COURT FILE No.: Halton, Central West Region, 999-07-53-00,07-55-00
& 07-54-00, 07-56-00
Citation: *Halton (Regional Municipality) v. Vastis*, 2008 ONCJ 44

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under 116(2)(a) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

REGIONAL MUNICIPALITY OF HALTON
Respondent

— AND —

GEORGE VASTIS

and

1255723 ONTARIO INC.
Appellants

Before Justice Alan D. Cooper
Heard on October 30, 31, November 1, 2007
Reasons for Judgment released on January 30, 2008

John A. Olah ……………………………………………………………………for the prosecution
David I. Crocker and Tudor B. Carsten …………………………………for the defendants
……………………………………………………….George Vastis and 1255723 Ontario Inc.

On appeal from convictions imposed by Justice of the Peace **Jerry S. Woloschuk** on April 20, 2006, and from the sentence imposed on September 19, 2006.

A.D. COOPER J.:

1.0: INTRODUCTION

[1] George Vastis is an officer and director of 1255723 Ontario Inc., and both he and the corporation were charged with ten charges of destroying a tree in an Environmentally Sensitive Area, and ten charges of destroying a tree on a woodlot, on April 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11,

2003. They were both further charged with one charge of destroying a tree in an Environmentally Sensitive Area, and one charge of destroying a tree in a woodlot, on or about the 14th and 15th days of July 2003. All charges were contrary to sections 3(a) and 4 of Halton By-law 79-83, and section section 19(1)(b) of the *Forestry Act*, R.S.O. 1990, c.F. 26 as amended. The Halton by-law was originally passed under the *Trees Act*, a predecessor of the *Forestry Act*. Both appellants were convicted of the 11 Environmentally Sensitive charges, and the 11 woodlot charges were stayed on the authority of *R. v. Kienapple*, [1975] 1 S.C.R. 729, 15 C.C.C. (2d) 524, because both sets of charges dealt with the same factual situation. George Vastis was ordered to pay a $3,000.00 fine for each of the 11 convictions, and was given a probation order for 2 years under section 72 of the *Provincial Offences Act*, to ensure compliance with a replanting and maintenance order made against the corporation. The order to replant the destroyed trees and to maintain them was imposed under section 19(2) of the *Forestry Act*, and no fine was imposed on 1255723 Ontario Inc.

2.0: CASE BACKGROUND

[2] The land in question had been a forested area of approximately 25 acres and was part of a larger parcel of land located at 4237 Fourth Line in the Town of Milton. The land is close to the Oakville border and is north of Highway 407 and Sixteen Mile Creek. It is in an environmentally sensitive area, known as ESA 16. Section 1 of the by-law defines an environmentally sensitive area as an area specifically designated in the Official Plan of the Region.

[3] The tree destruction was first detected on April 11, 2003. On that date, Mr. Cory Harris, a water resources engineer with the Regional conservation department, known as Conservation Halton, walked part of the area in question and noticed long narrow clearings where trees had been removed with an excavator and piled in the middle of the clearings. It later turned out that there were nine such areas, and it looked like the early development of a nine-hole golf course. Other standing trees were marked and were yet to be taken out.

[4] A formal investigation then began and Mr. Vastis was contacted and on April 15, 2003, he met with representatives from the Towns of Milton and Oakville and the Region of Halton, and walked the entire property with them. On April 29, 2003, Mr. Vastis was served with a stop work order from the Town of Oakville, and one from the Region. On May 13, 2003, counsel for the Region wrote to David Goodman, Mr. Vastis' lawyer at that time, to indicate there was to be no additional tree destruction without prior approval of the Regional Council.

[5] On July 15, 2003, Mr. Harris went onto the property again and witnessed new piles of logs, an excavator piling additional trees, and trees being put into a tub grinder to produce mulch.

[6] The first set of charges was laid on June 17, 2003, and the second set on July 22, 2003. A survey prepared for Mr. Vastis on April 18, 2003, before the July tree removal, indicates that 23.081 acres had been cleared of trees, and a further 1.527 acres was marked for later removal.

3.0: GROUNDS OF APPEAL ARGUED

3.1 Against Conviction:

[7] The trial judge erred in:

> (1) Refusing to grant a remedy for the Charter violation caused by Crown's persistent failures to comply with its disclosure obligations.
>
> (2) Refusing to grant a remedy for the Charter violation caused by the Crown's failure to try the defendant George Vastis within a reasonable time. [THE DEFENDANT 1255723 ONTARIO INC. DID NOT RAISE THIS AS A GROUND OF APPEAL]
>
> (3) Concluding that the defendants had cleared trees on their property for the purpose of building a golf course.
>
> (4) Concluding that the corporate defendant, which had been the registered owner of the lands for over two years, could not rely on the statutory exemption in section 7(1)(a) of the by-law, which permitted such an owner to

cut trees for its own use.

3.2 Against Sentence:

[8] The trial judge erred in:

(1) Imposing both a fine and a replanting order.

(2) Imposing a separate fine for each day that cutting took place.

(3) Treating the replanting order as a deterrent which caused him to prefer the replanting plan proposed by the Crown because it was costlier than the plan proposed by the defendants.

4.0: THE STANDARD OF REVIEW

4.1 PROVINCIAL OFFENCES ACT

4.1(a) Against Conviction:

120. (1) On the hearing of an appeal against a conviction or against a finding as to the ability, because of mental disorder, to conduct a defence, the court by order,

(a) may allow the appeal where it is of the opinion that,

(i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground, there was a miscarriage of justice; or

(b) may dismiss the appeal where,

(i) the court is of the opinion that the appellant, although the appellant was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in clause (a), or

(iii) although the court is of the opinion that on any ground mentioned in subclause (a) (ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

Idem

(2) Where the court allows an appeal under clause (1) (a), it shall,

(a) where the appeal is from a conviction,

(i) direct a finding of acquittal to be entered, or

(ii) order a new trial; or

(b) where the appeal is from a finding as to the ability, because of mental disorder, to conduct a defence, order a new trial, subject to section 44.

Idem

(3) Where the court dismisses an appeal under clause (1) (b), it may substitute the decision that in its opinion should have been made and affirm the sentence passed by the trial court or impose a sentence that is warranted in law. R.S.O. 1990, c. P.33, s. 120.

4.1(b) Against Sentence

122. (1) Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may, upon such evidence, if any, as it thinks fit to require or receive, by order,

(a) dismiss the appeal; or

(b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,

and, in making any order under clause (b), the court may take into account any time spent in custody by the defendant as a result of the offence.

Variance of sentence

(2) A judgment of a court that varies a sentence has the same force and effect as if it were a sentence passed by the trial court. R.S.O. 1990, c. P.33, s. 122.

One sentence on more than one count

123. Where one sentence is passed upon a finding of guilt on two or more counts, the sentence is good if any of the counts would have justified the sentence. R.S.O. 1990, c. P.33, s. 123; 1993, c. 27, Sched.

5.0: CASELAW

5.1 Against Conviction

[9] A very helpful case is that of *R. v. Sarnia Golf & Curling Club Ltd*. [2004] O.J. No. 3392, O.N.C.J. 131 (O.C.J.), in which McFadyen J., in paragraphs 40 and 41 of her judgment, set out the applicable standard:

> The case law clearly illustrates the principle that the Appellate Court must not re-try a case and substitute its own view. The Appellate Court must not undertake its

> own minute examination of the evidence in order to determine if a case has been proven beyond a reasonable doubt. The Appellate Court's function is to determine on the whole of the evidence whether the evidence is so weak that the verdict of guilty is unreasonable, whether the finding of guilt resulted from misapprehension of the law or whether a miscarriage of justice or substantial wrong has occurred. In relation to an appeal based on verdicts that are unreasonable or are unsupported by the evidence, the test is whether a trier of fact acting judicially could reasonably convict. My reference is *R. v. Colbeck* (1978), 42 C.C.C. (2d) 117 (Ont. C.A.).
>
> Moreover, it is almost trite law to say that great deference is to be paid to findings of credibility made at trial by the trier of fact.

5.2 Against Sentence

[10] In the same case, in paragraph 48, McFadyen J. stated as follows:

> Regarding the sentence appeal, this court is guided by the decision in *R. v. Fagbemi*, [2000] O.J. No. 2550 (Ont. C.J.) which makes reference to the Ontario Court of Appeal decision in *R. v. Turcotte* at (2000), 48 O.R. (3d) 97 (Ont. C.A.) in which there is a comprehensive overview of the limitations of an Appellate Court in considering an appeal against sentence. In order to succeed, the disposition must be not fit, clearly unreasonable, falling outside an acceptable range, demonstrably unfit, in substantial and marked departure from sentences customarily imposed for similar offenders committing similar offences. Further, sentences imposed at trial are entitled to considerable deference by the Appellate Court. As well, although an Appellate court might entertain a different opinion as to what objectives should be pursued and the best way to do so, Appellate Courts should not 'second guess' sentencing judges unless the sentence imposed is demonstrably unfit.

6.0: DISCLOSURE

[11] During the trial, the defence alleged that the prosecution had not met its duty to disclose all relevant information and thereby breached sections 7 and 11(d) of the *Charter of Rights and Freedoms*, and also committed an abuse of process at common law. Section 7 provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 11(d) states that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[12] In his submissions to me, Mr. Crocker said he was not attributing any deliberate intent by the Crown to conceal evidence. The brunt of the complaint is that the Crown ought to have made timely disclosure of a litany of items, and that the prosecution ought not to have been permitted to continue its investigation between trial dates.

[13] Mr. Olah had provided a voluminous disclosure brief (Disclosure Brief #1) to the defence on September 12, 2003, almost nine months before the trial began. Disclosure Brief #2 was provided on November 14, 2003, approximately seven months before the trial began.

[14] During the disclosure motion, Mr. Olah filed as exhibits, two affidavits of June Kim, a lawyer in his office, to counter the specific complaints raised by the defence. She also was cross-examined by Mr. Crocker. Most, if not all, of the alleged disclosure complaints are very trivial in nature, and have little merit to them. Some involved witness statements, photographs, notes in a daytimer, items which the defendant Vastis had in his possession or clearly ought to have known about, and information in the public domain which the defence could easily have accessed on its own. The worst that could be said was that the Crown inadvertently failed to provide some items, but whenever this became evident, it turned them over immediately.

[15] Whenever these issues were raised with the trial judge, he would adjourn the proceedings to permit the defence to obtain and review the items in question.

6.1: The Law Concerning Disclosure

[16] *R. v. Stinchcombe,* [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1, 9 C.R. (4th) 277, is the leading case on the Crown's obligation to disclose. In that case, the Crown prosecutor refused to turn over statements made to the police by a former secretary of the accused person, even though she had been subpoenaed. The trial judge refused to order the disclosure of these statements and this ruling was upheld by the Alberta Court of Appeal.

[17] Justice Sopinka, on behalf of the court, laid down fundamental rules of disclosure in criminal cases. The prosecution is required to disclose all relevant information to the defence, whether inculpatory or exculpatory, and even if it does not plan to introduce it into evidence. This general rule is subject only to limitations concerning privilege, protection of informant identity, and continuing investigations. This right to disclosure is a constitutional right and necessary to permit the accused to make full answer and defence. At paragraph 26, he stated that this rule “may apply with less impact in summary conviction offences.” At paragraph 28, he recognized that “the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.”

6.2: Remedies for Breaching the Duty to Disclose

[18] Even assuming there has been a violation of sections 7 and 11(d) of the Charter, a stay of proceedings under section 24(1) or at common law as an abuse of process, is a last resort and reserved for the most serious violations, and that disclosure orders and adjournments are generally the more appropriate remedies: *R. v. O’Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1.

6.3: Conclusion

[19] In my view, the Crown is not prohibited from continuing its investigation during the trial if that is seen as necessary. However, as Justice Sopinka stated in *R. v. Stinchcombe*, there is a continuing obligation to disclose. The disclosure complaints raised by the defence at trial were not serious violations, even on an indictable offence standard. They most certainly do not fall within the category of those most serious violations, which would warrant a stay of proceedings as requested by the appellants.

[20] In his ruling on May 17, 2005, Justice of the Peace Woloschuk, said the following:

> I find no evidence that the Crown withheld any disclosure. In fact, I find they disclosed any relevant information that they had in their possession or subsequently received. It is clear from the testimony of Ms. Kim that the prosecution team had direction to disclose all relevant information in a timely fashion and it appears to me they did exactly that. And when in error something was not disclosed at the appropriate time, they did so immediately upon realizing any deficiency. There is absolutely no evidence of the prosecution trying to obtain a tactical advantage as suggested by Mr. Crocker. I have found no evidence that the defendants' rights have been violated under section 7 or 11(d) of the *Charter of Rights and Freedoms*. There have, however, been times that disclosure was not provided at the earliest possible time or that continuing disclosure was provided during the trial. Trials are not static, but have a dynamic of their own. When this has happened, I always provided the defendants an opportunity to speak to the matter at hand and offered them a recess to consider the new disclosure or even adjournments. On a number of occasions, Mr. Crocker asked for time to review disclosure presented at trial. A recess was always granted including adjournments, if requested. On other occasions he indicated that he was prepared to proceed without the need to review new disclosure. There has not been any non-disclosure issue, but continuing disclosure. It is clear to me from caselaw that a stay is a remedy of last resort and only to be used in the clearest of cases. This is not such a case.

[21] There is no reasonable basis to interfere with this ruling.

7.0: UNREASONABLE DELAY

[22] The appellant Vastis, but not the corporate appellant, brought a motion at trial for a stay of proceedings for unreasonable delay. Section 11(b) of the *Charter of Rights and Freedoms* provides that any person charged with an offence has the right to be tried within a reasonable time. The thrust of the appellant's argument is that although the trial judge considered the period of institutional delay to be approximately ten to eleven months, he did not say how he arrived at this figure because he found the defendant had suffered no prejudice in any event.

7.1: Timeline of the Case

2003
June

17 – Information laid for April, 2003 offences

July

22- Information laid for July, 2003 offences

28- First attendance meeting before a Justice of the Peace; Judicial pre-trial set for September 22, 2003, and a trial for December 15 and 16, 2003

September

12- Disclosure brief #1 given then defence counsel David Goodman

22- First judicial pre-trial conference

November

3 - Second judicial pre-trial conference; certain admissions made by Mr. Goodman to shorten the length of the trial

17- Disclosure brief #2 given to Mr. Goodman

21- Mr. Crocker replaced Mr. Goodman as counsel

December

1- Third judicial pre-trial conference; Mr. Crocker advised he would seek to withdraw the admissions made by Mr. Goodman on November 3rd; the trial dates of December 15 and 16, 2003, were abandoned and new trial dates were selected for January 5, 6, 8, and 29, 2004

3- Mr. Crocker advised that Mr. Vastis would be on vacation until the evening of January 6, 2005, and not available for the first two days of the trial

12- Fourth judicial pre-trial conference; at the request of the defence, the January trial dates were abandoned and new trial dates of June 3, 10, 17, and 24, 2004, were chosen

15- **Abandoned trial date**; Mr. Crocker's application to withdraw the admissions made by Mr. Goodman was allowed

16- **Abandoned trial date**

2004

January

5- **Abandoned trial date**

6- **Abandoned trial date**

8- **Abandoned trial date**

29- **Abandoned trial date**

May

14- The defence served a Notice of Constitutional Question alleging Charter breaches of sections 7, 8, and 11(d), without filing a Notice of Motion

23- Fifth judicial pre-trial conference

June

3- Was to have been the first day of trial but the defence requested and was granted an adjournment to June 17th, to obtain more disclosure

10- **Abandoned trial date**

17- **First** day of trial

24- **Second** day of trial; the defence was not available on August 16 for the next trial date, but the prosecution was

October

7- **Third** day of trial

14- **Fourth** day of trial

21- **Fifth** day of trial

December

2- **Sixth** day of trial

16- **Seventh** day of trial

2005

January

17- The defence served a notice of motion returnable on February 15, 2005, alleging breaches of sections 7 and 11(d) of the Charter, concerning disclosure matters

February

8- The Crown served its responding motion record, although it had not yet received a motion record or brief of authorities

10- The defence served its motion record, factum, and brief of authorities

15- **Abandoned trial date**; Crown request for adjournment to allow it time to prepare additional responding materials

23- The Crown filed these further responding materials

24- **Abandoned trial date**; defence request for an adjournment to allow defence to respond to Crown materials filed, and to allow it to cross-examine June Kim, a lawyer and affiant from Mr. Olah's law firm

March

23- **Eighth** day of trial

April

5- **Ninth** day of trial

May

17- **Tenth** day of trial; **the defence Charter application concerning disclosure was dismissed**; June 7, 2005, was available for continuation and the Crown was agreeable to that date but the defence was not; selected continuation dates were September 19, 21, 23, and October 26 and 27, 2005.

July

19- The defence served a Notice of Motion under Charter section 11(b) for unreasonable delay.

August

31- The materials in support of the unreasonable delay motion were served by the defence.

September
19- **Eleventh** day of trial
23- **Twelfth** day of trial; **the defence application concerning unreasonable delay was dismissed.**

7.2: The Law

[23] The period from June 17, 2003, when the first information was laid, to September 23, 2005, when the defence application was dismissed, is 27 months and 2 days. The Supreme Court of Canada in *R. v. Morin* (1992), 12 C.R. (4th) 1, 71 C.C.C. (3d) 37, and in *R. v. Sharma* (1992), 12 C.R. (4th) 45, 71 C.C.C. (3d) 184, has enunciated that an appropriate guideline for institutional delay in the Provincial Courts is between 8 to 10 months. Therefore, the period of time referred to above, warrants a review.

[24] In his ruling on September 23, 2005, the trial judge said as follows:

> The crown's position is that only nine months should be attributed towards this motion of delay, while the defence submits it should be 18.5 months. Both made presentations as to how they came to these conclusions and they are part of the record. My conclusions differ. I conclude that it would be approximately 10 to 11 months that can be attributed to institutional delay. Though I could provide detailed analysis of how I came to this conclusion, I am of the opinion, after reviewing case law, that it is not necessary in this case since one has to consider as well the alleged prejudice to the accused and balancing of section 11(b).

[25] The trial judge then went on to conclude that the defendant Vastis had not met his onus to prove he had suffered any prejudice.

[26] Mr. Crocker submitted that the failure to give reasons as to how the 10 to 11 month figure was arrived at, is an error of law. He cited *R. v. Sheppard*, [2002] 1 S.C.R. 869, 162 C.C.C. (3d) 298 in which Justice Binnie, at paragraph 46 of his judgment, stated as follows:

> These cases make it clear, I think, that the duty to give reasons, where it exists, arises out of the circumstances of a particular case. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that count intervene. On the other hand, where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has circumnavigated without explanation, or where (as here) there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial vedict properly scrutinized on appeal. In such a case, even if the record discloses that on one view could support a reasonable verdict, the deficiencies in the reasons may amount to an error of law and justify appellate intervention. It will be for the appeal court to determine whether, in a particular case, the deficiency in the reasons precludes it from properly carrying out its appellate function.

[27] At paragraph 55, in subparagraph 10, Justice Binnie said:

> Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso.

[28] It should be noted that section 686(1)(b)(iii) of the *Criminal Code* is in substance identical to section 120(1)(b)(iii) of the *Provincial Offences Act* (see paragraph 9 above), and both provide that notwithstanding an error in law has occurred, the appeal may be dismissed if the court is of the opinion that no substantial wrong or miscarriage of justice has occurred.

[29] It is my view that the trial judge did not err in law in failing to give reasons how he arrived at the conclusion that the period of institutional delay was between 10 to 11 months. I say this because of his finding that no prejudice was suffered by Mr. Vastis. Without a finding of prejudice, there can be no stay of proceedings under section 24(1) of the Charter.

[30] Nonetheless, it would have been preferable if Justice of the Peace Woloschuk had explained how he did arrive at this calculation, and I will, in the following analysis, decide what I believe the correct formulation of the period of institutional delay ought to be.

[31] The factors to be considered in a section 11(b) analysis are:

1. The length of the delay;
2. Waiver of time periods;
3. The reasons for the delay, including
   (a) inherent time requirements of the case,
   (b) actions of the accused,
   (c) actions of the Crown,
   (d) limits on institutional resources, and
   (e) other reasons for delay; and
4. Prejudice to the accused.

1. LENGTH OF THE DELAY

[32] The period from June 17, 2003, when the first information was laid, to September 23, 2005, when the defence application was dismissed, is 27 months and 2 days.

2. WAIVER OF TIME PERIODS

[33] There was no waiver by the defence.

3. REASONS FOR THE DELAY

[34] (a) Inherent time requirements of the case:

The trial judge found this to be a complex case. The investigation was not a simple one since many acres of land and much technical information were involved. A considerable degree of preparation and organization was necessary to prepare the extensive disclosure provided to the defence. The trial ultimately took up 20 court days and involved 19 witnesses, 5 of whom were expert witnesses. There were 60 exhibits entered and three defence Charter motions. This was clearly a complex case.

[35] (b) Actions of the Accused:

A detailed analysis of the history of this case will now be gone into, and will necessitate my making specific findings as follows:

Neutral Intake Period:

Given the complexity of the case and the time needed to prepare the initial disclosure, I find this period to run from the laying of the first information on June 17, 2003, to September 12, 2003, when Disclosure Brief #1 was given to the defence. This is a period of 2 months and 27 days.

Institutional Delay:

I calculate this period to run from September 12, 2003 to December 12, 2003, when dates in June 2004, were selected to replace the aborted December 2003, trial dates. This amounts to **3 months and one day**.

Delay Attributable to the Defence:

This will run from December 12, 2003 to January 8, 2004, when the defence was first available for trial on the aborted January 2004, trial dates. This is 28 days.

Institutional Delay:

This is from January 8, 2004, to June 3, 2004, the first scheduled trial date in June. This is a period of **4 months and 27 days**.

Delay Attributable to the Defence:

On June 3, 2004, a 2-week adjournment was requested by Mr. Crocker, and the first day of trial was scheduled for June 17, 2004. This time is attributable to the defence.

Neutral Period:

From June 17, 2004, to the second day of trial on June 24, 2004, can be considered a neutral time period.

Institutional Delay:

From June 24, 2004, to the third day of trial on October 7, 2004, involved a considerable gap of time. The affidavit of Melissa Anne Kehrer, a lawyer employed in Mr. Olah's firm, was filed as an exhibit on the unreasonable delay motion. Having reviewed that affidavit and the transcript of June 24, 2005, it is clear that the defence was not available to continue the trial until August 16, 2004. I therefore commence the period of institutional delay from August 16, 2004, to the next trial date of October 7, 2004, a period of **1 month and 24 days**.

Inherent Time Requirements Period:

I find the remainder of the time from October 7, 2004, the third day of trial, to September 23, 2005, when the motion to stay the proceedings for unreasonable delay was dismissed, did not include institutional delay. There were no significant gaps in time and simply constituted the inherent time requirements of the case.

Conclusion:

The three periods of institutional delay set out above amount to a total of **9 months and 21 days**. This is my finding. Having made this calculation, I conclude that if the failure of the trial judge to explain how he arrived at the 10 to eleven month figure was an error of law, it has now been cured under the proviso in section 120(1)(b)(iii) of the *Provincial Offences Act*, and under section 120(3).

[36] (c) Actions of the Crown:

There is no evidence that the Crown has been responsible for any systemic delay.

[37] (d) Limits on Institutional Resources:

The trial judge made reference to a shortage of Justices of the Peace who would normally try cases of this nature. This explains, at least in part, why the institutional or systemic delay occurred in this case. Despite these limitations, the trial was still concluded within the time period required by the Supreme Court of Canada.

[38] (e) Other Reasons for Delay:

There are no other factors to be considered.

4. PREJUDICE TO THE ACCUSED

[39] On the delay application, an affidavit from Mr. Vastis was filed, and he testified as well. He said that as a result of the unreasonable delay in the proceedings, he suffered “extreme muscle tension and greatly reduced mobility” in his neck and shoulder area. As an exhibit to his affidavit, a letter from his brother-in-law, C. Gus Kandilas, was filed. He is an Osteopath and certified athletic therapist. For two years preceding his letter dated August 22, 2005, he treated the appellant for neck and shoulder pain, which Mr. Vastis attributed to stress from his court case.

[40] Also filed as an exhibit to the Vastis affidavit was an affidavit from Michael Hardie, a chiropractor who has treated the appellant since 1998 for neck and shoulder pain. In 2005 he noticed continuing neck pain and a marked reduction in his patient’s range of motion. Mr. Hardie was of the opinion that this was due to a combination of the stress Mr. Vastis said he was experiencing from the legal proceedings, as well as “degenerative disc disease not related to any specific trauma or event.”

[41] The appellant, in his affidavit, also described feeling “anxious, irritable, frustrated, and very angry”, as a result of the continuing trial, and said this impaired his relationships with his family and his business partner.

[42] In reviewing his cross-examination on September 19, 2005, it is clear that Mr. Vastis was not a convincing witness on his own behalf. The trial judge in his ruling on September 23, 2005, stated that "though Mr. Vastis was very passionate during his testimony, he provided very little credible evidence that all these ailments are due to the length of this trial."

[43] The trial judge in his ruling, clearly took all of the above evidence into account, and found that the appellant had failed, on a balance of probabilities, to establish that he had suffered prejudice as a result of the length of the trial proceedings. He found the neck and shoulder pain had predated the laying of charges in this case, and that Dr. Kandilis had no formal records of the treatments he claimed to have provided to his brother-in-law. The trial judge also acknowledged that "the process before any court is difficult" not just for Mr. Vastis but for "all defendants in general. This indicates that the trial judge did not accept that Mr. Vastis suffered any more stress than anyone else charged with an offence.

[44] The finding that the appellant failed to establish prejudice is a reasonable one, in my opinion, and ought not to be interfered with.

7.3 Conclusion

[45] The period of institutional delay, which I found to be 9 months and 21 days, is within the acceptable limits set out by the Supreme Court of Canada in *Morin* and *Sharma*, and given the complexity of this trial, and other factors, it is remarkable that the trial was completed when it was. There is no evidentiary basis to find there was any unreasonable delay in this matter, and the ruling of the trial judge will not be disturbed.

8.0: CREDIBILITY OF GEORGE VASTIS AND HIS REASON FOR REMOVING THE TREES

[46] Section 3(a) of the by-law reads as follows:

> No person shall destroy by cutting, burning or other means:
>
> (a) any tree located in an Environmentally Sensitive Area.

[47] Section 7(1)(a) is a statutory exception:

> In accordance with the exceptions set out in the Trees Act, R.S.O. 1980 c. 510 as amended, this By-law does not:
>
> (a) interfere with the right of a person who has been the registered owner of land for at least two years to cut trees thereon for his own use

[48] Section 7(2) is as follows:

> The expression "own use" in paragraph (a) of Subsection (1) above, shall be deemed not to include any sale, exchange or other disposition of the trees that are cut

[49] The corporate defendant had been the registered owner of the land for over two years, and Mr. Vastis testified that his purpose in removing the trees was to farm the land and plant crops to help defray his high property taxes. The cleared trees would be mulched and used to fertilize the land. The problem with that avowed intention was that it was proven at trial that Mr. Vastis, before the trees were removed, knew or ought to have known of the Managed Forest Tax Incentive Progam [MFTIP], which would have saved the trees and provided tax relief by filing an annual return.

[50] The other problem was that the nine long, narrow clearings looked very much like the early development of a nine-hole golf course, and expert evidence was called by the prosecution to show the clearings were not consistent with good farming practices. To compound this, it came out in evidence that Mr. Vastis was the owner of a golf driving range, for which he had used the services of Douglas Brooks, a golf course contractor. Evidence was heard that in the case at bar, Mr. Brooks had red ribbons placed on trees to delineate which trees were to be cut and which were not.

[51] To make matters worse for Mr. Vastis, he was not a believable witness. Justice of the Peace Woloschuk in his judgment of April 20, 2006, listed several concrete examples why he did not find his evidence credible and concluded that:

> I find Mr. Vastis' testimony to be not credible and trustworthy as it relates to many material issues before this court. There were internal inconsistencies, implausible statements, exaggerations, and contradictions by other witnesses.

[52] In his submissions, Mr. Crocker submitted that Mr. Vastis had difficulty understanding the questions because his first language is Greek. Therefore, what might seem to be a deficiency of credibility might more properly be attributed to an inability to comprehend what was being asked of him in cross-examination.

[53] Mr. Olah countered this assertion by pointing out that at no time did the defence request the services of a Greek interpreter and that the transcript of his evidence reveals no language difficulties. Also, Mr. Vastis came to Canada at sixteen years of age and was sixty-

two years old when he testified. He owned a number of commercial properties and Mr. Goodman, his former lawyer, testified that his client was a sophisticated businessman.

[54] The conclusion of the trial judge that "these clearings were intended for future use as a golf course" is a perfectly reasonable one, given the evidence which was before him.

9.0: STATUTORY EXEMPTION DEFENCE

[55] In his reasons for judgment, the trial judge found the tree clearings were in an Environmentally Sensitive Area, so that "the exemption relied upon by the defence would be inoperative."

[56] On reading the by-law exemption provisions (see paragraphs 48 and 49 above), I must respectfully disagree. However, even allowing for this error in law, the reasons for judgment make it clear that Justice of the Peace Woloschuk made specific findings of fact which would cause the exemption in section 7(1)(a) of the by-law not to apply. The most obvious one is his finding that the tree removal was not to facilitate farming, but to build a golf course.

[57] As well, in cross-examination, Mr. Vastis testified that all of the trees removed were either mulched or burnt. He was then shown a photograph taken on July 28, 2003, by Carolyn Deloyde, a Halton municipal planner. A considerable number of cut trees were loaded onto a large truck and about to be carted away. He then admitted he must have authorized this removal, and that the tree removal contractor was going to use it for firewood. Under section 7(2) of the bylaw, the expression "own use" in the section 7(1)(a) exemption, shall be deemed not to include any sale, exchange or other disposition of the

trees that are cut. Giving firewood to the contractor, if that really was the truth, would be considered under the "other disposition" category.

[58] For both of the above reasons, the trial judge found the tree removal was not for Mr. Vastis' own use. Because of these findings, the error in law can be cured by the proviso in section 120(b)(iii) of the *Provincial Offences Act* (see Standard of Review paragraph above).

10.0: NO DUE DILIGENCE AND FINDINGS OF GUILT

[59] The offences charged are strict liability ones. The trial judge found that Mr. Vastis had been advised to get permits to remove the trees but did not. He stated that:

> Clearly he proceeded without taking any due diligence in this matter. No reasonable person would destroy these trees without finding out if they can. He did not.

[60] The trial judge also found that Mr. Vastis "did not consult any experts or consultants prior to cutting the trees and he should have" and that he "did not even consult with his wife, a lawyer and the secretary of the defendant corporation."

[61] In finding Mr. Vastis and the corporate defendant guilty of all offences, Justice of the Peace Woloschuk said this:

> Mr. Vastis decided to clear large areas of what was a pristine forested area. The trees were on his land but he did not consider the consequences of destroying many acres of trees or the long-term effects on the environment, and in total contempt of the rules. This was someone trying to get ahead of the regulations and attempt to develop a golf course without proper oversight or approvals.

[62] The convictions were not unreasonable and were supported by the evidence. They were not based on a misapprehension of the law, and, in my opinion, there was no miscarriage of justice.

11.0: SENTENCE

[63] Mr. Vastis was fined $3,000.00 for each of the eleven convictions, and was placed on probation for two years in order to ensure that he would implement the replanting and maintenance order directed by the court. The corporate defendant was not fined, but was given a replanting order.

[64] The appellant's contention is that the trial judge erred in imposing a separate fine for each day of tree removal, especially since the by-law did not specifically provide for this. They also submit that he erred in treating the replanting order as a deterrent which caused him to prefer the replanting plan proposed by the Crown because it was costlier than the plan proposed by the defendants.

11.1: Separate Fines for Each Day

[65] The defence did not object at trial to the informations charging separate offences for each day of tree removal. Section 124 of the *Provincial Offences Act* is applicable:

> 124.(1) Judgment shall not be given in favour of an appellant based on any alleged defect in the substance or form of an information, certificate or process or any variance between the information, certificate or process and the evidence adduced at trial unless it is shown that objection was taken at the trial and that, in the case of a variance, an adjournment of the trial was refused although the variance had misled the appellant.

> Idem
>
> (2) Where an appeal is based on a defect in a conviction or an order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect. R.S.O. 1990, c. P.33, s. 124.

[66] Section 25 of the same Act provides as follows:

> 25. (1) Each offence charged in an information shall be set out in a separate count.
>
> (2) Each count in an information shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the defendant committed an offence therein specified.
>
> (6) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the defendant reasonable information with respect to the act or omission to be proved against the defendant and to identify the transaction referred to.

[67] It is clear from the above statutory provisions that, even if the appellants are not barred from raising this argument for the first time on appeal, a count in an information shall apply to a single transaction. Each day of tree removal could, as a matter of common sense, be considered to be a single transaction.

[68] Mr. Crocker made reference to other by-laws, including which specifically provide for separate offences for each day of tree removal, or for separate fines for each day. He points out that the offence and penalty provisions in section 12 of the by-law we are concerned with, do not spell out such things.

[69] There are no mandatory provisions in the *Provincial Offences Act*, or the former *Trees Act*, or the *Forestry Act*, which require a municipality to be so specific in drafting its offence and penalty sections. It is merely optional.

11.2: Quantum of Fine

[70] The fine imposed of $33,000.00 dollars, $3,000.00 for each of the eleven counts, is far below the maximum penalty of $20,000.00 or up to three months in custody, on each count, which section 19(1)(b) of the *Forestry Act* provides for. At trial, Justice of the Peace Woloschuk heard the evidence of Brenda Axon, Conservation Halton's Manager of Watershed Planning. She stated that the lands in question are part of one of the largest remaining forested units below the Niagara Escarpment and that the tree removal did great damage to this section of what was specifically designated as an Environmentally Sensitive Area. It was, in her opinion, the worst destruction of habitat she has seen in her twenty-five years in the field.

[71] The trial evidence also established that the work was done surreptitiously in an area which could not be seen from the roadway, and which continued even after Stop Work Orders had been delivered.

[72] These were very brazen offences which were committed solely for personal gain, and in flagrant disregard of the laws and authorities entrusted to protect these precious and rare natural resources.

[73] Without venturing an opinion as to what the appropriate fines ought to have been, I will merely say that the fines imposed by the trial judge were not demonstrably unfit, and ought not to be lowered.

11.3: The Replanting Order

[74] Section 19 of the *Forestry Act* is as follows:

> **19.** (1) Every person who,
>
> (a) contravenes a provision of this Act;
>
> (b) alone or through any other person, contravenes any provision of a by-law passed under this Act, or a predecessor of this Act;
>
> (c) obstructs or interferes with an officer or any person acting under the officer's instructions, in the discharge of his or her duties; or
>
> (d) fails, without just cause, to comply with an order made under subsection (2),
>
> is guilty of an offence and on conviction is liable to a fine of not more than $20,000 or to imprisonment for a term of not more than three months, or to both. 1998, c. 18, Sched. I, s. 21; 2002, c. 17, Sched. C, s. 12 (5).
>
> Replanting
>
> (2) If a person is convicted of an offence under clause (1) (b), the court shall consider all evidence given in respect of the necessity of replanting the area on which trees have been destroyed and may order the owner of the area to,
>
> (a) replant the trees, in the manner and within the time that the court considers appropriate; and
>
> (b) adequately maintain the replanted trees in the manner the court considers proper. 1998, c. 18, Sched. I, s. 21.
>
> Where inconsistent penalties
>
> (3) The penalty set out in subsection (1) applies despite any lower penalty set out in a by-law. 1998, c. 18, Sched. I, s. 21.

[75] It is clear from section 19(2) above that the trial judge had a broad discretion to order replanting as he considered appropriate. Although he stated that deterrence was one of the factors he considered, a careful reading of his judgment reveals that the particular replanting order he chose was not selected so as to punish the defendants financially.

[76] Mr. Crocker did not present any case law to establish that the trial judge could not take deterrence into account in deciding which replanting scheme to select. Justice of the Peace Woloschuk stated in his reasons for sentence that since he was imposing a replanting

order on the corporate defendant, there was no need to impose a fine as well, even though he could have. He felt the replanting order was a sufficient enough deterrent.

[77] The defence argued that if a replanting had to be imposed, the one proposed by its own consultant (The Stantec Report) ought to be selected, at an estimated cost of $62,463.00. The Crown put forth replanting proposals from its own consultant (The Gartner Lee Report) with estimated costs of $78,760 to $464,800, depending on which plan was selected. In the end, the trial judge chose a plan from the Gartner Lee Report, which was described as the "Medium Level" plan, with an estimated cost of $122,260. He took into account the size of the corporate defendant`s entity and he did consider the deterrent effect it would have, but his primary motivation in choosing the Medium Level plan was not deterrence.

[78] He found that the Stantec Report proposal would only replant 30% of the affected area. However, the Gartner Lee Report's Medium Level plan was chosen for the following reasons:

> Any plan chosen will not immediately bring back the area to its condition prior to the deforestation. It will take many years. This leaves me to consider the "Low" and "Medium Level" of reforestation as proposed by the Gartner Lee Report. Though both fulfil the requirements pursuant to section 19(2), the medium level of reforestation in my view is the most appropriate in this case.
>
> The "Medium Level" is a much more intensive plan than the "Low Level" totalling $78,760.00. Though both would meet the definition of woodland under the Forestry Act the "Low" effort proposal would take 10 years or more to become a forest, there will be an increased opportunity for rapid colonization of non-native species and therefore though the "Medium Level" of reforestation is not perfect, it is the most suitable considering all the circumstances of this case.

[79] The replanting option selected by the trial judge was carefully thought out by Justice of the Peace Woloschuk, and is not demonstrably unfit, and there is no reasonable basis to interfere with it.

12.0: CONCLUSION

[80] The findings of guilt on the eleven "Environmentally Sensitive Area" charges will stand, as will the sentences imposed on Mr. Vastis and the corporate defendant.

[81] On this appeal, I was advised that the replanting has still not taken place, almost five years after the deforestation occurred.

January 30, 2008

Signed: "Justice Alan D. Cooper"