

In the Provincial Court of Alberta

Citation: R. v. Nethery, 2005 ABPC 343

Date: 20051219
Docket: 030845457P101001;002
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Murray Ellis Nethery

Decision of the Honourable Judge M.G. Allen

Introduction

[1] The proceedings in this case have been lengthy, complex, and at times acrimonious. In a previous decision written decision, *R. v. Nethery*, [2004] A.J. No 1248 (Alta. Prov. Court), I explored related issues.

[2] This present application began when the main investigator took the stand with copies of her notebook entries and testified she had lost her notebook. After hearing her evidence on this point the applicant sought the remedy of a judicial stay pursuant to *s. 24(1)* of the *Charter*. Firstly, he alleged that his *s. 7 Charter* rights were infringed because the Crown failed in their disclosure obligations. Secondly, he alleged that because of the lengthy court proceedings the applicant's right to trial within a reasonable time pursuant to *s. 11(b)* had been infringed.

[3] Both counsel filed lengthy submissions and authorities related to both issues. After the Crown prosecutor, Ms. Kristensen, filed her written submissions she learned that the police investigator had located her lost notebook. That being so, I need not deal with the disclosure issue. However, I find I must still deal with the judicial stay application based upon the alleged infringement in *s. 11(b)*.

Section 11(b)

Section 11(b) of the *Charter* provides:

“Any person charged with an offence has the right

(b) to be tried within a reasonable time.”

Chronology of Events

[4] Let me set out in point form the chronology of this investigation with emphasis on the proceedings applicable to the present application:

- The date of the alleged offence is July 8, 2003.
- The information was sworn on July 29, 2003.
- On August 19, 2003, the matter was set down for trial on March 24, 2004.
- On March 24, 2004, or the first trial date, Judge Spence was scheduled to hear the trial. The applicant alleged that the Crown had failed to fulfill their disclosure obligations by failing to provide witness statements; by so doing he alleged that his *s. 7 Charter* rights had been infringed. He sought a stay or costs as a remedy. The applicant had not filed a written notice. In addition, the applicant objected to the calling of the breath technician because of the alleged failure to give proper notice to them. The Crown wanted to proceed to trial calling all their witnesses including the breath technician; however, the Crown objected to the hearing of the *Charter* application without a proper written *Charter* notice. Judge Spence adjourned the trial to October 1, 2004.
- On October 1, 2004, the matter first appeared before me for trial. At that time the applicant made an application to disallow the evidence of the breath technician based upon an alleged failure to comply with a notice under *s. 657.3* of the *Criminal Code*. In addition, the applicant contended that the Crown infringed his *s. 7 Charter* right to disclosure. As a result of this latter contention he applied for two alternative remedies pursuant to *s. 24(1)* of the *Charter*: a judicial stay or costs. This matter was put over to November 4, 2004, for decision.
- On November 4, 2004, the application was dismissed pursuant to a written decision already mentioned. The trial was adjourned to May 10, 2005.
- On May 10, 2005, the investigating officer testified. The defence asked for an opportunity to examine the investigating officer’s supervisor, Sgt. Showler. The trial was adjourned to June 30, 2005, for that purpose.
- On May 26, 2005, Mr. Gunn filed material alleging a breach of the applicant’s right to make full answer and defence pursuant to *s. 7* and a breach of his right to

trial within a reasonable time. Mr. Gunn asked for a judicial stay pursuant to *s. 24(1)* of the *Charter*.

- On June 30, 2005, Sgt. Showler was examined by Ms. Prithipaul. The matter was set over for decision on August 15, 2005.
- On July 26, 2005, Ms. Prithipaul submitted a further argument related to a breach of the disclosure issues.
- On August 2, 2005, the Crown sought further time to make written submissions. The defence was asked if they intended to file further material related to *s. 11(b)*; they indicated that they would. The matter was set over to November 9, 2005, for hearing and argument related to the *s. 11(b)*. Also, at that time a date was selected for trial continuation, April 12, 2006. Time was available in January but Mr. Gunn, the counsel of choice for the applicant, was on vacation.
- On October 11, 2005, Ms. Prithipaul submitted further argument related to the alleged breach of the applicant's *s. 11 (b)* rights.
- On October 25, 2005, Ms. Kristensen, on behalf of the Crown, filed written material responding to all *Charter* arguments raised by the applicant.
- On October 26, 2005, Ms. Kristensen sent a letter to the presiding judge informing him that Cst. Boonstra's missing notebook had been located.

Relevant Supreme Court Jurisprudence Relating to Section 11(b)

[5] The Supreme Court has dealt with *s. 11(b)* on a number of occasions. The three most recent cases where the principles related to *s. 11(b)* were canvassed are: *R. v. Askov* (1991), 59 C.C.C. (3d) 449 (S.C.C.)(*Askov*), *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.)(*Morin*), and *R. v. MacDougall* (1998), 128 C.C.C. (3d) 483 (S.C.C.)(*MacDougall*). *Askov* dealt with trial delay in district court; *Morin* dealt with delay in provincial court; *MacDougall* was concerned with delay in sentencing. In *Askov* the Supreme Court discussed the principles at length; that case is considered to be the leading case related to *s. 11(b)*. In *Morin* the Supreme Court summarized more concisely the principles and refined them somewhat; some refinement is also found in *MacDougall*. In my view *Morin* is the best case to use to understand the principles. Reference will be made to the other two cases and other jurisprudence where needed.

[6] *Morin* was charged with two *Criminal Code* offences: impaired operation and "over eighty." The accused's trial was set 13 months after his first appearance in court - 14 ½ months after his arrest. Two months before trial the Crown wrote a letter to defence counsel indicating if any accused was experiencing any particular prejudice by delay an attempt would be made to find earlier trial dates. The accused's counsel did not respond; on the trial date the accused applied for a judicial stay based on an alleged violation of his *s. 11(b)* rights. The trial judge denied that

application; a summary conviction judge entered a stay; the Ontario Court of Appeal restored the conviction. Her appeal to the Supreme Court was dismissed. Sopinka J. wrote the majority decision.

[7] At p. 12-13 Sopinka J. set out the primary purpose and interests sought to be protected by the section:

“The primary purpose of s. 11(b) is the protection of the individual rights of accused. A secondary interest of society as a whole has, however, been recognized by this court. I will address each of these interests and their interaction.

The individual rights which the section seeks to protect are: (1) the right to security of the person; (2) the right to liberty, and (3) the right to a fair trial.

The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public. As observed by Martin J.A. in *R. v. Beason* (1983), 7 C.C.C. (3d) 20, 1 D.L.R. (4th) 218, 36 C.R. (3d) 73 (Ont. C.A.): "Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused..." (p. 41). In some cases, however, the accused has no interest in an early trial and society's interest will not parallel that of the accused.

There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In *Conway*, a majority of this court recognized that the interests of the accused must be balanced by the interests of society in law enforcement. This theme was picked up in *Askov* in the reasons of Cory J. who referred to "a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (p. 474). As the seriousness of the offence increases so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket.”

[8] At p. 13 Sopinka J. summarized the factors that should be generally used to determine how long is too long:

“The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in *Smith*, supra, “[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?” (p. 105). While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

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.

These factors are substantially the same as those discussed by this court in *Smith*, supra, at pp. 105-6, and in *Askov*, supra, at pp. 483-4.

The judicial process referred to as “balancing” requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial: see *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459, [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260. 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 explanation for the delay and the prejudice to the accused.”

[9] Immediately thereafter Sopinka J. commented upon the process in reaching a determination whether *s. 11(b)* was infringed. He said that the process is not mathematical or administrative in nature but a judicial determination balancing the interests which the section is designed to protect against factors which inevitably lead to delay. The balancing requires an examination of the delay in light of other factors. The period to be scrutinized is the time from the date of the charge is sworn to the end of the trial. Periods that have been waived can be subtracted from the total. Then it must be determined whether the period is unreasonable in view of the interests the section serves to protect, the explanation for the delay, and the prejudice to the accused: see *Morin* pp. 13-14.

[10] In *MacDougall* McLachlin J. made similar observations but noted that the list of factors is not meant to be exhaustive. She wrote at para. 41:

“The analysis must not proceed in a mechanical manner. The factors and framework set out in *Askov* and *Morin* are not immutable or inflexible. As noted by L’Heureux-Dube J. in *Conway*, supra, at p. 1673, the list of factors can never be exhaustive. Nor is an unyielding focus on only certain periods of the delay appropriate: *Conway*, supra, at p. 1674. In every case it must be borne in mind that the ultimate question for determination is the reasonableness of the overall delay.”

[11] McLachlin J. held that an analysis under *s. 11(b)* is only necessitated when a certain threshold had been reached. She explained at para 43:

“A s. 11(b) analysis is required only where the delay is sufficiently great to raise an issue of whether the accused’s rights may have been prejudiced. This is the threshold requirement for the s. 11(b) inquiry. Absent an indication of delay capable of prejudicing an accused’s rights there is no need to proceed further.”

[12] In *MacDougall* the unanimous Court endorsed some of the observations made by L’Heureux-Dube J. concerning the determination of unreasonable delay in *R. v. Conway* (1989), 49 C.C.C. (3d) 289 (S.C.C.)(*Conway*). In *Conway*, L’Heureux-Dube J. observed at p. 306:

“Accordingly, the cut-off point after which a delay becomes unreasonable must be determined by balancing a number of factors. A balancing approach was favoured by this court in *Rahey*, although not all concurring members of the court necessarily agreed on how the balancing was to be effected nor on what were the specific factors to be considered. I doubt there can ever be an exhaustive and unanimous list of factors, but among the most relevant ones considered by the courts generally, and in particular, by this court in *Rahey*, are: prejudice suffered by the accused, waiver of time periods, inherent time requirements and limitations

on institutional resources. Certainly, the prejudice suffered by the accused is an important consideration. While some degree of impairment may necessarily result from the mere passage of time, in my view, greater weight in the over-all assessment of reasonableness should attach to impairment resulting from delays not attributable to the person charged.”

[13] She continued at pp. 306-7 of *Conway*:

“In effect when delays are caused, requested, or consented to by an accused, it may generally be assumed that the accused benefits from the resulting protraction of the proceedings, although the ultimate decision will of course have to be made having regard to the circumstances in each particular case. This is not to say that an accused will necessarily be at fault for protracting the proceedings. An accused has a right to make a full answer and defence and, to this end, to choose the manner in which to exercise this right in accordance with the law. Neither for that matter will blame be imputed to the Crown or the judicial system when a claim for *s. 11(b)* succeeds. The Crown is free to use its prosecutorial discretion as it sees fit, provided it does not conduct the prosecution in an abusive manner. We are not here concerned with fault but with the reasonableness of the over-all delays in bringing an accused to justice.”

[14] Later L’Heureux-Dubé added at p. 307:

“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 over-all 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.”

[15] Reference to *Conway*, *Morin* and *MacDougall* leads me to conclude that the factors set out in *Morin* are a guide to assist in determining whether the delay is unreasonable. The real test is whether in the facts of the individual case the overall delay is unreasonable.

[16] Generally, the ultimate burden to prove an infringement of *s. 11(b)* is upon the applicant; however, in certain circumstances the Crown may have an evidentiary burden. This burden had earlier been set out in a previous decision of the Court, *R. v. Smith* (1989), 52 C.C.C. (3d) 97 (S.C.C.) and was confirmed as being accurate in *Morin*. The role of the burden of proof in the balancing process to determine unreasonable delay was explained by Sopinka J. at p. 14 of *Morin*:

“I accept that the accused has the ultimate or legal burden of proof throughout. A case will only be decided by reference to the burden of proof if the court cannot come to a determinate conclusion on the facts presented to it. Although the accused may have the ultimate or legal burden, a secondary or evidentiary burden of putting forth evidence or argument may shift depending on the circumstances of each case. For example, a long period of delay occasioned by a request of the Crown for an adjournment would ordinarily call for an explanation from the Crown as to the necessity for the adjournment. In the absence of such an explanation, the court would be entitled to infer that the delay is unjustified. It would be appropriate to speak of the Crown having a secondary or evidentiary burden under these circumstances. In all cases, the court should be mindful that it is seldom necessary or desirable to decide this question on the basis of burden of proof and that it is preferable to evaluate the reasonableness of the over-all lapse of time, having regard to the factors referred to above.”

[17] The length of delay in this case causes me to embark upon a *s. 11(b)* analysis. Let me now deal with factors set out in *Morin* as a framework to determine the length of delay.

Length of Delay

[18] The information was sworn on July 29, 2003. The continuation of this trial has now been set for April 2006. Whether the trial will indeed be completed at that time is an open question based upon the proceedings so far. Thus, *prima facie* the length of the delay is approximately two years, seven months. The period of time for possible completion is exceptional and of sufficient length that an inquiry should be undertaken to determine if the delay is unreasonable.

[19] The length of delay should then be balanced against the other factors identified in *Morin*.

Waiver of Time Periods

[20] An accused's waiver of his or her *s. 11(b) Charter* rights must be unequivocal. This was best explained by Cory J. in *Askov* where he wrote at p. 480-481:

“As Lamer J. so cogently observed in *Mills*, it is a fundamental precept of our criminal justice system that it is the responsibility of the Crown to bring the accused to trial. Further, the right to be tried within a reasonable time is an aspect of fundamental justice protected by s. 7 of the Charter. It follows that any inquiry into the conduct of the accused should in no way absolve the Crown from its responsibility to bring the accused to trial. None the less, there is a societal interest in preventing an accused from using the guarantee as a means of escaping trial. It should be emphasized that an inquiry into the actions of the accused should be restricted to discovering those situations where the accused's acts either directly caused the delay (as in *Conway*), or the acts of the accused are shown to

be a deliberate and calculated tactic employed to delay the trial. These direct acts on the part of the accused, such as seeking an adjournment to retain new counsel, must of course be distinguished from those situations where the delay was caused by factors beyond the control of the accused, or a situation where the accused did nothing to prevent a delay caused by the Crown.

In addition, since the protection of the right of the individual is the primary aim of s. 11(b), the burden of proving that the direct acts of the accused caused the delay must fall upon the Crown. This would be true except in those cases where the effects of the accused's action are so clear and readily apparent that the intent of the accused to cause a delay is the inference that must be drawn from the record of his or her actions.”

[21] I did not discern a keen desire of Mr. Gunn to procure an early trial date or continuation date; however, that is not the test that is applicable to waiver. He and his associates may have acquiesced in the selection of continuation dates but I cannot infer that they waived the applicant's s. 11(b) rights in so doing.

Inherent Time Requirements

[22] In *Morin*, Sopinka J. held that there are inherent time requirements involved in the preparation of each case including the complexity of the individual prosecution. As well certain other common activities can serve to delay the case. He explained at pp. 16-17:

“... there are inherent requirements which are common to all cases. The respondent has described these as “intake requirements”. Whatever one wishes to call these requirements, they consist of activities such as retention of counsel, bail hearings, police and administrative paperwork, disclosure, etc. All of these activities may or may not be necessary in any 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 of these activities that are necessary and the simpler the form each activity takes, the shorter should be the delay.”

[23] At paras. 44-45 of *MacDougall* McLachlin J. summarized “inherent time requirements” applicable to s. 11(b):

“The period of time attributable to inherent time requirements is the period of time that would normally be required to process a case, assuming the availability of adequate institutional resources. The period of time attributable to inherent time requirements is neutral and does not count against the Crown or the accused in the s. 11(b) reasonableness assessment.

The inherent time required to process a particular case must not be confused with the average time required to process a case of that type. All cases have "inherent time requirements needed to get a case into the system and to complete that case": *R. v. Allen* (1996), 1 C.R. (5th) 347 at pp. 363-64, 110 C.C.C. (3d) 331 (Ont. C.A.), per Doherty J.A.; affirmed [1997] 3 S.C.R. 700, 119 C.C.C. (3d) 1; *Morin*, at p. 792, per Sopinka J. While the complexity of a case is often cited as a factor contributing to delay resulting from inherent time requirements, "each case will bring its own set of facts which must be evaluated": *Morin*, at p. 792. In other words, the inherent time requirements of a case are not limited to commonplace delays which occur in every situation, but may include delay due to extraordinary and unforeseeable events: *Allen*, *supra*."

[24] The applicant is charged with two *Criminal Code* offences: "over eighty" and impaired operation. These offences are amongst the most frequently prosecuted in Provincial Court. The investigation was essentially completed by the time the applicant was released on the date of the offence.

[25] I have not heard the entire trial at this time. The evidence led so far leads me to believe that the facts surrounding the commission of the offence are relatively straightforward. The applicant was involved in a motor vehicle collision whereby his truck crashed into the back-end of another driver's vehicle which was stopped at a red traffic light. After speaking with the applicant, the other driver called the police because he believed that the applicant was under the influence of alcohol. The police showed up approximately forty minutes later. Cst. Boonstra was the investigating officer. After making observations she arrested the applicant for impaired operation. Eventually the applicant provided breath samples to a technician. Facially, this is the most routine of prosecutions and is not a matter that could be described as a complex prosecution. Had everything been in order the prosecution would have called the civilian witness and the investigator, and relied upon the breath technician's certificate.

[26] The applicant and his counsel would need some time for preparation so that the delay for this purpose was inevitable. However, the necessary paperwork to be done in this case should have been completed by the police at the time of the investigation or shortly thereafter. The time required for the Crown to prepare disclosure of this information would not normally have been lengthy. This was not a complicated investigation or prosecution. The period of time attributable to the inherent time requirements could easily have been completed before the first trial date selected.

[27] What complicated the prosecution was failure of the Crown to disclose certain statements to the defence, the loss or misplacement of evidence by the police, and the demands of the applicant for disclosure. These issues will be discussed later in detail in the portion devoted to actions of the accused and actions of the Crown.

Delays Attributable to the Applicant or the Crown

[28] In some circumstances the delays attributable to either party can be discussed under a separate heading. In this instance it is more appropriate that the delays of each be discussed under the same heading.

[29] In *Conway L' Heureux-Dube* held that delays “caused, requested or consented to by the accused, it may be generally assumed that the accused benefits from the resulting protraction of proceedings”: see p. 306. In that case, the Court held that the accused caused the delays and his application for a stay was denied.

[30] In *Askov*, Cory J. ruled that the burden of proving the accused’s acts caused the delay or are a calculated tactic is upon the Crown. At pp. 480-481 he explained:

“As Lamer J. so cogently observed in *Mills*, it is a fundamental precept of our criminal justice system that it is the responsibility of the Crown to bring the accused to trial. Further, the right to be tried within a reasonable time is an aspect of fundamental justice protected by s. 7 of the Charter. It follows that any inquiry into the conduct of the accused should in no way absolve the Crown from its responsibility to bring the accused to trial. None the less, there is a societal interest in preventing an accused from using the guarantee as a means of escaping trial. It should be emphasized that an inquiry into the actions of the accused should be restricted to discovering those situations where the accused's acts either directly caused the delay (as in *Conway*), or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial. These direct acts on the part of the accused, such as seeking an adjournment to retain new counsel, must of course be distinguished from those situations where the delay was caused by factors beyond the control of the accused, or a situation where the accused did nothing to prevent a delay caused by the Crown.

In addition, since the protection of the right of the individual is the primary aim of s. 11(b), the burden of proving that the direct acts of the accused caused the delay must fall upon the Crown. This would be true except in those cases where the effects of the accused's action are so clear and readily apparent that the intent of the accused to cause a delay is the inference that must be drawn from the record of his or her actions.”

[31] In a similar vein McLachlin J. observed at para. 48 of *MacDougall*:

“Delays intentionally caused by, consented to or requested by the accused cannot be used in support of a claim that a s. 11(b) violation has occurred: *Conway*, supra, at p. 1673. Otherwise, there might be an incentive to employ dilatory tactics in order to escape justice. However, only those actions of the accused which directly contribute to the delay -- such as a request for an adjournment -- or which constitute a deliberate attempt to delay the trial, will count against an accused.

Such actions are inconsistent with a desire to proceed with the trial and are therefore inconsistent with an assertion of a s. 11(b) violation: see *Morin*, supra.”

[32] In *Morin*, pp. 17-18 Sopinka J. explained that the purpose of attributing delay to an accused for voluntary action is not the same as blaming the accused:

“As with the conduct of the accused, this factor does not serve to assign blame. This factor simply serves as a means whereby actions of the Crown which delay the trial may be investigated. Such actions include adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc. An example of action of this type is provided in *Smith*, supra, where adjournments were sought due to the wish of the Crown to have a particular investigating officer attend the trial. As I stated in that case, there is nothing wrong with the Crown seeking such adjournments but such delays cannot be relied upon by the Crown to explain away delay that is otherwise unreasonable.”

[33] Similarly, the point of attributing delay to the Crown is not to place blame as explained by Sopinka J. at p. 18 of *Morin*:

“(c) Actions of the Crown

As with the conduct of the accused, this factor does not serve to assign blame. This factor simply serves as a means whereby actions of the Crown which delay the trial may be investigated. Such actions include adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc. An example of action of this type is provided in *Smith*, supra, where adjournments were sought due to the wish of the Crown to have a particular investigating officer attend the trial. As I stated in that case, there is nothing wrong with the Crown seeking such adjournments but such delays cannot be relied upon by the Crown to explain away delay that is otherwise unreasonable.

(d) Limits on institutional resources.”

[34] Likewise, McLachlin J. in *MacDougall* wrote at para. 49:

“The Crown bears the responsibility of bringing accused persons to trial: *Askov*, supra. This extends to a duty to ensure that the trial proceedings, once engaged, are not unduly delayed. This applies to sentencing, which for purposes of s. 11(b) is part of the trial. Crown delay in excess of the inherent time requirements of the case count against the Crown in the s. 11(b) reasonableness assessment. Examples of delays that will count against the Crown in the assessment of the reasonableness of the total delay include adjournments requested by the Crown and disclosure delays: see *Morin*, supra. In some cases, the Crown may also be responsible for delays caused by the trial judge: see, e.g., *Rahey*, supra.”

[35] The applicant has referred me to two trial court decisions where the Crown delay in making disclosure formed part of the basis for successful stay applications based upon *s. 11(b)*: *R. v. Paryniuk*, [2003] O.J. No. 1051 (Ont. Sup. Ct.)(*Paryniuk*) Low J.; *R. v. Chan*, [2004] 7 W.W.R. 88 (Alta. Q.B.).

[36] The trial was adjourned from January 2006 to April 2006 to convenience Mr. Gunn's vacation. This delay can be attributed to the applicant.

[37] The other adjournments in this trial are not so easily attributed to the applicant. The trial has been adjourned on a number of other occasions. A contributing factor in the adjournments has been the tenacious attitude of Mr. Gunn, the applicant's counsel, in pressing *Charter* issues. Indeed, the Crown's position is that the delay was caused by the actions of Mr. Gunn and therefore attributable to the defence explaining the delay of the trial.

[38] The responsibility of bringing an accused to trial within a reasonable time rests upon the Crown. The defence is entitled to be prepared for trial by having appropriate disclosure so that a fair trial can be undergone by an accused. Generally, the Crown relies upon the police to provide them with the material so that it can in turn be provided to the accused person. The failure of the police to provide the Crown with the material in a timely manner does not excuse the Crown from their responsibility. In providing disclosure the prosecution service and the police act as a team. The lack of timely disclosure for *s. 11(b)* purposes is a factor attributable to the Crown. The purpose of attributing the factor to the Crown is not to assign blame but to ensure that the Crown has met their responsibility.

[39] From the Crown's perspective the case at bar can only be described as a rather unique series of unfortunate events triggered by poor documentation or loss or misplacement of certain documents. It is very unlikely that these events would repeat themselves in a future case. The investigating officer apparently served a copy of the breath technician's certificate but did not fill out the notice of intention portion of that certificate. The original document was lost. The police did not provide the Crown with copies of a witness statement in a timely manner. The Crown certainly had sufficient time to provide that disclosure between the trial selection date and the first trial. Both counsel requested an adjournment of the original trial because of this. The Crown to receive a proper *Charter* notice; the defence to receive the disclosure. At the next appearance the *Charter* breach was argued and put over for decision. When the matter next appeared for trial the police officer did not have her notes. This caused a further delay for another *Charter* application. The defence certainly contributed to the adjournments by vigorously demanding *Charter* relief. I find in the unique circumstances that the Crown has not met their onus of explaining the delay. The delays in these circumstances are attributable to the Crown.

Limits on Institutional Resources

[40] In *Askov* the Court recognized that there must be some allowance for limited institutional resources. Due deference must be given to a province's ability to allocate funds for Crown

prosecutors and courtrooms to deal with criminal cases. Differences of climate, terrain, and financial resources were require different solutions for adequate funding. “However, the lack of institutional facilities can never be used as a basis for rendering the 11(b) guarantee meaningless”: see p. 478. Cory J. invited a comparison between the questioned jurisdiction and the best comparable jurisdiction in the country. However, the comparison need not be too precise or exact: see p. 480.

[41] In *Morin*, Sopinka J. observed at p. 18:

“Institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(b) of the Charter. It was the major source of the delay in Askov. As I have stated, this is the period that starts to run when the parties are ready for trial but the system cannot accommodate them. In Utopia this form of delay would be given zero tolerance. There, resources would be unlimited and their application would be administratively perfect so that there would be no shortage of judges or court-rooms and essential court staff would always be available. Unfortunately, this is not the world in which s. 11(b) was either conceived or in which it operates. We live in a country with a rapidly growing population in many regions and in which resources are limited. In applying s. 11(b), account must be taken of this fact of life. As stated by Lamer J. (as he then was) in *Mills* (at p. 550), and approved in *Askov* (at p. 478):

‘In an ideal world there would be no delays in bringing an accused to trial and there would be no difficulties in securing fully adequate funding, personnel and facilities for the administration of criminal justice. As we do not live in such a world, some allowance must be made for limited institutional resources.’”

[42] He suggested that a guideline should be adopted by the Court and applied to provincial court trials. The guideline was set out at p. 28 of *Morin* :

“In my view, a period in the order of 10 months would not be unreasonable. While I have suggested that a guideline of eight to 10 months be used by courts to assess institutional delay in Provincial Courts, deviations of several months in either direction can be justified by the presence or absence of prejudice.”

[43] Earlier he explained that the guideline was not meant to be a fixed limitation period but would yield to other factors. The application of the guideline will also be influenced by the presence or absence of prejudice: see *Morin* at pp. 20-21.

[44] In *MacDougall*, McLachlin J. held that unreasonable systematic delay was to be determined on a careful case-by-case analysis: see para. 53. She added at para. 54:

“The reality of restricted institutional resources and the need to process a large number of cases within a reasonable time and at a reasonable cost, must thus be balanced against the need for speedy resolution of criminal charges. The question in every case is whether considering all of the circumstances of the case, the systematic delay was reasonable.”

[45] Trial lead times in the Provincial Court in Edmonton are not more than nine months. Each of the trial dates were within that time frame. The individual adjournments would not have infringed the accused’s rights. Should a further adjournment be required it is likely that it too would within be within that range. Certainly, a projection of when the case is likely to conclude can be considered in the *s. 11(b)* analysis: *Paryniuk* para. 5. Counsel for the applicant indicated that the change in circumstances would likely give rise to additional evidence from the investigating officer and perhaps application for further *Charter* relief. So the end of the trial is not entirely clear at this point. What must be determined is the cumulative delay to bring this matter to trial.

Prejudice

[46] In *Askov* the Court observed that in certain circumstances prejudice to the accused can be assumed. Cory J. wrote at p. 48-3:

“The different positions taken by members of the court with regard to the prejudice suffered by an accused as a result of a delayed trial are set forth in *Mills* and *Rahey*. Perhaps the differences can be resolved in this manner. It should be inferred that a very long and unreasonable delay has prejudiced the accused. As Sopinka J. put it in *Smith*, supra, at p. 111:

Having found that the delay is substantially longer than can be justified on any acceptable basis, it would be difficult indeed to conclude that the appellant's *s. 11(b)* rights have not been violated because the appellant has suffered no prejudice. In this particular context, the inference of prejudice is so strong that it would be difficult to disagree with the view of Lamer J. in *Mills* and *Rahey* that it is virtually irrebuttable.

Nevertheless, it will be open to the Crown to attempt to demonstrate that the accused has not been prejudiced. This would preserve the societal interest by providing that a trial would proceed in those cases where despite a long delay no resulting damage had been suffered by the accused. Yet, the existence of the inference of prejudice drawn from a very long delay will safely preserve the pre-eminent right of the individual. Obviously, the difficulty of overcoming the inference will of necessity become more difficult with the passage of time and at some point will become irrebuttable. None the less, the factual situation presented

in Conway serves as an example of an extremely lengthy delay which did not prejudice the accused. However, in most situations, as Sopinka J. pointed out in Smith, the presumption will be "virtually irrebuttable".

Furthermore, the option left open by Sopinka J. in the Smith case whereby accused persons who have suffered some additional form of prejudice are permitted to adduce evidence of prejudice on their own initiative in order to strengthen their position in seeking a remedy under s. 24(1) of the Charter is consistent with the primary concern of protecting the individual's right under s. 11(b)."

[47] Similar observations were made by the Court in *Morin*: see p. 23-25.

[48] In *MacDougall* McLachlin J. observed at para. 58:

"The final "Askov" factor is prejudice to the accused resulting from the delay. As Cory J. stated in *Askov*, supra, prejudice can often be inferred from a lengthy delay. However, while it is the duty of the Crown to bring the accused to trial, and while there is no obligation on an accused to press for a trial (*Morin*, supra), any action or inaction on the part of an accused which is inconsistent with a desire for a timely trial is relevant to the assessment of prejudice."

[49] In the case at bar no evidence has been led by either party as to prejudice. The prejudice because of the delay in this instance is such that it can be presumed.

Conclusion to Section 11(b)

[50] The accused's right to a trial within a reasonable time must be balanced against the rights of society in having a matter determined at trial. The *Morin* factors are a framework which assist in a determination of whether the delay is unreasonable. Only one question need be resolved: how long is too long?

[51] In my view the delays thus far in this case and the likely delays in the future cause me to find that the delays are too long to complete the trial. Accordingly, I find that the applicant's s. 11(b) rights have been infringed.

An Appropriate Remedy

[52] *Charter* infringements can give rise to remedies set out in s. 24 of the *Charter*. Here the applicant seeks a judicial stay pursuant to s. 24(1). In *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) observed that a stay was only appropriate in the clearest of cases. At para. 82 she wrote:

“It must always be remembered that a stay of proceedings is only appropriate “in the clearest of cases,” where the prejudice to the accused’s right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.”

[53] In *R. v. Callocchia* (2001), 149 C.C.C. (3d) 215 (Que. C.A.) Fish J.A. held that the clearest of cases test is not applicable to *s. 11(b)* applications: see paras. 73-78.

[54] There is support for Fish J.A.’s position when reference is made to jurisprudence from the Supreme Court. In *R. v. Rahey* (1987), 33 C.C.C. (3d) 289 Lamer J., writing for the majority, observed at pp. 306-7:

“Now to turn to the remedy. Again in *Mills*, I have explained why a stay is the minimal remedy. If an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest possible trial is permissible. To allow a trial to proceed after such a finding would be to participate in a further violation of the Charter.”

[55] In *Askov* the Court ordered a stay without discussing a remedy after finding a *s. 11(b)* violation.

[56] Whether the clearest of cases test is used or not, it is clear that a stay is an appropriate remedy where a judge finds that an individual’s right to trial within a reasonable time has been infringed. The clearest of cases test applies “where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.” Where the trial is unreasonably delayed such prejudice could not be repaired so a stay is warranted. On the *Askov* test the prejudice is to be inferred.

[57] Accordingly, I order a judicial stay of this trial pursuant to *s. 24(1)* of the *Charter*.

Dated at the City of Edmonton, Alberta this 19th day of December, 2005.

M.G. Allen
A Judge of the Provincial Court of Alberta

Appearances:

Mr. B. Gunn and Ms. S. Prithipaul
for the Applicant

Ms. B. Kristensen
for the Respondent