SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

VICTOR SERFATY
ALAN BENLOLO
ELLIOTT BENLOLO
SIMON BENLOLO

Accused

--- Before THE HONOURABLE MADAM JUSTICE MOLLOY, without a jury, at the Metropolitan Toronto court house; commencing on Friday, March 19, 2004 at 2:15 p.m.

RULING ON 11(B) MOTION

APPEARANCES:

R. GOLDSTEIN, Esq. & V. CHENARD, Ms. — for the Crown

V. SERFATY — for SELF
H. COHEN Esq. & D. LESSARD, Ms. — for Alan, Elliott and Simon BENLOLO

Ruling
MOLLOY, J.

FRIDAY, MARCH 19, 2004

THE COURT: The four accused parties ("the applicants") seek a stay of the ten charges against them under the Competition Act on the grounds that their *Charter* rights to a fair trial within a reasonable time have been violated. In this regard, they point to a total delay of slightly more than three years from the date of the charges and first court appearance to the date of the commencement of trial in this court and they rely on s.11(b) of the *Charter*. In addition, the applicants rely on ss.11(d) (presumption of innocence and right to a fair hearing) and s.7 (right to life, liberty and security of the person).

The voir dire in this matter continued for eight-and-a-half days, the substantial portion of which was related to the issues raised under ss.7 and 11(d) of the *Charter* rather than the more typical 11(b) issues. In respect of the s.7 and 11(d) issues the applicants relied on evidence which they say support the following general conclusions:

(a) that the charges are without merit and never should have been laid;

(b) that the Competition Bureau was

improperly motivated in laying the charges;

(c) that the Competition Bureau improperly collaborated with the R.C.M.P. and were improperly influenced by the R.C.M.P. investigation into other alleged criminal activity by some of the applicants;

(d) that the Competition Bureau ought to have proceeded civilly rather than criminally;

(e) that the Competition Bureau ought to have done a better job of explaining the regulatory regime, including Canada Post regulations so as to educate the principals involved and prevent the conduct giving rise to the charges;

(f) that the Competition Bureau improperly exposed the applicants to media attention and sullied their reputations with banks thereby heightening the prejudice they have suffered as a result of these charges;

(g) that the Competition Bureau caused Canada Post to issue a Prohibition Order in respect of Alan Benlolo and Victor Serfaty

preventing them from receiving mail and also increasing the prejudice to those applicants.

These points are advanced in support of the argument under ss.7 and 11(d), but also to buttress the argument under s.11(b). Thus, in considering whether the delay is reasonable under s.11(b), the applicants submit I should take into account the background of improper motivation and improper conduct as well as the fact that much of the prejudice suffered by the applicants was not only known by, but actually created by, the Competition Bureau.

As I indicated immediately following the argument yesterday, I am dismissing the application. I propose to deal first with some of the more novel issues raised by the applicants and then turn to the more traditional s.11(b) analysis.

MERITS

Much of the evidence before me on the voir dire was directed towards demonstrating that the charges are without merit. It is not my function to decide whether or not the accused are guilty. This is a jury trial and the

jury will make that decision. It is also not my function to determine if there is sufficient evidence to meet the threshold that would have been applied at a preliminary hearing. A preliminary hearing was scheduled in this matter. However, on the date it was to proceed, all of the accused waived their right to a preliminary, thereby conceding there was sufficient evidence to warrant committal for trial. They did so on the advice of counsel. On the voir dire before me, they all testified that they did not fully understand the implications of that and simply relied on their lawyer. However, all of them were present in the court at the time the preliminary was waived. The record of that appearance is clear as to the position taken and no objection was made at any time by any of the accused. All of them agreed to it. All are intelligent, well educated businessmen. I see no basis for me to go behind their decision at that time and to determine as part of this application whether or not there is, in fact, sufficient evidence to warrant a trial.

WHETHER CHARGES SHOULD HAVE BEEN LAID

There is no merit to the argument that the Competition Bureau ought to have proceeded civilly rather

than criminally. It is for the Competition Bureau, in consultation with counsel if it chooses, to decide which track it will follow to deal with any particular situation. It is outside my role to interfere in that exercise of discretion or to review it after the fact. Likewise, it is not my role to review whether or not criminal charges were appropriate in this case. It is the Crown who decides whether charges will proceed. Many factors go into such decisions, factors which are far beyond the jurisdiction of this Court to consider. This is a matter of prosecutorial discretion and not subject to review by this Court in the manner suggested here. See *R v. Power, 89 C.C.C. (3d) 1* and cases referred to therein.

MISCONDUCT

The evidence does not support the allegations that the Competition Bureau was improperly motivated in proceeding against these accused. There is nothing wrong with the Competition Bureau investigators consulting with other law enforcement agencies in the course of their investigation and there is nothing wrong in their taking into account what is going on in other investigations. Indeed, co-operation between law

enforcement agencies is a positive rather than a negative thing. In any event, the Competition Bureau's involvement pre-dates its knowledge of any R.C.M.P. investigation on this other alleged criminal activity.

If there was some sort of egregious misconduct amounting to abuse of process, I agree I would, have jurisdiction to intervene. There is, however, nothing like that here. I find no bad faith on the part of the investigators at the Competition Bureau or the Crown. The applicants may disagree with the approach taken by the Bureau and they may believe the Bureau was unduly influenced by unrelated criminal investigations by the R.C.M.P. However, I find that Mr. Bradley and the Competition Bureau reacted legitimately in the belief that there had been violations of the Competition Act. They were not motivated by any animus towards the applicants or their companies, but rather by complaints received from the public and by their mandate under the governing statute to act in the protection of that public. They were concerned about stopping the activities which they considered to be a violation of the Act. Since those activities were integral to the success of the business involved, it is not surprising that the business failed. However, that is not the same thing as

saying that the Bureau set out to destroy the business itself.

PUBLICITY

I will take publicity into account in dealing later with the prejudice to the accused as a result of delay. However, I will deal briefly here as well with the allegation that the Bureau acted improperly in generating publicity. I find no merit in that argument. There is no evidence that Mr. Bradley or anyone at the Bureau notified the press about the execution of the search warrant on October 24, 2000. I note that the camera crew was not present waiting for the investigators to arrive but rather showed up after the search was already under way. That suggests to me that someone notified the press after the search had begun and likely means it was not someone at the Bureau with advance knowledge of when the search would start. I accept Mr. Bradley's evidence that he did not notify the press himself and is not aware of anyone else of the Bureau doing so. I note that the activities of the business had already attracted press attention before that time.

With respect to the earlier press release

and interviews with the media by the Competition Bureau, I say merely that there is nothing to amount to abuse of process or prosecutorial misconduct. The Bureau has a public education and public protection role. It is not my function to review how it chooses to exercise that role.

COMMUNICATION WITH BANKS

It was appropriate for Mr. Bradley to obtain banking information in the course of his investigation. It is unfortunate for the applicants and their businesses that some banks apparently reacted to such inquiries by restricting the applicants' banking privileges and or choosing not to deal with them at all. However, there is no direct evidence that this was as a result of anything Mr. Bradley said or did, much less anything improper. The Bureau's investigation was just one of several ongoing investigations, including the R.C.M.P. criminal fraud investigation and inquiries by the United States Securities Exchange Commission. It may have been the combined effect of these that caused the banks to react as they did or it may have been that such inquiries led them to inquire more closely into the background of their customers, particularly in respect of some of the Benlolos who had criminal records.

However, there is no evidence that Mr. Bradley said anything improper or untrue to any banking official. The applicants testified that their bankers told them that Mr. Bradley said certain things. Mr. Bradley denies saying such things. The bank officials themselves were not called to testify. The applicants' evidence as to what they were told is not admissible to prove the truth of the fact that Mr. Bradley said such things. It is hearsay.

PROHIBITION ORDER BY CANADA POST

I will deal with this further in the consideration of prejudice arising from delay. However, it is also alleged to form part of the misconduct. I find that allegation to be without merit. An affidavit was filed by Mr. Bradley seeking the Prohibition Order. There was nothing improper in doing that, given the use of the mails by the business in the alleged offence. The matter was obviously independently considered by Canada Post and the Minister involved, as the ultimate order made was more limited than that which was sought by the Bureau. There was no wrongdoing and nothing that would approach the abuse of process standard to justify any intervention by me. There is a review process with respect to the Prohibition Order

itself. The applicants, on the advice of counsel, elected to leave the order in place pending the resolution of the criminal charges.

DELAY PRIOR TO THE CHARGES BEING LAID

The charges relate to mailings in May, July, August, September and December 2000. The first set of charges against all of the accused, except Simon Benlolo, were laid in November, 2000, within about one month of the October 24, 2000 search warrants and related to the first four mailings. This was actually a very short period of time given the massive amount of documentation involved.

The second set of charges against the same three accused were laid in January or February, 2001 and relate to the mid December mailing. Again, this was a very short period of time in which to consider the evidence and lay the charge.

The charges against Simon Benlolo were laid in February, 2000, a little over a year after the events giving rise to the charges. Mr. Bradley testified, and I accept, that the extent of Simon Benlolo's involvement was not known to him at the initial stages of his investigation. He received further information in about March, 2001 as a

result of witness interviews and then more information at the end of September, 2001 as a result of the production of documents by banks. It took some time to review those documents and to consult with Crown counsel as to whether charges were appropriate. Then the charges were laid. It is not appropriate for me to review when Mr. Bradley could or should have determined the existence of reasonable and probable grounds to charge Simon Benlolo. That is an exercise of prosecutorial discretion, as I indicated already. There is no evidence of any prejudice to Simon Benlolo as a result of the charges against him being laid in 2002, as opposed to one year earlier.

It is only in exceptional circumstances that delay prior to the laying of charges is taken into account on an 11(b) application. There is nothing about the circumstances of this case to warrant such consideration.

DELAY POST CHARGES

I turn now to consider the delay that has occurred from the time charges were laid up until the trial date in this court in March, 2004.

On its face, a delay of over three years in reaching trial is an unusually long period of time and

requires scrutiny, as is conceded by the Crown. There is no mathematical formula for determining how much delay is acceptable and at what point it becomes unreasonable. Rather, the Court is required to consider a number of relevant factors and come to a determination that balances the interests of the accused to a timely trial with the interests of society in ensuring that serious charges are decided on their merits: see *R v. Morin* and *R v. Askov*.

There are four criteria to be considered:

i) the length of the delay;

ii) any waiver of time periods by the accused;

iii) reasons for the delay; and

iv) prejudice to the accused.

(i) Length of the Delay

As I have already stated, the length of the delay in this case is outside the norm and warrants inquiry and explanation.

(ii) Waiver

Any waiver of a s.11(b) right must be clear and unequivocal: *R v. Morin*. It is impossible that part of

the delay in getting a timely preliminary hearing date in this case was the availability of defence counsel. I do recognize that a waiver can arise by necessary implication, even if not expressly stated on the record. However, I do not agree with the Crown's submission that I should logically infer some waiver of delay by defence counsel in the absence of transcripts or affidavit evidence indicating that this was, in fact, the case. The absence or unavailability of transcripts is itself a systemic failure and ought not to have any adverse consequences for the accused. In the absence of transcripts or affidavit evidence indicating what the reasons were for the delay, the appropriate assumption is one which protects the accused's rights, i.e. that the delay was systemic, although tempered, of course, by the nature of the case, length of trial and inherent delay arising from that.

Accordingly, I do not find any waiver between February 2001 and November 2002 when this case was in the Provincial Court.

There is some evidence of waiver by the defence with respect to the delay between March 21, 2003 and November 3, 2003 in this court. March 21, 2003 was the date upon which the trial date was fixed. The Crown offered

three available dates and defence counsel, due to his own schedule, selected the latest available date, which was November 3, 2003. There was therefore obviously some delay just because of defence counsel's schedule. The court schedule and the Crown could have accommodated an earlier date. The difficulty is that the Crown did not state on the record what the earlier two dates were. Maybe the Crown offered a date in the spring of 2003. That is possible, although perhaps not likely for a three-week trial. Maybe all three of the dates offered were in October or November. There is no way for me to know based on the record before me. It was incumbent upon the Crown to put the earlier dates on the record if the Crown was seeking to rely on waiver by the defence. The Crown did not do so. Therefore, there is no reasoned basis for concluding that any of this delay to the accused was waived. Any period of time I could pick would be completely arbitrary. I therefore find no waiver in this court either.

(iii)(a) Reasons for the Delay-- NOV. 24/00 - MAY 30/01

The first charges (eight counts against each of three accused) were laid on November 24, 2000. There was a further mailing in December which led to a second set of

charges (two counts against each of three accused). Substantial disclosure was made on various dates through February 2001. The disclosure is voluminous, thousands of pages of documents as well as substantial material retrieved from computers and stored electronically. From the date of the first appearance in the Provincial Court in February, 2001, the matter was adjourned from time to time to give defence counsel time to review the disclosure which had been made. Given the number of accused, the number of corporate entities involved, the number of documents involved and the relative complexity of the issues, the entire delay from November 24, 2000 to May 30, 2001 is attributable to the inherent requirements of the case. It is perfectly reasonable, in my view.

(iii)(b)Reasons for Delay:MAY 30/01-FEB. 11/02(8 1/2 MONTHS)

On May 30, 2001, the preliminary hearing date was fixed for February 11, 2002. The length of that delay is due to the length of the preliminary (which was estimated to be two weeks) and when it could, be accommodated in the court calendar. It is, therefore, systemic in nature, but with the recognition that the longer the period of time required for a pre-trial, the longer it

will reasonably take to fit it into the court schedule. An eight-and-a-half month delay in reaching a preliminary hearing for a case of this nature is not in and of itself problematic.

(iii)(c)REASONS FOR DELAY: FEB.11/02-NOV.18/02(8 1/2 MONTHS)

Shortly before the February 11, 2002 trial date, Simon Benlolo was charged. The Crown applied to adjourn the preliminary hearing so that the trials against all four accused could proceed together. I have already stated that the timing of the charges against Simon Benlolo was not unreasonable. Likewise, while it was obviously the actions of the Crown in charging Simon Benlolo and in requesting the adjournment caused this further delay, such conduct was also reasonable. See *R v. Koruz, R v. Schiewi (1992) 72 C.C.C. (3d) 353 Alberta Court of Appeal; affirmed 79 C.C.C. (3d) 574 (S.C.C.)*

The consideration of the conduct of the Crown and the defence in determining the reasons for delay is not a process of ascribing blame to one party or another. Rather, it is an examination of the underlying reasons for delay. Delay caused by the Crown being unprepared or by failure to disclose relevant documents in a timely way is

obviously more problematic than delay which occurs at the behest of one party or the other, but which was reasonable in the circumstances.

In this situation, the Crown acted reasonably. The defence did not consent to the adjournment, but neither did they seek to have the charges severed so that the first three accused could proceed more quickly (which is not to say that such a request would have been granted in any event). Further, there were advantages to the accused in having the charges tried together, since they involved all of the same parties and incidents and since for at least some of the time, it appeared that all would be represented by the same counsel. Indeed, as it has turned out in the trial before me, Simon Benlolo is represented by the same counsel as his two brothers.

When the preliminary hearing date was reached in November, 2002, as I have already discussed, all of the accused elected to waive the preliminary and proceed directly to trial before this Court. Although there had been some limited disclosure in the interim, it was primarily updates and simply in keeping with the Crown's ongoing duty of disclosure. There was no new disclosure of any substance that would explain why the preliminary would

be waived in November, 2002 but not in February, 2002. The applicants have testified that their counsel at the time (not the counsel now on the record) was not prepared for the preliminary, had met with them only briefly, if at all, and had not reviewed the disclosure material with them. They testified that they were told by counsel that waiving the preliminary would speed up the process of getting to trial which, of course, makes no sense at all if, in fact, counsel was ready to proceed on the November, 2002 date fixed for the preliminary hearing. It is therefore difficult to understand why the preliminary was not waived in February, 2002 or some point in between, which would, actually, have had the effect of moving the matter closer to trial.

This conduct by the defence must also be taken into consideration along with the reasonableness of the Crown's adjournment request in determining how to characterize this eight-and-a-half month delay. In these circumstances, I find this period of delay to be neutral in nature.

Before leaving this issue, I must deal with Mr. Cohen's argument based on the affidavit used by the Crown in support of the adjournment request. The affidavit was that of a law clerk, Lillian Carr, and is based on

information and belief. In particular, Mr. Cohen points to a statement by Ms. Carr that at the time the other accused were charged in November, 2000 and January, 2001, Simon Benlolo "was not known to the Crown".

Mr. Cohen argues that this is a material falsehood and I should treat it in the same way as a material misrepresentation made on an *ex parte* application to the court. I disagree. First of all, it was not an *ex parte* application. It was on notice. All of the accused were present in court with their counsel when the affidavit was relied upon. If the statement was material and untrue, it was incumbent upon them to bring that to the attention of the Court.

Secondly, the statement was not material. If the affidavit had been more carefully drafted, it perhaps would have indicated that the nature and extent of Simon's involvement was not known to the Crown at the time of the original charges rather than that Simon Benlolo, himself, was not known to the Crown. Mr. Bradley obviously knew who Simon Benlolo was and that he worked on the premises. However, the distinction between that and the knowledge as to the level of his involvement would not have materially affected the outcome of the motion.

Thirdly, I am confident that the inaccuracy was inadvertent.

And finally, dismissing the charges before this Court is a completely inappropriate remedy for such an oversight even if I felt there was a significant problem with the affidavit, which I do not.

(iii)(d)Reasons for Delay in this Court

The waiver of the preliminary hearing was on November 18, 2002. The first appearance in this court was on January 29, 2003. That period of delay is part of the normal intake process, particularly given the intervening Christmas period. This is simply part of the inherent time requirements of the case.

The case was scheduled for a judicial pre-trial on January 29, 2003, which did not proceed because all counsel failed to appear. The matter was, therefore, put over to March 6, 2003 for a further judicial pre-trial date. The delay between January 29 and March 6, 2003 of slightly more than one month was contributed to by everyone and I would, therefore, characterize it as neutral.

On March 6, 2003 Victor Serfaty appeared without counsel. It may also be the case that Simon Benlolo

did not have counsel on that date either, although my memory is not precise on that point. In any event, the court was not notified by the defence that no counsel would be attending for one or both of these two accused and that, therefore, an open court pre-trial needed to be arranged. That could not be accommodated at the last minute, so the pre-trial was further adjourned to March 21, 2003, about two weeks away. While this is obviously a short period of time, it was occasioned by the conduct of the accused. That is not meant to be a criticism, as they were likely unaware of the problem created by their appearing without counsel. In the circumstances, therefore, I would describe this as a neutral time delay.

On March 21, 2003 a trial date was set for November 3, 2003. I have already stated that I do not consider any part of that delay to be waived by the defence. Therefore, this seven-month period must be regarded as systemic delay. That said, given the nature of the case, the length of the trial (three weeks before a jury) and the intervening summer months, a delay of seven months to get to trial is not unreasonable.

The final period of time to be considered is the delay from November 3, 2003 to March 8, 2004 when this

trial actually commenced. The reasons for that delay is that the previous counsel for Elliott and Alan Benlolo (Mr. Czernik) got off the record and the Benlolos retained new counsel. The reason Mr. Czernik ultimately got off the record is because he had a clear conflict of interest.

The Crown drew the apparent conflict of interest to the attention of Mr. Czernik at an earlier stage. It was also specifically raised at a judicial pre-trial in the Provincial Court in March, 2001 and November, 2001. The Crown raised it again in letters to Mr. Czernik on January 22, 2002 and October 7, 2003. Mr. Czernik appears to have taken some steps to address the problem by having other associates appear from time to time in the Provincial Court for Mr. Serfaty and for Simon Benlolo. However, he did not acknowledge his own conflict of interest in continuing to act for Alan and Elliott Benlolo until the eve of trial. Even then it was only because of the continued insistence of the Crown that Mr. Czernik ultimately conceded that there was a conflict.

In my opinion, the Crown acted responsibly and professionally throughout. I do not accept Mr. Cohen's submission that the Crown had some greater responsibility to obtain an earlier resolution of the conflict of interest

issue. The conflict was obvious and was raised in a timely way by the Crown. It was also raised repeatedly. The Crown gave adequate time to the defence to consider the matter and to arrange for other counsel to come in. Those steps were not taken by counsel for the defence in time to keep the November, 2002 trial date. The failure of the trial to proceed in November, 2002 is in no way attributable to the Crown. It must either be characterized as conduct of the defence or waiver or, at best, neutral (since the accused themselves could not be expected to know the implications of the conflict of interest issue). Either way, it is neither systemic delay nor delay attributable to the Crown.

In the circumstances, the time between November 3, 2003 and the March 8, 2004 trial date when this case finally proceeded was reasonably necessary to enable new defence counsel to get up to speed. None of this is systemic delay.

(iv) Prejudice to the Accused

There is always prejudice to an accused whenever criminal charges are laid and whenever a trial is delayed.

The accused in this case, however, have

demonstrated actual prejudice which goes beyond the norm. This includes interference with their business dealings and their ability to earn a living from employment, particularly for Mr. Serfaty and Alan Benlolo. There has been considerable publicity, particularly in the beginning. All of the accused are part of a small community where people know each other. The stigma of these outstanding charges has been a cloud hanging over their heads. While the stigma arises because of the charges themselves, there is no question that it has been made worse for the accused because of how long the charges have been outstanding. There have also been financial consequences, particularly for Mr. Serfaty who lost his business and was unable to obtain other employment until quite recently.

That said, not all of the prejudice described by the applicants is attributable to delay of this case. These are not the only criminal charges being faced by Elliott and Alan Benlolo. There are also R.C.M.P. fraud charges pending. Alan Benlolo's financial difficulties are not simply in respect of these charges. He also has issues arising from a judgment obtained against him by the Securities Exchange Commission in the United States with proceedings being brought here to enforce that judgment.

His inability to carry on business with the banks here or to get regulatory clearance for a business he was involved with in the United States is not solely because of the Competition Act charges here. There are also the other charges he faces and his criminal record for fraud in the United States.

Although the Prohibition Order from the Post Office interfered with the ability of Alan Benlolo and Mr. Serfaty to use the mail, they have elected not to seek any modification of it or to have it set aside. They decided to do that based on legal advice that it was better to have the criminal charges dealt with first. Further, I believe both gentlemen exaggerated the impact of the Prohibition Order on their lives, e.g. alleging that power was shut off or cell phones repeatedly disconnected for non payment of bills. It is not a particularly complicated matter to arrange for the automatic payment of such bills out of one's bank account or to pay them through online banking or telephone banking rather than through the mail.

I had the same concerns about some of Mr. Serfaty's evidence as to the impact of the delay upon his personal and social life as well as his marriage. He had been previously separated from his wife prior to the charges

being laid. Although they had reconciled before the charges were laid, they then later split up again. I have no doubt that the stress of the pending charges and the financial difficulties arising from the loss of the business contributed to the marriage breakdown. However, it is not fair to ascribe the marriage breakdown to the delay in getting to trial. Mr. Serfaty describes himself as having no social life and no friends. However, he also conceded in cross-examination that he has been staying from time to time with friends and he has had at least one live-in girlfriend during the time since his marriage has failed.

There was a very brief period of time (about one month) where the accused had travel restrictions on their bail. However, that was the only restriction on their liberty. They have been on bail since the charges were laid and have served no time whatsoever in custody.

Mr. Serfaty has had a change in his lifestyle. However, the Benlolos continue to live a relatively lavish lifestyle with domestic staff or nannies, expensive luxury cars and children in private schools. Alan and Elliott Benlolo allege they have lost their homes. However, they now live in side-by-side newly constructed mansions of approximately 6300 square feet, apparently paid

for entirely by their parents, who also have their own large home elsewhere.

CONCLUSION

Thus while I accept that there has been prejudice and while I recognize that it has not been minimal, I do not see it as so significant that it warrants staying the charges in this case.

The total amount of delay that is either systemic or attributable to the Crown is relatively short. Most of the delay is either because of the inherent requirements of the case or is neutral in nature. There is no evidence that the delay has compromised the ability of the accused to receive a fair trial. It is largely a documentary case. The documents have been preserved. There will be little, if any, impact on the trial of the fading memories of witnesses, even if that did exist, of which there is no evidence.

Taking all of these factors into account and balancing the interests of the accused and their rights under the *Charter* against society's interest in having this case decided on its merits, I conclude that the delay in

Ruling
MOLLOY, J.

this case is not unreasonable. Further, there has been no abuse of process or misconduct that would warrant a stay of proceedings.

Accordingly, the application is dismissed.

CERTIFIED:

LUANNE DUBE, C.S.R.
OFFICIAL COURT REPORTER
SUPERIOR COURT OF JUSTICE