IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF EDMUNDSTON

Reference: 2013 NBQB 318 **E/CA/2/13**
Date: 20130913

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

-and-

NORMAND LAVOIE,

Respondent

BEFORE: The Honourable Madam Justice Lucie A. LaVigne

DATES OF HEARING: August 2, 2013 and September 13, 2013

DATE OF DECISION: September 13, 2013

APPEARANCES:

Louis G. Plourde for the Appellant

Normand Lavoie on his own behalf

LAVIGNE J. (orally):

I. INTRODUCTION

[1] This appeal deals with the right to be tried within a reasonable time as guaranteed under section 11(*b*) of the *Canadian Charter of Rights and Freedoms* (*"Charter"*). A Provincial Court judge ordered a judicial stay of proceedings for unreasonable delay following a motion brought seven months after the information was filed. The Crown is seeking to have that order quashed and a new trial ordered.

[2] It is my opinion, for the reasons below, that the trial judge erred in her analysis of the reasonableness of the delay. I find that there was no infringement of the accused's right to be tried within a reasonable time. The appeal is allowed. I am setting aside the stay of proceedings and ordering that the case go to trial.

II. OVERVIEW OF THE FACTS

[3] An information was filed on April 23, 2012, charging the Respondent with the following:

> [TRANSLATION] **Normand Lavoie**, between October 25 and October 27, 2011, inclusive, in or near Saint-Basile, New Brunswick,
>
> 1- having ownership and possession of animals, namely **one hundred and thirty-three (133) dogs**, and having the care and control of same, did fail to provide said animals with the required food, water, shelter and care as provided in subsection 4(1) of Regulation 2000-4 made under the *Society for the Prevention of Cruelty to Animals Act*, c. S-12, RSNB, as amended, the whole contrary to subsection 18(1) of the Act, thereby committing an offence contrary to and in violation of subsection 18(2) of the Act, as amended;
>
> 2- Did, without a licence issued in accordance with the *Society for the Prevention of Cruelty to Animals Act*, c. S-12, RSNB and its regulations, operate a pet establishment, namely a kennel, contrary to and in violation of subsection 4(*c*) of Regulation 2010-74 made under the Act, the whole contrary

> to subsection 23(1) of the Act, thereby committing an offence contrary to and in violation of subsection 23(2) of the *Society for the Prevention of Cruelty to Animals Act*, as amended.

[4] An initial appearance in Provincial Court took place on May 9, 2012. The matter was adjourned until May 23 at the Respondent's request, at which point he pled not guilty to both offences. The judge scheduled the trial for November 19 to 21, 2012. Mr. Lavoie sought a stay of proceedings on the first day set aside for the trial, namely November 19, claiming unreasonable delay since part of the evidence disclosed to him in May 2012 still had not been translated from English to French as requested. The judge adjourned the matter until December 7, 2012, for hearing of the motion. She reserved judgment on the issue and adjourned the hearing until January 23, 2013, for decision. On January 23, 2013, she issued her decision ("Decision") and ordered a stay of proceedings for unreasonable delay.

III. GROUNDS OF APPEAL

[5] The Crown's grounds of appeal are as follows:

> [TRANSLATION] a) by deciding to stay the proceedings in violation of the Respondent's rights under section 11(*b*) of the *Canadian Charter of Rights and Freedoms*, the Provincial Court judge erred in law with respect to the periods to be considered and attributed from the date the information against the Respondent was filed until the trial date;
>
> b) the Provincial Court judge erred in law by finding that the Respondent's right under section 11(*b*) of the *Canadian Charter of Rights and Freedoms* had been infringed.

IV. LEGISLATIVE PROVISIONS

[6] The only legislative provisions relevant to disposing of this motion are sections 11(*b*) and 24(1) of the *Charter*, which provide as follows:

> 11. Any person charged with an offence has the right […] b) to be tried within a reasonable time;
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[7] Section 11(*b*) of the *Charter* applies to criminal and penal matters. It falls to the accused to establish, on a balance of probabilities, that a *Charter* right has been infringed.

V. ANALYSIS

[8] Our Court of Appeal has occasionally been called upon to decide this issue. Mr. Justice Bell's succinct analysis in paragraph 9 of *R. v. Lanteigne*, 2010 NBCA 91, [2010] N.B.J. No. 423 is a good summary of the state of the law:

> The relevant jurisprudence regarding the right to be tried within a reasonable time is set out in *R. v. Askov*, [1990] 2 S.C.R. 1199, [1990] S.C.J. No. 106 (QL); *R. v. Morin*, [1992] 1 S.C.R. 771, [1992] S.C.J. No. 25 (QL) at paras. 31-64 and *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3; and reiterated by this court in *Giberson v. R.*, 2010 NBCA 19, 356 N.B.R. (2d) 196 at para. 4; *Black v. R.*, 2010 NBCA 65, [2010] N.B.J. No. 287 (QL) at para. 13; and *Black v. R.*, 2010 NBCA 36, [2010] N.B.J. No. 171 (QL) [*Black (I)*]. It is now trite law that the following factors are to be considered by a trial judge in assessing whether a delay violates an accused's s. 11(*b*) *Charter* right:
>
> 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,
> **e)** other reasons; and
>
> 4) Prejudice to the accused.

A. STANDARD OF REVIEW

[9] In paragraph 11 of *R. v. Lanteigne*, Mr. Justice Bell reminds us of the standard of review to be applied in an appeal of this nature.

> The standard of review in s. 11(*b*) cases is normally as set out in *R. v. Gray*, 2001 NBCA 51, 239 N.B.R. (2d) 83, (adopted in *Giberson* at para. 2):
>
> > Whether or not the delay is reasonable within the meaning of paragraph 11(*b*) of the *Charter* is, in a large measure, a question of fact. Unless the trial judge erred with respect to the relevant principles of law, this Court must show deference when asked to reverse a finding that an accused's right to be tried within a reasonable time has been violated. [para. 6]

[10] However, in the same paragraph, Mr. Justice Bell goes on to say that for a question of law, the standard is one of correctness:

> In this case, however, the Court is being asked to respond to a pure question of law, namely, whether the period of a stay directed under s. 579 should be attributed to the Crown for purposes of assessing the reasonableness of a delay. On that narrow question, the standard is one of correctness.

[11] In *R. v. Tran*, 2012 ONCA 18, [2012] O.J. No. 83, the Court of Appeal for Ontario explained this difference between the standard of review applicable to a trial judge's findings of fact and the standard applicable to the characterization and attribution of the various periods of delay as follows, at paragraph 19:

> [TRADUCTION] Cette cour soutient à plusieurs reprises que la qualification des différentes périodes de retard au sens de l'alinéa 11*b*) de la *Charte* et la décision finale visant à déterminer si le retard est déraisonnable ou non doivent être examinées selon une norme du bien-fondé. Cependant, les conclusions de fait sous-jacentes doivent être examinées en fonction de la norme d'une erreur manifeste et dominante: *R. v. Schertzer*, 2009 ONCA 742, 255 O.A.C. 45, au paragraphe 71.

[12] An appellate court must show deference and can vary a trial judge's findings of fact only if they are clearly wrong, not supported by the evidence or otherwise unreasonable. The error must be palpable and overriding. However, where errors of law are concerned, the court is not bound by deference and the standard is one of correctness. In my opinion, that is the case here.

B. REASONABLE TIME GUIDELINES

[13] Some delay is obviously inevitable. The issue is the point at which the delay becomes unreasonable.

[14] In her Decision, the trial judge stated [TRANSLATION] "that New Brunswick's case law requires that all phases of a trial be completed within six to eight months" [Transcript – p. 41, lines 2 to 5]. In her defence, she was no doubt referring to the decisions cited by the Crown prosecutor in his oral arguments, namely *R. c. Basque*, 2010 NBCP 27, [2010] A.N.B. No. 166, and *R. v. Lanteigne*, 2011 NBPC 6, [2011] N.B.J. No. 30. I cannot say I agree with that statement. In my opinion, the state of the law on the guidelines is as set out in the Supreme Court of Canada's decisions in *R. v. Askov*, [1990] 2 S.C.R. 1199, [1990] S.C.J. No. 106, *R. v. Morin*, [1992] 1 S.C.R. 771, [1992] S.C.J. No. 25, and *R. v. Godin*, 2009 SCC 26, [2009] S.C.J. No. 26 and reiterated by our Court of Appeal in *R. v. Firth*, [1992] N.B.J. No. 363, (1992), 126 N.B.R. (2d) 47. Those guidelines are a proposed institutional delay of eight to ten months for Provincial Courts and a further period of six to eight months between remission for trial and the trial itself before the Superior Court, for a total period of 14 to 18 months. However, as Mr. Justice Ryan indicated in *Firth*, "these are guidelines and are not to be considered rigid" (see *R. v. Firth*, [1992] N.B.J. No. 363, (1992), 126 N.B.R. (2^{d}) 47, page 4).

[15] At the time the stay of proceedings motion was brought (November 19, 2012), the period (from April 23 to November 19, 2012) did not exceed the guidelines since it was only seven months long.

[16] The proposed period of eight to ten months should not be interpreted as though it were a legal limitation period as the result of which a charge must automatically be stayed if it is exceeded. The issue of whether there has been an unreasonable delay in a specific case is not simply a matter of time; what may appear to be an excessive delay in one case may have a reasonable explanation in others. If it were simply a matter of time, the issue could easily be decided.

[17] The Supreme Court of Canada has repeatedly asserted the Draconian nature of the stay of proceedings (see *R. v. Taillefer*; *R. v. Duguay*, 2003 SCC 70, [2003] 3 S.C.R. 307 and *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411).

C. HISTORY OF MOTIONS UNDER SECTION 11(b) OF THE CHARTER

[18] In this case, no written motion was filed seeking a stay of proceedings.

[19] The judge explained in her Decision how this stay of proceedings motion arose:

> [TRANSLATION] On November 14, 2012, Mr. Lavoie came to court early on appearances day. He wanted to plead guilty to the first count and, if the Court accepted his guilty plea, the Crown would withdraw the second count. It should be noted that Mr. Lavoie was no longer represented by counsel at that point, and he informed the Court that he had to let his lawyer go for financial reasons.
>
> After hearing the facts underlying the charges, Mr. Lavoie informed the Court that he had not committed the offences with which he was charged. He wanted to plead guilty because he was still waiting to receive more than half of the translation of the Crown's evidence disclosure, and the Crown had informed him

> that the entire translation would not be ready before his trial, which was to begin five days later.
>
> Noting that the matter would be adjourned, Mr. Lavoie had decided to plead guilty to get it over with. He had, therefore, entered into an agreement with the Crown, which Crown counsel confirmed, that if Mr. Lavoie pled guilty to one count, the other would be withdrawn.
>
> I then rejected Mr. Lavoie's guilty plea and ordered him to report for trial on November 19, 2012 [Transcript, page 34, lines 13 to 24, and page 35, lines 1 to 16].
>
> […]
>
> On November 19, 2012, Mr. Lavoie requested a stay of proceedings [Transcript, page 36, lines 16-17].

[20] The judge adjourned the hearing on the motion until December 7. No notice of motion was filed. In this type of case, there has to be an evidentiary basis for the decision. No evidence was adduced in either affidavit or *viva voce* form. The only evidence on the record is a letter the Respondent submitted to the judge during the hearing to establish the date on which he had asked the Crown to provide him with a translation of the evidence disclosure. With the exception of that letter, the parties confined themselves to making oral submissions, with no objection on either side.

[21] It is preferable for an accused who intends to invoke the *Charter* owing to unreasonable delay, whether at trial or at another hearing, to give the Crown reasonable written notice of his intent to do so. This gives the judge and Crown an opportunity to consider the redress being sought and the grounds on which the applicant is relying for the motion. In that connection, this is a good point at which to review the remarks of Mr. Justice Drapeau (as he then was) in *Smith v. Human Rights Commission (N.B.) et al.* [1999] N.B.J. No. 392, (1999), 217 N.B.R. (2d) 336 (C.A.), at paragraph 19:

> […] The *Charter* was not conceived in a vacuum: its authors assumed that it would be applied within a procedural framework provided elsewhere. In the present case, the applicable framework is provided by the Rules of Court. Experience has shown that respect for the jurisdictional framework created by the Rules of Court and compliance with its procedural dictates serve the best interests of justice. Indeed, conformity with the Rules of Court invariably produces a winnowing of the chaff from the grain and, in turn, helpful clarity is brought to the questions submitted to the court for resolution. Focused and insightful decisions invariably follow. The end product is better justice for all.

[22] I also subscribe to the comments of Mr. Justice Rideout in *R. v. Leblanc*, 2005 NBQB 465, [2005] N.B.J. No. 533 at para. 12:

> [TRADUCTION] Il est bien convenu qu'un avis approprié écrit doit être donné sur une motion de la Charte. La motion doit être accompagnée d'un affidavit décrivant le fondement de la motion et la preuve factuelle qu'il importe d'invoquer. Il est également reconnu que lors d'un procès, certaines circonstances exigent qu'une contestation fondée sur la Charte soit déclenchée immédiatement. Cependant, la majorité des motions de la Charte doivent être exécutées seulement après qu'un avis approprié écrit a été donné.

[23] Although I acknowledge that it may be difficult to impose on a self-represented accused as in this case, written notice outlining the grounds for the motion should still be required before proceeding.

D. TRANSLATION OF THE DOCUMENTS DISCLOSED TO THE RESPONDENT

[24] A disproportionate part of the parties' submissions and of the Decision has to do with the Respondent's language rights. However, this was not a motion under sections 16 to 22 of the *Charter*. Section 11(*b*) of the *Charter* is not the means by which an accused's language rights should be considered.

[25] The trial judge found that on July 5, 2012, the Respondent requested a translation of the documents that had been disclosed to him in May 2012. The translation was only completed on December 21. The judge ruled that this five-and-a-half-month wait was unreasonable.

[26] She found that the translation had been the main cause of the unreasonable delay. She indicated as follows in the Decision:

> [TRANSLATION] This matter could and ought to have been addressed within a much more reasonable time. However, this was not possible since the translation of the disclosure alone was completed 14 months after the offence was committed and seven months after the information was filed [Transcript, page 39, lines 15 to 20].

[27] The Crown explained the time that passed between the point when the translation was requested and when it was received. According to the information given to the judge during the hearing on December 7, a total of 236 pages had to be translated from English to French. They included a veterinary report for each of the 133 dogs to which the charges relate. Many pages were handwritten notes, which had to be typed out by the author, an animal protection officer for the Province of New Brunswick, before they could be sent for translation.

[28] The Crown only received the typewritten documents on October 9, and they were sent for translation the same day. The respondent was given 139 pages on November 1, 2012. The other 97 pages still had not been translated on November 19, the scheduled trial date. During the hearing on December 7, the judge was informed that the other documents would be available on December 21.

[29] The judge found that the translation had caused a delay of more than seven months. The need to translate the documents included in the disclosure had no impact on the November 19,

2012, date chosen for the trial, since the trial was scheduled on May 23, 2012, whereas the translation was only requested on July 5. The translation was completed within five and a half months after the Respondent requested it. If the request had been made as soon as the information was filed (April 23), the translation would have been available at least six weeks before the scheduled trial date and would, therefore, not have had any impact on the proceedings. The trial was never adjourned due to the translation issue. On November 19, the trial was postponed in order to hear the Respondent's motion seeking a stay of proceedings. The hearing went forward on December 7 and the decision was issued on January 23. In the meantime, the translation was received on December 21.

[30] In *R. v. Lanteigne,* 2011 NBPC 6, [2011] N.B.J. No. 30, Mr. Justice Duffie ordered a stay of proceedings because 23 months had passed between the information and the date set for trial. In that case, the documents were in French, the accused had elected to be tried in English, and he had advised the court on December 1, 2008, that he would have the disclosure translated to accommodate his English-speaking lawyer. The trial was set down for July 2, 2009. On June 30, the accused's lawyer advised the court that the translation was not ready and requested an adjournment. The trial was adjourned until December 11, 2009. When reviewing the period of delay, Mr. Justice Duffie, while acknowledging that it was due to the need for translation, attributed the adjournment between July 2 and December 11 to the accused. The delay was computed from the original trial date until the new trial date, rather than looking at the period between the date the translation was requested and the date it was received.

[31] Needless to say, the accused has the right to choose the language in which his trial is conducted. However, New Brunswick is a bilingual province; public servants can work in either

French or English. It comes as no surprise that some evidence may be in a language other than the one selected by the accused. If an accused requests that those documents be translated into the language of his choice, he has to expect that the translation will take some time to complete. That delay may be more or less long depending on the nature and volume of the documents to be translated. It is an inherent time requirement of the case.

[32] Beginning the disclosure translation process before the accused asks for it could prove to be a waste of time, effort and resources. Once a translation is requested, the parties are no longer ready for trial and, therefore, institutional delay ends and an inherent time requirement begins. In the case at bar, the translation was requested on July 5 and the translation completed on December 21. I find that in this case, four months of that period were a reasonable inherent time requirement to obtain the translation.

E. THE NEW TRIAL DATE

[33] The period to be examined usually begins on the date the information is filed and ends on the date set for trial.

[34] In the case at bar, the trial was set for November 19 to 21, 2012. The judge did not adjourn the trial for lack of the translation or at the Crown's request. She postponed the matter until December 7 in order to hear the Respondent's motion seeking a stay of proceedings. During the hearing on December 7, she informed the parties that if they wanted… [TRANSLATION] "to have three days on the Court schedule, it will take us to at least June 2013" [Transcript, page 20, lines 20 to 22].

[35] I understand that, according to the judge's regular schedule, the next available dates were in late June. However, this was not a normal situation; on November 19, the Respondent had requested a stay of proceedings for infringement of his right to be tried within a reasonable time. At the time the *Charter* challenge was raised, only seven months had passed since the information had been filed. With the threat hanging over this case, efforts should have been made to hold the trial within the timeframe suggested by the guidelines, namely within eight to ten months, since it was still possible to do so. A stay of proceedings is a remedy of last resort, "to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted" (see *R. v. O'Connor*, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98, at para. 77). Under the circumstances, higher priority should have been given to a matter like this one, which already posed a problem in relation to section 11(*b*) of the *Charter*.

[36] At the end of the hearing on December 7, the judge reserved judgement on the issue and adjourned the matter until January 23, 2013, telling the Respondent that on that date, she would either tell him that the proceedings were stayed or she would set a new trial date. The new trial date was never set; however, the judge did review the length of the delay, considering that the full period had already passed and characterizing the entire period from November 19 to late June as institutional delay.

[37] In *R. v. Smith*, [1989] 2 S.C.R. 1120, [1989] S.C.J. No. 119, the Supreme Court of Canada considered the issue of whether an anticipatory stay of proceedings application can be brought under section 11(*b*) of the *Charter*. The accused's application was anticipatory as it had been brought several months before the date set for the preliminary inquiry. Mr. Justice Sopinka, in writing unanimous reasons, ruled that, since the date of the preliminary inquiry was fixed and

could not, at the behest of the accused, be moved up, the trial judge properly considered the accused's application on the basis of section 11(*b*) since the time had already elapsed.

[38] However, in *Smith* the next date had been fixed, which is not the case here. Not only was the motion anticipatory, but the new trial date was never set. Under the circumstances, the question is whether the judge should have considered the date in late June in her calculations even though the trial date had not been fixed.

[39] The Crown did not object to the date in late June used by the judge for computation purposes. Under the circumstances, I will leave this issue for another day, since a determination is not required in order to reach a decision in this case.

F. PREJUDICE TO THE ACCUSED

[40] The main purpose of section 11(*b*) of the *Charter* should be kept in mind; Mr. Justice Ryan summarized it as follows in *Firth*, at page 3:

> […] Mr. Justice Sopinka in the *Morin* case said that the main purpose of s.11 (*b*) of the *Charter* is to protect an individual's rights to security of the person, liberty and a fair trial. He explained that security is protected by minimizing the stigma and anxiety associated with criminal procedures; liberty is protected by minimizing exposure to restrictions such as pre-trial incarceration or onerous bail conditions; and the right to a fair trial is protected by ensuring that proceedings take place while evidence is available and fresh. […]

[41] The parties did not raise the issue of prejudice during the motion and no evidence was adduced on the subject. However, "the degree of prejudice or absence thereof is also an important factor in determining the length of institutional delay that will be tolerated" (see page 803 of *R. v. Morin*). Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. The accused may

call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay.

[42] However, even in the absence of specific evidence of prejudice, prejudice can be inferred when the delay is excessive. (see *R. v. Morin* and *R. v. Godin*).

[43] The judge concluded that the delay was excessive, that the Respondent could no longer have a fair trial and that the presumption of prejudice resulting from the passage of time applied. Given my finding that the required analysis was not done, there is no need for me to rule on the issue of prejudice to the accused.

G. PROVINCIAL COURT DECISION

[44] In order to assess the reasonableness of a delay, the trial judge must consider the length of the delay, less any periods the defence has waived, and then look at the reasons for the delay (in particular the inherent time requirements of the case, actions of the accused, actions of the Crown, and limits on institutional resources) and the prejudice to the accused.

[45] The judge considered the first factor, that is to say the length of the delay, and ruled that the time was excessive. She made no mention of waiver, the second factor. She then turned her attention to the third factor, namely the reasons for the delay. She did not discuss inherent time requirements or allocate any period for the inherent time requirements of this case. She confined herself to the period between May 9 and December 21. She ruled that the Respondent was partially responsible for the delay, because he had waited until July 5 to request the translation. She found that the maximum period she could attribute to the Respondent was the period between May 9 and July 5, 2012. She did not specifically indicate in which category she placed

the period from July 5 to December 21, but she can be inferred to have attributed that delay to the Crown. Immediately after mentioning the period from July 5 to December 21, she added that, [TRANSLATION] "The other delays are institutional, but cannot be attributed to Mr. Lavoie" [Transcript, page 39, lines 13 and 14]. With respect to the final factor she was required to examine, she found that the Respondent had suffered prejudice resulting from the passage of time, and she ordered a stay of proceedings.

[46] She neither discussed nor attributed the period between April 23 and May 9, 2012, that is to say the period between the time the information was filed and the accused's first court appearance.

[47] She did not specifically consider or attribute the period devoted to the *Charter* challenge, namely the period between November 19 (the date the Respondent applied for a stay of proceedings) and January 23 (the date of the Decision).

[48] The judge confined herself to two specific periods of time, namely the period between May 9 and July 5 and the period between July 5 and December 21. She attributed the first delay to the Respondent, since he requested a translation on July 5 rather than at his first court appearance. As for the second period, she indicated that it was unreasonable for the translation process to have taken from July 5 to December 21. The judge then looked at the issue from the perspective only of the passage of time.

[49] The court must look at waiver as a factor. An accused may waive all or part of a period by agreement or through his conduct, which will reduce the length of the delay accordingly. The judge did not mention this factor.

[50] The judge made no mention of the inherent time requirements of the case at bar. This factor affects the determination of the reasonableness of the delay under section 11(*b*). In *Morin*, the Supreme Court acknowledged that, "All offences have certain inherent time requirements which inevitably lead to delay" (see *R. v. Morin*, [1992] 1 S.C.R. 771, [1992] S.C.J. No. 25, page 791). Red tape, retaining a lawyer, pre-trial proceedings, counsel's preparations, and so on, all take time. Moreover, it may take time to address motions by the prosecution, the defence or both. In *R. v. Schertzer*, 2009 ONCA 742, [2009] O.J. No. 4425, the Court of Appeal for Ontario found that the time required to hear and dispose of pre-trial motions, including one under section 11(*b*) of the *Charter*, had to be considered an inherent time requirement of the case. All of these activities take time and all legitimate some delay. In assessing the reasonableness of delay for the purposes of section 11(*b*), the period attributable to the inherent time requirements of the case is neutral and should be attributed neither to the prosecution nor to the defence (see *R. v. MacDougall*, [1998] S.C.J. No. 74, [1998] 3 S.C.R. 45 at para. 44).

[51] After addressing the time it took to translate the disclosure documents, the judge found that [TRANSLATION] "The other delays are institutional" [Transcript, page 39, line 13]. Institutional delay is the period that begins when the parties are ready for trial, but the system cannot accommodate them immediately. When applying section 11(*b*), allowances should be made for the fact of life that resources are limited and, therefore, some institutional delay is reasonable. It is this reasonable period that the Supreme Court suggested as a guideline.

[52] The judge did not comment on or assess the reasonableness of the institutional limits and resources of the province or area, nor did she suggest that the institutional delay stemmed from insufficient institutional resources, namely a lack of judicial or other resources.

[53] Determining what constitutes an unreasonable delay is not a simple matter of time, but a matter of time and a number of other factors. The trial judge has to assess or weigh up the various factors to reach a conclusion. The reasonableness of the entire elapsed period should be assessed in light of all of the aforementioned factors.

[54] I am afraid that the judge's attention to the details surrounding the translation issue caused her to lose sight of the bigger picture. She seems to have confined herself to the issue of whether it was reasonable to take from July 5 to December 21, 2012, to translate the disclosure. The translation issue ought not to have been the focal point of her examination, unless the translation had caused a delay in the conduct of the proceedings. The time it took to translate the disclosure was not the issue. The only relevant issue was whether the translation had caused a delay and, if so, the judge had to determine the length of that delay, classify it according to the various categories listed in *Morin* and attribute it. Was it among the inherent time requirements of the case, or was it a delay attributable to the Crown?

[55] The trial judge had to determine if the accused's section 11(*b*) *Charter* rights had been infringed because of unreasonable delay and, if so, she had to decide if the accused was entitled to a stay of proceedings under section 24 of the *Charter*. Determining the point at which a delay becomes unreasonable means weighing up all of the factors listed by the Supreme Court in *Morin* and repeated by Mr. Justice Bell in *R. v. Lanteigne*.

VI. APPLICATION OF THE FACTORS TO THE CASE AT BAR

[56] The court's primary obligation with regard to a motion based on section 11(*b*) of the *Charter* is to decide whether there is a *prima facie* valid cause with respect to unreasonable

delay. A 14-month period to hold a trial in Provincial Court is enough to raise the issue of the reasonableness of the delay, and that period warrants analysis.

[57] As for waiver, there is no evidence that the Respondent waived invoking certain periods of delay.

[58] The length of the delay requires the court to look at the period from the time the information was filed until the end of the trial in order to determine the reasons for the delay. The various periods may be broken down as follows:

- The period from April 23 to May 9 is an inherent time requirement for bringing the proceedings before the court and is neutral (15 days).

- The period from May 9 to May 23 is attributable to the Respondent, who requested an adjournment before entering his plea (14 days).

- The period between May 23 and November 19 should be divided between a neutral inherent time requirement of four months attributable to the need to translate the evidence disclosure, and institutional delay of one month and 26 days attributable to the Crown.

- The fact that the Respondent's motion for a stay of proceedings was made without notice required an adjournment from November 19 to December 7. I attribute the delay resulting from this adjournment to the Respondent (18 days).

- The motion was heard on December 7 and the decision issued on January 23. In this case, I am of the opinion that this period is an inherent time requirement and, therefore, neutral (47 days).

- The period between January 23 and the date fixed for the new trial is institutional delay attributable to the Crown (five months).

[59] No period is left unexplained.

[60] The total period between the time the information was filed and the scheduled trial was 14 months. This period can be explained by neutral inherent time requirements (six months), institutional delays attributable to the Crown (seven months), and a one-month period attributable to the accused.

[61] There is no evidence to suggest that institutional limits resulted in unreasonable delay. The seven months of institutional delay were not unreasonable under the circumstances.

[62] No actual prejudice was proved.

[63] When the various periods are properly identified and attributed, I cannot find that the accused's right to be tried within a reasonable time was infringed by the total elapsed time in this case.

VII. CONCLUSION

[64] The trial judge erred by failing to follow the guidelines set out in *R. v. Morin*. It is necessary to consider the various delays throughout the course of the matter, determine the reasons for those delays and break them down into the different categories recognized in *Morin*.

[65] The judge characterized all of the periods save the one from May 9 to December 21 as institutional delay attributable to the Crown, when certain periods ought to have been attributed to the Respondent and others considered inherent time requirements of the case.

[66] In my opinion, these errors caused the trial judge to come to the wrong conclusion as to infringement of the accused's section 11(*b*) *Charter* rights.

[67] Having analyzed the reasons for the delay, applied the proposed guidelines for institutional delay and factored in the lack of evidence of actual prejudice, it is my opinion that the delay in this case was not unreasonable. I find that there was no infringement of the accused's right to be tried within a reasonable time. The public interest in holding a trial must prevail.

VIII. DISPOSITION

[68] The stay of proceedings order is quashed. I order that Respondent Normand Lavoie be tried; it follows that every effort should be made to hold this trial forthwith.

DATED at Edmundston, New Brunswick, on this 13th day of September 2013.

Lucie A. LaVigne
Judge of the Court of Queen's Bench
of New Brunswick