ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

S[redacted] L[redacted]

Before Justice L. Chapin
Heard on June 27, 2011
Reasons for Judgment released on September 19, 2011

P. McDermott ..... for the Crown
M. Monte ..... for the accused S[redacted] L[redacted]

Chapin, J.:

On November 27th, 2009, a member of the Toronto Police Service arrested Ms. S[redacted] L[redacted] for the offence of operating a motor vehicle while after having consuming alcohol in such a quantity that the concentration in her blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood. The information in relation to this incident was laid January 26, 2010. Ms. L[redacted] was scheduled to stand trial on this charge on November 22, 2010, almost 10 months following the laying of that charge.

Ms. L[redacted] has applied for a stay of proceedings, pursuant to s-s. 24 (1) of the *Canadian Charter of Rights and Freedoms* on the basis that her right to be tried within a reasonable time, as guaranteed by para. 11(b) of the *Charter*, has been infringed. This is the fourth trial date for this matter.

Summary of case History

Ms. L[redacted] was charged on November 27, 2009. The first appearance date was

February 24, 2009. On that date initial disclosure was received and the matter went over to March 24th, 2010. On March 24, 2010 counsel for Ms. L[redacted] attended and asked if there was further disclosure available. He was advised that disclosure was complete and the case went over to April 21, 2011 for the purpose of having a crown pre-trial. Although the March 24th, 2011transcript indicates that the case was to be spoken to on April 21, 2011 it was spoken to on April 19, 2011. By April 19, 2011 the crown pre-trial had been completed and the crown was ready to set a trial date. The agent attending on Ms. L[redacted]'s behalf did not have dates for her counsel so the case went over for one week to April 28, 2011 to set a date for trial.

On April 28, 2011 counsel for Ms. L[redacted] attempted to set a date for a judicial pre-trial but was advised that one could not be set for a four hour trial and case went over to May 12, 2011 to set a date for trial. On May 12, 2010 an agent for counsel attended and set the trial date for November 22, 2010.

On November 22, 2010 the trial started but was not completed. On that date there was a guilty plea before me as well as a sentencing matter. A date for hearing further evidence was set for January 12, 2011. On January 12, 2011 I had a funeral to attend to and could not proceed with the matter and a new date for further evidence was set for April 14, 2011. On April 14, 2011 the trial could not continue as the transcripts from the November 22, 2011 date had not been made available to Ms. L[redacted]'s counsel. The transcripts had been ordered on three separate occasions prior to that date. Defence counsel asked that the matter go over to April 19, 2011 to set a new date. On April 19, 2011 a new trial date was set for June 27, 2011. On June 27th, 2011 counsel brought this application. As of June 27, 2011 the total delay from the laying of the information to June 27, 2011 was nineteen months.

Overview of the Governing Legal Principles

As has been made abundantly clear by the Supreme Court of Canada in *R. v. Morin*, [1992] S.C.J. No. 25, the general approach to a determination of whether the right guaranteed by para. 11(b) of the *Charter* has been denied is not by the application of a mathematical or administrative formula, but rather by a judicial determination which involves balancing the interests which the section is designed to protect, including the right to security of the person, the right to liberty and the right to a fair trial, against factors which contribute to delay. Sometimes those factors are inevitable and sometimes they are avoidable by one, the other, or both parties.

The Supreme Court in *R. v. Morin*, *supra*, has identified the following as the relevant factors for consideration in this type of application: (1) the overall 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 the delay; and (4) prejudice

to the accused.

It bears mentioning that it is also in society's interest that an accused's right to trial within a reasonable time be strictly observed. As articulated by the Supreme Court in *R. v. Morin*, *supra*, society has an interest in ensuring that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. See: *R. v. Morin*, *supra*, at p. 8, para. 29.

The exercise of judicial weighing in this type of application must also consider society's interest in law enforcement, an aspect of which is seeing that criminal charges are heard on their merits. As the seriousness of the offence increases, so does the societal demand that the accused be brought to trial. See: *R. v. Morin*, *supra*, at p. 8, para. 30. By "offence", I have taken the Court to mean the underlying allegations and not simply the legal classification of the delict. For example, an allegation of "driving 'over 80'", as I have before me in this case, can embrace a variety of factual scenarios, some much more serious, from an objective perspective, than others.

As to the factor of prejudice, the appellate authorities have made it clear that it is prejudice arising from the delay, and not the charge itself, which is germane to the analysis. Having said that, the Ontario Court of Appeal in *R. v. Kovacs-Tatar*, [2004] O.J. No. 4756 (C.A.) at p. 9, para. 33 has recognized that what was initially prejudice from being charged may become prejudice caused by institutional delay due to a delay beyond the guidelines. Furthermore, as noted in *R. v. Morin*, *supra*, at p. 14, para. 62, "action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider" in evaluating the degree of prejudice, if any, suffered by the accused. In particular, "inaction may…be relevant to assessing the degree of prejudice, if any, that an accused has suffered as a result of delay." One example of action or inaction which is relevant to the assessment of specific prejudice is whether an accused puts the Crown on notice, on a timely basis, of the prejudice he or she is suffering. See: *R. v. Vertlib*, [2006] O.J. No. 660 (Sup. Ct.) at para.'s 27 – 28, and 41, upheld on appeal by the Ontario Court of Appeal and reported at [2008] O.J. No. 1223 (C.A.).

In *R. v. Morin*, *supra*, the Supreme Court set an eight- to ten-month guideline for reasonable delay. The Court emphasized that this guideline is neither a limitation period nor a fixed ceiling on delay. Deviations of several months in either direction can be justified by the presence or absence of prejudice. See: *R. v. Morin*, *supra*, at p. 16, para. 76.

The Supreme Court of Canada, itself, endorsed such a deviation in the *Morin* decision. That case involved a total delay of 14 ½ months. The Court allotted approximately two months for the case's inherent time requirements. The balance, namely 12 months, was attributed to institutional delay. Ms. Morin faced an allegation of operating a

motor vehicle while her ability to do so was impaired by the consumption of alcohol and with a blood-alcohol concentration in excess of the legal limit. There was no suggestion that as a result of her driving she caused any property damage, let alone injury. She alleged no specific prejudice attributable to the delay incurred. The Supreme Court, faced with a delay that fell two months beyond the upper end of the guideline it had established, concluded, that Ms. Morin had not established a violation of her para. 11(b) *Charter* right.

More recently, the Supreme Court of Canada in its decision, *R. v. Godin*, [2009] S.C.J. No. 26 at p. 5, para. 5, made it clear that even where the guideline has been "substantially exceeded", that, in and of itself, does not make the delay unreasonable. Put another way, where the impugned delay falls relative to the eight- to ten-month guideline established by the Court is but one factor relevant to the determination of whether an accused person has established a violation of the para. 11(b) *Charter* right. If the impugned delay falls well beyond the guideline, that will not be determinative of the application. The Court's decision in *R. v. Godin, supra*, clearly endorses as correct the Court's earlier direction as to the approach to be taken to these applications. In this regard, Cromwell J., who authored the unanimous decision in *R. v. Godin, supra* stated at p. 7, para. 18:

The legal framework for the appeal was set out by the Court in *Morin*, at pp. 786-89. Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(b) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important, however, not to lose sight of the forest for the trees while engaging in this detailed analysis. As Sopinka J. noted in *Morin*, at p. 787, "[t]he general approach…is not by the application of a mathematical formula but rather by a judicial determination balancing the interests which [s. 11(b)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay."

Application of the Law to the Facts

Overall Length of Delay

The overall length of delay in this matter is nineteen months. In my view, that this quantity of delay is of sufficient length to raise an issue as to its reasonableness and merits further scrutiny.

Waiver of Timer Periods:

In this case there are no waivers of time periods.

The Reasons for the Delay:

(A) Inherent Time Requirements of the Case

As noted in *R. v. Morin*, *supra*, at page 10, para. 41 *ff*:

All offences have certain inherent time requirements which inevitably lead to delay. Just as the fire truck must get to the fire, so must a case be prepared. The complexity of the trial is one requirement which has often been mentioned. All other factors being equal, the more complicated a case, the longer it will take counsel to prepare for trial and for the trial to be conducted once it begins…The inherent requirements of such cases will serve to excuse longer periods of delay than for cases which are less complex. Each case will bring its own set of facts which must be evaluated…

As well as the complexity of a case, there are inherent requirements which are common to almost all cases. The respondent has described such activities as "intake requirements". Whatever one wishes to call these requirements, they consist of activities such as retention of counsel, bail hearings, police and administration paperwork, disclosure, etc. All of these activities may or may not be necessary in a particular case but each takes some amount of time. As the number and complexity of these activities increase, so does the amount of delay that is reasonable. Equally, the fewer the activities which are necessary and the simpler the form each activity takes, the shorter should be the delay.

This case is not a complex one, the crown called two witnesses. It is a routine over 80 case in this jurisdiction. I find that the intake period ran from January 26, 2010 to May 12, 2010 - 3 months and two weeks. An important factor is that counsel for Ms. L[redacted] did not underestimate the time required for trial. One day was the estimate and in most cases that time should be sufficient for hearing the evidence and submissions of counsel. Counsel for Ms. L[redacted] conceded that the first trial date was set within the guidelines.

(B) Actions of the Accused

There is nothing on the record before me to indicate that the actions of the accused delayed the case in any way.

(C) Actions of the Crown

Similarly, there is nothing in the record that would indicate that the crown bears responsibility for contributing to the delay.

(D) Limits on Institutional Resources

It is common ground between the parties that they were ready to proceed to trial as of May 12, 2010. At that time, November 22, 2009 represented the earliest date which the Court could accommodate all parties, some 6 ½ months later. On this date the matter went over for further evidence to January 12, 2011. On this date I was not available as I had a funeral to attend to and one of the two defence counsel that started this case, Mr. Montes, was not available, however the other counsel was.

The matter went over to April 14, 2011. On that date counsel had not been notified that the transcript was available shortly before the trial. There is no date on my copy of the transcript by me recollection was that it was provided a day or two before the April 14, 2011 date. I note that counsel was diligent in pursuing the transcript. A letter was sent out on January 12, 2011, March 16, 2011 and April 5, 2011. On April 14, 2011 I offered counsel an opportunity to hold down the matter while he obtained a copy of the transcript, but understandably, he didn't feel comfortable dealing with the matter without having a opportunity to thoroughly go over the transcript and prepare his client. The case was adjourned to June 27, 2011 and this application was brought.

Counsel for Ms. L[redacted] characterizes the delay between May 12, 2010 to June 27, 2011 as institutional delay apart from 18 days that he attributes to the defence for trial dates that were available and the defence was not.

The crown submits that the analysis is different when the court is looking and a situation where the trial has started and has not finished on the first date and refers to the decision in *R.* v. *Allen* [1996] O.J. No. 3175 (OCA). That case dealt with a complicated fraud case that started with a preliminary inquiry in the provincial court and eventually went to the Superior Court. There were numerous delays, and the majority appear to have been at defence counsel's request. Counsel eventually brought an application to stay the proceedings pursuant to s., 24(1) of the Charter of Rights and Freedoms. The trial judge stayed the charges and focused on one period of delay of six months during which the accused was in custody. The Court of Appeal found that the trial judge erred in finding that s. 11(b) provided a right to have one's trial completed within a reasonable time in that he subjected discrete delays within the total time period to a separate s. 11(b) analysis. At paragraphs 17 - 20 the court said :

> I can see nothing in the language of s. 11(b) which suggests any right to have one's trial proceed according to a constitutionally mandated timetable. Section 11(b) creates one right - the right to be tried within a reasonable time. As long as the entire time period in issue cannot be said to be unreasonable when tested against the principles pronounced in R. v. Morin (1992), 71 C.C.C. (3d) 1 (S.C.C.), there is no violation of s. 11(b). Justice L'Heureux-Dubé, writing for the majority in R. v. Conway (1989), 49 C.C.C. (3d) 289 at 307 (S.C.C.), put it this way:
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> - In deciding a claim made under s. 11(b) of the Charter, the correct approach is in my view to evaluate the reasonableness of the overall lapse of time. A piecemeal analysis is generally not appropriate. In a case where each individual period, taken in isolation from the others, may constitute a reasonable delay, the total period may nevertheless be unreasonable for the purpose of s. 11(b). The case of Rahey illustrates the point. While each adjournment initiated by the judge was for a short period, the accumulation of all 19 adjournments over the span of 11 months was held to infringe s. 11(b). However, nothing prevents a court from focusing on specific time periods which may be significant in the over-all assessment, as going to the weight to give to specific delays, as opposed to their reasonableness. [Emphasis added]

> **18** Arbour J.A. followed the same approach in R. v. Bennett (1991), 64 C.C.C. (3d) 449 at 467 (Ont. C.A.), aff'd, (1992), 74 C.C.C. (3d) 384 (S.C.C.). She observed:
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> - It is easy to lose sight of the importance of the total period of delay, particularly when engaged in an examination of the causes for various components of the total delay. A case may take too long to reach the preliminary inquiry, but then may be tried very expeditiously after committal, or vice versa.Ultimately, it is the reasonableness of the total period of time that has to be assessed, in the light of the reasons that explain its constituent parts.[Emphasis added]
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> The approach adopted by Ferguson J. is diametrically opposed to that dictated by Conway and Bennett. The six-month period between the adjournment of the trial at the end of February and its continuation on August 30th should not have been subject to a separate s. 11(b) analysis. In finding a breach of s. 11(b) and directing a stay of proceedings because he regarded the six-month adjournment as unreasonable, Ferguson J. erred in law and failed to address the real issue - was the respondent, in all of the circumstances, denied a trial within a reasonable time? I must now address that issue.
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> - VI.
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> Was there an infringement of s. 11(b)?
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> **20** The approach to be followed when a s. 11(b) claim is made is now firmly established: R. v. Morin, supra; R. v. Bennett, supra. In Morin, Sopinka J. said at pp. 13-14:
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> - ... the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial: [citations omitted]. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanations for the delay, and the prejudice to the accused.

The court also noted that the initial time estimate was woefully inadequate and said that in those situations the time required to complete the case is to be considered intake. In this case the situation is different as the initial time estimate was not inaccurate and therefore the time from the initial trail date to subsequent dates should not be treated as neutral. I cannot imagine that the Court of Appeal would endorse a situation where any case could drag on for months and months as long as it was commenced within a reasonable amount of time.

In my view the time period from the date from which the parties were ready to set a date for trial , May 12, 2010 to June 27, 2011 , less the 18 days referred to previously when counsel was not available when the crown and the court was is properly characterized as institutional delay.

The system should expect to accommodate trials and continuing trials in a timely fashion whether or not participants are faced with unforeseen events such as funerals and counsel should be able to count on receiving transcripts in a timely fashion when they are ordered in a timely fashion. The provincial courts frequently have to deal with more than one matter in one day and if 11(b) Charter rights are to be respected the system must find a way to accommodate all matters that come before this busy court.

In this case I find that the institutional delay is 12 and ½ months.

(E) Other Reasons

There are no other reasons for the delay in this case.

In summary, the attributions for delay are as follows:

January 26, 2010 - May 12, 2010 -	neutral/intake	3 months & 2 weeks
May 12, 2010 - November 22, 2010 -	institutional	6 months
November 22, 2010 - April 14, 2011-	institutional	4 months & 3 weeks
September 27, 2010- October 5, 2010	defence	1 week

(the first date available to court was September 27th , 2010 but defence was not available until October 5, 2010)

April 14 - 2011 - April 19, 2011 -	defence	1 week
April 19, 2011 - June 27, 2011 -	institutional	2 months & 1 week
Total Institutional Delay -	12 ½ months	

Prejudice to the Accused:

As noted earlier in this ruling, the appellate courts made it clear that it is prejudice arising from the delay, and not the charge itself, which is germane to the analysis. However, said that, the Ontario Court of Appeal in *Kovacs-Tatar supra* has recognized that what was initially prejudice from being charged may become prejudice caused by institutional delay due to a delay beyond the guidelines. Furthermore, as noted in *Morin*, *supra* "action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider" in evaluating the degree of prejudice, if any, suffered by the accused.

Ms. L[redacted] filed an affidavit and also testified on the application. The affidavit states that Ms. L[redacted] has had these charges hanging over her head for over " 23" months as of June 2011 and that she has suffered from stress and sleeplessness as a result. The number "23 is most likely a typographical error. The actual number of months would have been 19 at the time of the affidavit, however 19 months is still a very significant period of time. I wonder if the error is as a result of using precedents.

Ms. Lococo swore in the affidavit that she has been unable to make decisions about her future employment because of the outstanding charges. In addition the affidavit indicates that she has incurred significant costs because of the many flights to Toronto she has had to take in order to attend her trial. June 27, 2011 was the fourth time she had to attend court.

In addition to the affidavit filed Ms. L[redacted] testified at the hearing. Ms. L[redacted] works in the silviculture industry which is a branch of the forest industry and has to do

a lot a travelling to various locations in British Columbia, Manitoba and Saskatchewan. The work is very physically taxing and she needs to drive to these locations as they are remote camps that cannot be reached by bus or plane.

Ms. L[redacted] attended York University and graduated sum cum laude in 2009 in Anthropology. For the last 12 years she has been working towards a supervisory role. In the past this job has come up twice and she has had to refuse both times because she can't be a foreperson without the ability to drive. The job entails a lot of travelling every day going to different outlying small communities. She applies for this job before the last trial date and then had to turn it down. The job was offered to her in April of 2011 and had been offered to her the year before as well. She described the job as the type of job someone has to die before another one comes up. Ms. L[redacted] explained that a supervisory job would be much easier on her body, which is important to her as her knees are not in good shape and she has arthritis in her hands.

The job would have paid a salary of $70,000.00 and attending these proceedings and paying for legal representation has drained her of her savings. She had spent at least $ 3,500.00 in 2011, excluding lawyers' fees from 2011 and 2010. In addition she has had to stop making her student loan payments because of the legal expenses she has incurred.

I found Ms. L[redacted] to be a very credible witness. She did not exaggerate and was responsive to all questions asked of her.

In terms of action or non-action I find that Ms. L[redacted] has made every effort to move this case along.

Certainly some of the prejudice is as a result of charges being laid, specifically, the stress up until the trial date, but given the 19 months that this case has been ongoing I will infer additional prejudice because of the delay and additional expenses. I also find that there has been actual prejudice with respect to the lost opportunity when the supervisory role came alone for the second time. Ms. L[redacted]'s chosen field of work is unique and unfortunately the long awaited opportunity came up the second time after the first two trial dates.

Conclusion

I will now turn to my balancing of the relevant factors.

As noted above, limits in institutional resources account for 12 ½ of the 19 months of delay in this matter. This time frame falls beyond the eight- to ten-month guideline established by the Supreme Court of Canada.

I have been mindful of the nature of the allegations in this case. I am also mindful that

each case that comes before the court is distinctive. In this situation I have to balance Ms. L[redacted]'s right to have a trial within a reasonable period of time with society's interest in law enforcement, an aspect of which is seeing that criminal charges are heard on their merits. As the seriousness of the offence increases, so does the societal demand that the accused be brought to trial.

In this case I find on balance that Ms. L[redacted]'s right to be tried within a reasonable time has been breach and outweighs societies' right to have the case heard on its merits. Drinking and driving cases are serious but as those cases go, this case is at the less serious end. There was no collision, no one was injured and her breathalyser readings were relatively low, being a concentration of 110 milligrams of alcohol in 100 millilitres of blood. On the other side of the equation, this matter, a routine drinking and driving case has gone on for a significant period of time with four trial dates being set and Ms. L[redacted] has suffered actual prejudice, not just prejudice as a result of the charges being laid.

Once the breach has been established the only remedy is a stay of the proceedings. Accordingly the charge of driving a motor vehicle while the concentration of alcohol in her blood exceeded 80 milligrams per 100 millilitres of blood is stayed pursuant to section 24(1) of the Charter.

Released: Monday, September 19, 2011

Signed: "Justice L. Chapin"