for the hearing of the appeal. Counsel for the Attorney General

having carriage of the case were now Brian Trafford, who had been counsel at trial, and Casey Hill.

44. The agreed statement of facts prepared by counsel for the accused Martin was received by Crown counsel by December 1, 1986. On December 3, 1986 counsel for Martin wrote Mr. Trafford setting out the grounds of appeal proposed to be argued, to assist Mr. Trafford in responding to the agreed statement of facts."

"45. At the request of counsel for the Attorney General the appeal did not proceed on November 3, 1986. All counsel required more time to prepare for the appeal. Counsel for the accused acquiesced in the request for the adjournment. A new date of March 2, 1987 was set for the healing of the appeal.

46. On January 15, 1987 counsel for Martin wrote to the Registrar of the Court of Appeal indicating that Crown counsel was requesting that the appeal be adjourned to June, 1987. Counsel for Martin indicated his agreement to the adjournment but wanted the case heard before the summer adjournment. He therefore set out a timetable for preparation of material which all counsel had ageed to. A new peremptory date of June 8 and 9, 1987 was set for the appeal.

47. On February 20, 1987 Mr. Trafford forwarded to counsel for the accused a 'counter-proposal' to the agreed statement of facts.

48. On May 5, 1987 counsel met to settle the ageed statement of facts. A final version of the agreed statement of facts was completed on May 15, 1987 and forwarded to counsel.

49. On May 21, 1987 an application for directions was made by Crown counsel to MacKinnon, A.C.J.O. At that time a new date of November 4, 1987 was set for the appeal. The appeal did not proceed in February and June 1987 at the request of Crown counsel who requested further time to prepare because of the lamness of the preparation and submission of the Appellants' materials. This delay was in part attributable to the need by Crown counsel to significantly redo the proposed agreed statement of facts submitted by counsel for Martin. This had a ripple effect on the ability of counsel for Martin and Monk to finish their Appellants' factums and hence Crown counsel to respond. In addition S. Casey Hill, Deputy Director, Crown Law Office who at that time was to argue the case was unavailable on June 9, 1987 because he was to address a conference of the Provincial Court Judges. Dates later in June which were suggested by counsel were unacceptable to the Court."

"THE APPEAL

50. The appeal was heard by Justices of Appeal Houlden, Grange and Tarnopolsky on November 4, 5 and 6, 1987 and February 1 and 2, 1988. Counsel for the Crown was Mr. Trafford and Ms. Kasner. Mr. Hill did not participate in the

> appeal. On February 3, 1989 the Court of Appeal allowed the appeal and ordered a new trial. The Court ordered however that the Crown would not be permitted to make allegations against the accused which the trial Judge found were not proven. The Court also stated that 'it might be preferable if the Crown were to prefer a new indictment.' The accused were admitted to bail pending the new trial, on February 3, 1987. They had also been on bail between November 6, 1987 and January 31, 1988."

While the period leading up to the resolution of the appeal is important, the period from February 5, 1988 to November 4, 1988 when both accused appeared before Judge LeSage on the preferred indictment is crucial.

By letter dated the 17th of February 1988, David Martin, counsel for the accused Monk, wrote the Attorney-General, Ian Scott, requesting the opportunity to make representations why a new trial ought not to proceed. It was not until May 19, 1988 that Mr. Martin received a reply to his letter and such reply was by way of a telephone call. Mr. Martin was advised by Mr. Brian Trafford who had acted on behalf of the Crown both at trail and on the appeal that Martin would be given one week to make his representations and these should be in written form. A similar opportunity would be provided to Mr. Rosenberg, counsel for Jack Martin, who had not made a similar request to the Attorney-General.

During this three month period (3-1/2 months since the appeal had been decided) it is important to note that Mr. Trafford had recommended on February 12, 1988 that a new trial proceed on a preferred indictment. Thereafter five different officials of the Department of the Attorney-General (including the Assistant Deputy Attorney-General, Douglas Hunt) considered this recommendation.

On May 26, 1988 counsel for Monk wrote the Attorney-General asking him to consider a number of factors including:

a) what Mr. Martin described as "the repeated, irrational" overreach of Mr. Trafford in the discharge of his duties.
b) Mr. Martin relied on s. 11(b) of the Charter and complained "In those circumstances even your, and your advisors, delay in failing to consider this matter for three and one-half months is intolerable."

On July 6, 1988 Brian Trafford wrote a memo to the Assistant Deputy Attorney-General responding to matters raised in David Martin's letter of May 26, 1988.

On July 7, 1988 Mr. Rosenberg, who initially had not written to the Attorney-General, made representations on behalf of the accused Martin. Mr. Trafford responded to these representations by way of a memo to his superior the Assistant Deputy Attorney-General on August 22, 1988.

On September 19, 1988 David Martin wrote Douglas Hunt, Assistant Deputy Attorney-General,

as follows:

> On February 2, 1988 the Ontario Court of Appeal set aside the conviction in the above matter.
>
> On May 19, I was asked to make submissions to the Attorney-General with respect to whether this matter should be retried. I was told that my submissions must be received by the Attorney-General within one week.
>
> Four further months have now passed. I have heard no word. Meanwhile, my client remains on judicial interim release on terms that include geographic restrictions that severely hamper his business activities.
>
> As I said in my letter of May 26, 1988 this delay is intolerable.
>
> Please confirm that proceedings will not be recommenced in this matter.

Further, David Martin wrote again to Mr. Hunt on September 26, 1988 as follows:

> May I please have a reply to my letter of September 19, 1988.
>
> Surely you must agree that your failure to even reply to my correspondence is creating a rather bizarre situation. My client remains on bail subject to restrictive conditions, no decision seems to be forthcoming with respect to whether he will be prosecuted or not, and the Attorney-General's representatives will not reply to my enquiries.

It is obvious that Mr. David Martin had not received Mr. Hunt's reply to his letter of September 19, 1988 when he wrote Mr. Hunt on September 26th. However, Mr. Hunt did reply on September 21, 1988 as follows:

> In response to your letter of September 19, 1988 relating to the above-mentioned matter, please be advised that the Attorney-General and those assisting him will be completing their consideration of the recommendation to prefer an indictment in the immediate future. Upon the Attorney-General's deciding what course of action is in the best interest of justice, you will be advised.

Mr. David Martin wrote the Attorney-General one final time on October 14, 1988. In this letter, he pointed out that 8-1/2 months had passed since the conclusion of the appeal and no decision had

been taken. He described the prosecution in action as unacceptable.

In answer to this letter, Mr. Hunt advised Mr. Martin that on October 7, 1988 the Attorney-General had preferred an indictment against both accused. He further advised Mr. Martin that the indictment "will be presented to the District Court at Brampton in the immediate future". This, in fact, was done on November 4, 1988 when both accused appeared before The Honourable P. LeSage.

The issue of whether the rights of both accused to be tried within a reasonable time as guaranteed by s. 11(b) of the Charter have been contravened.

A period of eight years and five days has elapsed since the date the accused Martin was initially charged (October 2, 1980) and the date a new indictment was preferred by the Attorney-General (October 7, 1988). A period of eight years and one day has passed since that date Monk was charged and the indictment preferred. The offences specified in the indictment are alleged to have occurred on various dates in the years 1979 and 1980. The accused appeared in District Court at Brampton on November 4, 1988 and this pre-trial motion was argued for four days in February 1989. In R. v. Antoine (1983) 5 C.C.C. (3d) 97 Mr. Justice Martin laid down the following proposition:

> In my view in determining the question of whether the respondent's rights under s. 11(b) of the Charter has been infringed, the preferable approach is to examine the entire period between the laying of the initial information and the trial of the accused to determine whether the delay, in the circumstances, was reasonable. The determination of the reasonableness of the delay requires an examination of the reasons for the delay, if prima facie, the delay appears excessive.

In my view the delay in this case is excessive and accordingly I am required to investigate and determine whether or not the delay is excessive.

The issue of weight to be given to different periods of delay.

In Regina v. Heaslip (1983), 9 C.C.C. (3d) 480 (Ont. C.A.) Martin J.A. stated that a distinction must be made between pre Charter and post Charter delay. While a court may take into account delay antecedent to the enactment of the Charter, more weight must be given to delay which has occurred since the enactment of the Charter on 17 April 1982. In the case before me, the preliminary inquiry commenced on June 15, 1981 and the committal of both accused took place on August 30, 1982. I have reviewed the original information which reflects that the evidence on submissions at the preliminary inquiry subsequent to April 17, 1982 were on April 19, 1982 and July 9, 1982 respectively. I conclude that the bulk of the evidence was heard pre Charter.

A central issue in this case concerns the delay between the judgment of the Court of Appeal ordering a new trial for each accused and the preferring of the new indictment. In many jurisdictions

of the United States the only period to be considered in deciding whether there has been unreasonable delay is the period between the date ordering a new trial and the actual bringing the matter on for trial. Mr. Justice Martin rejects this standard in Regina v. Antoine and stated:

> ...the preferable approach is to examine the whole period between the laying of the initial information and the trial of the accused to determine whether the delay, in the circumstances, was reasonable.

In considering the whole period, however, the weight to be assigned to post appeal delay is considerable. In the case of Bell v. D.P.P., [1985] 1 A.C. 937, the Privy Council considered whether or not the appellant's rights had been infringed by a violation of s. 20 of the Constitution of Jamaica. This provision of the Jamaican Constitution states that a person charged with a criminal offence shall be afforded a fair hearing within a reasonable period. The accused was initially arrested, tried and convicted on a gun charge. He appealed his conviction and a new trial was ordered. At the new trial the accused was discharged because the Crown was unable to proceed. He was rearrested and retried. Lord Templeman addressed the importance on the prompt disposition of a retrial. At p. 954 His Lordship stated:

> A period of delay which might be reasonable between arrest and trial is not necessarily reasonable between an order for retrial and the retrial itself. Far from recognizing any urgency, the full Court excused the delay which occurred after March 1979 on the ground that it was partly due in their words to bureaucratic bungling.

His Lordship went on to point out that the Courts of Jamaica did not recognize the urgency of a speedy retrial and concluded that the decision of the Supreme Court of Jamaica was flawed by its failure to so recognize this principle.

In R. v. Booth (1989, unreported), The Honourable C.T. Murphy of the District Court of Ontario ordered a stay of proceedings in the following circumstances. The offence was allegedly committed on November 21, 1981. In 1983 the trial judge ordered a stay of proceedings. In May 1984, the Crown successfully appealed the order staying the proceedings to the Court of Appeal and a new trial was ordered. In April 1988, the Supreme Court of Canada dismissed the accused's appeal upholding the judgment of the Court of Appeal. The case was put on the list of the Assignment court on November 1, 1988 for the purposes of fixing a date for trial. The Honourable Judge Murphy found as a fact the following:

> The failure of the Crown to take necessary steps to have the matter placed on an Assignment Court list for disposition at the earliest reasonable opportunity resulted in an unexplained delay on an indictment alleging the commission of an offence some 6-1/2 months earlier. That failure on the part of the Crown to proceed as expeditiously as possible in circumstances which were already straining the bounds of credibility insofar as time as concerned amounted to a

> denial of the s. 11(b) Charter rights of each of the accused to trial within a reasonable time.

In my view, there is, in law, a positive obligation on the Crown to treat a retrial as a matter of urgency and accordingly to bring a retrial on for disposition as promptly as reasonably possible.

Reasons for the delay in this case.

Counsel for both accused submitted that three periods of delay were attributable to either institutional delay or were the fault of the Crown. First, the preliminary inquiry lasted a period of 14 months but consisted of only 11 part or full days for the hearing of evidence and submissions in this case. It is not disputed that the reason the preliminary inquiry was so extended was due to lack of court facilities. The lack of court facilities in this Judicial District has been well recognized by our Court of Appeal. (R. v. Askov et al. (1987), 37 C.C.C. (3d) 289 at p. 300.) Counsel submitted that I should attribute 13 months of this 14 month period to institutional delay and that while there is no suggestion that this delay was a deliberate attempt by the Crown to delay the proceedings, nevertheless, the ultimate responsibility for institutional delay rests with the Crown.

Secondly, it was submitted that after a number of delays in having the appeal heard, it was agreed by all parties that the appeal would be heard as scheduled for June 8 and June 9th of 1987. This was to be a peremptory date. (See Agreed Statement of Fact paragraph 46.) At the request of the Crown, the appeal was adjourned due to the unavailability of Mr. Casey Hill who had been assigned to argue the case on behalf of the Crown. The appeal could not be scheduled for a later date in June of 1987. Accordingly, counsel submitted that five months of delay was properly attributable to the Crown. The appeal was finally commenced in November 1987.

Thirdly, it was argued that the nine months delay following the judgment of the Court of Appeal until the accused appeared in this court on November 4, 1988 to answer the new indictment was attributable to the fault of the Crown.

To summarize: It is the contention of the accused that a period of 27 months delay is the responsibility of the Crown.

In response to these assertions, the Crown submitted the following: First, that the bulk of evidence at the preliminary inquiry was completed when the Charter was enacted on April 17, 1982. Thereafter the inquiry continued on April 19th and June 9th and thereafter adjourned for the decision of His Honour Judge Young. Accordingly, little if any weight ought to be attributable to the Crown. Furthermore, the first indictment was promptly presented to the District Court on October 1, 1982 but the trial was unable to proceed in an expeditious fashion because of proceedings commenced by counsel on behalf of both accused to quash the order of committal for trial.

Secondly, with respect to the delay in prosecuting the appeal, it was argued that the transcripts in

this appeal consisted of more than 25 volumes. In view of the length of the transcripts it was appropriate to secure an agreement as to an agreed statement of fact. Moreover, in light of the Crown's concern that the question of prosecutorial misconduct might be raised on appeal, it was deemed preferable that Mr. Hill argue the appeal rather than Mr. Trafford. It is undisputed that Mr. Hill was not available on June 9, 1985 due to a commitment to address a conference of Provincial Judges.

Thirdly, on the question of post appeal delay, the Crown contended that it was counsel for Martin who requested that the Attorney-General exercise his discretion not to proceed with a retrial. One of the grounds submitted to the Attorney-General amounted to a charge of misconduct in the initial prosecution and that time was required by the Attorney-General and his officials to assess such a serious charge.

Has the delay in the circumstances of this case been unreasonable?

In R. v. Smith (1988), 42 C.C.C. (3d), Huband J.A. stated:

> What constitutes unreasonable delay is a matter of judicial discretion. A time span which is unreasonable in one case might be completely reasonable in another. The circumstances of each case must be considered. The potential variables between any two cases are so numerous that the decision in one case will be unlikely to constitute a strong precedent for a second case.

> At the end of the day the judge must stand back and ask himself whether the delay complained of is of that quality that the charge against the accused should be stayed or dismissed without putting the accused to the hazard of a trial.

In reviewing the history of the case before me, I think it is fair to characterize it as long and complex. The trial took four months to complete and more than 25 volumes of transcript were filed for the hearing of the appeal. The allegations of the Crown grew in number with the passage of time. Initially, the allegations consisted of defrauding the public involving a mortgage to Taylor Gardens Ventures Ltd. and breach of trust pertaining to three investors. On October 6, 1980 a new information was laid alleging one count of defrauding the public concerning the said Taylor Gardens Venture. On the 27th of February 1981 a further information was laid containing a general allegation of defrauding the public and this was the information upon which the preliminary inquiry was commenced.

When the trial finally began on March 5, 1984 the indictment specified one count of defrauding the public with 16 particulars. On March 6, 1984 the Crown presented a new indictment increasing the number of particulars to 62. When the Crown's case was nearing completion on June 6, 1984 the number of particulars was increased by four to 66. Throughout the course of the trial, the accused

through their counsel continually asserted that the indictment was flawed as not complying with s. 510(1) of the Criminal Code. This position was finally vindicated by the Court of Appeal when it stated "we think it would have been better, in the circumstances of this case, if the information had contained five counts, since there may have been prejudice to the appellants from the procedure followed by the Crown". Having the benefit of 20-20 hindsight, I conclude that the position taken by the Crown as it pertained to the indictment made an already difficult case more complex and time consuming.

When the judgment of the Court of Appeal was delivered on February 3, 1988 a period of some 7-1/2 years had elapsed from the time that the accused were both charged. The charges related to offences alleged committed between the 1st of January 1978 and the 30th day of July 1980. The new indictment relates to offences alleged to have taken place in February 1979. A period of more than 10 years has elapsed.

It seems to me that the Crown was obliged to move expeditiously if it chose to retry the accused in light of the fact that 7-1/2 years had passed since the accused were first charged. It is true that Mr. David martin, on behalf of the accused Monk, requested the Attorney-General to exercise his discretion and not proceed with a retrial which would take time to consider. However, it is significant to me that Mr. Martin had to wait for three months before being told that he would be given the opportunity to make submissions in this regard. Furthermore, in advising Monk's counsel that his representations must be made within one week, one would reasonably expect a prompt decision. This did not happen. Indeed, the only communication with Mr. Martin other than the telephone conversation of May 19, 1988 was the letter of Douglas Hunt on September 21, 1988 in response to the "intolerable" delay complained of by Monk's counsel.

When viewed against the background of 7-1/2 years having elapsed, I agree that the delay was intolerable. The cumulative effect of a drawn out preliminary inquiry due to lack of proper court facilities combined with the delay in proceeding with the appeal made it incumbent on the Crown to move with dispatch when the Court of Appeal judgment was rendered. Accordingly, I find the delay to be inordinate.

Furthermore, I find that both accused have been prejudiced by the delay. In R. v. Beason (1983), 7 C.C.C. (3d) 20 (Ont. C.A.), Martin J.A. articulated the underlying philosophy which s. 11(b) of the Charter seeks to ensure at p. 41:

> Trials held within a reasonable time have an intrinsic value. The constitutional guarantee inures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused, even though he may wish to put off the confrontation which a trial involves. If innocent, the accused should be cleared with a minimum disruption of his social and family relationships. If guilty he should be found guilty and an appropriate disposition made without unreasonable delay. His interest is best served by having the charge disposed of within a reasonable

> time so that he may get on with his life. A trial at some distant date in the future when his circumstances may have drastically changed may work an additional hardship upon the accused and adversely affect his prospects for rehabilitation.

Since the charges were laid against the accused, they were released on bail subject to the restriction that neither of them are at liberty to leave the province. This restriction has now been in place for 8-1/2 years. Both accused testified that this term (which was appropriate at the time it was made) has worked a serious hardship on each of them. With this I concur.

Moreover, neither accused has been able to make long term plans for their respective futures with the prospects of a trial still confronting them. While it is true that Mr. Monk has been recently successful in a new business opportunity, I accept the evidence that the wait for a final resolution of this matter has caused enormous stress and anxiety. Part of this anxiety is simply the product of being charged with the offence. However, with the effluxion of time, the delay in concluding this matter weighs more heavily on both accused.

Another factor which I take into account is that the nature of the Crown's case has changed. During the first trial, a general count of defrauding the public containing 66 particulars was at the heart of the Crown's case. In the new indictment, the allegations relate to specifically named companies and individuals. In the original trial, the Crown only had to make out a case of global fraud whereas in this trial the Crown will be requested to prove fraud pertaining to those companies or people named. This is important within the context of both accused testifying at this second trial.

At the first trial, only the accused Martin testified. I am advised that Monk will elect to testify if this trial proceeds. At the first trial, the accused Martin was not examined or cross-examined concerning his dealings with Allan Neely who is alleged to have been a victim of the fraud. Accordingly, a transcript of the former proceedings is of no use to refresh his memory of events which occurred more than 10 years ago as it pertains to the Neely allegation. This is but one illustration of the limitations of transcripts to refresh one's memory.

In the case of Rahey v. The Queen (1987), 33 C.C.C. (3d) 289 (S.C.C.) at p. 312, Wilson J. stated:

> However, it seems to me that so long as viva voce evidence played a fairly central role in the case, it is open to a judge to infer that the passage of time will dull memories, particularly if, as in this case, the events are routine bookkeeping transactions which occurred 10 years earlier. I think it should be sufficient for the judge, as Glube, D.J.T.D. did in this case, to ascertain memory loss objectively, or to infer it from the passage of time and that burden on the appellant should be limited to demonstrating that viva voce evidence testimony was an important element in the case.

In this case, the Crown produced at the first trial hundreds of documents to support its position.

However, at the heart of the case was the question of what was expected of the accused in the investment of different monies. In my view, memory of these transactions and the conversations related thereto are of crucial importance in determining whether the accused or either of them acted dishonestly.

In my opinion, the dulling of memory some 10 years after the events alleged is one more factor relevant to the claim of each accused of prejudice.

Conclusion.

I find that the right of each accused to be tried within a reasonable time has been contravened. Accordingly, the appropriate remedy under the provision of s. 24(2) of the Charter is to order a stay of proceedings.

The s. 11(a) argument.

When the Court of Appellant ordered a new trial on February 3, 1988 they ordered a new trial on the charge or charges of fraud. Furthermore, they restricted the scope of any new trial by not permitting the Crown "to make allegations against Martin on the particulars which the trial judge found not proven". The Court also suggested "it might be preferable if the Crown were to prefer a new indictment". The Crown has indeed preferred a new indictment which not only includes counts of fraud but counts of theft.

Section 11(a) of the Charter provides any person charged with an offence has the right to be informed without reasonable delay of the specific offence. The charges of theft contained in the new indictment are companion counts to the allegations of fraud and are said to have occurred on February 16, 1979 and July 16, 1980 respectively. It is unfair, in my view, for the Crown after the passage of 8-1/2 years to now make allegations of theft. This is a violation of the right of both accused "to be informed without unreasonable delay on the specific offence". Accordingly, I would stay the proceedings on Counts 4, 6 and 22 of the indictment pursuant to the provisions of s. 24(2) of the Charter.

SPEYER D.C.J.