DATE: February 17, 2015
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Citation: *R. v.* [redacted] 2015 ONCJ 71

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

[redacted]

Before Justice Paul F. Monahan
Heard on January 26, 2015
Reasons for Decision on s.11(*b*) *Charter* Application
Released on February 17, 2015

Mr. J. Mathurin ..... for the Crown
Mr. A. Stastny .....for the defendant Mr. [redacted]

MONAHAN J.:

Introduction

[1] [redacted] is charged with assaulting his spouse on or about August 23, 2013 contrary to s.266 of the *Criminal Code of Canada* (the "*Code*").

[2] Mr. [redacted] brings this application to stay the proceeding on the basis that his right under s.11(*b*) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") to be tried within a reasonable time has been violated.

[3] For the reasons set out herein, I am granting a stay of proceedings on the basis that the accused's right under s.11(*b*) has been violated.

Legal Framework

[4] The Supreme Court of Canada in *R. v. Morin*[1] confirmed the well-established legal test for a s.11(*b*) *Charter* application. The accused must show a breach of s.11(*b*) on the balance of probabilities. The Court must consider the following four factors:

(i) the overall length of the delay;

(ii) whether the accused has waived any of the delay;

(iii) the reasons for delay; and

(iv) any prejudice to the accused.

[5] The Court must make findings with respect to the above four factors and then the Court must undertake a balancing analysis wherein the Court considers whether the delay is unreasonable, having regard to the interests of the accused, including any actual or inferred prejudice suffered, and society's interest in having the matter tried on the merits. Before staying the charges, the Court must be satisfied that the interests of the accused and society in a prompt trial outweigh the interests of society in bringing the accused to trial.[2]

[6] A guideline of 8 to 10 months is to be used by provincial courts to assess institutional delay, but deviations of several months in either direction can be justified, depending upon the presence or absence of prejudice.[3] The Ontario Court of Appeal has suggested that the guideline for a straightforward case in the Region of Peel is 8 to 9 months.[4] In another case, the Supreme Court of Canada indicated on the facts of that case that the lower end of the *Morin* guidelines should apply in Peel.[5] I do not interpret these cases as permanently adjusting the *Morin* guidelines

[1] [1992] 1 S.C.R. 771 at para. 31.
[2] *R. v. Ignagni* (2013), 49 M.V.R. (6th) 19 (Ont. S.C.J.) at para. 5.
[3] *R. v. Morin*, *supra* at para. 76.
[4] See *R. v. Rego*, [2005] O.J. 4768 (Ont. C.A.) at para. 4.
[5] *R. v. Sharma*, [1992] 1 S.C.R. 814 at 827-28.

in all cases in Peel. Rather, I interpret these cases as indicating that for a straightforward case in Peel, the lower end of the guidelines is a desirable objective. The Courts have also made it clear that the guidelines are not limitation periods.[6]

[7] Prejudice can be actual or inferred. Inferred prejudice can result from a prolonged delay. As the Supreme Court of Canada said in *Morin*, "the longer the delay the more likely that such an inference will be drawn. In circumstances in which prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined."[7]

[8] Prejudice will not usually be inferred unless the delay is "substantially longer than can be justified on any acceptable basis".[8] Moreover, prejudice which results from the inherent time requirements of the case or the actions of the accused is to be accorded no weight.[9]

[9] Turning then to an analysis of the four factors:

(i) the overall period of delay

[10] In this case the overall period of delay runs from the time the information was sworn on August 24, 2013 until the date set for trial of March 25, 2015, a period of just over 19 months. This period of delay requires further examination and consideration.

(ii) whether the accused has waived any of the delay

[11] There is no suggestion that the accused has waived any of the delay.

(iii) the reasons for the delay

[12] Under this heading, the Court must make findings with respect to the

[6] *R. v. Tran* (2012), 288 C.C.C. (3d) 177 (Ont. C.A.) at para. 63.
[7] *R. v. Morin*, *supra* at para. 61.
[8] *R. v. Smith*, [1989] 2 S.C.R. 1120 at p. 1122; see also *R. v. Lahiry* (2011), 109 O.R. (3d) 187 (S.C.J.) at para. 147.
[9] *R. v. Ignagni*, *supra* at para. 74.

reasons for the delay. The burden is on the accused on a s.11(*b*) application to prove the reasons for the individual periods of delay.[10] The Court must examine each period of delay and determine for each such period the reasons for the delay categorized as follows:

a) the inherent time requirements of the case which are considered to be neutral;

b) the actions of the accused;

c) the actions of the Crown;

d) limits on institutional resources; and

e) other reasons for the delay.

Agreement between the Crown and the Defence on Institutional delay of 449 days

[13] In the course of their submissions on the 11(b) application, the Crown and the defence agreed that the total period of institutional delay was 449 days which is approximately 15 months. It is nevertheless important to break down how that delay arose.

[14] I note at the outset that this is a straightforward matter in which the Crown estimates calling two witnesses and the defence may call one witness. The parties have estimated that it is a case that can be tried in one day.

August 24, 2013 to November 8, 2013

[15] In this case, the period of time from August 24, 2013, when the information was sworn, until November 8, 2013, 2014 (59 days), when the first trial date was set, is agreed between the parties to be neutral intake time. The Court accepts this submission.

[10] *R. v. Lahiry*, *supra* at para. 60.

November 8, 2013 to July 30, 2014

[16] On November 8, 2013, a Crown pre-trial was conducted and a trial date of July 30, 2014 was set, some 264 days later.

[17] At the time that the trial date was set on November 8, 2013, the defence indicated on the record that they were available to conduct the trial as early as December 2, 2013. Both the Crown and the defence agreed that given that the defence was ready to start the trial on December 2, it is fair and appropriate that 24 days for trial preparation time be deducted from the 264 days between November 8 and July 30, 2014. As a result, the parties submit, and the Court agrees, that the total institutional delay during this time frame is 240 days.

July 30, 2014 to March 25, 2015

[18] As indicated above, the matter was scheduled for trial on July 30, 2014. On that day, the accused was present as was the complainant and all parties were ready for trial. By the afternoon of July 30, 2014, it became apparent that the Court was unable to provide a trial judge to hear the case as all the judges sitting in Brampton that day were occupied with other matters.

[19] On July 30, 2014, both the Court and the Crown indicated that the parties could attend "fast-track" court where they could receive a new trial date on an expedited basis. Defence counsel indicated on the record on July 30, 2014 that he and his client were anxious to get the matter dealt with and they agreed to take the fast-track option. On July 30, 2014, the parties were directed by the trial coordinator's office to attend on August 8, 2014 for the purpose of setting a trial date in fast-track court. However, sometime between July 30 and August 8, 2014, the trial coordinator's office telephoned defence counsel and advised that the fast-track dates had all been taken up and that the matter would need to have a new trial date set in the normal course.

[20] Counsel for both parties attended on August 8, 2014. The Court offered February 18, 2015 as the first available trial date. Defence counsel was not available

but did indicate that he was available the very next day namely February 19, 2015. The Court was not available that day. The Court then offered February 25 and March 4, 2015 but defence counsel was not available. The first date the trial coordinator offered that all parties were available was March 25, 2015.

[21] Defence counsel submits, and the Crown agrees, that the timeframe between July 30 and February 18, 2015 (the first available trial date offered by the Court) is clearly institutional delay and amounts to 203 days. Defence counsel submitted that as he was available on February 19, 2015 but the Court could only offer February 25, 2015, a further six days of delay should be allocated between February 18 and March 25, 2015 as institutional delay.

[22] There are at least two possibilities with respect to the time frame between February 18 and March 25, 2015. First, the defence could take the position that all of it should be treated as institutional delay as it was brought about by the failure of the institution to provide the judicial resources necessary to have the case tried on on July 30, 2014 as scheduled. On the other hand, the Crown could take the position that the institutional delay stops at February 18, 2015 which was the first available date offered. In fact, the defence submits, quite reasonably in the Court's view, that only six days between February 18 and March 25 should be treated as institutional delay with the rest of it being treated as neutral delay. The defence essentially submits that the institutional delay which started on July 30, 2014 should stop running at February 25, 2015 which was the second trial date offered for which the defence was unavailable. The Crown accepted this submission as fair. The Court agrees that this is a reasonable way of treating the timeframe from February 18 to March 25, 2015 and is somewhat generous to the Crown.

[23] Accordingly, the 203 days during the timeframe from July 30, 2014 to February 18, 2015 days plus a further 6 days between February 18, 2015 and March 15, 2015 will be treated as institutional delay. The total institutional delay during this time frame is 209 days.

Total Institutional Delay

[24] For the reasons set out above, the parties jointly submitted, and the Court agrees, that the total institutional delay is 449 days which is approximately 15 months.

(iv) Prejudice

[25] As indicated by the Supreme Court of Canada in *R. v. Morin,* deviations of several months from the guidelines in either direction can be justified by the presence or absence of prejudice. Prejudice may take the form of restrictions on liberty, undermining the accused's ability to get a fair trial or interference with the security interests of the person.

[26] The burden is on Mr. [redacted] to establish prejudice on a balance of probabilities. Prejudice can be actual or inferred. As indicated above, prejudice will generally not be inferred except where there is a very long period of delay.

[27] In this case, the defence does not take the position that the delay has implications for the fair trial interests of Mr. [redacted] The prejudice which Mr. [redacted] alleges in this case relates to his liberty interests (as concerns his bail conditions) and his security of the person.

[28] Mr. [redacted] swore an affidavit and gave oral testimony on the s.11(*b*) application and was subject to cross-examination. He testified to a number of alleged areas of prejudice which he claimed were associated with the delay as follows:

(a) prejudice related to the adjourned trial date;

(b) prejudice associated with the oversight role of the accused's employer;

(c) access to Mr. [redacted] daughter;

(d) access to the condominium;

(e) increased legal fees; and

(f) travel to the United States.

[29] I will outline the position of Mr. [redacted] on each area of alleged prejudice and the Court's determination with respect to each claim.

(a) Prejudice Related to the Adjourned Trial Date

[30] Mr. [redacted] testified to the burden which the long period of time waiting for the trial date has had on him. He spoke to his embarrassment and burden relating to the charges for which he is presumed to be innocent. The Court accepts that the accused has demonstrated actual prejudice to his security of the person relating to the burden on him associated with the delay. The Court accepts that there is significant stress associated with attending Court for a trial on July 30 and then waiting most of the day for the trial to start only to learn that the case would not be heard that day but would have to be put over. In this case, the accused ended up being advised that his matter would be delayed another 209 days (7 months) having already waited 240 days (8 months) for the first trial date.

[31] In summary on this point, the accused has demonstrated some actual prejudice associated with his case not being reached on July 30, 2014 as scheduled. The Court characterizes this prejudice, viewed narrowly on its own, as moderate in severity.

(b) Prejudice Associated with the Oversight Role of the Accused's Employer

[32] Mr. [redacted] is a member the Canadian Armed Forces which he joined in January 2013. For every Court date associated with his case, he is required to have a senior member of the military in attendance with him to keep track of the matter from the military's perspective. This has been ongoing for every Court attendance since August 2013, including the aborted trial date on July 30, 2014. Mr. [redacted] testified to embarrassment before his employer associated with the charges themselves and to the fact that the case has continued on for a

long period of time. He testified that the ongoing nature of the case has been a burden on both him and on the military.

[33] The Court is not concerned about the burden on the military. The issue is whether the accused has suffered prejudice. The Court record in this proceeding is largely unremarkable. The transcripts of the various attendances include the typical references to conditions of release, the retaining of counsel, disclosure, routine adjournments and the setting of trial dates. To the Court and the lawyers, these events are routine. However, the Court recognizes that for individuals who appear before the Court these routine matters can carry great stress. For Mr. [redacted] there is the added stress of attending to these seemingly routine Court events in the presence of his employer.

[34] Most people who attend before this Court do not have to have their employer with them watching over their every move when they attend Court. It is one thing for an employer to be told of criminal charges against an employee. It is quite another to have the employer present in Court on every attendance and to see the accused facing serious criminal charges and attending to all of the seemingly routine events associated with defending those charges.

[35] It is true that this state of affairs flows, in part, from the charge itself but it is exacerbated by the delay associated with the prosecution. The prejudice on Mr. [redacted] of having his criminal charges being the subject of ongoing direct oversight by his employer over an extended period of time is significant in the Court's view. In the Court's view, this prejudice is moderate in severity.

(c) Access to Mr. Manickvasakar's Daughter

[36] It is a condition of his recognizance of bail that Mr. [redacted] can only access his six-year-old daughter through a mutually agreeable third-party or via a Family Court order. In this case, Mr. [redacted] own father has been agreed with his ex-wife to be a mutually acceptable third-party. As a result, he now must turn to his 78-year-old father to make arrangements with his ex-wife every time he

wishes to see his daughter. He has access to his daughter on weekends and holidays and he expressed frustration and showed emotion when testifying to this limitation and to the challenges faced with accessing his daughter through his father. The Court understood this frustration as being, in part, to the fact that the accused does not feel that he should need to turn to a his 78-year-old father to get his help every time the accused wants to see his daughter. The accused also testified to a number of misunderstandings with his ex-wife that occurred in terms of scheduling and that as a result he was unable to see his daughter over the Christmas holidays as he had planned or hoped for.

[37] There is no doubt that any time there is a family breakup and one spouse is seeking to exercise access to the children, there will commonly be frustration, misunderstandings and stress associated with exercising that access and this will occur whether or not there are criminal charges. However, the accused in this case faces further stress and challenges because if he fails to observe the requirements of his recognizance of bail he will commit a criminal offence and his liberty is at risk. This is different than the consequences for a spouse who can only access his children under the authority of an access agreement with his spouse and/or a Family Court order.

[38] In the Court's view, much of the stress and frustration concerning access to his daughter which the accused is facing stems from the charges and from the simple fact that he is separated from his ex-wife and does not live with his daughter. However, the Court does accept that there is added prejudice associated with the prolonged prosecution of this matter such that the accused can only access his six-year-old daughter through his 78 year old father and under the auspices of a recognizance with the Court which if not observed could lead to further criminal charges against him. This prejudice is moderate in the Court's view.

(d) Access to the Condominium

[39] Mr. [redacted] owns a condominium which his wife was living in at the

time of the events giving rise to the charges. It is a condition of his recognizance of bail that he not attend at the condominium building. However, his wife moved out of the condominium in April 2014. Mr. [redacted] has managed to rent it out since that time. As the owner of the condominium, he is still entitled to use the facilities of the condominium building which include a pool and a gym. He testified that he would like to take his daughter swimming in the pool. His counsel wrote three letters to the attention of the Crown in the fall of 2014 (dated October 18, November 23 and December 26, 2014) to which he has no response. Each letter explains that the bail condition prevents him from attending at the condominium building but now that his ex-wife no longer lives there, the letters request that the Crown consent to a bail variation to permit him to access the property.[11]

[40] The Court considers that on these facts, the Crown would likely consent to such a bail variation if the Crown turned its mind to the request. It would seem to be fair and appropriate that the bail condition be varied to permit him to access the property.[12] The letters were faxed to the Peel Crown Attorney's Office but not to the attention of a specific person. Each letter is addressed "to whom it may concern". The name of the accused is mentioned in each letter as well as the trial date.

[41] Whether the Crown would or would not consent to a bail variation is somewhat beside the point. The Crown has not responded to any of the letters. One would have expected that, at a minimum, someone in the Crown's office would acknowledge the letters and provide an answer to the request even if it was to deny the variation. In the Court's view, it would have been better if defence counsel had addressed the letters to someone in the Crown's office rather than just sending the letters "to whom it may concern". Having said that, to have no response to three letters addressed in this way is clearly unacceptable.

[11] In the letter of December 26, 2014, in addition to raising the access to the building issue, his lawyer also seeks to vary the access to his daughter so that arrangements could be made through counsel.

[12] This Court recognizes that bail conditions can only be varied on the Consent of the Crown or by by way of an application to the Superior Court of Justice.

[42] However, at the end of the day the alleged prejudice is associated with a property right and the potential for the accused and his daughter to enjoy that property right. The Crown should have responded to defence counsel's requests for a bail variation. However, the Court does not consider that the failure to be able to exercise a property right amounts to prejudice to Mr. [redacted] security of the person. Security of the person interests relate to the anxiety, concern and stigma associated with the criminal proceeding.[13] The access to the condominium is really a restriction on the accused's liberty but, in the Court's view, it is not of the nature or severity required to found or support a s. 11 (*b*) *Charter* application.

(e) Increased Legal Fees

[43] The accused claims prejudice through increased legal fees associated with having to attend all day on July 30, 2014 and not having a trial proceed on that day and now having a second trial date for March 25, 2015. The Court does not have any details on the amount of the increased cost or the accused's financial means. Having said that, the weight of opinion in the case law indicates that this is a recognized form of prejudice.[14] In the circumstances, the Court accepts that there is some actual prejudice associated with the increased legal costs.

(f) Travel to the United States

[44] The accused testified that he wished to take his daughter to Disneyland in the United States and that he sought advice from counsel who told him that he could not "guarantee" that he would not have a problem crossing the border given that these charges were outstanding. As a result he has chosen not to go.

[45] I am not as persuaded concerning the problems regarding travel to the United States. It is an area of potential prejudice but the accused did not attempt to cross the border and his interest in going to the United States appeared to be largely theoretical. The Court is not prepared to find actual prejudice associated with this

[13] *R. v. Morin*, *supra* at para. 28.
[14] See the reference to the additional expense for blitz court in *R. v. Rego*, *supra* at para 3.

issue.

Balancing

[46] As indicated above, the Court must undertake a balancing analysis wherein it considers whether the delay is unreasonable, having regard to the interests of the accused, including any actual or inferred prejudice suffered and society's interest in having the matter tried on the merits. Before staying the charges, the Court must be satisfied that the interests of the accused and society in a prompt trial outweigh the interests of society in bringing the accused to a trial on the merits.

[47] I have determined that a stay should issue in this case as I consider that Mr. [redacted] s. 11 (*b*) right to be tried within a reasonable period of time has been violated. In arriving at this conclusion, I have considered and balanced each of the following factors:

(i) This case involves allegations of domestic abuse. Allegations such as these are extremely serious and cannot be tolerated. Society has a strong interest in having cases such as these tried on the merits;

(ii) This is a straightforward case with no more than a total of three witnesses on both sides. It is a one day trial;

(iii) On the question of prejudice, I have found that the accused has suffered actual prejudice in respect of having his trial been scheduled but not proceeded with on the scheduled trial date; the oversight role of his employer concerning his criminal proceedings; access to his daughter and increased legal fees. Taken together, the prejudice is moderate to high in severity;

(iv) The true impact of prejudice on the accused in each of these areas can only be fully understood in the context of the length of the delay itself. In this case, there has been 15 months of institutional delay. As indicated above, the guidelines from *Morin* provide for 8 to 10 months of institutional

delay and some authorities suggest that this period should be shorter in Peel. It is recognized that the guidelines are precisely that, guidelines and not limitation periods. Considerable flexibility must be permitted when "enforcing" the guidelines. Having said that, 15 months of institutional delay is well outside the guidelines and exceeds by a significant amount the delay which has led to stays in other cases in this jurisdiction.[15] Each case must, of course, be decided on its own facts. In this case, the accused has sought to have his matter tried at the earliest possible opportunity and has done everything reasonably possible to have that done. Unfortunately, the Court institution has not been able to have the case tried within a reasonable time;

(v) When this matter was not reached on July 30, 2014, it should have been fast-tracked to a new and early trial date. The case law is clear that cases not reached on their scheduled trial date should be given priority.[16] This is not the kind of case in which the defendant had hoped for a delay for the purpose of bolstering a s.11 (*b*) argument. Indeed, it is just the opposite. When the case was not reached on July 30, the defence immediately sought to avail themselves of the fast-track court. The Court and the Crown wanted to accommodate the accused and suggested that he go to fast-track court but the institution could not or did not ultimately provide the fast-track option; and

(vi) While I have found actual prejudice in this case, I also infer prejudice in this case given the 15 months of institutional delay. This case meets the test for inferred prejudice in the case law which requires a delay "substantially longer than can be justified on any acceptable basis". Fifteen months delay in a case such as this one is simply unacceptable and

[15] See for example *R v. Tobin* 2013 ONCJ 227 (per Gage J.) where a stay was granted where the institutional delay was 11.74 months; see also *R v. Trocki* 2014 ONCJ 693 (per Copeland J.) where the institutional delay was 10 months and a stay was granted.

cannot be justified. However, let me be clear that even if I did not infer prejudice in this case, a stay would nevertheless have been appropriate given the actual prejudice demonstrated.

Conclusion

[48] While society has an interest in trying cases on the merits, society also has an interest in ensuring that persons who are brought before the court on serious charges are tried as soon as is reasonably possible. That did not happen here.

[49] For the foregoing reasons, the application is allowed and a stay of proceedings is entered.

Released: February 17, 2015

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Justice Paul F. Monahan

[16] See *R. v. Lahiry*, *supra* at para. 67.