R. v. L.

Ontario Judgments

Ontario Superior Court of Justice

Toronto, Ontario

I.V.B. Nordheimer J.

Heard: August 13, 2007.

Judgment: August 16, 2007.

[2007] O.J. No. 5532

Between Her Majesty the Queen, and C. L.

(75 paras.)

Counsel

R. Fried, Esq.: Appearing for the Crown.

M. Johal, Ms.: Appearing for the Accused.

REASONS FOR JUDGMENT

S. 11(B) DELAY APPLICATION

I.V.B. NORDHEIMER J.

1 Good morning.

2 Mr. L.' application seeks a stay of the charges against him on the basis that there has been an unreasonable delay in bringing this matter to trial such that it offends his right to a fair trial under s. 11(b) of the Canadian Charter of Rights and Freedoms. Accordingly, it is necessary to review the chronology of events in this proceeding.

3 Mr. L. faces one count of sexual assault, one count of sexual interference, one count of uttering a threat, one count of invitation to sexual touching and one count of forcible confinement. These charges arise out of allegations Mr. L. inappropriately touched his stepdaughter on three occasions between January 1, 2000 and December 31, 2001. The complainant reported the assaults in January 2005.

4 Mr. L. was arrested on January 25, 2005. Mr. L. was released the same day from the police station on a promise to appear.

5 Mr. L. made his first appearance in the Ontario Court of Justice on March 9, 2005. The matter was remanded to March 17, 2005. On March 17, 2005 some disclosure was provided and the matter was adjourned to April 11, 2005. On March 23, 2005 counsel for Mr. L. wrote to the Crown Attorney's office pointing out that the videotaped statements of the complainant and other persons were not part of the disclosure that had been made.

6 There were further appearances in the Ontario Court of Justice on April 11th, April 20th and May 11, 2005. No further disclosure was forthcoming during this time.

7 On May 11, 2005 counsel for Mr. L. sent a further letter to the Crown Attorney's office requesting disclosure of the videotaped statements. Responses were received from that office stating that priority would be given to making this disclosure.

8 A further appearance at the Ontario Court of Justice took place on June 8, 2005, a date approximately four and one-half months after Mr. L.' arrest. On this appearance, copies of three videotaped statements were provided to counsel for Mr. L.. one was a statement from the complainant, one was a statement from the complainant's aunt and one was a statement from the complainant's mother. The matter was then adjourned to June 24, 2005.

9 On June 24, 2005, the matter was adjourned to July 8, 2005 so that a Crown pre-trial could be held in the intervening period. A Crown pre-trial was held on July 5th. On July 8, 2005, counsel for Mr. L. was advised that a judicial pre-trial would have to be held. The judicial pre-trial was then scheduled for August 18, 2005. However, because of a subsequently discovered conflict in counsel's schedule, counsel for Mr. L. arranged for the pre-trial to be brought forward to August 10, 2005.

10 On August 10, 2005, the judicial pre-trial was held. At that time, the matter was

put over to March 29th and 30, 2006 for a preliminary hearing. I would note that these dates for the preliminary hearing are approximately 14 months from the date of Mr. L.' arrest.

11 On March 29, 2006, counsel attended for the preliminary hearing. This is the appropriate point to mention a very important aspect of this case, and that is that Mr. L. is deaf. He has been since birth. Consequently, Mr. L. requires an American Sign Language interpreter in order to understand what others are saving. When counsel arrived for the preliminary hearing only one American Sign Language interpreter was present. This was problematic for two reasons. One is that American Sign Language interpreters normally work in pairs. While one interpreter is interpreting, the other interpreter monitors the interpretation to make sure it is accurate. The pair of interpreters switch back and forth between these two roles about every 20 minutes in order to reduce fatigue.

12 The other reason that having only one interpreter was a problem was that, in addition to the fact that Mr. L. is deaf, the complainant's mother, who is a Crown witness, is also deaf. Because of the need to position the interpreters in close proximity to the persons for whom they are interpreting, in order for the Crown's witness to communicate and for Mr. L. to communicate, each needed to have their own team of interpreters. Consequently, and as I shall refer to this in greater detail when we get to the issue of the first trial date in this court, in these circumstances there ought to have been four American Sign Language interpreters present. Notwithstanding this problem, however, Mr. L. and his counsel agreed to proceed with a preliminary hearing with one interpreter trying to interpret for all parties.

13 In the end result, the preliminary hearing was held and was completed on March 30, 2006. Mr. L. was committed for trial.

14 On April 25, 2006 Mr. L. made his first appearance in the Superior Court. On that day a judicial pre-trial was held. The matter was then adjourned to May 16, 2006 in order to permit the Crown to make disclosure of a statement taken from a new Crown witness subsequent to the preliminary hearing.

15 On May 16, 2006 the matter was adjourned to June 6, 2006. By June 8, 2006, disclosure had been made of a videotaped statement of this new Crown witness. A trial date was then set for February 12, 2007, slightly more than eight months away. This was the first date that the Crown offered for this trial although counsel for Mr. L. had earlier dates available. It was noted at the time that sign language interpreters would be required for the trial. Indeed, on this day, the sign language interpreter

who was present in court advised counsel for Mr. L. that four sign language interpreters would be necessary because the trial involved not only a deaf accused but also deaf witnesses. The need for four sign language interpreters was not communicated to the court. However, on that same day, a court interpreter request form was completed and filed with the court office that noted that American Sign Language interpreters were required at trial for both the accused and for a witness.

16 On February 12, 2007, counsel and Mr. L. attended for trial. Only two sign language interpreters were present. Both interpreters indicated they were not content to proceed with the trial in the absence of additional interpreters. An application for an adjournment of the trial was, therefore, made.

17 Madam Justice McWatt was the presiding judge on that day. She heard evidence from one of the sign language interpreters regarding the proper procedure for such interpreters that I earlier mentioned, that is, that American Sign Language interpreters work in teams of two and that in this case two teams were required because the trial involved persons in addition to the accused who were deaf.

18 Crown counsel took the position that the trial could proceed with just the two interpreters. However, after hearing the evidence regarding the reasons for the need to have four interpreters present Madam Justice McWatt concluded that four interpreters were necessary in order to ensure Mr. L.' fair trial rights and to ensure the accuracy of the record. Madam Justice McWatt then adjourned the matter February 21, 2007 so that a new trial date could be set a date when four sign language interpreters could be present. On February 21, 2007, a new trial date of August 13, 2007 was set - a date that was approximately 31 months from the date of Mr. L.' arrest. At the start of the trial on that date, counsel for Mr. L. brought this application for a stay of proceedings due to delay.

19 With that recitation of the chronology preceding this trial, I now turn to my analysis of the issues raised in the application.

20 The factors to be considered in determining whether an accused's person section 11(b) rights have been infringed are set out in a number of cases, but they are all traceable back to the decision of R. v. Morin, *[1992] 1 S.C.R. 771*. The four factors are (1) the length of the delay; (2) whether the accused has waived any time periods; (3) the reasons for the delay and (4) the issue of prejudice to the accused person.

21 I will deal with each of those factors.

1. The length of the delay

22 As I have just noted, the total time from the date of the charges to the current trial date is 31 months. Such a period of time is of sufficient length to warrant scrutiny by this court as constituting a possible infringement of the accused's section 11(b) rights under the Charter. The Crown does not dispute that this is the case.

2. The waiver of time periods

23 It is agreed that there are no instances where Mr. L. can be said to have waived any period of time.

3. Reasons for the delay

24 This factor is broken down into five sub-categories. The first is:

(a) the inherent time requirements of the case.

25 As observed in Morin, every case has its own inherent time requirements. As Mr. Justice Sopinka said, at para. 42:

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

26 Mr. L. had counsel from the outset of the proceeding. He was released on a promise to appear so there were no bail hearings to contend with. In addition, in terms of the administrative paperwork and disclosure issues, this is a very simple case. There is one main Crown witness - the complainant - together with two or

three other witnesses. There is no forensic evidence, there is no expert evidence, is no medical evidence and it is not a case where there are thousands of documents.

27 There is nothing special about this case that would give rise to the need for any unusual periods of time to pass in order to be ready for a preliminary hearing. Notwithstanding that fact, it took the Crown four and one-half months to make disclosure of the most critical pieces of evidence, that is, the videotaped statements of the complainant and the other witnesses.

28 The fact is that there is no reason why the critical disclosure, in this case, should not have been available within a very short time after Mr. L. was arrested. An allowance of two months for the intake period or inherent time requirements of this case at the first stage of the proceeding is a fair and adequate one. It is agreed that a further intake period of one month should be allowed in this court for the second stage of the proceeding.

(b) actions of the accused

29 There are two instances where the defence accepts that it bears responsibility for some of the delay. The first is the delay of one month between June 2005 and July 2005 in setting the date for the judicial pre-trial in the Ontario Court. The second is a delay of one month arising from the fact that the Crown offered a new trial date of July 2007, that counsel for Mr. L. was unable to accommodate. The defence is, therefore, responsible for two months of delay.

(c) actions of the Crown

30 The Crown accepts that it must bear some responsibility for the fact that it took four and one-half months to make disclosure in this case. While there is some quarrel of how much of that delay falls to the Crown, as I have already said it should not have taken more than at most two months to make disclosure. The Crown is, therefore, responsible for two and one-half months of that delay.

31 The Crown asserts that the defence should bear the responsibility for some of the additional delay because the defence would not agree to set a date for a judicial pre-trial in the Ontario Court of Justice due to the lack of disclosure. The Crown points to decisions such as R. v. N.N.M., *[2006] O.J. No. 1802* (C.A.) and R. v. Collette, *[2004] O.J. No. 5304* (S.C.J.) in support of his assertion that the defence

ought to have agreed to set a judicial pre-trial notwithstanding the videotaped statements had not been disclosed.

32 I do not quarrel with the general proposition, stated in the cases cited by the Crown, that the defence is not entitled to insist on having in its possession every single piece of disclosure before agreeing to schedule any other step in the proceeding. However, as was observed in R. v. N.N.M., the degree to which that principle can be invoked is directly impacted by the importance of the material not disclosed. I would add to that observation that when considering whether the defence bears any responsibility in this regard, the court must be conscious of the fact that it embarks on a risky endeavour if it attempts to substitute its view of the significance of evidence not disclosed over that of counsel.

33 In any event, in this case, it was the videotaped statement of the complainant that had not been disclosed. I do not believe that there can be any contest over the fact that that would be the single most important piece of evidence that the defence would need to see. In my view, it would be unreasonable to fault defence counsel for refusing to engage in a judicial pre-trial without having seen that statement. indeed, it is hard to see how a judicial pre-trial would have been useful in those circumstances. The Crown's assertion that the notes of the police officers respecting the statement would be an adequate substitute for the videotaped statement itself, is simply not a tenable one, especially in a case such as this where credibility issues will loom large.

34 Another period of delay for which the Crown is responsible is the delay that was occasioned when a statement was taken from a new witness after the preliminary hearing. When the matter was spoken to in this court after the judicial pre-trial on April 25, 2006, the Crown accepted that it was responsible for the delay until a copy of the statement could be disclosed to the defence. That disclosure did not occur until the early part of June. While there was some reference to a possible retainer issue when the matter was spoken to in May, 2006, in my view that was a non-issue in terms of the progress of the case. The Crown must bear responsibility for this one and one-half months of delay.

35 The Crown, therefore, bears direct responsibility for four months of the delay.

(d) limits on institutional resources

36 There are two aspects of the delay that fall under this factor. First is the fact that

the earliest trial date that the Crown could offer in this court for this case was slightly more than eight months away. In other words, the first trial date offered fell outside the upper limit of the administrative guidelines set out in Morin of between six and eight months in a superior court. While it only slightly exceeds that guideline, that fact nonetheless meant that this case essentially started in this court at the outside limits of permissible delay. One of the consequences of that reality is that it was especially important that the trial date be met. The Crown ought to have been particularly cognizant of that fact. I will say in passing that it is troubling that, more than 15 years after the decisions in Askov, *[1990] 2 S.C.R. 1199*, and Morin, we are still in a situation in the largest city in this Province where a very simple and relatively short trial has to be set on the wrong side of those guidelines. If the system cannot comfortably meet the guidelines in a case such as this, it bodes ill for more complicated, more serious and lengthier trials.

37 The other aspect of delay that falls under this category, and the most significant one, is the lost trial date in February, 2007. The Ontario government, through the Ministry of the Attorney General, is responsible in criminal cases for ensuring that proper interpretation services are provided. Let me make it clear, at this point, that interpretation services are not to be seen as some sort of added benefit to certain accused persons, nor are they to be treated as an administrative annoyance. The right to the assistance of an interpreter is a constitutional guarantee provided for in section 14 of the Charter. Courts have the duty and obligation to ensure that this right is accorded to any person who requires it. As Chief Justice Lamer said in R. v. Tran, *[1994] 2 S.C.R. 951* at para. 48:

> "This is because courts have an independent responsibility to ensure that their proceedings are fair and in accordance with the principles of natural justice and, therefore, to protect an accused's right to interpreter assistance, irrespective of whether the right has actually been formally asserted."

38 On the evidence that I have heard, I have no hesitation in concluding that the official within the Ministry of the Attorney General who is charged with providing interpreters, that is the Interpreter Co-ordinator, knew, as early as June 2006, that four interpreters would be necessary for this case. I further conclude that this need was re-communicated to the Interpreter Co-ordinator in December 2006 by one of the interpreters who had been booked for this case when she became aware that one of the other assigned interpreters had been cancelled. Notwithstanding those warnings, however, the fact is that that office did not ensure that four interpreters were present for the trial date of February, 2007.

39 The Crown proffers two alternative explanations for this outcome in an effort to have the delay that resulted from the loss of that trial date treated as neutral delay. One explanation is that the Interpreter Co-ordinator was, in fact, unaware of the need for four interpreters because of a change in the person who occupied that position in November 2006. I have already concluded that the Interpreter Co-ordinator was reminded of this need in December 2006. However, even if he had not been, the fact is that the Interpreter Co-ordinator ought to have had this knowledge regardless of any communications from the interpreters themselves. The role of the Interpreter Coordinator is to ensure that the mandate that rests on the Ministry of the Attorney General to provide proper interpretation services is fulfilled. In order to properly carry out that role, the Interpreter Co-ordinator ought to be aware of the requirements of individual cases and how those requirements will impact on the number of interpreters that must be provided. In this case, the documentation establishes that the Interpreter Co-ordinator had been told that both the accused and one or more witnesses were deaf. Consequently, the Interpreter Co-ordinator ought to have known that at a minimum four sign language interpreters would be needed for this case. I would add to those observations the perhaps self-evident observation that an accused person is not, in any event, responsible for any failures of communications within the Ministry of the Attorney General that may result from changes in personnel.

40 The other explanation offered by the Crown is that the Interpreter Co-ordinator was made aware by the interpreters of their belief that four interpreters were required but he exercised his discretion as the person responsible for interpretation services to decide that only two interpreters were, in fact, necessary. I accept that the Interpreter Co-ordinator has the right to decide how to perform his duties. In doing so, however, the Interpreter Co-ordinator is still responsible for ensuring the Ministry's mandate to provide interpretation services is carried out in a proper and effective manner. I have already pointed out that the court has an independent and supervisory jurisdiction to ensure compliance with the constitutional guarantee contained in section 14 of the Charter. If the Interpreter Co-ordinator decides on a course of action that the court subsequently determines is inadequate to meet that constitutional guarantee, and an adjournment of the proceeding is required, then that becomes a matter of institutional delay just as it would if no interpreter was provided.

41 In this case, Madam Justice McWatt determined that four sign language interpreters were necessary to ensure a fair trial. As I stated more than once during the hearing of this application, I do not see that I have jurisdiction to revisit that

decision but, even if I did, based on the evidence that she heard and that I have heard, I completely agree with her conclusion. Four interpreters were not present and Madam Justice McWatt consequently adjourned the trial. The resulting delay until the next trial date is, therefore, institutional delay because it arises from the failure of the state to provide an essential element trial process.

42 Absent a finding that this delay is neutral delay, the Crown attempts to avoid responsibility for it by suggesting that Mr. L. had a choice. The Crown says that Mr. L. could have agreed to proceed with two interpreters, particularly in light of the fact that he had been willing to proceed with only one interpreter at the preliminary hearing. Having failed to exercise that choice the Crown says that Mr. L. cannot then attempt to take advantage of the resulting delay.

43 In my view, that submission cannot be accepted for a number of reasons. First, there is a manifest difference between the consequences of a preliminary hearing for an accused person and the consequences of a trial. While the defence might be prepared to take a more relaxed view regarding the manner in which the case is presented for the purposes of a preliminary hearing, it would be an entirely, and justifiably, different matter at the trial stage.

44 Second, the Crown's suggestion ignores the serious concerns expressed by the interpreters regarding the problems associated with proceeding in the absence of a proper number of interpreters, and the impact that would have on the accuracy of the proceedings and the quality of the trial record. It is not in the interests of any party, or of the public at large, to proceed with a trial in circumstances where the record is suspect with the real risk that the matter will be remitted back for a new trial by an appeal court arising from that fact.

45 Third, is the fact that the Crown's suggestion, in essence, serves to turn reasonableness by accused and their counsel into a weapon in the hands of the Crown. It results in a situation where an accused, who deviates in any way from a strict insistence on having every right and procedure honoured in every respect, could then have that concession used as a basis for forcing him or her to accept less than their full rights at some other stage of the proceeding. That approach is directly contrary to the desired objective of encouraging counsel to make reasonable concessions.

46 Fourth, and finally, we do not operate in a justice system that requires an accused person to waive one constitutional right as the price for ensuring that

another of his constitutional rights is honoured.

(e) other reasons for delay

47 The delay in this case has been covered in my analysis of the other categories. There is no other reason proffered for any of the delay, in this case.

4. Prejudice to the defendant

48 There are two aspects to this factor. One is actual prejudice and the other is inferred prejudice. Both are equally important considerations. In my view, prejudice can be inferred in this case given the time that has passed. Indeed, the Crown concedes that some prejudice can be inferred from the period of delay.

49 We are also dealing here with events that allegedly occurred in 2000 or 2001, some six to seven years ago. The impact of the passage of time on people's memories is well-known. Its effect on trial fairness is, therefore, also a concern. That concern is not ameliorated, as the Crown suggests, by the fact that Mr. L. says that he had no memory of the events at the time he was arrested so the passage of time has not made matters any worse. Mr. L. is not the only witness at this trial. Indeed, he might not be a witness at all. Delay affects the memories of all witnesses. This effect is exacerbated in cases of historic sexual offences where, as in this case, many years have passed before the allegations even surface. As noted in Morin at para. 30, there is a societal interest, separate and apart from the interests of the accused person, in ensuring that trials proceed promptly.

50 The other aspect of prejudice is actual prejudice. In considering that issue, one has to take into account the individual nature of the accused person. In this case we have a man who is not only deaf, he is developmentally challenged. Mr. L. has a very limited ability to read and write. Indeed, he functions at a primary school level when it comes to reading, writing and comprehension. Because of his disability, he has been unable to learn a trade. He exists on government disability benefits and the support of his family. He also relies for assistance from his family members to deal with certain routine tasks of life.

51 I reject the Crown's assertion that because this evidence came only from Mr. L. and from his stepfather it should be viewed with some skepticism. I had the opportunity to observe Mr. L. when he gave evidence, and I do not believe that he was in any way falsifying or exaggerating his personal circumstances. In addition, a

parent is particularly well situated to provide insight into the individual circumstances of a child. Again, Mr. L.' stepfather gave his evidence in a straightforward fashion. It was given based on his knowledge gained over 17 years of contact with his stepson, and it was given without embellishment of any kind.

52 Mr. L. swore an affidavit, and confirmed in his evidence before me that he worries about this case a lot, that he has trouble sleeping, and that he has nightmares about being found guilty and being sent to jail. Indeed, in a poignant and telling moment he said that his situation made him feel "sad." The fact is that Mr. L. is not operating at the level of the average adult in terms of his life experiences or in his ability to comprehend and adjust to the difficult circumstances that are imposed on any person by the criminal process. The impact on him from that process is, therefore, different and it is more significant.

53 The Crown says that the effects, of which Mr. L. complains, arise from the fact of being charged and do not constitute prejudice for the purpose of a section 11(b) analysis. In my view, that contention puts too narrow a focus on the prejudice analysis. It is true that an accused person will suffer prejudice from being charged regardless of whether the trial takes place in a timely fashion or not. It is also true that the infliction of that initial inherent prejudice is not the form of prejudice with which the section 11(b) analysis is generally concerned. However, if that prejudice is exacerbated by a failure to proceed to trial promptly, as I have found is the case here, then that prejudice does factor into the section 11(b) analysis. As Madam Justice Wilson said in R. v. Rahey, *[1987] 1 S.C.R. 588*, at p. 624:

> "The prejudice arising from the fact of being charged with a criminal offence is suffered even where the accused is tried within a reasonable time. It is, so to speak, inherent in the system itself. I agree with Lamer J., however, that that prejudice must be kept to a minimum by a speedy disposition of the charges against the accused. If this is not done, then the degree of prejudice will exceed that which is the inevitable concomitant of the system and be directly attributable to the delay under s. 11(b)."

54 This point was also made in R. v. Kovacs-Tatar *(2004), 73 O.R. (3d) 161* (C.A.) where the Court of Appeal said in para. 33:

> "Thus, what was initially prejudice from being charged may become prejudice caused by institutional delay due to a delay beyond the guidelines."

55 The fact that prejudice that arises from the charges themselves can become prejudice attributable to delay results from the fact that the rights that section 11(b) is designed to protect include more than just the right to a fair trial in the sense of a timely trial. As stated by Mr. Justice Sopinka in Morin at para. 27:

> "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."

56 This point was expanded upon by Mr. Justice Rosenberg in R. v. Batte *(2000), 145 C.C.C. (3d) 498* (Ont. C.A.) where he said, at para. 84:

> "Section 11(b) protects the right to security of the person by, as it was put in Morin at p. 786, seeking to minimize the anxiety, concern and stigma and exposure to criminal proceedings'. At pp. 802-803, Sopinka J. held that prejudice to the accused's security interest could be shown by evidence of the ongoing stress or damage to reputation as a result of overlong exposure to the vexations and vicissitudes of a pending criminal accusation."

57 This form of prejudice was again recognized by the Ontario Court of Appeal in R. v. Kporwodu *(2005), 75 O.R. (3d) 190* where the court said, at para. 172:

> "Security of the person recognizes the stigmatization, loss of privacy and stress and anxiety created by criminal proceedings."

58 These concerns apply with equal force to this case. While the actual prejudice may not be as evident here as it is in other cases, for example, cases involving very restrictive bail conditions, or where there is medical evidence regarding physical or mental effects on the accused person, I am nonetheless satisfied that Mr. L. has suffered actual prejudice arising from the delay in this case. Indeed, having seen and heard from Mr. L., I believe that his personal circumstances have directly impacted on his ability to both comprehend and understand the process that has surrounded him since the time of his arrest and that this has caused increased anxiety and stress to Mr. L. that would not normally be occasioned, and certainly not to the same degree, in an accused person who does not share Mr. L.' individual characteristics.

59 I would add that the law recognizes that there are categories of persons who are more susceptible, than the general public, to the negative impact of being involved in the criminal justice system and that they will suffer greater prejudice as

a result. Criminal prosecutions involving young persons is one such category - see, for example, R. v. M. (G.C.) *(1991), 3 O.R. (3d) 223* (C.A.). As a consequence, the law understandably requires that proceedings involving such persons should proceed with even greater speed. In my view, persons who suffer from disabilities that put them at greater risk of adverse affects should be similarly treated. Their increased susceptibility to the prejudicial effects of the criminal process will be compounded if the resolution of the charges is unduly prolonged. They are entitled to have the prejudicial impact on them evaluated with their individual realities in mind, and not be judged against the impact that one might expect on the average person.

60 I am, therefore, satisfied that there is both inferred and actual prejudice to Mr. L. arising from the delay, in this case.

5. Balancing

61 Finally, is the question of balancing of problems that delay causes for the accused person with the community's interest in seeing that criminal charges are disposed of in a proper manner. The fact that there must be a balancing between these competing objectives means that there can be no hard and fast rule as to when delay passes from reasonable delay to unreasonable delay. As the court of Appeal observed in R. v. Seegmiller *(2004) 191 C.C.C. (3d) 347* (Ont. C.A.) at para. 26:

> "The determination of what constitutes a reasonable' time for trial under s. 11(b) of the charter is fact driven and case specific."

62 While the Crown relies heavily on Seegmiller, the above statement would demonstrate the frailties in attempting to make comparisons. I would add, however, that Seegmiller can also be distinguished because the Amount of delay was less than it is in this case. More importantly, the Court of Appeal placed great emphasis on the lack of prejudice to Mr. Seegmiller arising from delay. In contrast, I have concluded that Mr. L. has suffered not only inferred prejudice but real prejudice arising from delay in this case.

63 It is accepted that the community's interest in seeing that persons are properly tried on any criminal charge increases as the seriousness of the charge increases. I recognize that the charges in this case are serious but, by definition, all charges that this court deals with are serious ones. That fact, however, does not exempt this

court from the requirements of section 11(b). Further, the balancing aspect of the section 11(b) analysis recognizes that criminal offences involve differing degrees of seriousness.

64 Notwithstanding that these are serious charges, it must be recognized that they are not the most serious charges under the Criminal Code, either in general terms or in terms of sexual offences.

65 It also remains the fact that it took 31 months for this case to proceed from arrest to trial. Allowing a two month period in the Provincial court and another one month in the Superior Court for the inherent time requirements of this case including intake considerations, there is a period of 28 months left.

66 Of that time, the defence is only responsible for two months. The Crown bears direct responsibility for the two and one-half months of delay from the delayed disclosure in the Ontario Court and a further month and a half of delay in disclosing a further statement after the judicial pre-trial in this court for a total of four months.

67 On top of these considerations, five months of a six month delay in getting a new trial date, after the failure to have adequate interpreters available for the first trial date, represents institutional delay for which the Crown must bear ultimate responsibility. The total delay arising from Crown/institutional delay is, therefore, nine months or half, again, as much time as the total Morin guidelines for a two-stage proceeding.

68 In reaching my conclusion, on this matter, I will repeat the essence of what I have said before in such cases. If the guidelines set out by the Supreme Court of Canada are to have any meaning and impact, cases cannot be routinely excused from compliance, especially simple and straightforward cases such as the one here. If the state is not to be held to account for the failure to bring a case such as this to trial in an acceptable period of time, then one is left to wonder what situations of delay will arise for which the state will be held accountable. Absent such accountability, the very meaning and existence of the constitutional right to a fair trial, that is set out in section 11(b) of the Charter, becomes something akin to a Constitutional mirage.

69 Perhaps if there was no actual prejudice to Mr. L., as the Crown contended, then the balance would tip in favour of the societal interest of having a trial on the merits. However, as I have said, I am satisfied that there has been real prejudice to Mr. L. arising from the delay. The presence of prejudice to Mr. L. arising from that delay,

taken together with the fact that the period of unacceptable delay lies almost entirely at the feet of the Crown, satisfies me that the fair trial rights of Mr. L. outweigh the societal interests in having these charges tried.

70 A stay of these proceedings is therefore granted.

71 MR. FRIED: Thank you, Your Honour.

72 MS. JOHAL: Thank you, Your Honour.

73 THE COURT: Thank you, counsel. Is there anything else to deal with?

74 MR. FRIED: No, thank you.

75 THE COURT: All right. Thank you.

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