

Court of Queen's Bench of Alberta

Citation: R. v. Rajasansi, 2009 ABQB 674

Date: 20091119
Docket: 061492740Q1
Registry: Calgary

Between:

Her Majesty the Queen

- and -

Kulwinder Singh Rajasansi

- and -

Wesley Keane Sinclair

Accused/Applicants

Restriction on Publication: By Court Order, information that may identify the person described in this judgment as C.L. may not be published, broadcast, or transmitted in any manner. There is also a ban on publishing the contents of the application for the publication ban or the evidence, information or submissions at the hearing of the application. See the *Criminal Code*, s. 486.4.

Corrected judgment: A corrigendum was issued on November 19, 2009; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Memorandum of Decision
of the
Honourable Mr. Justice P.J. McIntyre**

[1] Sixty-one months after the incident, and 35 months after being charged, the Applicants seek a judicial stay of proceedings under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. They say that their constitutional right to be tried within a reasonable time (s. 11(b)), and their right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal (s. 11(d)), have been violated. They also suggest

the failures that occurred in the disclosure process amount to an abuse of process and violate their s. 7 rights. The parties filed an extensive agreed statement of facts. Most of those facts are contained in the next section.

Facts

[2] The Applicants, Kulwinder Singh Rajasansi and Wesley Keane Sinclair are charged: That they, on or about the 19th day of October, 2004, at or near Calgary, Alberta, did unlawfully commit a sexual assault upon C.L., contrary to section 271 of the Criminal Code of Canada.

[3] The Crown alleges that on October 19, 2004 two females, C.L. and Cassandra Najem, accompanied Wesley Sinclair, Amir Nawaz and an unknown male, who is now alleged to be Kulwinder Singh Rajasansi, drove to a home in Erin Woods where they met Mathew Plaku and Coleman Domenjoz. It is alleged that several had sexual contact with C.L. while she was under the influence of alcohol or drugs and incapable of giving consent. The unknown male, now alleged to be Rajasansi, would have left the house by himself at an undetermined point in the night. Nawaz was in a fight with Najem. She ran out of the home and called the police.

[4] The Crown alleges that when the police arrived, they found C.L. upstairs in a bedroom where she was unconscious and naked from the waist down. C.L. says she does not recall the events, including whether she engaged in sexual activity. That same day, Amir Nawaz was arrested and charged with sexually assaulting both C.L. and Cassandra Najem. Sinclair was arrested and interviewed by the police. He was then released without charges.

[5] On October 19, 2004 at about 5 a.m., paramedics drove C.L., who was still unconscious, from the home in Erin Woods to the Rockyview General Hospital Emergency Department where she was treated and assessed by hospital staff. The Calgary Sexual Assault Response Team (“CSART”), a medical team of doctors and nurses who help police where there is an allegation of sexual assault, assisted with treatment and assessment.

[6] The following health records arose from the treatment and assessment of C.L.:

1. Calgary Emergency Medical Services (the paramedics), created a “Patient Care Record”;
2. The Rockyview General Hospital Emergency Department created an “Emergency Chart”;
3. CSART created records, including nurse’s notes and Doctor Heard’s notes. The nurse’s notes were placed on the Emergency Chart, the Doctor’s notes were not;

4. Calgary Laboratory Services created records, including those for drug screening and blood alcohol concentration (copies of some of these records were also kept on the Emergency Chart); and
5. The Medical Examiner's Office created records.

[7] At 10:55 a.m. on October 19, 2004, Calgary Police Service Detective Lynne Cunningham called the hospital. Her notes state:

I called Rockyview Hospital - stated that s/a CSART nurse had been called - I o'kay'd.

[8] At 11:05 a.m., the CSART nurse, Grayzyna Czarnecki, entered the hospital room with C.L. and remained there until 11:25 a.m. She re-entered the room at 11:35 a.m. At 12:03 p.m., CSART doctor, Dr. Heard, entered the room with C.L. and remained until 12:34 p.m. Dr. Heard re-attended on C.L. from 12:42 p.m. until 1:18 p.m.

[9] At 1:45 p.m., Dr. Heard spoke by telephone with Detective Cunningham. In a later Information to Obtain a DNA Warrant, Detective Cunningham stated that she had "authorized" Dr. Heard to take exhibits from C.L.'s body during the medical examination.

[10] Statements made by the complainant to the CSART nurse were not disclosed to defence counsel until July 27, 2009. The notes of the nurse had been placed on the Emergency Chart.

[11] A document prepared by Dr. Heard headed "Calgary Health Region" "Sexual Assault" shows that a history was taken at 12:00 and that "General examination and Treatment" began at 12:40 and ended at 13: (illegible). This appears to be the only record of any interaction between C.L. and Dr. Heard.

[12] This case was first set for trial June 16, 2008, then December 1, 2008, then June 15, 2009 and now January 11, 2010. The reasons for the various adjournments will be identified. The disclosure provided before the December 1, 2008 trial date contained only the CSART examination record prepared by Dr. Heard, a Calgary Laboratory Services Report showing the urine analysis screening for drugs with a collection time of 10:34 a.m. and a "print date" of October 19, 2004, and a Medical Examiner's Office report containing information about blood alcohol levels. The Patient Care Record, the Emergency Chart and other Calgary laboratory services reports were not in the possession of the Crown and were not disclosed.

[13] On October 20, 2004, Rajasansi became a suspect when police learned that a fingerprint identified on a liquor bottle in the Erin Woods house was a match to his prints.

[14] On October 21, 2004, a photographic line up containing a photograph of the suspect Rajasansi was presented to C.L. and Cassandra Najem.

[15] On January 10, 2005, a forensic report from Angela Butler confirmed the presence of semen on several exhibits that were alleged to have been seized from the residence and C.L. Portions of some of the exhibits were sent to Derek Sutherland for DNA analysis.

[16] On January 24, 2005, a Toxicology Report was prepared by Peter Singer of the Medical Examiner's office. He analysed a blood sample purporting to have come from C.L. and identified as Exhibit MJV17 as containing 110/mg/100ml of alcohol.

[17] On April 6, 2005, a Biology Report of Sutherland was prepared which included the conclusion that the vaginal aspirate purportedly from C.L. and identified as Exhibit MJV18 contained a DNA typing profile of "mixed origin" which included a "major male component" and a "minor male component" coming from two unknown individuals.

[18] No steps were taken to find out if the DNA profile matched the suspect Rajasansi for well over a year. In fact nothing of significance was done on the file for more than a year until May 31, 2006, when Rajasansi was, for the first time, told by the police that he was a suspect for an alleged sexual assault on C.L. and released without charge.

[19] On July 19, 2006, Detective Cunningham appeared before Judge Fraser. The Information to Obtain was sworn and a DNA Warrant was granted authorizing the seizure of a DNA sample from Rajasansi. Samples were later seized from him by Detective Cunningham and sent for analysis to Sutherland.

[20] On November 23, 2006, Rajasansi was issued a Promise to Appear for the alleged sexual assault of C.L. Sinclair was arrested and charged on November 26, 2006. The information was sworn on December 7, 2006.

[21] After several court appearances related to obtaining counsel and initial disclosure, a "pre-preliminary" hearing was held on March 20, 2007, where admissions were made. The matter was set over for a Preliminary Inquiry to be heard August 22, 2007 .

[22] The first arraignment date in this Court was October 19, 2007. The indictment contains an endorsement that defence counsel in this Court raised an issue of disclosure. The matter was adjourned to November 23, 2007 to set a trial date.

[23] On November 23, 2007, the matter was adjourned for one week to November 30, 2007.

[24] On November 30, 2007, the matter was set for trial by judge and jury for two weeks beginning on June 16, 2008.

[25] Difficulties arose between Rajasansi and his counsel. The Court was alerted to this on March 28, 2008. However, on April 11, 2008, defence counsel advised the Court that she was on the record and re-elected to trial by judge alone. The trial dates were reduced to five days.

[26] On June 13, 2008, further irreconcilable concerns between defence counsel and Rajasansi resulted in defence counsel being excused. Rajasansi retained new counsel, Mr. O'Brien, and on June 20, 2008, the matter was scheduled to go to trial on December 1, 2008. Sinclair had been prepared to go to trial on June 16, 2008.

[27] Defense counsel immediately made written requests for further disclosure to the Crown seeking the production of relevant materials that had not yet been provided. The June 27, 2008 letter sought the October 19, 2004 interview of Cassandra Najern, among other requests.

[28] On October 2, 2008, defence counsel e-mailed the Crown seeking the requested disclosure that had been outlined in previous correspondence to enable completion of a Charter Notice.

[29] On October 3, 2008, a Pre-Trial Conference was held before me. Matters of disclosure, and expert evidence were discussed. There were two Charter applications to be dealt with: one by Rajasansi to set aside the DNA warrant and the other by Sinclair to the admissibility of his statement. The 5 days of trial time set for December 1, 2008 would be used for these applications. The trial would begin later. I was advised of outstanding disclosure requests and that the Charter Notice could not be completed without receipt of the disclosure. I directed the Charter Notice need not be filed until one week after the Crown disclosure.

[30] On October 3, 2008, the Crown confirmed the Emergency Chart and Patient Care Records would be disclosed to the defence. This has been accepted to be an undertaking by the Crown.

[31] On October 8, 2008 defence counsel reiterated the disclosure request made on October 2, 2008.

[32] On October 30, 2008, the Crown directed Detective Cunningham to get the Emergency Chart and Patient Care Records.

[33] On October 31, 2008, defence counsel filed the Charter Notice with the Court.

[34] In a letter dated November 10, 2008, defence counsel requested disclosure of the missing documentation.

[35] On November 12, 2008, a Forensic Alcohol expert, Kimberly Hogh, prepared a forensic report extrapolating the reading of 110 mg/100 ml found in Exhibit MJV17 using the assumption that the blood sample was taken during the CSART examination between 12:40 and 1:20 on October 19, 2004.

[36] On November 19, 2008, defence counsel reiterated in an e-mail his concerns with the lack of disclosure and gave notice of his intention to apply to the Court for an adjournment and costs unless the disclosure and obligations of the Crown were met.

[37] In a letter from defence counsel dated November 21, 2008, it was confirmed that both defence counsel were available to continue the trial on February 2, 2009, but Crown counsel was unavailable until April 6, 2009. The only common available date after February was June 15, 2009.

[38] By December 1, 2008, all the disclosure requests made by the defence had been met except for:

- 1) The Patient Care Records;
- 2) The Emergency Chart; and
- 3) The Calgary laboratory service reports.

[39] On December 1, 2008, the *voir dire* into the admissibility of the DNA seizures started and continued to December 5. On December 4, the Crown advised that it was not going to lead the statement against Sinclair so that *voir dire* became unnecessary. I dismissed the attack on the DNA warrant on December 11. The case was adjourned to June 15, 2009 for the continuation of the trial.

[40] On December 8, 2008, the Crown asked Detective Cunningham to get the missing Patient Care Records and Emergency Chart.

[41] On May 22, 2009, the Crown made a third request to Detective Cunningham to get the Patient Care Records and the Emergency Chart. The Crown stated this was a priority.

[42] On May 26, 2009, Crown counsel was advised by Dr. Heard that she had the Emergency Chart of C.L. faxed out to her but she would not provide it to the Crown. However, she did provide the Crown with a lab report that showing the "collection time" of the sample used to analyze C.L.'s blood alcohol content was in fact 6:12 a.m. on October 19, 2004 and not between 12:40 and 1:20 p.m. The print date on this report was October 20, 2004. It is understood that the earlier the collection time the lower the blood alcohol level of C.L. at the time of the incident.

[43] The Crown received the lab report between May 26 and June 1, 2009. Clearly, it is critical to know the collection time of the blood sample.

[44] On June 1, 2009, the Crown sent a letter to defence counsel containing the previously undisclosed lab report. The effect of the lab report on the Crown's case was not discussed.

[45] On June 3, 2009, Crown counsel e-mailed Detective Cunningham asking, for the fourth time, for the Emergency Chart and the Patient Care Records.

[46] On June 4, 2009, Detective Cunningham advised Crown counsel in an e-mail that production of records before trial was not likely. She stated that in the past, the police have waited 8 months or more for those records and that she would have to obtain the consent to release medical information from C.L. On the same day, Detective Cunningham met with C.L. and obtained two consents, one for the Patient Care Records and one for the Emergency Chart. The Patient Care Records were obtained within 3 days. They were disclosed to the defence on June 11, 2009. Detective Cunningham did not give the consent to obtain the Emergency Chart to the Rockyview General Hospital before June 15, 2009, date of trial.

[47] About 2:00 p.m. on June 12, 2009, on a Friday afternoon, the Crown sent a letter to the defence disclosing there was an issue with the collection times of the blood sample and that the alcohol expert would be providing a revised opinion at some future date.

[48] On June 15, 2009, the trial was to begin. Crown counsel advised me that the trial could not go ahead. The matter was adjourned to November 12, 2009 to argue the effect of the late disclosure and delay on the constitutional rights of the accused. The trial is now scheduled for January 11 to 29, 2010.

[49] On June 16, 2009 at 1:12 p.m., Detective Cunningham provided the C.L. consent to the Rockyview General Hospital for the Emergency Chart. On June 19, she was told by the hospital the records were ready to be picked up.

[50] On June 24, 2009, Detective Cunningham gave the Emergency Chart to the Crown which forwarded it to defence counsel on July 27, 2009. The Emergency Chart included the CSART nurse notes of an interview with C.L. on October 19, 2004.

Positions of the Parties

[51] The Applicants say that a judicial stay of proceedings under s. 24 (1) of the *Canadian Charter of Rights and Freedoms* must be ordered because of unreasonable delay. Rajasansi submits that on October 20, 2004 he became a suspect and that the Court must take the pre-charge delay into account when assessing whether there was a violation of his constitutional rights. The Applicants argue that considering the trial will not be completed until at least January 2010, the delay of 5 years and 3 months constitutes an unacceptable delay.

[52] The Applicants argue the main reason for the unreasonable delay stems from the failure of the investigators to act diligently in either disclosing evidence that had been obtained or in failing to obtain forensic evidence, hospital records, laboratory reports, Patient Care Records and expert opinions they were required to collect and disclose. The Applicants argue that they cannot be found to have contributed to the delay considering the Crown required some of the evidence which was not disclosed in a timely manner. In June of 2008 the disclosure remained inadequate: the October 19, 2004 statement of Najem, a main witness, had not been disclosed, the nurse's notes, hospital records and lab report had not been disclosed. Therefore, the Applicants submit that it would be absurd to count that period of time against them when the Crown was not ready to proceed.

[53] In his affidavit in support of the Application, the Applicant Rajasansi submits that he has suffered prejudice in several ways. He submits that the stigmatization relating to the offence of sexual assault, restrictions on possible movement, added stress, and anxiety over the uncertainty of the delay are some of the elements that give rise to prejudice. In addition, the delay in proceedings had the effect of holding his application for citizenship suspended, and interfered with employment and business opportunities. He adds that the delay contributed to the breakdown of his marriage and resulted in undue stress over the possibility of “deportation” to a country where he has no family ties. The increase in legal costs directly attributable to the delay is significant. Moreover, the Applicant Rajasansi alleges that he suffers from a medical condition which preexisted the date of October 19, 2004 that affects his capacity to remember.

[54] The Applicant Sinclair does not claim any specific mental distress because of the delay.

[55] The Crown concedes that the case at bar is not complex, that the whole situation does not reflect well on the administration of justice, and that the Crown is responsible for some of the delay, but submits there is no Charter violation. It agrees that the process has been long and the system is not a perfect one, but argues that a fair trial can still be held.

[56] The Crown also submits that the rights guaranteed by s. 11 (b) of the Charter have not been infringed or denied. It argues that the Applicants have not shown that the protection of their interest in a prompt trial and the ancillary public interest in prompt justice outweighs the public interest in bringing them to trial.

[57] The Crown argues that except for the period of 7 months, from June 15, 2009 to January 11, 2010 which has been caused by the unexplained failure of investigators to provide material to the Crown, the rest of the delay was caused by the Applicants or by ordinary institutional delays. The Crown argues that it has been ready to go to trial since June of 2008. It argues that the Applicants contributed to the delay by requesting a preliminary inquiry, with the decision of Rajasansi’s defence counsel to withdraw in June of 2008, by instructing counsel to bring pre-trial Charter arguments, by only setting one week for trial in December of 2008 when it was clearly insufficient, and by not seeking medical disclosure before October of 2008.

[58] The Crown submits that it did not need the report extrapolating the reading of 110 mg/100 ml. The Crown argues that the report was not essential because it expects C.L. to say that she did not consent and the paramedics to say that she was unconscious. Therefore, the June, 2008 adjournment cannot be found to have been caused by the Crown.

[59] The Crown submits that the disclosure process engages both parties. It argues that the Crown undertook to get some records even though it had no obligation to do so, like the lab report, without which, an O’Connor application would have been necessary. It agreed, to cooperate. It took longer to obtain than the Crown was expecting, so it says it is unfair to blame the Crown when it was cooperating and acting out of good will. However, the Crown agrees that

once the Applicants were told on October 3, 2008 that the Crown would get the medical records, they were entitled to expect to get them. The Crown accepted this was an undertaking.

[60] In addition, the Crown states that the following is noteworthy:

- 1) The Accused requested a preliminary hearing but neither found it necessary to use the discovery aspect of the preliminary hearing to obtain the records. Dr. Heard testified at the preliminary hearing;
- 2) The Accused never brought an O'Connor application to obtain the records;
- 3) The Accused were prepared to go to trial on June 16, 2008 without the records.
- 4) At least until October 3, 2008, the Defence did not seem to place importance on the records. The Pre-trial conference report says that they were unsure whether they had requested them. The Crown did, however, agree to provide them;
- 5) Defence counsel made no follow-up request for the records during the period of October 3, 2008 to June 1, 2009; and
- 6) Two individuals pleaded guilty to charges relating to assault of C.L. without seeking disclosure of the records.

[61] The Crown suggests that when considering the issue of prejudice, the Court must consider that the Applicants have not endured stringent release conditions while awaiting trial. Moreover, Sinclair has not made any specific claims of prejudice and Rajasansi's claims are not well documented. Rajasansi was cross-examined on his affidavit. The Crown submits that the delay is not the cause for a violation of the right of security of Applicant considering that Rajasansi lives in the same house as at the time of the incident and has the same employment. Further, he married in 2008 after he was accused, when his former wife was aware of the charges. Lastly, the Applicant Rajasansi did not seek medical treatment for his anxiety.

[62] The Crown states that full disclosure has now been made and that evidence and witnesses necessary to provide the Applicants with a fair trial are available.

[63] The Crown argues that the Applicants have not established an abuse of process and therefore, it submits there is no s.7 violation. The Crown submits there is no evidence that potential witnesses were not interviewed in a timely fashion or that evidence has been lost. The Crown argues there is no material before the Court which shows that the Applicants cannot receive a fair trial because of pre-charge delay. About Rajasansi's medical condition that affects his memory, the Crown adds that presumably it would have been possible to capture Rajasansi's

recollection of events at an earlier time. Generally the Crown argues that the material before the Court does not show that the Applicants suffered some other prejudice because of the slow-moving investigation.

[64] The Crown agrees that if this Court were to find a s. 11 or s. 7 violation, the suitable remedy is a judicial stay.

Analysis

[65] In *R. v. Morin*, [1992] 1 S.C.R. 771, Sopinka J. stated that to assess whether delay has been unreasonable, the courts must look at the length of the delay from the date of the charge to the end of the trial, less any waiver of time periods by the accused. Then the reasons for the delay, as well as the prejudice to the accused and the interests protected under s. 11 (b) must be taken into account in deciding whether the period of time is unreasonable: *Morin* at p. 788.

[66] In light of *Morin* and *R. v. Godin*, 2009 SCC 26, the interests protected under s. 11 (b) are:

- 1) the right to liberty as regards to pre-trial custody and bail conditions;
- 2) the right to security of the person, by seeking to minimize the anxiety and stigma associated to criminal proceedings; and
- 3) the right to 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”: *Godin* at para. 30; *Morin* at 786-788.

[67] In *Morin*, Sopinka J. explained that the primary purpose of s. 11(b) is the protection of the individual rights of the accused. He also referred to *R. v. Conway*, [1989] 1 S.C.R. 1659 in which it was stated that the protection of s. 11(b) interests must be balanced by the interests of society in law enforcement: *Morin* at 786-787.

[68] Sopinka J. further listed at 787 and 788 the factors to be considered in assessing whether the delay is unreasonable:

- 1) The length of the delay;
- 2) Waiver of time periods by the accused;
- 3) The reasons for the delay, including
 - a) inherent time requirements of the case,

- b) actions of the accused,
 - c) actions of the Crown,
 - d) limits on institutional resources; and
 - e) other reasons for delay; and
- 4) Prejudice to the accused.

[69] Recently, in *Godin*, Cromwell J., writing for the Court, reiterated the principles stated in *Morin*:

[18] The legal framework for the appeal was set out by the Court in *Morin*, at pp. 786-89. Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(b) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important, however, not to lose sight of the forest for the trees while engaging in this detailed analysis. As Sopinka J. noted in *Morin*, at p. 787, “[t]he general approach ... is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which [s. 11 (b)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.”

[70] In written and oral argument, the Applicants said that *Godin* is virtually indistinguishable from this case. I agree. However, every s. 11(b) application needs to be determined on its own facts.

[71] In *Godin*, the appellant was charged with sexual assault, unlawful confinement and threatening to kill his ex-girlfriend. The 30-month post-charge delay was caused by 1) a long delay in obtaining, and therefore in disclosing, potentially important forensic evidence, 2) failure to acknowledge or respond to defence counsel’s effort to obtain earlier dates, and 3) the need to adjourn the long-delayed preliminary inquiry because there was not sufficient court time for it to proceed on the date set. Cromwell J., writing for the Court, stated that the difficulty arose from considerable delay, coupled with the fact that the case was straightforward and so did not require a lot of court time, the fact that virtually all of the delay was attributable to the Crown and remained unexplained and unjustified, and the fact that defence counsel attempted but was unsuccessful in moving the case ahead faster. Cromwell J. stated that the appellant was entitled to timely disclosure and did not receive it.

[72] In *Godin*, the report with the DNA analysis of a vaginal swab, taken from the complainant the day after the alleged offences were committed, was received by the Crown nine months later and four days before the trial was scheduled to commence. The Crown promptly disclosed this information to the defence. However, because of the potential importance of this new information, the trial could not proceed as scheduled.

[73] The evidence was potentially important for the defence because the DNA profile did not match the appellant and the report was possibly inconsistent with the complainant's statement at the hospital that she had not had intercourse for three days before the alleged assault. No explanation was offered for the nine-month delay in obtaining and disclosing the analysis. Cromwell J. found that even though there was no suggestion that Crown counsel delayed disclosure or was at fault, the resulting delay was attributable to the Crown. Cromwell J. added that "[t]he Crown bears the burden of explaining unusual delays caused by the forensic investigators. It offers no explanation in this case."

[74] Cromwell J. found that despite the scheduling issues and the fact that defence counsel was unavailable on some suggested dates, which had the effect of postponing the trial, this was not a waiver by the defence. Scheduling requires reasonable availability and reasonable cooperation.

[75] In *Godin*, it was held that the delay of 30 months was virtually entirely attributable to the Crown, or institutional delay, and that it was mostly unexplained. Cromwell J. noted that the evidence that was disclosed some nine months after the tests which produced it was critical evidence. He acknowledged the strong societal interest in having serious charges tried on their merits, but found that "the progress in this case was delayed to such a degree that the appellant's constitutional right to be tried within a reasonable time was violated." The order of the trial judge of a judicial stay was restored.

I Length of the delay

[76] In *Morin*, it was held that the Court must examine the period from the charge to the end of the trial. In *Morin*, Sopinka J. adds that in certain circumstances the pre-charge delay may have an influence on the overall determination as to whether the post-charge delay is unreasonable, but he is clear that the pre-trial delay is not to be counted in assessing the length of the delay: *Morin* at 789.

[77] In *Morin*, Sopinka J. at 799 suggests a period of institutional delay between 8 to 10 months for institutional delay in the provincial courts and of 6 to 8 months from committal to trial for a total period of between 14 and 18 months: See also *Godin* at para. 5.

[78] The following dates are relevant to this s. 11 (b) application:

- 1) December 7, 2006: Charges are sworn,
- 2) August 22 to 24, 2007: Preliminary inquiry,
- 3) October 19, 2007: Arraignment date,
- 4) June 16, 2008: Original trial date,

- 5) June 20, 2008: Trial adjourned to December 1, 2008,
- 6) October 3, 2008: Pre-trial conference,
- 7) December 1, 2008: Trial date,
- 8) June 15, 2009: Trial Date Adjourned to November 12, 2009,
- 9) November 12, 2009: Trial date (Charter Application for judicial stay), and
- 10) January 11 to 29, 2010: Trial dates are scheduled.

[79] In this case, the charges against the Applicants were sworn on December 7, 2006. The trial is scheduled from January 11 - 29, 2010, for a total of 3 years and 2 months (38 months) since the Applicants were charged. The guidelines outlined in *Morin* have been exceeded. However, all the factors need to be examined together in order to determine whether the delay is unreasonable.

II Waiver of Time Periods

[80] A waiver of time periods by the accused will occur “[i]f by agreement or other conduct the accused has waived in whole or in part his or her rights to complain of delay then this will either dispose of the matter or allow the period waived to be deducted.”: *Morin* at 790. In order for the accused to waive their s. 11(b) rights, the waiver must be clear and unequivocal with the complete understanding of the rights that are waived and the impact of the waiver. However, acquiescence to the inevitable does not constitute a waiver: *Morin* at 790.

[81] In a letter from defence counsel dated November 21, 2008, it was confirmed that both defence counsel were available to continue the trial February 2, 2009, but Crown counsel was unavailable until April 6, 2009. The only mutual available date after February was June 15, 2009. In light of *Godin*, the fact that the only common date was in June of 2009, does not necessarily mean that the delay should be treated as waived.

[82] The Crown does not suggest that the Applicants waived any period of delay. The Applicants specify that even if Rajasansi sought a change of counsel, which led to rescheduling from June 2008 to December of 2008, it did not amount to a waiver of time periods. The Applicants argue that since the Crown was not ready to proceed to trial due to its own failure to comply with disclosure, the adjournment was in any event inevitable.

[83] In my opinion the Applicants did not waive their s. 11(b) Charter rights. There is nothing in the conduct of the Applicants that could lead me to conclude that the Applicants waived any period of delay.

III The Reasons for the Delay

a) Inherent Time Requirements

[84] The Applicants and the Crown agree that this case is not complex.

[85] The Crown states that the period of 9 months from the time a Promise to Appear was issued to Rajasansi and Sinclair to when Rajasansi and Sinclair were committed to stand trial after preliminary hearing - from November 23, 2006 to August 22, 2007 - conforms with the guidelines outlined in *Morin*. The Applicants agree that the period between the laying of the information and the preliminary inquiry is not unreasonable by itself.

[86] From August 22, 2007 to June 16, 2008, two months of the delay was caused by the arraignment scheduling. The initial arraignment date was October 19, 2007. The indictment contains an endorsement that defence counsel raised an issue of disclosure. The matter was adjourned to November 23, 2007 to set a trial date and on that last date the matter was adjourned for one week to November 30, 2007. On November 30, 2007, the matter was set for trial by judge and jury for two weeks commencing on June 16, 2008.

b) Actions of the Accused

[87] The Applicant Rajasansi had several difficulties with his former counsel. The Court was alerted to this on March 28, 2008. However, on April 11, 2008, defence counsel advised the Court that she was on the record and re-elected to judge alone. The trial dates were reduced to a period of five days. On June 13, 2008, further irreconcilable concerns between defence counsel and the Applicant Rajasansi resulted in defence counsel being excused. Rajasansi retained new counsel, Mr. O'Brien, on June 20, 2008.

[88] Counsel for the Applicants raised and requested disclosure on several occasions including on June 27, 2008, July 30, 2008, September 18, 2008 and a few more times in October and November of 2008.

c) Actions of the Crown

[89] The Crown concedes that it is responsible for a delay of 7 months, from June 15, 2009 to January 11, 2010 that has been caused by the unexplained failure of investigators to provide certain material to the Crown.

[90] The Crown did not provide timely disclosure. The Crown does not dispute that the Emergency Chart, the Patient Care Records or the lab reports needed to be disclosed. In fact, the Crown requested them from Detective Cunningham on several occasions. Full disclosure only occurred after June 15, 2009. The PCR records were in existence for almost 5 years, but were only disclosed on June 11, 2009, a few days before the set date of trial. Similarly, the lab report

was in existence since October 20, 2004 and disclosed on June 1, 2009.

[91] The missing reports were not only important for the defence but were essential for the Crown's case. The Crown is attempting to prove that the Applicants had sexual contact with the complainant either without her consent or when she was so intoxicated that she was incapable of giving consent. Without the lab report regarding the blood sample of the complainant or with the Forensic Toxicology Specialist report based on an erroneous assumption regarding the blood sample, the Crown was not ready to go to trial in June of 2008, nor was it ready in June of 2009. It is important to note that when the Crown realized that there was an issue with the collection times, it advised defence counsel that it would be providing a revised version at a later date. Moreover, the statement of Najem, a main witness, had not been disclosed by the trial date of June of 2008.

[92] Generally, the Crown has not explained the lack of actions of investigators or the reasons for the untimely disclosure. It is difficult to understand why Detective Cunningham acted lackadaisically, especially after the Crown had made four requests and considering that Detective Cunningham was under the impression that it could take eight months to get some of the documents. It is common ground that the Crown and the police are indivisible when considering disclosure. This delay was attributable to the Crown.

d) Limits on Institutional Resources

[93] The parties have not argued that the delay was due to limits on institutional resources.

IV Prejudice

[94] The Applicants were not subject to onerous conditions of release. However, as stated in *Godin* at para. 31, the prejudice needs to be considered together with the length of the delay:

[31] The question of prejudice cannot be considered separately from the length of the delay. As Sopinka J. wrote in *Morin*, at p. 801, even in the absence of specific evidence of prejudice, "prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn". Here, the delay exceeded the ordinary guidelines by a year or more, even though the case was straightforward. Furthermore, there was some evidence of actual prejudice and a reasonable inference of a risk of prejudice.

[95] Justice Cromwell added that proof of actual prejudice was not necessarily required to establish a s.11. (b) violation.

[96] In light of *Godin*, prejudice need to be considered together with delay. I am of the opinion that, in this case, prejudice may be inferred from the length of the delay and the lack of justification regarding the delay. Moreover, there is evidence of actual prejudice for the Applicant Rajasansi.

[97] I agree with Cromwell J. in *Godin*, that “there is a strong societal interest in having serious charges tried on their merits.” The seriousness of a charge needs to be considered but, in itself, the seriousness of a charge does not prevent a stay from being ordered: See for example *R. v. Court* (1997), 36 O.R. (3d) 263 (Ct. J. (Gen. Div.)); *R. v. Morrison*, [2005] Q.J. No. 13847 (Sup. Ct.); *R. v. Kporwodu* (2005), 75 O.R. (3d) 190 (C.A.).

Conclusion

[98] This case is the same as *Godin*. It is not a complex case. The delay of 38 months in bringing it to trial is striking. The delay is almost entirely attributable to the Crown. It is in large part unexplained and unjustified. Critical evidence such as the October 20, 2004 lab report was not disclosed until 55 months after it was produced. The defence made repeated requests for disclosure with no result. The length of the delay itself is prejudicial against both applicants, and in Rajasansi’s case, there is some evidence of additional prejudice. Balancing all these factors against the period of delay, as in paras. 39-41 of *Godin*, I hold that the progress of this case was delayed to such a degree that the Applicants’ constitutional right to be tried within a reasonable time was breached. As agreed by counsel, should I find unreasonable delay, the only way to give meaning to this breach of the Applicants’ section 11(b) rights is to enter a stay. The proceedings against the Applicants are stayed. Considering my conclusion, there is no need to determine if there is a s.7 violation.

Heard on the 12th and 13th days of November, 2009.

Dated at Calgary, Alberta this 19th day of November, 2009.

P.J. McIntyre
J.C.Q.B.A.

Appearances:

Noel C. O'Brien, Q.C.
O'Brien, Devlin, MacLeod
for Kulwinder Singh Rajsansi

Stephen R. Wojick
for Wesley Keane Sinclair

Brian J. Holtby, Q.C.
Alberta Justice
for the Crown

**Corrigendum of the Memorandum of Decision
of
The Honourable Mr. Justice P.J. McIntyre**

A Restriction on Publication notice was added to the front page.