

Case Name:
R. v. Darwish

Between
Her Majesty the Queen, Appellant, and
Wajde Hassan Darwish, Respondent

[2010] O.J. No. 604

2010 ONCA 124

258 O.A.C. 272

208 C.R.R. (2d) 43

252 C.C.C. (3d) 1

73 C.R. (6th) 121

2010 CarswellOnt 814

100 O.R. (3d) 579

Docket: C47553

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, J.C. MacPherson and R.P. Armstrong JJ.A.

Heard: December 17, 2009.
Judgment: February 16, 2010.

(64 paras.)

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- To make full answer and defence -- Trial within a reasonable time -- Appeal by Crown from stay of proceedings allowed -- Accused was charged with fraud and forgery -- Crown relied on forensic audit produced by accused's employer -- Pre-trial, judge ordered stay due to Crown's failure to produce full and independent second audit -- Judge found that were audit

produced, trial would not proceed within a reasonable time -- Appellate court found that right to make full answer and defence did not encompass a right to have Crown investigate alternative defences -- Had trial proceeded, only four months of 28 months' delay was attributable to Crown -- Stay was set aside -- Canadian Charter of Rights and Freedoms, ss. 7, 11(b).

Appeal by the Crown from a stay of the proceedings against the accused, Darwish. The accused was charged with one count of fraud and several counts of forgery. The Crown alleged that between 2000 and 2002, the accused defrauded his employer of \$1.8 million in the course of his employment as the company's Chief Financial Officer. The accused left his employment on bad terms in 2003. In February 2005, the employer went to police with the allegations that led to the charges. The Crown relied on a forensic audit prepared for the employer by its accountant that concluded that the accused signed cheques in his capacity as signing officer and forged signatures of other company signing officers in order to misappropriate funds. The accused maintained that all amounts he received were either compensation or deferred compensation owed for his work. He contended that the employer misused the criminal process in an effort to recover a civil debt. He argued that a full and independent audit of his nine years of service to the employer was necessary to show his entitlement to the funds, and because the first audit was biased due to the auditor's position with the employer. The criminal proceedings were stayed pre-trial on the basis that the accused was denied his constitutional right to make full answer and defence. The judge based her decision on the Crown's failure to produce a second independent forensic audit that conformed to the accused's reasonable requests despite an undertaking to do so. The judge further found that were she to order the full forensic audit to which the accused was entitled, the resulting additional delay would exceed the constitutionally acceptable limits. The Crown appealed.

HELD: Appeal allowed. The Crown was not under any duty, constitutional or otherwise, to obtain the forensic audit demanded by the accused. Its failure to do so did not result in any constitutional violation of the accused's right to make full answer and defence. The judge erred in characterizing the right to make full answer and defence and the Crown's disclosure obligations as encompassing the right to have the prosecution investigate any defences that were not fanciful or speculative. There was no evidence from which the trial judge could conclude that the Crown undertook to obtain a full and independent audit as demanded by the accused. Consequently, she was wrong in law to hold that the Crown breached that undertaking. Finally, had the trial proceeded on its merits as scheduled, there would have been no violation of s. 11(b) of the Charter. Apart from four months, none of the 28 months between the charges and proposed trial date was attributable to the Crown. The delay in proceeding with the appeal was not subject to Charter scrutiny.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 11(b)

Appeal From:

On appeal from the order of Justice Kathleen E. McGowan of the Ontario Court of Justice dated July 18, 2007, staying all charges, with reasons reported at (2007), 160 C.R.R. (2d) 139, [2007] O.J. No. 2871.

Counsel:

Christopher Webb, for the appellant.

Phil Downes, for the respondent.

The judgment of the Court was delivered by

D.H. DOHERTY J.A.:--

I. OVERVIEW

1 The respondent was charged with one count of fraud and several counts of forgery. The prosecution alleges that between May 2000 and September 2002, the respondent defrauded the Phaeton Group of Companies ("Phaeton") of approximately \$1.8 million. Phaeton includes a number of related companies that operate numerous car dealerships, all of which are controlled by Mr. Emain Kadrie, a businessman who resides in Dubai. Phaeton employed the respondent as its CFO beginning in 1993.

2 The respondent and PAG did not part on good terms. Phaeton sued the respondent in September 2003. In December 2003, Mr. Kadrie caused a formal complaint to be filed against the respondent with the Institute of Chartered Accountants of Ontario. In February 2005, Mr. Kadrie went to the police with the allegations that led to these charges. The respondent claims that all of these proceedings involve the same allegations.

3 In the criminal proceedings, the Crown contends that the respondent, using his position as CFO, caused a number of cheques to be drawn on Phaeton's accounts. These cheques were to the benefit of the respondent or companies he controlled. On the Crown's theory, the respondent, as a designated signing officer, signed these cheques in his own name, and negotiated them with forged signatures of other Phaeton officers. In laying the charges, the police relied on a forensic audit prepared for Phaeton by its accountant, Michael Bondy (the "Bondy Audit") and various "will states", including one from Mr. Kadrie.

4 Throughout the various proceedings initiated by Mr. Kadrie, the respondent has maintained that

any money he received from Phaeton was due to him as compensation for his employment. He asserts that funds he received between May 2000 and September 2002, were referable either to compensation owed for that time period or deferred compensation owing to him for work done prior to May 2000. The respondent maintains that any dispute over the amounts owed or taken is purely a civil matter. He asserts that Mr. Kadrie has misused the criminal process in an effort to recover a civil debt.

5 The merits of the allegations have not been litigated. The trial judge, on a pre-trial motion, stayed the proceedings on the grounds that the respondent had been denied his constitutional right to make full answer and defence.

6 As I read the trial judge's reasons, she found a denial of the respondent's right to make full answer and defence on two grounds. First, she held that the Crown's failure to produce a second forensic audit that conformed to the respondent's reasonable requests constituted a violation of the Crown's "duty to investigate", and precipitated a denial of the respondent's right to make full answer and defence (see paras. 51, 70-74). Second, the trial judge found that the Crown had undertaken before the pre-trial judge to obtain a second forensic audit that was "full and independent" and had then failed to do so (see para. 69).

7 The respondent also argued on the pre-trial motion that his right to a trial within a reasonable time had been breached and that, as such, the proceedings should be stayed. While the trial judge did not find a breach of s. 11(b) of the *Charter*, she held that if she were to order the full forensic audit to which the defence was entitled, the resulting additional delay would push the case beyond constitutionally tolerable time limits (see para. 82). Consequently, the trial judge concluded that the only appropriate remedy for the breach of the respondent's right to make full answer and defence was a stay.

8 I would allow the appeal. The Crown was not under any duty, constitutional or otherwise, to obtain the forensic audit demanded by the defence. Its failure to do so did not result in any constitutional violation of the accused's right to make full answer and defence. Furthermore, there was no evidence from which the trial judge could conclude that the Crown undertook to obtain the "full and independent" audit demanded by the defence. Consequently, she was wrong in law to hold that the Crown breached that undertaking. Finally, had the trial proceeded on its merits as scheduled, there would have been no violation of s. 11(b) of the *Charter*.

II. FACTUAL BACKGROUND

9 The charges were laid in June 2005. There were several adjournments between June 2005 and late-January 2006. The respondent's counsel hoped to persuade the Crown that the matter did not belong in the criminal courts.

10 At the first pre-trial, held on January 24, 2006, counsel for the respondent voiced concerns about the Bondy Audit. He pointed out that Mr. Bondy's firm, Phaeton's accountants, had employed

the respondent before he went to Phaeton, and suggested that Mr. Bondy may have a personal animus against the respondent. Counsel also opined that the scope of the Bondy Audit was far too narrow. He advised the court that the respondent would advance the defence of "entitlement", meaning that any funds the respondent received were owed to him as compensation for work he performed during his tenure at Phaeton. Counsel maintained that in order to properly explore the "entitlement" defence the audit must address the financial affairs of Phaeton for the entire 9 years of the respondent's employment, and not just the 2-year timeframe covered by the charges. The pre-trial judge told counsel that he saw merit in both concerns.

11 The day after the pre-trial, Crown counsel, no doubt influenced by the pre-trial judge's observations, instructed the investigating officer to contact Mr. Kadrie and advise him that given Mr. Bondy's potential bias against the respondent, a second audit was necessary. The officer conveyed to Mr. Kadrie the Crown's opinion that without a second audit, the chances of conviction were so low that they would not justify the continuation of the prosecution. The investigating officer also advised Mr. Kadrie that if a second audit was to be obtained, Mr. Kadrie would have to shoulder its costs. It was not the policy of the London police to fund forensic audits and the London Crown Attorney's Office declined to do so in this case.

12 Very shortly after the pre-trial, the Crown and the defence began discussing the nature and scope of the proposed new audit. It was understood that Mr. Kadrie was the only source of funds and would have to pay for whatever audit was performed. Counsel also agreed that KPMG should be retained to perform the audit.

13 The scope of the second audit was a bone of contention from the outset. Counsel for the respondent insisted that it must cover the financial affairs of all of the companies during the entire time period that the respondent was employed by Phaeton. He also maintained that it should analyze payments made to Mr. Kadrie and other senior managers. Crown counsel took the position that, absent some more specific guidance from the defence as to the relevance of documents and material predating the 2-year time period covered by the charges, he would propose to limit the audit to that period of time.

14 Between February and June 2006, counsel for the respondent and the Crown, along with accountants and civil counsel for both parties, met on various occasions. They continued to debate the scope of the proposed second audit. Counsel for the respondent remained firm. He put it concisely in his correspondence: "The relevant issue of entitlement began in 1993. That's when the audit must begin."

15 Counsel for the respondent also advised the Crown that the full audit would reveal crucial failings in Mr. Kadrie's credibility and would demonstrate that there was no merit to the forgery allegations. He did not provide any specifics as to how an audit could achieve these results. Nor did he refer the Crown to any specific documentation that might support the "entitlement" defence.

16 Crown counsel remained firm in his position that the far-ranging audit demanded by the

respondent could not be justified and was not necessary for the Crown's purposes. Crown counsel had been advised that the audit proposed by counsel for the respondent would cost hundreds of thousands of dollars. Crown counsel put his position this way:

Mr. Ross [the accountant with KPMG] indicates that without some further delineation by your client as to some specific documents and time periods that he alleges supports his defence of entitlement a complete audit at this time involving all of the records requested and without some further narrowing of the scope would be an incredibly long, arduous, unfocussed, and expensive process.

17 By June 2006, Mr. Kadrie had agreed to fund the second audit, at least to the extent of \$50,000, and KPMG had agreed to perform it. The specifics of the retainer agreement had not been resolved. The Crown proposed that the audit would be limited to the timeframe covered by the charges, subject to expanding the audit's scope if the defence provided a sufficiently particularized and meritorious request to do so. The defence continued to insist that the entire timeframe of the respondent's employment must be covered in the audit. Counsel for the respondent offered to make the respondent's accountant available to assist KPMG and hopefully reduce the costs of the audit.

18 At the second pre-trial on June 19, 2006, counsel for the respondent expressed concerns that the terms of the second audit had not yet been fixed. He advised the pre-trial judge that recent developments suggested that KPMG's retainer would be exclusively with Mr. Kadrie or Phaeton, and would not involve the Crown. He described this arrangement as "preposterous" and indicative that the proposed audit lacked independence. Counsel for the respondent did not want to set a date for the preliminary inquiry while the matters relating to the second audit were unresolved.

19 Crown counsel, in response to the defence submissions, referred to difficulties his superiors had with the proposed language in the initial draft of the KPMG retainer, and said:

We had to get started somewhere, and of course Mr. Kadrie wants to know what it is going to cost. Mr. Ross [the accountant for KPMG] hasn't seen this room full of documents, and so it was Mr. Ross's suggestion that they at least start with the documents that are necessary to do the window as Mr. Trudell [counsel for the respondent] calls it, and then we will go from there if necessary.

20 The pre-trial judge told counsel that if he were the trier of fact, he would be interested in the financial relationships among the respondent, Mr. Kadrie and the relevant companies during the entire time that the respondent was employed by Phaeton. He went on, however, to indicate that a date for the preliminary inquiry should be set. The pre-trial judge suggested that any inadequacies in the scope of the audit would be revealed by cross-examination and could well result in an acquittal.

21 The parties agreed that the preliminary inquiry would take four weeks. In fixing February 5, 2007 as the commencement date for the preliminary inquiry, counsel for the respondent indicated that the February dates were "the earliest dates available" for a four-week preliminary inquiry.

22 Counsel for the respondent, between June and January 2007, maintained and repeated his objections to the proposed audit. He made it clear that he regarded the audit eventually undertaken by KPMG as neither independent of Mr. Kadrie, nor sufficiently comprehensive.

23 KPMG produced its audit, referable to the timeframe covered by the charges, in January 2007. The conclusions of that audit were consistent with the conclusions reached in the Bondy Audit. The KPMG audit was delivered to the respondent's accountant in the last week of January and to counsel on January 30, 2007.

24 About one week before the preliminary inquiry was to start, counsel for the respondent advised the court that due to commitments arising out an ongoing murder trial, he would be unable to commence the preliminary inquiry as scheduled. Counsel indicated that he hoped the murder trial would be completed in sufficient time to allow the preliminary inquiry to proceed in the last two weeks of the four weeks scheduled. Counsel believed that the preliminary inquiry could be completed in two weeks.

25 As matters developed, counsel for the respondent was not available until the last week of the four-week time period that had been set aside for the preliminary inquiry. On February 26, 2007, the date counsel was first available, the respondent indicated he would re-elect for trial in the Ontario Court of Justice. The trial was set for October 2007, with pre-trial motions in May 2007.

III. ANALYSIS

(a) The Crown's Duty to Investigate

26 In addressing s. 7 of the *Charter* and in particular the right to make full answer and defence, the trial judge said at para. 51:

The Crown has a duty to ensure a fair process and that means it cannot knowingly embark upon a prosecution based upon an investigation that is inherently deficient. It is unfair to expect the accused person to take on the task of completing the investigation in order to make full answer and defence. While the Crown is not obliged to go on a fishing expedition at the behest of the accused it cannot stand idly by when the defendant raises the possibility of a real deficiency in the investigation. It should follow that the Crown's duty to investigate can only be activated when the deficiency raised by the defence is real and not fanciful or speculative. [Emphasis added.]

27 When applying the above principles, the trial judge observed that the Crown had decided that it would not pay for a second audit and that Mr. Kadrie was not willing to pay for the audit demanded by the defence. She continued at para. 74:

Neither position satisfies the need to provide sufficient information to the defendant to allow him to present his defence. In these circumstances Mr. Darwish can never be in a position to defend himself. The only conclusion I can reach at this point is that his right to make full answer and defence has been compromised and therefore his right under s. 7 of the *Charter* to be tried in accordance with the principles of fundamental justice has been breached. [Emphasis added.]

28 The trial judge held that the constitutional right to make full answer and defence includes the right to have the prosecution investigate any defences that are "not fanciful or speculative". On this approach, the accused is constitutionally entitled to have the police pursue a line of investigation if the defence can show that there is a realistic possibility that pursuing that investigation will yield information that could assist the accused. This formulation of the right to make full answer and defence goes far beyond any description of that right previously recognized in the case law. It is unworkable in practice. Further, it is inconsistent with the philosophy underlying the criminal justice system.

29 An accused does not have a freestanding constitutional right to an adequate investigation of the charges against him or her: *R. v. Barnes*, 2009 ONCA 432, at para. 1. Inadequacies in an investigation may lead to the ultimate failure of the prosecution, to a specific breach of a *Charter* right or to a civil remedy. Those inadequacies do not, however, in-and-of-themselves constitute a denial of the right to make full answer and defence.

30 An accused also does not have a constitutional right to direct the conduct of the criminal investigation of which he or she is the target. As Hill J. put it in *R. v. West*, [2001] O.J. No. 3406 (S.C.), at para. 75, the defence cannot, through a disguised-disclosure demand, "conscript the police to undertake investigatory work for the accused". See also: *R. v. Schmidt* (2001), 151 C.C.C. (3d) 74 (B.C.C.A.), at para. 19. That is not to say that the police and the Crown should not give serious consideration to investigative requests made on behalf of an accused. Clearly, they must. However, it is the prosecutorial authorities that carry the ultimate responsibility for determining the course of the investigation. Criminal investigations involve the use of public resources and the exercise of intrusive powers in the public interest. Responsibility for the proper use of those resources and powers rests with those in the service of the prosecution, and not with the defence.

31 Nor does the disclosure right, as broad as that right is, extend so far as to require the police to investigate potential defences. The Crown's disclosure obligation was recently described in *R. v. McNeil*, [2009] 1 S.C.R. 66. The court, at para. 22, reiterated the Crown's obligation, subject to very limited exceptions, to make timely disclosure to an accused of all relevant material "in the possession or control of the Crown". The Crown's disclosure obligation will also require the Crown, in response to defence requests, to take reasonable steps to inquire about and obtain relevant information in the possession of some third parties. Charron J. described this aspect of the disclosure obligation at para. 49:

The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfil its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so.

32 I see a vast difference between requiring the Crown to take reasonable steps to assist an accused in obtaining disclosure of relevant material in the possession of a third party, and requiring the Crown to conduct investigations that may assist the defence. The former recognizes an accused's right to relevant information and the practical advantage that the Crown may have over the defence when it comes to obtaining that information from some third parties. The latter would require the prosecution to effectively surrender control of the investigation to the defence, or ultimately face a stay of the criminal charges.

33 The disclosure obligation rests on the premise that material in possession of the prosecutorial authorities that is relevant to a criminal prosecution is not the "property" of the Crown, but is rather "the property of the public to be used to ensure that justice is done": *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 333. This rationale fully justifies the broad disclosure obligations imposed on the prosecution with respect to material that is in existence. It does not justify an approach that would permit the defence to dictate the course of the investigation to prosecutorial authorities.

34 The distinction between the right to the disclosure of the fruits of an investigation and a right to demand an additional investigation is made clear in *R. v. Daley*, 2008 BCCA 257. In *Daley*, the complainant in a sexual assault case had been examined following the assault by a nurse. The results of that examination were placed in a "sexual assault kit". The police preserved the kit, but did not attempt to have the samples it contained forensically examined. Disclosure of the kit was made to the defence. The defence argued that, as the samples were potentially exculpatory, the Crown was obliged not only to disclose their existence to the defence, but also to have the necessary forensic tests performed.

35 The British Columbia Court of Appeal unanimously rejected this submission, stating at para. 15:

The Crown's obligation was to disclose what could be inculpatory or exculpatory evidence. It did so. Once the appellant had knowledge of the existence of the kit, it was open to him to have it examined and he could easily have done so. He evidently chose not to. [Citations omitted.]

36 The trial judge relies on *R. v. Brown* (1998), 164 C.R.R. (2d) 1 (Ont. Ct. J. (Gen. Div.)), as jurisprudential support for the existence of a "duty to investigate". *Brown* is a very different case than the present one and does not bear the broad reading given to it by the trial judge. In *Brown*, the

accused brought numerous pre-trial *Charter* motions alleging misconduct by various individuals engaged in the prosecution of the accused. Trafford J. recognized that unless the Crown directed an investigation into these allegations, the court would not be in a position to effectively and efficiently assess the merits underlying them (at paras. 38-39). He held, at para. 40, that once the court determined that there was potential merit to the defence allegations, "the Crown Attorney had a duty to request the investigation by the police and the police had a duty to conduct one".

37 I have no difficulty with the duty to investigate described by Trafford J. in the context of the allegations put forward in *Brown*. This court has recognized much the same obligation in *R. v. Ahluwalia* (2000), 149 C.C.C. (3d) 193 (Ont. C.A.), at para. 72. I would not, however, characterize the obligation described in *Brown* as a component of the right to make full answer and defence. Rather, it is a duty owed by the prosecution to the court and to the administration of justice.

38 No matter how one characterizes the obligation recognized in *Brown*, that obligation stops well-short of imposing a duty on the prosecution to conduct any investigation that on a reasonable view could assist an accused in advancing a substantive defence. The duty to investigate described in *Brown* is triggered by material and potentially meritorious allegations of state misconduct from which *Charter* relief is sought, made in the context of an ongoing criminal proceeding.

39 An interpretation of the right to make full answer and defence that imposes a duty on the prosecution to investigate possible defences is also irreconcilable with the basic features of the criminal justice system. No doubt, the Crown has obligations to an accused and to the administration of justice that go beyond those normally imposed on opposing counsel in litigation. However, the criminal justice system remains essentially an accusatorial and adversarial one. The prosecution, which includes the Crown and the police, is charged with the responsibility of investigating and prosecuting crime in the public interest. To do so the prosecution must investigate allegations, lay charges and prove those charges in a criminal proceeding. To properly perform these functions the prosecution must decide on the nature and scope of an investigation. The accused is entitled to the product of that investigation, but is not entitled to dictate the nature or scope of that investigation.

40 On the trial judge's interpretation of the right to make full answer and defence any accused could effectively assume *de facto* control of a criminal investigation being conducted against them by pointing to some avenue of investigation that might reasonably assist in advancing a defence. On this approach, the prosecution would be obliged to direct its resources to that avenue of investigation or face the consequences of a constitutional violation of the right to make full answer and defence.

41 The facts of this case provide an excellent example of the negative consequences flowing from this inordinately broad interpretation of an accused's right to make full answer and defence. The respondent, who had full disclosure of the product of the Crown's investigation, was able to put the Crown in the untenable position of either pursuing a line of investigation demanded by the defence

at a cost of hundreds-of-thousands of dollars, or abandoning the prosecution. The defence put the Crown in this bind simply by asserting that its defence was "entitlement" and convincing the trial judge that, from a defence perspective, the suggested forensic audit could reasonably be expected to yield helpful information for the defence. Giving this kind of control over the conduct of an investigation to the accused, who is, after all, the target of that investigation, is unworkable. It turns the adversarial process at least sideways, if not upside down.

42 In holding that the right to make full answer and defence does not encompass a Crown obligation to pursue defence investigative requests, I would not want to be taken as discouraging the kind of interaction that occurred between counsel in this case. The defence chose to raise the issue of the suitability of the initial audit in the pre-trial context. The Crown, in its role as a minister of justice, was obliged to give careful consideration to the defence objections. Both counsel made efforts to come to some consensus as to the nature and scope of the new audit. They were partially successful. In the end, however, it was for the Crown to decide on how to proceed with the second audit. Assuming that the Crown's decision was not tainted by any improper motive (and no such motive is suggested here), that decision did not engage any of the respondent's constitutional rights.

43 Like the pre-trial judge, I think the shortcomings alleged by the defence in the KPMG audit produced by the prosecution could potentially have provided grist for the fact-finding mill at trial. Counsel, armed with access to all of the relevant documents and the audit itself, could have explored any weaknesses in the audit through cross-examination of its authors and of Mr. Kadrie. Counsel also could have called evidence from the respondent's accountant and the respondent himself. These measures have provided accused in countless cases where evidence of this kind is relied on by the Crown with an opportunity to make full answer and defence. There is no reason to think that in this case they would not be up to the task of providing the respondent with an adequate opportunity to make full answer and defence. If a specific problem arose in the course of the trial that adversely affected the respondent's ability to make full answer and defence - if, for example, certain crucial documents turned out to be unavailable - the respondent could raise a *Charter* claim at that time. The merits of the claim would have to be assessed in the context of the trial proceedings and the evidence adduced at the trial.

(b) The Breach of the Crown's Undertaking

44 In finding that the accused was denied the right to make full answer and defence the trial judge also found that the Crown had failed to comply with an undertaking it had given to the defence to obtain "a full and independent audit". As I read the reasons, the trial judge tied the Crown's failure to comply with its undertaking to the respondent's inability to make full answer and defence without that audit.

45 The trial judge referred to her understanding of the agreement between the Crown and defence in different parts of her reasons. For example, at para. 69 she said:

The difficulties with the original audit and complaint were set out before Justice

Getliffe [the pre-trial judge] and *it was agreed that in order for the defendant to be able to make full answer and defence a full and independent audit was required.* [Emphasis added.]

46 The Crown had agreed that it could not pursue the charges without an independent audit. However, there was never any agreement as to the scope of that audit. Indeed, as summarized above, the Crown and defence debated the scope of the second audit for months without arriving at a consensus. There was no evidence that they ever reached any agreement that a "full" audit as demanded by the defence was necessary.

47 A finding of fact in the absence of any evidence to support that finding constitutes an error in law: *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 599. To the extent that the trial judge found a denial of the right to make full answer and defence based on a breach of an undertaking to provide a "full" audit, that finding is tainted by legal error.

48 Counsel for the respondent persuasively argued that even if the trial judge was wrong in finding a Crown undertaking to produce a *full* audit, she was correct in holding that the Crown undertook to provide an *independent* audit. Counsel submits that the Crown did not live up to this undertaking.

49 Nothing in the record supports the contention that the KPMG audit was not an independent one. The respondent understood from the outset that Mr. Kadrie would pay for the audit; his counsel specifically indicated that this arrangement was an appropriate one. Obviously, as the person paying for the audit, Mr. Kadrie could determine its scope by deciding how much he would pay. There is, however, no evidence to support the contention that the ultimate scope of the audit prepared by KPMG was a product of any financial limit placed on the retainer by Mr. Kadrie. The Crown proposed from the outset that the audit would focus on the timeframe covered by the charges. The KPMG retainer with Phaeton reflected that focus, although it also contemplated the examination of some documents outside of that timeframe. There is simply no evidence that Mr. Kadrie demanded as a condition precedent to funding the audit that KPMG restrict its scope in performing it.

50 The trial judge's finding that the audit was not independent confuses the question of what work will be done with the independence of that work. The retainer determined what work KPMG would do. The terms of that retainer were settled between KPMG and Phaeton. The retainer did not, however, surrender KPMG's independent judgment in matters covered by the retainer to Mr. Kadrie or anyone else. The mere fact that the work to be done is circumscribed by the terms of a retainer does not mean that the work done is not independent of the party required under the terms of the retainer to pay for it.

51 KPMG produced an audit. The respondent made no attempt on the pre-trial motion to demonstrate, through cross-examination of the author of the audit or otherwise, that there was any reason to question KPMG's independence. In the end, the respondent's claim that the audit was not independent is based solely on the scope of the retainer and the source of the funds for the retainer.

Neither necessarily compromised the independence of the audit. Counsel for the respondent, if he wishes, could pursue the respondent's concerns over the independence of the audit in cross-examination at trial.

(c) The Section 11(b) Claim

52 As indicated above, the trial judge ultimately declined to find a breach of s. 11(b). She did, however, conduct a section 11(b) analysis. Counsel for the respondent, relying on the trial judge's findings of fact, argues that as of the scheduled trial date in October 2007, and apart from any further delay that may have been occasioned had a new audit been ordered, this case was beyond constitutionally acceptable time limits.

53 I cannot accept this submission. The 28 months between the laying of the charges in mid-June 2005, and the proposed start of the trial in mid-October 2007, is clearly long enough to merit a section 11(b) inquiry. However, apart from about four months, none of the delay is attributable to Crown conduct. As I read the record, having regard to the passage of time between the setting of the date for the preliminary inquiry and the preliminary inquiry date, as well as the passage of time between the setting of the trial date and the actual trial date, the vast majority of the delay is properly characterized as neutral or institutional. The timeline in this case can be conveniently broken down into four phases:

- Mid-June 2005 to late-January 2006;
- Late-January 2006 to mid-June 2006;
- Late-June 2006 to early-February 2007; and
- March 2007 - mid-October 2007.

54 In addressing the reasons for the delay, the trial judge said at para. 67, "[t]he majority of the delay in this case is directly attributable to the efforts to address the issues surrounding the forensic audit."

55 This finding is contrary to the evidence. The passage of time between mid-June 2005 and late-January 2006 - approximately seven months - was attributable to various "intake" procedures, none of which involved the audit. Counsel agreed that this time was neutral for the purposes of s. 11(b). The delay between late-June 2006 and early-February 2007 - approximately seven months - was attributable to the unavailability, prior to the latter date, of a courtroom for a four-week preliminary inquiry. While it is true there were discussions concerning the audit during this time period, counsel for the respondent expressly advised the court that the February date was the earliest date available for a four-week preliminary inquiry. This seven-month block of time should be characterized as institutional delay. Seven months between the fixing of a date for the preliminary inquiry and the commencement of the preliminary inquiry is within the guidelines set down in *R. v. Morin*, [1992] 1 S.C.R. 771. The Crown submits that the four-week period set aside for the preliminary inquiry in February and the remaining period of time before the scheduled commencement of the trial, from March through mid-October 2007 - approximately seven months -

should be attributed to the defence as it was the defence that requested the adjournment of the preliminary inquiry in February. This characterization ignores the fact that the defence re-elected and was prepared to go to trial in the Ontario Court of Justice. Consequently, the adjournment of the preliminary inquiry at the request of the defence had no real effect on the timing of the commencement of the trial.

56 Given the timing of the re-election, which occurred after the date on which the preliminary inquiry was scheduled to proceed, this case should be treated as one in which the proceedings travelled through two levels of court. This seven-month period should be attributed to scheduling demands and, consequently, to institutional delay. A seven-month delay in the trial court is within the guidelines set down in *Morin*. I would add that the attribution of this seven-month period as institutional delay is potentially unduly favourable to the respondent in that it assumes that the October dates were the first available dates for trial. The record is silent on this issue.

57 The only period of delay potentially referable to discussions concerning the audit is the five-month period between late-January 2006 and mid-June 2006. As of late January, the Crown had decided it needed a new forensic audit. Clearly, time would be needed to prepare that audit. To the extent that the preparation of the audit delayed the proceedings, that delay is properly attributable to the Crown. It is fair to infer that but for the need to prepare a second audit the parties would have been in a position to set a preliminary inquiry date before June of 2006.

58 I do not think, however, that it would be fair to attribute the entire five months to the Crown. It was appropriate, especially given the position of the defence, that counsel try to reach some consensus as to the audit's nature and scope before proceeding with it. Consultation necessarily meant some delay in finalizing the accountants' retainer. Some part of the five months should be attributable to the time relating to those consultations. While I appreciate that any allocation must be somewhat arbitrary, I think it is fair to allocate two of the five months to the consultations. The other three months should be allocated to the Crown.

59 Having regard to the total elapsed time, the explanations for the various delays, the relative complexity of the case and the public interest in a trial on the merits, but also bearing in mind the allegations of prejudice put forward on behalf of the respondent, I do not think that the respondent has made out a violation of s. 11(b).

IV. THE APPELLATE DELAY

60 Counsel for the respondent on appeal submits that even if the court is satisfied that the trial judge erred in entering a stay, because of the time that has elapsed while the Crown's appeal was outstanding, it should decline to order a new trial. This appeal was launched some two-and-a-half years ago. Counsel for the respondent submits that the Crown had an obligation to pursue its appeal with due diligence, but instead allowed months, if not years, to go by without making any progress on the appeal.

61 Crown counsel on appeal offered an explanation in his oral submissions for some of the delay. That explanation relates primarily to the availability of transcripts. However, even if this explanation is accepted at face value, this appeal went unperfected for no good reason for almost a year.

62 Section 11(b) does not apply to appeals. Delays on appeal give rise to a *Charter* remedy only if those delays would undermine the fairness of a subsequent trial: *R. v. Potvin*, [1993] 2 S.C.R. 880, at p. 915. The respondent has not attempted to draw any connection between the appellate delay and his ability to obtain a fair trial should this court order a new trial.

63 I am satisfied that the errors made on the motion to stay proceedings require that the stay be set aside and a new trial ordered. I stress, however, that this court expects the Crown to pursue its appeals with due diligence and in accordance with the rules. The Crown has to do better than it did in this case. Respondents who find themselves adversely affected by Crown foot-dragging on appeals should avail themselves of the various procedures available to bring those delays to the attention of the court. This court has the power to dismiss appeals as abandoned if they are not pursued in accordance with the rules.

V. CONCLUSION

64 I would allow the appeal, set aside the stay and direct a new trial.

D.H. DOHERTY J.A.

J.C. MacPHERSON J.A.:-- I agree.

R.P. ARMSTRONG J.A.:-- I agree.

---- End of Request ----

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