DEFERRING DELAY

A Comment on *R.* v. *Potvin*

Wayne Renke

An accused or the Crown may be dissatisfied with a trial judge's disposition of a case and launch an appeal. The hearing of the appeal or the rendering of the decision may be delayed sufficiently that the accused takes the position that his or her constitutional rights have been violated. Appellate delay might have been considered reviewable under s. 11(b) of the *Charter* — "Any person charged with an offence has the right...to be tried within a reasonable time:" an accused might have argued that the right to be "tried" within a reasonable time includes the right to an appeal within a reasonable time. This argument was supported by some lower court decisions,[1] and by Supreme Court *obiter*, most notably in the dissent of Sopinka J. in *Conway*.[2]

In *Potvin*[3], however, Sopinka J., writing for the majority,[4] determined that appellate delay is not reviewable under s. 11(b). But, should the delay amount to an abuse of process, appellate delay is reviewable under s. 7. His conclusion applies to appeals from conviction, acquittal, and judicial stays (106, 111).[5] Sopinka J.'s decision is remarkable for two reasons. First, his decision is a paradigm of "legalistic" interpretation, opposed to the "generous" approach to *Charter* interpretation described in the *Big M* case.[6] Second, his decision exposes the malleability of *Charter* language; Sopinka J. reverses himself on the interpretation of s. 11(b).

After a brief review of the *Potvin* facts and a subordinate issue, I shall discuss the main features of Sopinka J.'s decision, with reference to the minority's responses and Sopinka J.'s position in *Conway*. I cannot argue that Sopinka J.'s interpretation of s. 11(b) in *Potvin* is "wrong," in the sense of lacking rational support — his is a legitimate reading of s. 11(b). I shall argue that an alternative reading, advocated by Sopinka J. in *Conway*, is also legitimate, and, in view of the *Big M* "generous" interpretation directive, ought to have been adopted in *Potvin*. I shall suggest two practical reasons for Sopinka J.'s retreat from his *Conway* position.

Background

Potvin was charged with criminal negligence causing death. The Information was sworn on September 15, 1988. Potvin was released from custody on an undertaking. The case was complicated — about 16 lay witnesses and some expert witnesses were to be called between Crown and defence counsel, and an out-of-town judge was required to hear the case. The case was expected to take about ten trial days. Following numerous pre- and post-preliminary inquiry adjournments, Potvin's trial was set for December 3, 1990. On that date, Potvin successfully applied for a stay of proceedings on the basis that his right to be tried within a reasonable time had been infringed. On December 24, 1990, the Crown filed an appeal. The Crown served the appeal book on June 21, 1991. Counsel appeared to set a date for the appeal hearing on January 15, 1992. The hearing was set for April 24, 1992, the earliest date available for Potvin's counsel. At the appeal hearing, Potvin raised the issue of appellate delay. The Ontario Court of Appeal, in a unanimous decision written by Osborne J. A., allowed the appeal, set aside the stay, and remitted the matter for trial on an expedited basis, without dealing with the appellate delay issue. Potvin appealed to the Supreme Court, raising two grounds of appeal. He claimed that both the pre-trial and appellate delay offended s. 11(b).

I shall not address the pre-trial delay issue, since the Supreme Court developed no new pre-trial delay

law. The Court held unanimously that the pre-trial delay was reasonable in the circumstances and dismissed this ground of appeal. Sopinka J. noted that Osborne J. A. carefully applied the *Morin*[7] principles to the facts, and adopted Osborne J. A.'s reasons (106).

Appellate Delay

Both the majority and minority of the Supreme Court dismissed the appellate delay ground of appeal, but on different bases. McLachlin J., writing for the minority,[8] argued that s. 11(b) does apply to appellate delay, but the delay did not violate s. 11(b). McLachlin J. did not assert that a s. 11(b) analysis would apply in exactly the same way to appellate and pre-trial delay. She held that the established s. 11(b) principles are sufficiently flexible to apply to all stages of delay. The majority, as indicated, ruled that appellate delay is not reviewable under s. 11(b), but is reviewable under s. 7; in this case, the delay did not violate s. 7. Sopinka J.'s position has four main planks: (1) appellants[9] do not suffer restrictions of interests requisite to engage s. 11(b); (2) appellants are not "charged" within the meaning of s. 11; (3) the words "to be tried" in s. 11(b) should not be interpreted to apply to appeals; and (4) s. 7 may be used to review appellate delay.

(1) Not Restricted

Sopinka J. referred to the *Morin* list of rights protected under s. 11(b) — (i) security of the person (protected by minimizing anxiety, concern, and stigma of exposure to criminal proceedings), (ii) liberty (protected by minimizing exposure to liberty-restrictions from pre-trial incarceration or restrictive release conditions), and (iii) fair trial (protected by ensuring that proceedings take place while evidence is available and fresh) (107).[10] Sopinka J. argued that restrictions of interests caused by appellate delay are not comparable to restrictions of interests suffered through pre-trial delay. Sopinka J. analogized appellants to persons facing pending charges. An acquitted person, in particular, is in the position of a person against whom charges are only contemplated — an appeal may not be filed; if it is, the appeal may not be allowed (the Crown must prove error) (108). Sopinka J. suggested that in some respects appellate delay restricts appellants' interests less than pre-charge delay restricts uncharged persons' interests: "the acquitted accused is somewhat more removed from the prospect of being subject to a charge than the suspect. In the former case, no charge can be revived until the acquittal is set aside....In the latter case, all that stands between the suspect and a charge is the *ex parte* decision of the prosecutor" (107-108). Sopinka J., moreover, evinced little sympathy for convicts who have engaged the appeal process. He quoted Stevenson J. in *C.I.P. Inc.*: "The appellant invoked the processes of which it now complains and must accept the burdens inherent in full appellate review" (108).[11]

Sopinka J. invited a strong rejoinder from McLachlin J. She asserted that Sopinka J. "diminishes the seriousness of the position of an acquitted person facing an appeal" (116). An appellant, acquitted or not, suffers the "stigma" and "anxiety" of criminal proceedings; the Crown continues to aver the guilt of the accused (or the invalidity of the accused's acquittal), and the appellant faces the "real danger" of an adversely determined appeal (ibid.). The restrictions of interests of an appellant, claimed McLachlin J., are more like the restrictions besetting a person awaiting trial than those besetting an uncharged person (117). McLachlin J. echoed the Sopinka J. of *Conway*, where Sopinka J. wrote that "[t]here is little question that most persons charged with an offence suffer some prejudice such as stress, anxiety or stigmatization. As well, prejudice is likely to increase over time and will almost certainly continue until the ultimate resolution of the matter...[prejudice] will persist until all appellate proceedings are finished."[12] I suggest that McLachlin J. and the *Conway* Sopinka J. have a more realistic view of the effects of appeals than the *Potvin* Sopinka J. I also suggest that Sopinka and Stevenson JJ.'s response to convicted appellants is unprincipled. We can concede that convicted appellants must bear reasonable appellate delays. A convict, though, should not be denied *Charter* rights simply for exercising appeal rights.

Sopinka J. could grant his former and McLachlin J.'s current restriction of interests assessment, but still attempt to deny s. 11(b) review of appellate delay, on the ground that appellants are not "charged" within the meaning of s. 11.

(2) Not "Charged"

Sopinka J. is inconsistent on the issue of whether appellants are "charged." On the one hand, while claiming that "as a general rule 'a person charged' under s. 11 does not include an accused person who is party to an appeal," he admitted that a "particular

paragraph may apply to appeal proceedings as an exception to the general rule" (107). If some provisions of s. 11 might apply to appeals, appellants must be "charged" within the meaning of s. 11, or the section could not apply. On the other hand, Sopinka J. claimed that neither acquitted accuseds nor convicts are persons "charged" (108-109).

Sopinka J. supported the claim concerning the non-charged status of convicts by a reference to the *Lyons* case.[13] In *Lyons*, La Forest J. held that a convict subject to a dangerous offender application is not "charged" with an offence (so that the application need not be tried before a jury). In further support of Sopinka J., I note that we would not ordinarily say (absent appeal considerations) that acquitted or convicted persons are "charged." To say that a person is "charged" is to say that the person has been formally alleged to have committed an offence: "a person is 'charged with an offence' within the meaning of s. 11 of the *Charter* when an information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn."[14] Once the allegations have been dealt with at trial, the "charge" has been dealt with; the verdict marks a change in status of the person from a person "charged" to a person acquitted or convicted. In the civil law, a claim "merges" in a judgment; one might say that a criminal charge "merges" in a verdict. On appeal, moreover, an appellant is not re-charged. On appeal, not the charge, but the verdict or stay is at issue.

Three responses may be made. First, *Lyons* is distinguishable. In a dangerous offender application, liability for an offence is not directly or indirectly at issue — in an appeal, liability is directly or indirectly at issue. A convicted appellant contests conviction; an acquitted appellant contests potential conviction. Second, where an acquittal or conviction is appealed, we can intelligibly regard the appellant as "charged" with an offence, since the appellant is exposed to the threat of conviction or sustained conviction for a charged offence. The Information or Indictment, after all, is included in the Appeal Book.[15] Moreover, in *Conway*, Sopinka J. referred favourably to Marshall J.'s dissent in the *Loud Hawk* case.[16] Marshall J. wrote: "There has been at all relevant times a case on a court docket captioned *United States* v. *Loud Hawk* — I can think of no more formal indication that the respondents stand accused by the Government."[17] This could be said of both convicted and acquitted appellants. Third, the opening words of s. 11 are "Any person charged with an offence," not "Any person *who is* charged with an offence." The opening words are broad enough to include any person who is or was charged with an offence; the opening words do not require that the charge be technically outstanding throughout proceedings taken in respect of or arising from the charge.

Sopinka J. intimated, referring to the *Kalanj* case, that appellate delay is not the "result" of a charge — it does not "proceed from" a "formal charge" (108). Two sorts of responses might be made. One might accept Sopinka J.'s terms of engagement, and argue that appellate delay does, in fact, result from an actual charge. This was McLachlin J.'s tactic. She claimed that "[t]he appeal proceedings clearly result from an actual charge; indeed, they are dependant upon it for their validity" (115-116). Alternatively, one might deny Sopinka J.'s terms of engagement. For Sopinka J., the charge seems to be a sort of proximate cause of reviewable delay. The opening words of s. 11, though, do not require any causal link between a charge and delay. Section 11 sets as a necessary condition for its application only that a person have a certain status — the person must be "charged." Furthermore, *Kalanj* does not impose the condition Sopinka J. relies on. In *Kalanj*, McIntyre J., for the majority, did not refer to delay "resulting" from a charge. McIntyre J. decided only that before delay may be reckoned under s. 11(b), an Information must be laid or an Indictment preferred.[18]

I trust that I have shown that appellants may reasonably be considered to be persons "charged" under s. 11. Since the *Charter* should be interpreted "generously," the opening words of s. 11 should not be interpreted to exclude appellants.

(3) Not "Tried"

Sopinka J.'s strongest argument (La Forest J. concurred specifically on this point) was that s. 11(b) refers to a right to be "tried" and does not refer to appeal rights. If appeal rights were to be encompassed by s. 11(b), Sopinka J. suggested, more apt language would have been used (109). To bolster his argument, Sopinka J. referred to Articles 5 and 6 of the *European Convention on Human Rights*. Article 5(3) provides that "everyone...shall be entitled to a trial within a reasonable time....." Article 6(1) provides that "[i]n the determination...of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time...." Sopinka J. also referred to the *Wemhoff* case,[19] in which the European Court of Human Rights held that the former provision

applies only to trial, while the latter extends to "final determination," even if that is on appeal. "No doubt," Sopinka J. mused, "this language was before the framers of the *Charter*, and the selection of the more limiting term is significant" (ibid.).[20]

One might approach *Wemhoff* in this way: The *Charter* does not contain provisions referring to "trial" and to "determination." One could conclude that no distinction between "trial" and "determination" is, then, suggested by s. 11(b) — had that distinction been contemplated, it could have been expressed. Since it was not expressed, the distinction should not be made, and s. 11(b) should not be taken to exclude appeals.

Furthermore, the *Charter* (unlike the Sixth Amendment to the U.S. Constitution and Article 5(3) of the *Convention*) does not refer to "trial" within a reasonable time, but to the right to be "tried" within a reasonable time. One might infer that this usage shows that the *Charter* does not attempt to distinguish between trial and appeal rights. If the framers of the *Charter* had intended to restrict s. 11(b) to trials, they could have used the term "trial" in s. 11(b). I concede that in ordinary English legal parlance, the term "try" is used in connection with "trials:" the claim "I've tried one hundred cases" is more naturally rephrased as "I've run one hundred trials," than as "I've argued one hundred appeals." The English reading, though, is not determinative. In *Conway*, Sopinka J. considered the French text of s. 11(b) — "*Tout inculpé a le droit: ...d'être jugé dans un délai raisonnable.*" Sopinka J. commented that "'*Jugé*' means 'judged' or 'sentenced' and connotes a sense of adjudication which goes beyond the mere trial itself. Had the section been intended to apply to the start of the trial only, then '*mis en jugement*' would have been used."[21] Even if Sopinka J. is incorrect, ordinary legal parlance should not be determinative of the meaning of *Charter* terms. The language chosen to articulate a *Charter* provision is only one factor to be considered.[22]

In *Potvin*, Sopinka J. interpreted s. 11(b) legalistically: he seized on technical, restrictive interpretations of the terms "charged" and "tried" and used these interpretations to exclude from s. 11(b) protection those caught in the appellate meshes of the criminal justice system. Legalistic interpretation is not proper *Charter* interpretation. A right guaranteed by the *Charter* is to be understood "purposively," in light of the interests the right is meant to protect. Sopinka J. accepted this interpretive approach in *Conway*.[23] As indicated in part (1) above, appellate delay impairs interests — the same interests that have been protected in pre-trial delay applications of s. 11(b). Since the language of s. 11(b) may be reasonably interpreted to include appeals, it should have been interpreted to apply to appeals.

(4) 7 not 11

Sopinka J. held that appellate delay may be initially addressed outside of the *Charter*, under the Criminal Code appeal provisions and criminal appeal rules.[24] Where "systemic delay" causes "real prejudice" to appellants, resort may be had to s. 7 to remedy the abuse of process (112).

McLachlin J. identified practical difficulties with Sopinka J.'s delivery of appellate delay to s. 7. Segregating delay reviews under two different sections unduly complicates delay analyses involving appellate delay. Suppose that an appeal results in an order for a trial (in the case of a stay) or a new trial (in the case of a verdict). Sopinka J. tells us that s. 11(b) will apply, again, to the accused — "the accused reverts to the status of a person charged" (110). Sopinka J. does not tell us how the trial judge is to assess the full measure of delay. McLachlin J. suggested that either the full quantum of delay might be assessed under s. 11(b), or the analysis might be broken into stages, with s. 11(b) applying to the period from the commencement of proceedings until stay or verdict, s. 7 applying to the appeal period, and s. 11(b) applying to the period after the order for a trial or a new trial until trial (113). Sopinka J. avoided determinate comment on this matter, sheltering behind metaphor. He quoted from an article by D. H. Doherty, who claims that after the order for trial, "the constitutional clock should be rewound at the time of the order by the appellate court" (110).[25]

McLachlin J. reminded us of another practical difficulty with s. 7: "The abuse of process doctrine is a narrow doctrine which has only on rare occasions provided a remedy to accused persons caught in the meshes of criminal process....Moreover, it has been repeatedly held that the doctrine...should be applied only in the clearest of cases...the fact remains that abuse of process has seldom, in its long history, served as a remedy for delay in the criminal process" (118).

We might predict that s. 7 shall seldom, in its post-*Potvin* abuse-of-process applications, serve as a remedy for delay in the appellate process. *Potvin* is a

useful case for appellate administrators; it is not for accuseds. This observation leads to the practical reasons which may lay behind Sopinka J.'s retreat from *Conway*.

Appellate Practicalities

Two practical concerns tend to support the restriction of appellate delay review.

First, the Supreme Court appears to have seen *Askov*'s ghost. In *Conway*, Sopinka J. made some Askovian pronouncements about the scrutiny of delay at all levels of the judicial system. *Askov*, decided after *Conway*, proved *Charter* scrutiny expensive. In *Askov*, Cory J., writing for the majority, set out the factors to be considered in determining whether s. 11(b) has been infringed by pre-trial delay — (i) length of the delay; (ii) explanation for the delay, with reference to (a) the nature and inherent time requirements of the case and the conduct of the Crown and other officers of the State, (b) systemic or institutional delay, and (c) the conduct of the accused; (iii) waiver by the accused; and (iv) prejudice to the accused. Cory J. stated that in the case of long delays, an often "virtually irrebuttable presumption of prejudice" arises.[26] Cory J. also (fatefully) opined that "a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable."[27]

As a result of *Askov*, by April, 1992 in Ontario alone, more than 52,000 criminal charges had been judicially stayed or withdrawn by Crown Prosecutors; to comply with *Askov*, the Ontario government had spent about $39.2 million and had hired 27 Provincial Court Judges, 61 Crown Prosecutors, and 168 court administrators.[28]

The Supreme Court performed damage control with the March 26, 1992 *Morin* decision. In *Morin*, Sopinka J., writing for the majority, characterized the six to eight month reference not as a "limitation period," but as an "administrative guideline."[29] The burden of proving prejudice was returned to the accused.[30]

What would have happened if appellate delay were turned over to s. 11(b) review, even as tempered by *Morin*? We can speculate that the Supreme Court did not desire to expose the appellate system to Askovian scrutiny. Keeping appellate delay out of s. 11(b) review avoids that provision's administrative guidelines and criteria for evaluation of delay. Appellate delay is left to more vague review under s. 7 — i.e., to review more fully controlled by the courts. (An unkind observer might suggest that the Supreme Court was more willing to constrain trial courts than appeal courts, like itself.)

Second, applying s. 11(b) to appeals could restrict possible appellate cut-backs. If s. 11(b) were held to apply to appeals, one might fear that a foothold would be created for the claim that appeal rights are constitutionally guaranteed (the right to an appeal within a reasonable time could be taken to imply an right to an appeal). If appeal rights were constitutionally guaranteed, legislation eliminating appeals might be held unconstitutional. At least some members of the Supreme Court, in fact, desire some limitation of criminal appeals. Lamer C.J.C. has been reported to have said that certain appeals as of right to the Supreme Court should be eliminated to free time for the hearing of non-criminal cases.[31] By keeping appeals out of s. 11(b), and leaving appellate delay to more vague review (and constitutional status) under s. 7, *Potvin* helps keep the way clear for the requisite legislation.

Perhaps these are the reasons for Sopinka J.'s retreat from *Conway*. I hope to have shown that, in any event, Sopinka J. did not simply come to a "better view" of the interpretation of s. 11(b).

Wayne N. Renke
Faculty of Law, University of Alberta.

Endnotes

1. *R* v. *Ramsay* (1992), 9 O.R. (3d) 400 (Gen. Div.) per Lovekin J. at 402-403; *R.* v. *Ushkowski* (1991), 67 C.C.C. (3d) 422 (Man. C.A.) per Twaddle J.A.; *R.* v. *Boire* (1991), 66 C.C.C. (3d) 216 (Que. C.A.) per Baudouin J. A. at 219, per Brossard J. A. at 227; *R.* v. *Hudson's Bay Co.* (1990), 58 C.C.C. (3d) 507 (Sask. Q.B.) per Barclay J. at 515; *R.* v. *Stapleton* (1990), 262 A.P.R. (Nfld. S.C.T.D.) per Easton J. at 147; *Gordon Redi-Mix* v. *The Queen*, [1988] 6 W.W.R. 470 (Sask. Q.B.) per Wedge J. at 477.

2. *R.* v. *Conway*, [1989] 1 S.C.R. 1659; *A.D.* v. *The Queen*, [1993] S.C.R. 441; cf. *Rahey* v. *The Queen*, [1987] 1 S.C.R. 588 per Lamer J., as he then was, at 611.

3. *R.* v. *Potvin* (1993), 83 C.C.C. (3d) 97; I shall refer in the text to page numbers from this report.

4. L'Heureux-Dubé, Gonthier, Cory, and Iacobucci, JJ., concurring; La Forest J. concurred in a separate judgment.

5. Sopinka J. does not refer to sentence appeals. I shall assume that the analysis applicable to other appeals applies to sentence appeals.

6. *R* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 per Dickson J., as he then was, at 344.

7. *R.* v. *Morin* (1992), 71 C.C.C (3d) 1 (S.C.C.).

8. Lamer C.J.C. and Major J., concurring.

9. By "appellants" I shall mean acquitted and convicted appellants.

10. Sopinka J. does not refer in *Potvin* to the "social interest" protected under s. 11(b). I shall not pursue the relevance of social interest to appellate delay.

11. *R.* v. *C.I.P. Inc.*, [1992] 1 S.C.R. 843 at 864-5.

12. *Conway*, *supra* note 2 at 1709.

13. *R.* v. *Lyons* (1987), 37 C.C.C. (3d) 1 (S.C.C.).

14. *Kalanj* v. *The Queen* [1989] 1 S.C.R. 1594 per McIntyre J. at 1607.

15. Alberta Rules of Court, Rule 854(3)(i).

16. *United States* v. *Loud Hawk* 88 L. Ed. 2d 640 (S. Ct., 1986) at 657; *Conway*, *supra* note 2 at 1708.

17. *Loud Hawk*, *supra* note 16 at 657.

18. *Kalanj*, *supra* note 14 at 1607.

19. (1968) 1 E.H.R.R. 55.

20. What is perhaps more significant is that Sopinka J. quoted *Wemhoff* to support his contrary position in *Conway*: *Conway*, *supra* note 2 at 1708-9.

21. *Conway*, *supra* note 2 at 1707.

22. *Big M*, *supra* note 6 at 1707.

23. *Conway*, *supra* note 2 at 1709.

24. See, for example, Alberta Rules of Court, Rules 840(3) and 515.1(8), and the Consolidated Practice Directions of the Court of Appeal of Alberta, January, 1991, E.8.

25. D.H. Doherty, (now Doherty, J.A. of the Ontario Court of Appeal) "More Flesh on the Bones: The Continued Judicial Interpretation of s. 11(b) of the Canadian *Charter* of Rights and Freedoms" (1984) *Canadian Bar Association, Ontario: Annual Institute on Continuing Legal Education* 9.

26. *R.* v. *Askov* (1990), 79 C. R. (3d) 273 (S.C.C.) at 306.

27. *Askov*, *ibid.* at 313.

28. C. Schmitz, "S.C.C. relaxes tight *Askov* pre-trial time limits" *Lawyers Weekly* (10 April 1992) 1.

29. *Morin*, *supra* note 7 at 19.

30. *Morin*, *supra* note 7 per Lamer C.J.C. (diss.) at 6; Sopinka J. at 14, 24; McLachlin J. at 31.

31. S. Bindman, "Top Court wants to eliminate right to appeal in some cases" *The Edmonton Journal* (20 Aug. 1993) A4.