Date: 2013 01 23
Docket: S-1-CR-2011 000111

2013 NWTSC 4 (CanLII)

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

HUGUES LATOUR

MEMORANDUM OF JUDGMENT

[1] On December 17, 2012, Hugues Latour applied for a judicial stay of proceedings, claiming his right to be tried within a reasonable time, guaranteed by s. 11(b) of the *Canadian Charter of Rights and Freedoms*, was violated. I granted the application the following day and issued a stay of proceedings pursuant to s. 24(1) of the *Charter*. These are the reasons for that decision.

NON-COMPLIANCE WITH *CRIMINAL PROCEDURE RULES*

[2] Mr. Latour's application did not comply with the formal requirements of Criminal Procedure Rules.

[3] Rule 69 provides that in an application under s. 11(b) of the *Charter*, the applicant must file, among other things, transcripts of previous proceedings and a detailed affidavit. The affidavit must contain a full statement of the history of the proceedings. Neither of these requirements was met.

[4] Under r. 134, the court may exercise its discretion to waive compliance where it considers it necessary in the interests of justice.

[5] Crown counsel referred to *R.* v. *Babra* [2007] O.J. No. 4071, where the Ontario Court of Justice considered the impact of non-compliance with an equivalent procedural rule in the context of an application under s. 11(b). It was noted that, although the need for transcripts will depend on the issue, for most s. 11(b) applications they will be required to ensure that the court has access to a complete record in determining questions relating to the delay. (See also *R.* v. *Stevens* 2011 ONSC 5130, at paragraph 42).

[6] In *Babra*, the applicant complied with neither the rules respecting service, nor those respecting supporting materials. Some, but not all, transcripts of previous proceedings were submitted, as well as an affidavit which the court found inadequate. In the circumstances, the court found the record before it was insufficient to determine if the delay was excessive. For this and other reasons, it dismissed the application.

[7] In light of the nature of the inquiry required on an application brought under s. 11(b), it will be appropriate to apply r. 134 and waive the formal requirements set out in the Rules only in exceptional cases. This is one such case.

[8] There are a number of things about Mr. Latour's application that distinguish it from the facts in *Babra* and which make it necessary in the interests of justice to dispense with compliance with the requirements for transcripts and an affidavit.

[9] Transcripts would have added very little to the application and were not necessary to allow a proper analysis of the delay. There were very few appearances and there are no disputes about when they were made or what they were about. The results of each appearance are readily apparent from the materials in the court's file, including the Clerk's notes, correspondence between counsel and the registry, pre-trial conference reports, notices of motion and supporting materials. As I will explain later in these reasons, much of the delay resulted from things that did not involve appearances at all.

[10] Other than this application, there was only one other motion when the Crown applied for an adjournment. Arguably, transcripts from that motion might have been helpful, but the Crown's basis for seeking the adjournment was clear from the evidence it filed in support of that application and there is no question that it was contested by Mr. Latour.

[11] For similar reasons, the absence of an affidavit from defence detailing the history of the proceedings did not hinder the inquiry.

2013 NWTSC 4 (CanLII)

[12] The manner in which defence counsel presented this application was far from ideal. Given the rights and interests involved in this application, however, the interests of justice required that Mr. Latour be permitted to proceed with this application, despite non-compliance with the *Criminal Procedure Rules*. The nature of the proceedings and the quality of information that was available permitted the court to perform a thorough legal analysis.

2013 NWTSC 4 (CanLII)

CASE HISTORY

[13] The following is apparent from the court record:

[14] Mr. Latour was arrested and charged with one count of parental abduction under section 283(1) of the Criminal Code on December 15, 2010.

[15] Following a show cause hearing held on December 22, 2010, Mr. Latour was released on conditions which, among other things, required him to report in person to the RCMP three times a week, deposit his passport and remain within the Northwest Territories pending determination of the matter. There were also conditions on the manner of Mr. Latour's access to his child and respecting contact with the child's mother. These conditions were subsequently amended, but the reporting requirements and general mobility restrictions remained.

[16] Mr. Latour's bail was revoked on October 5, 2011 because of subsequent charges.

[17] There were court appearances relating to the Crown election and scheduling the preliminary inquiry on January 18, February 22, March 1 and April 12 of 2011. There is a transcript from the April 12 appearance which reflects that Mr. Latour's then defence counsel had concerns about delay at that point and she wanted to ensure the preliminary inquiry be held at the earliest possible date and in any event, by the following June. *Transcript of April 12, 2011 appearance, page 1, lines 10 to 16 and page 2, lines 11 to 18.*

[18] The preliminary inquiry was held on June 24, 2011 and Mr. Latour was ordered to stand trial.

[19] On July 4, 2011, the Manager of the Supreme Court wrote to both Crown and defence counsel and asked them to take steps to schedule a pre-trial conference and to submit dates they would be available for trial.

[20] Defence counsel submitted her dates on July 21, 2011. There is no record of the Crown having submitted any potential trial dates in response to this request.

[21] At the list scheduling on September 1, 2011, a pre-trial conference was set for September 27, 2011. It proceeded on that date.

[22] The pre-trial conference report that followed did not identify any pre-trial or *Charter* motions.

[23] The Crown provided available dates for trial on November 23, 2011.

[24] Mr. Latour filed a Notice of Change of Solicitors on November 24, 2011.

[25] The next court appearance was at list scheduling on November 25, 2011. The Clerk's notes indicate that both Crown and defence counsel confirmed that an additional pre-trial conference was not required.

[26] Mr. Latour's new defence counsel provided dates he was available for trial immediately following that appearance.

[27] On November 30, 2011 the Manager of Supreme Court advised both counsel that the trial, which was to proceed in front of a judge sitting alone, was set for February 27, 2012 in Inuvik. It was scheduled for just over three days, commencing late on that Monday afternoon and concluding Thursday.

[28] On December 3, 2011, the Crown discovered that it had made a scheduling error and that the assigned prosecutor would be away on vacation when the trial was scheduled to proceed in February.

[29] In a letter dated December 15, 2011, Crown counsel advised the court of the scheduling mistake and that he was not, in fact, available for the trial in February of 2012. He asked that an application for an adjournment be set down for January 18, 2012, when both Crown and defence counsel would be available. He also requested a second pre-trial conference.

[30] Subsequently, the Crown brought the application for an adjournment, based on the scheduling error. The application, which was contested, was heard and granted on January 18, 2012. The Clerk's notes from that appearance indicate there was direction to Crown and defence counsel to submit new trial dates to the registry as soon as possible, so that the trial could be rescheduled.

[31] Defence counsel wrote to the Manager of Supreme Court on January 24, 2012 and provided dates he was available for trial in February, May, June, July and August of 2012.

2013 NWTSC 4 (CanLII)

[32] On March 1, 2012 the Crown sent a letter with available dates beginning in September of 2012 and requested a second pre-trial conference be held prior to the case being rescheduled.

[33] The matter came forward at the list scheduling on March 2, 2012. The Clerk's notes indicate that the second pre-trial conference was again requested by the Crown.

[34] The second pre-trial conference took place on March 27, 2012 before Justice Richard.

[35] In his report following the pre-trial conference, Justice Richard noted that the dates defence counsel had submitted in January following the adjournment application had become stale. Among other things, he directed "each counsel to put priority on this file with a view to setting it for trial as soon as practicable, given its age". He also set out a number of deadlines for completion of an Agreed Statement of Facts and provision of potential trial dates, directing that on or before April 30, 2012, counsel were to advise the court of their availability for trial in Inuvik from June 1, 2012 and onward. Finally, his report identified the possibility of a defence application based on a breach of s. 11(b) of the *Charter*, but no other pre-trial motions.

[36] Neither defence, nor Crown counsel met the April 30, 2012 deadline for providing potential trial dates, but they did provide dates on May 8 and May 9, 2012, respectively.

[37] The first date that both Crown and defence counsel were available for a trial was October 9, 2012. At list scheduling on May 11, 2012 the trial was set for December 17, 2012 in Inuvik. This was the first date both parties were available and that the court could accommodate in Inuvik.

LEGAL FRAMEWORK

[38] There are guidelines that help courts decide if delay is excessive, but there is no hard and fast cut-off point between reasonable and unreasonable delay (see *R.* v. *Morin*, [1992] 1 S.C.R. 771). The determination is "fact driven and case specific". *R.* v. *Seegmiller* (2004), 191 C.C.C. (3d) 347 (Ont. C.A.), leave to appeal dismissed [2005] S.C.C.A. No. 64; see also *R.* v. *Barkman* [2004] M.J. No. 362.

[39] The "fact driven and case specific" approach to the analysis results in a wide variation amongst cases throughout Canada as to the length of delay that is considered reasonable in any given case. For example, in *R.* v. *Unka*, [2005] N.W.T.J. No. 19 (SC), a period of thirty-three months, which took into account

2013 NWTSC 4 (CanLII)

waiver by the accused, was found to be unreasonable. In *R.* v. *Godin* [2009] 2 S.C.R. 3 a delay of thirty months in getting to trial was considered unreasonable.

[40] By contrast, in *R.* v. *Stevens*, supra, the court found a delay of thirty-seven months was reasonable after analyzing the specific factors leading to delay. More recently, the Nunavut Court of Justice, in *R.* v. *Oolamik*, 2012 NUCJ 21, concluded a delay of forty months did not violate the accused's right to a trial within a reasonable time, given all of the circumstances.

[41] Some delay is inevitable. The question is whether the delay in any given case is too much. *R.* v. *Morin*, supra.

[42] In performing its analysis, the court must balance the factors that lead to delay against the interests that s. 11(b) is intended to protect, namely, the individual's rights to security of the person, liberty and a fair trial, as well as society's interests in ensuring that accused persons are tried promptly and that those who break the law are tried according to law.

[43] The first step is to look at the overall length of time that has elapsed, less any waiver of time periods by the accused. If this appears to be, *prima facie*, excessive, then the court must go on to consider the reasons for the delay, namely, the inherent time requirements, the actions of the Crown and defence, limits on institutional resources and any other factors that may have led to delay. Finally, the court must consider any prejudice to the accused. *R. v. Morin*, supra.

[44] The accused bears the ultimate burden of proving that his or her right to a trial within a reasonable time has been breached, but the Crown has an evidentiary burden to explain those delays that appear unreasonable. In the absence of an explanation, the court may draw an inference that the delay is unjustified. *R.* v. *Smith* [1989] 2 S.C.R. 1120 at 1132-1133.

ANALYSIS

Length of the Delay

[45] Mr. Latour was charged on December 15, 2010. Ultimately, his trial, which was scheduled initially for February 27, 2012, would not proceed until two years and two days from the charge, on December 17, 2012. This was over a year from the time that the Crown first discovered its scheduling mistake.

[46] There is no evidence that Mr. Latour waived any time periods, nor did the Crown assert that he had.

2013 NWTSC 4 (CanLII)

[47] In the circumstances, the length of the delay warrants inquiry into whether it was reasonable.

Reasons for the Delay

a. Inherent Time Requirements

[48] Inherent time requirements are things like the time it takes to retain counsel, to hold bail hearings, to make disclosure, for holding a preliminary inquiry, for attending pre-trial conferences and for case preparation. Typically, the more complex a case is, the longer it will take to get to trial. *R.* v. *Morin*, supra, at 791-793.

[49] Although the charge is a serious one, this particular case appeared relatively uncomplicated. There was a single charge on the indictment. It was to take place before a judge sitting alone. The anticipated legal issues were straightforward. There would be no expert witnesses or reports. There is nothing on the court file to suggest that any of the witnesses required an interpreter to give their evidence, although I note that Mr. Latour requested an interpreter to assist him as required.

[50] It is not surprising, then, that inherent time requirements played a very small role in the delay in Mr. Latour's case getting to trial. The necessary steps, including a preliminary inquiry, were taken and Crown and defence counsel were ready to go to trial by November 30, 2011, just under a year following the charge.

b. Mr. Latour's Actions

[51] Mr. Latour did not contribute to the delay in this case in any significant way. Other than this application, he made no pre-trial motions. He missed one deadline. In fact, it appears that he was ready and willing to proceed to trial expeditiously at all times. He changed his counsel once, but this was well before trial and did not result in any delays.

c. Actions by the Crown

[52] By contrast, I find that almost all of the delay in this case can be attributed to the Crown.

[53] The Crown was slow to respond to calls for dates throughout. The Manager of Supreme Court first requested the parties to submit available dates in July of 2011. It appears that the Crown did not respond to this request at any point.

2013 NWTSC 4 (CanLII)

[54] The Crown discovered its internal scheduling mistake in early December of 2011. Following that, the Crown made a management decision to not assign the case to another lawyer. This decision was entirely within the Crown's discretion, but it had time implications. An adjournment would be necessary and the alternative dates for a trial would be limited to dates the assigned lawyer was available.

[55] The adjournment application was heard on January 18, 2012 and it was granted. At that point, the Crown's case was ready and it had been for some time. A pre-trial conference had been held. The case had been scheduled for trial. The Crown required an adjournment solely to accommodate the assigned lawyer's schedule. Given the stage of the proceedings, what the Crown did – and did not do – following the adjournment is perplexing.

[56] As noted, direction was given to both counsel at the time the adjournment was granted to provide new trial dates as soon as possible. Defence counsel submitted dates he was available for trial throughout the spring and summer of 2012 within a few days. The Crown did not submit new dates until six weeks later. Moreover, when potential dates were provided, Crown counsel indicated that he was not available until after September 15, 2012, approximately seven months later.

[57] No explanation was offered for this. The Crown filed an affidavit in response to this application, but it focused on the charges leading to Mr. Latour's bail being revoked and expanded on the reasons that the Crown required the trial to be adjourned from the date initially scheduled, including the Crown's decision to not assign the file to another lawyer in its office. The affidavit did not address why it took six weeks to submit dates following the adjournment application, nor the reasons that the dates provided were so far in the future.

[58] The Crown's insistence on a second pre-trial conference being held before the trial was rescheduled caused further delay.

[59] In his letter dated March 1, 2012, Crown counsel wrote the following with respect to the need for a second pre-trial conference:

> Crown Counsel is requesting a further Pre-trial Conference prior to the scheduling of this matter. Our current availability is limited by the need to have all witnesses available in the event of Charter applications or other pre-trial motions. A further Pre-trial Conference would be very useful in narrowing the issues and would thereby enable the Crown to limit the witness list.

2013 NWTSC 4 (CanLII)

[60] This is the only apparent explanation for the Crown's desire for a further pre-trial conference. For a number or reasons, it is unsatisfactory.

[61] The Crown's position on the need for another pre-trial conference was inconsistent with the Crown's earlier representation that a second one was unnecessary. Moreover, given the stage of the proceedings at that point, the issues had, presumably, been narrowed to the extent they could be before the last trial date. Even if there was more work that could be done to narrow the issues and limit the number of witnesses necessary, it is not clear why it had be done through a pre-trial conference rather than through counsel directly.

[62] The result was a delay of four weeks awaiting the pre-trial conference, which was held on March 27, 2012. This was followed by another five weeks that passed before the directions imposed by the pre-trial conference judge, including the requirement for counsel to provide new dates, were satisfied. In addition to the immediate effect of this particular period of delay, there were implications for the inevitable institutional delay.

d. Institutional Delay

[63] This is delay attributable to systemic factors. It is the period of time from when the parties are ready to proceed to trial until the trial can be scheduled. *R.* v. *Morin*, supra, 794-795.

[64] The first date that both the Crown and Mr. Latour could go to trial was October 9, 2012. The first date the court could accommodate the parties in Inuvik was December 17, 2012. Thus, the period of institutional delay was approximately two and a half months.

[65] Context is helpful in illustrating the link between the Crown's failure to submit dates and the institutional delay. This is a busy circuit court that hears criminal and civil cases in various communities throughout the Northwest Territories. Scheduling trials requires coordinating the schedules of judges, court and sheriff's officers, court reporters, interpreters (if required) and, of course, lawyers. Suitable facilities, which are frequently in short supply and often shared with the Territorial Court, must be booked, along with air travel and accommodation. The starting point for scheduling is knowing all of this information. If any of it is missing, proceedings cannot be scheduled.

[66] It should have been obvious to the Crown that until it provided its available dates, Mr. Latour's trial could not be rescheduled and everything would grind to a halt. That is exactly what happened. In the meantime, other cases, of equal

2013 NWTSC 4 (CanLII)

importance and urgency, and where all of the required information was furnished, were put into the court's schedule. This, in turn, limited the blocks of time available for Mr. Latour's trial.

[67] The institutional delay in this case is not, in and of itself, unreasonable. Combined with the previous period of delay following the adjournment, however, it exacerbated an already unreasonable period of delay that followed the adjournment. Had the Crown provided reasonable new trial dates and provide them in a timely manner following the discovery of its scheduling error, the trial would have been scheduled sooner and, in all likelihood, within a reasonable time.

Prejudice to the Accused

[68] Mr. Latour did not lead any evidence of actual prejudice. The court may, however, infer prejudice from the length of the delay and "[t]he longer the delay, the more likely that such an inference will be drawn". *R.* v. *Morin*, supra, 801.

[69] Prejudice is assessed in light of the interests that s. 11(b) protects. Justice Cromwell put it this way in *R.* v. *Godin*, supra:

> [30] Prejudice in this context is concerned with the three interests of the accused that s. 11(b) protects: liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence. See Morin, at pp. 801-3

[70] Because other charges were accumulated which, in turn, led to Mr. Latour's remand, it is difficult to determine the extent to which his liberty interests might have been prejudiced without engaging in a great deal of speculation. Nevertheless, it can be readily inferred that Mr. Latour has suffered prejudice by the delay in bringing this case to trial in terms of his right to security of the person and to make a full answer in defence.

[71] The stress that this would create for an individual awaiting trial is obvious. Parental abduction is a serious charge. When prosecuted by indictment, it carries a penalty of up to ten years imprisonment. Being accused of this crime would naturally have an impact on child custody and access. While Mr. Latour did not put specific evidence before the court on how this charge has affected attempts to resolve custody and access issues with his child's mother, it is clear from the record that access to his child was limited by his release conditions.

2013 NWTSC 4 (CanLII)

[72] Delay has a most significant effect on the ability to make a full answer in defence. As stated by Justice McLaughlin, as she was then, in *R.* v. *Morin*, supra, (at p. 810), "Witnesses forget, witnesses disappear. The quality of evidence may deteriorate."

[73] Based on the allegations in this case, witnesses would be required to recall the *minutia* of what they saw and heard over a period of several days and in a number of different locations, some two years after the events occurred. The quality of the evidence would necessarily be diminished by the passage of time, making it difficult to conduct effective direct and cross-examinations. Clearly, this would be prejudicial to Mr. Latour's ability to put forth a full answer in defence.

2013 NWTSC 4 (CanLII)

REMEDY

[74] I am mindful of the principle that a judicial stay of proceedings is a remedy that should be granted only in the clearest of cases. *R.* v. *O'Connor*, [1995] 4 S.C.R. 411 at paragraph 82.

[75] Crown counsel urged me to consider alternatives to issuing a stay of proceedings in the event that I found the delay to be a breach of Mr. Latour's right to a trial within a reasonable time. He referred me to an example from the Provincial Court of Manitoba, *R.* v. *T.M.*, 2008 MBPC 48 where the court determined that the accused's s. 11(b) right was violated and that he had suffered prejudice. Nevertheless, the court declined to issue a stay of proceedings and instead ordered the trial to proceed on an expedited basis.

[76] Society has an interest in ensuring that those accused of crimes are brought to trial; however, society also has an interest in ensuring criminal proceedings are conducted in a manner that complies with each individual's Charter rights. In this case, the delay was unexplained, unreasonable and Mr. Latour suffered prejudice. His right to be tried within a reasonable time under s. 11(b) of the Charter was clearly violated. Accordingly, the appropriate remedy is a stay of proceedings pursuant to s. 24(1) of the Charter.

Dated the 23rd day of January, 2013.

K. Shaner
J.S.C.

Counsel for the Crown: Glen Boyd
Defence Counsel: Steven J. Fix

S-1-CR-2011 000111

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

2013 NWTSC 4 (CanLII)

BETWEEN:

HER MAJESTY THE QUEEN

-and-

HUGUES LATOUR

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE K. SHANER