Beyond Borders
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ECPAT CANADA

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## JUSTICE DENIED: THE DISTURBING CASE OF ERNEST FENWICK MACINTOSH

### Overview

On July 20, 2010, the victims of the alleged[1] sexual abuse by Ernest MacIntosh and the citizens of Nova Scotia must have at long last breathed a sigh of collective relief. MacIntosh had finally been convicted of charges that dated back to the 1970s.[2]

Ernest Fenwick MacIntosh is no stranger to the criminal justice system. He is a self-admitted sexual offender having been convicted of an indecent assault in 1982 and a sexual assault in 1983.

Sadly, to the dismay of the victims of the alleged sexual abuse and the citizens of Nova Scotia on December 8, 2011, the Nova Scotia Court of Appeal judicially stayed[3] all charges against MacIntosh on the basis that his right to a trial within a reasonable period of time had been infringed. Had the state actors simply done their jobs there would have been absolutely no issue about MacIntosh's right to be tried within a reasonable period of time. He would have been tried, convicted and sentenced on the merits.

### Facts

The charges facing MacIntosh this time around dated back to the 1970s.[4]

In January and February 1995 the first two victims made complaints to the police and in December 1995 charges were laid against MacIntosh.[5] A warrant was issued for his arrest in February 1996. At this time, the police were well aware that MacIntosh had long left Nova Scotia and was residing in India.[6]

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[1] I use the word "alleged" and will use that word throughout this article for the sole reason that at the time of writing this response, the charges against Ernest MacIntosh have been judicially

[2] MacIntosh was further convicted on January 31, 2011 in another trial relating to the same timeframe but involving different victims. He was sentenced to a total of 5 years and 8 months incarceration.

[3] "A judicial stay is the "A-Bomb" of judicial remedies. Its result is to prevent the Crown from proceeding with criminal charges that the Crown believes will result in convictions. It is a finding that has serious implications." R v. MacIntosh 2010 NSSC 105 (CanLII)

[4] Often the victims of sexual abuse delay reporting. This is by no means uncommon. In fact the term historical sexual assault has developed to encompass the same.

[5] In total there would be six complainants who would have been as young as eight years of age when the alleged sexual abuse took place.

[6] India is a country with one of the highest rates of sex tourism. Godoy, Emilio (13 August 2007). "16,000 Victims of Child Sexual Exploitation". RIGHTS-MEXICO. Inter Press Service. While in India there were numerous allegations that MacIntosh was sexually abusing young children there.

In fact in August 1996 Cst. Deveau of the RCMP actually spoke to MacIntosh in India.[7] Between August 1996 and September 1997 the authorities took no action. It was not until September 1997 that the Crown Attorney's Office began the process of seeking MacIntosh's extradition.[8] Further, in 1997 MacIntosh's passport was not being renewed because of the outstanding charges. At this point (April 1998) MacIntosh engaged counsel who on his behalf successfully addressed this issue and commenced a vigorous campaign of requesting disclosure.

Shockingly, it would take another nine years for the formal request for extradition to be forwarded to the Government of India.[9] MacIntosh was arrested in India in April 2007 and returned back to Canada in June 2007. He remained in custody until April 2008 and by January 2011 both of his trials were completed. He had applied unsuccessfully to the trial charge to have his charges permanently stayed for a denial of his right to be tried within a reasonable period of time.

**NOVA SCOTIA COURT OF APPEAL**

MacIntosh appealed to the Nova Scotia Court of Appeal who heard his appeal on June 8, 2011. On December 8, six months later, their decision was released judicially staying or ending the prosecution of MacIntosh on the basis that his right to a trial within a reasonable period of time had been breached.

**ANALYSIS**

S. 11(b) of the Canadian Charter of Rights and Freedoms states, "Any person charged with an offence has the right to be tried within a reasonable period of time". This is an important right for both individuals charged with a crime and for society as a whole. Without this right, persons accused of crimes could be forever in a state of limbo or subject to onerous bail conditions—or worse languish in jail. In addition, society as a whole has a collective interest in ensuring that those who transgress the law are promptly brought to trial.

Justice John Sopinka in 1992 in R v. Morin[10], commented on s.11(b) as follows, "…though beguiling in its simplicity, this language has presented the Court with one of its most difficult challenges in search of an interpretation that respects the right of the individual in an era in

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He was banned from visiting at least two schools as a result of his alleged sexual abuse of young boys.

[7] Deveau had testified that he told MacIntosh that there was a warrant for his arrest and that MacIntosh told him he had no intention of returning to Canada after which the line went dead. MacIntosh denied being told of the warrant and claimed that the call made him curious and that when the line went dead he waited for a call back.

[8] In Canada, while prosecutions for these sorts of offences are conducted by the province, extraditions are conducted by the Federal Department of Justice.

[9] The clock, so to speak, had already been running for three years as it starts to run once the information is sworn or the charges laid.

[10] [1992] 1 SCR 771

which the administration of justice is faced both with dwindling resources and a burgeoning caseload."

The Court went on in Morin to set out the factors that must be analyzed in assessing whether an accused's rights under s.11(b) have been infringed. These factors include the length of the delay, waiver of time periods, the reasons for the delay and prejudice to the accused.

Both the Trial Judge and the Nova Scotia Court of Appeal considered MacIntosh's application to have the charges stayed on the basis of a violation of his s.11(b) rights by analyzing the delay in two broad categories: the laying of the charges until extradition (1995-2007) and extradition to trial (2007-2010). There is no doubt that the overall delay from the time the charge was laid was substantial and warranted an inquiry into the reasons for the delay and the apportionment of responsibility.[11]

The Trial Judge had found that as MacIntosh was out of the country and aware of the charges he was facing yet chose to remain in India thereby evading the Canadian judicial process, he could not seek to have this time counted as against the Crown. The Nova Scotia Court of Appeal disagreed with this finding holding that the Crown has a duty to bring an accused person to Court and that an accused person has no duty to bring him or herself to Court.

There can be no doubt that the fact that it took the authorities twelve years to initiate extradition proceedings is extraordinary and requires further investigation. There can simply be no explanation for these significant latches. When MacIntosh told Cst. Deveau he would not return to Canada the authorities ought to have acted with prompt dispatch to initiate the extradition process and forced MacIntosh back to Canada—and not have delayed this process for in excess of a decade. This is especially noteworthy given that MacIntosh was back in Canada within two months of his eventual arrest in India.

Notwithstanding this inexcusable conduct, it is by no means determinative of the issue of the apportionment of delay. There is no authority whatsoever from the Supreme Court of Canada in support of the position taken by the Nova Scotia Court of Appeal. It is a trite proposition of law that an accused has no duty to bring him or herself to Court. However this does not end the issue.

Mr. Justice Doherty, a now preeminent Justice of the Ontario Court of Appeal, in a paper delivered to the National Criminal Law Programme in July 1989 [12]wrote as follows:

> Many accused do not want to be tried at all, and many embrace any opportunity to delay judgment day. This reluctance to go to trial is no doubt a very human reaction to judgment days of any sort; as well as a reflection of the fact that in many cases delay inures to the benefit of the

[11] The inquiry, which can be complex should only be undertaken if the period is of sufficient length to raise an issue as to its reasonableness. R v. Morin. [1992] 1 SCR 771

[12] Justice Doherty's comments appear with approval in R v Askov [1990] 2 SCR 1199.

> accused. An accused is often not interested in exercising the right bestowed on him by s. 11(b). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits. This view may seem harsh but experience supports its validity. This unique attitude on the part of the accused toward his right often puts a court in a position where it perceives itself as being asked to dismiss a charge, not because the accused was denied something which he wanted, and which could have assisted him, but rather, because he got exactly what he wanted, or at least was happy to have — delay. A dismissal of the charge, the only remedy available when s. 11(b) is found to have been violated sticks in the judicial craw when everyone in the courtroom knows that the last thing the accused wanted was a speedy trial. It hardly enhances the reputation of the administration of justice when an accused escapes a trial on the merits, not because he was wronged in any real sense, but rather because he successfully played the waiting game.

MacIntosh's conduct once he spoke to Cst. Deveau was the exact type of conduct to which Mr. Justice Doherty is referring. MacIntosh did not wish a trial within in a reasonable period of time; he did not wish a trial at all. MacIntosh was content to remain in India while his counsel in Canada commenced an action for the return of his passport and attempted to obtain as much disclosure as was possible for the ultimate defence of these matters should MacIntosh be ultimately extradited. In fact, MacIntosh even contested extradition in India. Perhaps his previous convictions played some part in his decision to remain in India.

MacIntosh was returned to Canada in June 2007. By this time, the investigation into all the charges had been complete for years. However, again for undisclosed reasons, video and audio taped statements of the complainants as well as the affidavit of one of the complainants were not made available to the defence until May 2008.[13] These important materials had been in the Crown's possession since at least August 2002. It is clear that the Crown's failure to disclose these critical materials froze this case in its tracks and the Crown bears ultimate responsibility for this apportionment of delay.

However, just because the Crown's conduct was inexcusable does not necessarily result in a stay. In other words in the context of an 11(b) application, a matter does not automatically get stayed by the Courts and not tried on its merits because of such conduct. Rather the Court must still engage in the balancing process by weighing the prejudice suffered by an accused, against the societal interest in bringing an accused to stand trial on its merits. The seriousness of the charges are an important aspect of this balancing process.

The prejudice to be assessed is the prejudice resultant of the delay not that of being charged. The ultimate determination of this issue necessarily encompasses a

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[13] Disclosure is vitally important to the defence of any criminal case. Video and audio statements of the complainants are necessary disclosure as per R v Stinchcombe [1991] 3 S.C.R. 326

determination of the apportionment of the period of delay between charge and extradition. Further, the fact that MacIntosh was a convicted sexual offender ought to have been considered in the balancing process.

**THE FUTURE**

One hopes the Attorney General of Nova Scotia will seek leave to appeal this case to the Supreme Court of Canada to address some of the issues raised—and the victims and citizens of Nova Scotia will have their faith in the justice system partially restored.

Regardless, the Attorney General of Nova Scotia owes an explanation (if one exists) to the six victims of MacIntosh and to the citizens of Nova Scotia as to explain why this case sat on various desks gathering dust for more than a decade while MacIntosh was allowed to go about his life in India.

Further the Attorney General of Nova Scotia owes an explanation (if one exists) to the six victims of MacIntosh and to the citizens of Nova Scotia and to MacIntosh as well as to why no one bothered to copy some audio and video tapes for 11 months.

The right to a trial within a reasonable period of time is neither a new nor novel concept. Every prosecutor in this country knows the clock starts ticking once a charge is laid. The delays by the prosecutors in this case were inexcusable and entirely avoidable. At present the consequences of their inaction are clear: MacIntosh is a free man.

Had the prosecutors done their job, MacIntosh would be rightfully in jail. More important, the courageous victims who had the strength to come forward years later and to no longer remain silent would hopefully be comforted having bore witness to some semblance of justice. Sadly justice has been denied.

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