

CANADA / JUDGMENT

R. v. Reinbrecht

2016 BCSC 1790

COURT

Supreme Court of British Columbia

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2016 BCSC 1790 R. v. Reinbrecht

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Reinbrecht,

2016 BCSC 1790

Date: 20160525

Docket: 93462-1

Registry: Kamloops

Regina

v.

Leon Michael William Reinbrecht

Before: The Honourable Madam Justice Donegan

(appearing by videoconference)

Oral Ruling on Mr. Reinbrecht's Application

for a Judicial Stay of Proceedings based upon

Unreasonable Delay

Counsel for the Crown:

N. Flanagan

C. Cook

Counsel for the Accused:

J. Doyle

I.F. Kaatz

Place and Date of Trial/Hearing:

Kamloops, B.C.

April 11, 14 & 15, 2016

Place and Date of Judgment:

Kamloops, B.C.

May 26, 2016

INTRODUCTION

[1] THE COURT: Leon Michael William Reinbrecht was the operator of a speed boat that collided with a houseboat on the waters of Shuswap Lake on July 3, 2010. The houseboat's operator was killed and several of its passengers injured. Mr. Reinbrecht was subsequently charged with criminal negligence causing death and criminal negligence causing bodily harm on December 8, 2011. Nearly four years later, following a trial, he was found guilty of both counts. He now applies, pursuant to s. 24(1) of the Charter, for a judicial stay of proceedings, contending that his right to be tried within a reasonable time under s. 11(b) of the Charter has been infringed. Mr. Reinbrecht has abandoned the first application in his written notice of application where he alleged that ss. 7 and 11(d) had been violated. Any arguments pertaining to his right to a fair trial that were compromised by delay were made by his counsel in the course and context of prejudice.

OVERVIEW

- [2] I have before me a very thorough evidentiary record which includes transcripts of all court appearances from Mr. Reinbrecht's first appearance to the setting of the final trial date, affidavits from the original Crown and defence lawyers, a large body of correspondence between them and others, media clippings and an affidavit from Mr. Reinbrecht, among other things. No cross-examination was sought on any of the affidavits. I heard submissions over the course of three days. No written submissions were filed.
- [3] The analytical framework for determining whether Mr. Reinbrecht's s. 11(b) rights have been violated was set out by Mr. Justice Sopinka, for the majority, in *R. v. Morin*, [1992] 1 S.C.R. 771. I will detail that framework and its application to this case in full later in these reasons, but I think a summary at this overview stage will be helpful.
- [4] In assessing whether delay is unreasonable, a court is to look at the length of the delay, less any periods that have been waived by the defence. Then the court is to take into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(b) seeks to protect. While this analysis often leads to a minute examination of particular time periods

and factual determinations about why certain delays occurred, I am mindful of Mr. Justice Cromwell's remarks in *R. v. Godin*, 2009 SCC 26 at para. 19, when he wrote that it is important in this detailed analysis "not to lose sight of the forest for the trees." I am also mindful of Mr. Justice Sopinka's remarks in *Morin* that the general approach in this analysis is not the application of a mathematical or administrative formula, but rather 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.

- [5] So, first, an overview of the "forest".
- [6] The substantial body of evidence tendered in this hearing reflects a consistent and common theme. From the commencement of this prosecution, both the Crown and defence repeatedly advocated for and took steps in furtherance of an early trial date for Mr. Reinbrecht. Both sides were cognizant of the time that had passed between the collision and the laying of charges. Both sides repeatedly expressed to the court and each other a desire to get the matter to trial as soon as possible in order to protect the integrity of the prosecution and, of course, protect and preserve a fair trial in a reasonable time for Mr. Reinbrecht.
- [7] At the outset, Mr. Reinbrecht elected to engage a two-stage process. He retained counsel immediately. As the case proceeded through its first stage in the Provincial Court, it followed a typical course. After a reasonable intake period, a six-day preliminary inquiry was scheduled, institutionally, to my mind, within a reasonable time.
- [8] The preliminary inquiry did not take place. Months prior to its scheduled start date, the Crown preferred a direct indictment. Now moved into this court, Mr. Reinbrecht found himself financially unable to retain his counsel for what was anticipated to be a four-week or perhaps longer trial. As a result, Mr. Reinbrecht applied for a conditional stay of proceedings pending government funding of his defence through a process commonly referred to as a Rowbotham application. This Rowbotham application and its process caused delay.
- [9] Mr. Reinbrecht's first trial in this court was scheduled in September of 2013. His counsel for the Rowbotham application and counsel for the government, working toward the mutual goal of securing counsel for him for trial, engaged in what turned out to be an unexpectedly protracted process. This delay prompted his counsel to seek to adjourn the trial, which was granted. Had his trial occurred in September of 2013, the elapsed time for our purposes most likely would not have been sufficient to raise an issue as to its reasonableness.
- [10] Mr. Reinbrecht's second trial date was scheduled for January of 2014. In the months preceding this anticipated trial date when both counsel were busy preparing, ongoing disclosure was occurring, and the Rowbotham process was completing, an event unfolded that no one could have predicted. A significant witness, a passenger from Mr. Reinbrecht's speedboat that night, told authorities that she no longer wanted to protect the accused. She gave another statement. She made allegations that prompted Mr. Reinbrecht's counsel to withdraw from the case for ethical reasons. The second trial was adjourned for the

appointment of new counsel for Mr. Reinbrecht.

- [11] In accordance with new counsel's and court availability, Mr. Reinbrecht's third trial was scheduled for February of 2015. It did commence then and completed, in terms of evidence and submissions, in June of 2015. I rendered a decision at the end of October 2015.
- [12] Now, an overview of the "trees", in the form of a point-form chronology of court appearances and other milestones in this case.

Provincial Court:

December 8, 2011:

Information sworn and summons requested.

January 19, 2012:

First Appearance in Provincial Court

Mr. Walker appeared and confirmed he is counsel. He requested an adjournment to the first week of March 2012 to review disclosure.

March 8, 2012:

Second Appearance in Provincial Court

Mr. Walker indicated he had been given 21 binders to look at and requested a two-week adjournment.

March 22, 2012:

Arraignment Hearing in Provincial Court

Mr. Walker elected for Mr. Reinbrecht to be tried by Supreme Court judge alone and requested a preliminary inquiry for three to five days. He expressed that committal at the preliminary inquiry is in issue. He expressed concern about the cost to his client for more than three days of preliminary inquiry. Crown counsel, Mr. Mann, indicated the Crown would call roughly 30 witnesses, so a six-day preliminary inquiry would be needed. He, too, expressed concern about delay.

April 5, 2012:

Fix Date for Preliminary Inquiry

The preliminary inquiry was set for six days between January 14 and 22, 2013. A variety of pre-trial conferences and a trial confirmation hearing was also set.

September 5, 2012:

Pre-Trial Conference Before Harrison PCJ

Mr. Walker indicated that he wanted a three-day preliminary inquiry where he wanted the Crown to call evidence relating to what it says "is the crim. neg". Mr. Walker indicated he would not "consent commit", because he wanted to see the witnesses, but acknowledged frankly to the court that "there will be a trial, this is not an easy case." Mr. Mann advised Mr. Walker and the court that the Crown was seeking a direct indictment. The matter was then adjourned to the next pre-trial conference to see if the Crown would indeed be authorized to proceed by way of direct indictment.

Supreme Court

September 25, 2012:

Direct indictment preferred.

October 22, 2012:

First Appearance in Supreme Court

Mr. Walker appeared for a limited purpose and advised he was not counsel at trial, but counsel for Mr. Reinbrecht's anticipated Rowbotham application. He sought a four-week adjournment to November 19 and advised that he had asked his client to obtain some financial information necessary to support the application so that he could either fix the date for the Rowbotham application on November 19th or have it heard that day. Mr. Walker indicated that he wanted to "shoot for" the trial in the spring of 2013, subject to disclosure.

Mr. Mann expressed concern about delay and urged a shorter adjournment. It was adjourned to November 19, 2012, with the hope and intention that Mr. Walker's application on behalf of Mr. Reinbrecht would be ready to proceed.

November 19, 2012:

Second Appearance before Mr. Justice Affleck

Mr. Walker again appeared on a limited retainer. He sought a two to three-week adjournment to continue sending more information to the Attorney General's office in support of the pending Rowbotham application. Mr. Mann expressed concern about delay and sought only a one-week adjournment. He urged that trial dates be scheduled for June of 2013.

November 23, 2012:

Mr. Reinbrecht's Rowbotham application filed.

December 3, 2012:

Third Appearance before Mr. Justice Blair

Mr. Walker, again appearing on his limited retainer, advised that the Rowbotham application had been filed and that the Attorney General had asked for further material. Again, Crown counsel pushed to set trial dates and advised that June of 2013 dates were not available for trial, as it would mean moving other criminal cases, one facing serious delay arguments too.

Counsel for the Attorney General, Ms. Zaltz, appeared by telephone. She advised that a Rowbotham hearing likely would not be necessary, but the Attorney General required a substantial number of documents and financial detail from Mr. Reinbrecht. Mr. Walker indicated that he hoped to be able to provide all of the requested material by early January of 2013.

As it was a fix date for trial, Mr. Walker and Mr. Mann went to see Scheduling in Kamloops to reserve trial dates. Mr. Reinbrecht was, at that point, self-represented, but Mr. Walker, anticipating a successful Rowbotham application, reserved dates in his calendar. The trial dates reserved were the September 2013 dates. The Rowbotham application was adjourned to February 4, 2013.

February 4, 2013:

Fix Dates for Trial and Rowbotham Application before Madam Justice Hyslop

Mr. Walker, on his limited retainer, advised that his materials for the Rowbotham application were not yet in order. He sought to adjourn the fix date for the Rowbotham application to April 8, 2013. Trial dates were formally set commencing September 9, 2013, for five weeks. Jury selection was scheduled for September 3rd.

April 8, 2013:

Fix Date for Rowbotham Application before Mr. Justice Meiklem

Adjourned to April 15, 2013.

April 15, 2013:

Fix Date for Rowbotham Application before Mr. Justice Meiklem

Mr. Walker advised that the Attorney General had requested more financial information and sought to adjourn to May 13.

May 13, 2013:

Fix Date for Rowbotham Application

Mr. Walker appeared and advised that he sent a box of material to his client to swear and return. He indicated that he hoped to file the material this week and get it to the Attorney General's office. He applied to adjourn to May 27 to give the Attorney General's counsel some time to review. Mr. Mann expressed concern about the approaching September trial dates with no funding in place.

May 27, 2013:

Fix Date for Rowbotham application

Mr. Walker and Ms. Zaltz sought to adjourn to July 2, 2013 to continue getting material together. Mr. Mann expressed concern about the rapidly approaching September trial date, indicated the Crown would be opposed to any adjournment and expressed the desire and need to address the issue of whether Mr. Walker was counsel of record soon. Mr. Walker made it clear that he was on a limited retainer, but indicated to the court that the September trial dates were workable with the Rowbotham application set for July 2. He made it clear that he was not agreeable for working for legal aid rates.

The Rowbotham application was set for July 2, 2013.

June 4, 2013:

Email Communication from Defence Counsel to Crown Counsel

Mr. Walker emailed Mr. Mann advising that Mr. Reinbrecht was still self-represented for trial. Mr. Walker suggested that the September trial date be adjourned to allow the issue of appointment of counsel to be resolved. He suggested adjourning to the fall or early 2014.

June 18, 2013:

Defence Application to Adjourn the September 2013 Trial before Madam Justice Ross

Mr. Walker applied to adjourn the September 2013 trial date in front of Madam Justice Ross. Mr. Walker confirmed again that he was counsel for the Rowbotham application only and appeared for Mr. Reinbrecht to seek to adjourn the September trial dates. Mr. Walker indicated that he was cautiously optimistic that the Rowbotham application would succeed. He still had to discuss rates with legal aid, but believed it may be late July or even early August 2013 before counsel would be appointed. He asked for the adjournment and indicated that dates in January 2014 were available.

Mr. Walker said at one point:

... because there will be a Charter argument relating to delay on this matter, that the delay be noted notionally as at the foot of the defence because it's to assist him with respect to his right to counsel. And so I say that the four or five months that are going to be involved in the delay from the September to whatever date we get in January would be at his foot.

Mr. Mann indicated that he did not condone an adjournment, but acquiesced because of the difficult situation. He agreed with Mr. Walker's position that the adjournment would be at the hands of the accused.

Mr. Mann also explained the direct indictment. He said:

Because the Crown had preferred a direct indictment in this matter back in September of last year, we sought thereafter to schedule a trial date as soon as possible because we had been advised early on in this matter from Mr. Walker that -- that time was of the essence, that there likely will be an application under the Charter to have a stay of proceedings based on what I expect they will suggest is unreasonable delay. And because of that the Crown sought a direct indictment, obtained that, and then attempted to have the trial scheduled as soon as possible. We were able to do that by setting the trial date for September of this year.

The Crown did not agree to an adjournment beyond January 2014, because "the matter needs to get on". Mr. Mann then cited reliance on civilian witnesses and concern about the fading of memories.

Madam Justice Ross granted the adjournment and reasons were given. She did note that, based on the information she had before her, delay for that time period rested at the foot of the defence. She indicated that the next trial date would be pre-emptory on the defence.

July 2, 2013:

Rowbotham Application Hearing before Mr. Justice Groves

Adjourned to July 25, 2013.

July 25, 2013:

Rowbotham Application Hearing before Mr. Justice Steeves

Following a hearing with respect to conditions of funding and contribution, a conditional stay of proceedings was entered pending the appointment of government-funded counsel on a number of conditions. I will have more to say on this later in these reasons.

August 16, 2013:

Father of Material Crown Witness called Crown Counsel

Britney Sundberg's father telephoned Mr. Mann and told him that his daughter was pregnant, having nightmares about the accident, no longer wished to protect the accused and, having received a subpoena, wanted to tell the truth about what happened. Mr. Mann told him that he would have the police take a new statement from her.

August 20, 2013:

Mr. Mann Contacted Police to have Britney Sundberg Interviewed

Constable Ford of the Chase RCMP then contacted another police officer by email to take a statement from Ms. Sundberg. In her email, she wrote that there was no "super rush" because she and Mr. Mann were away until after the September long weekend.

September 9, 2013:

The RCMP communicated to Mr. Mann that they had decided to wait to interview Ms. Sundberg until after she delivered her baby.

September 10, 2013:

Pre-Trial Conference before Madam Justice Ross

Mr. Walker advised that he had good news and bad news. He told the court that the Rowbotham order was granted, but that he was still working on negotiations for his fees and disbursements. He indicated that it looked like another lawyer may be appointed and that Mr. Reinbrecht was still working on getting the materials that Mr. Justice Steeves ordered together. Mr. Walker also indicated that the January 2014 trial dates would have to be adjourned. He indicated that even if he was appointed that day (September 10), he would not be ready for trial. He also noted the defence desire to retain an expert, Mr. Beaumont, and the necessity of having that expert out on Shuswap Lake under the same conditions as when the collision occurred.

Mr. Mann opposed the adjournment request, following which Mr. Walker withdrew his adjournment application. He asked to adjourn the adjournment application to the week of October 15, if need be. Mr. Mann was opposed to an adjournment for that length.

Based on the material before her at that time, Madam Justice Ross expressed her view that there was no diligence in bringing on the Rowbotham application to that point, and no diligence in securing the material ordered by Mr. Justice Steeves. She would not have been inclined to grant the adjournment. She did, however, adjourn Mr. Walker's adjournment application to October 4, 2013.

September 12, 2013:

Mr. Mann was told by RCMP that Ms. Sundberg had delivered her baby. They would wait a couple of weeks post-delivery to interview her.

October 4, 2013:

Pre-Trial Conference before Madam Justice Ross

Mr. Walker reported that he would be retained. A number of issues were discussed. The matter was adjourned to another pre-trial conference date.

October 22, 2013:

Statement taken from Britney Sundberg.

October 25, 2013:

Mr. Mann received the video recording of Britney Sundberg's statement

October 28, 2013:

Mr. Mann left a voicemail message for Mr. Walker regarding the existence of the statement.

November 4, 2013:

Mr. Mann delivered a copy of the video recording of Ms. Sundberg's statement, the interviewer's written notes, along with disclosure of how the statement came to be taken, to Mr. Walker.

November 20, 2013:

Mr. Mann advised Mr. Walker of a matter that he intended to raise at the upcoming pre-trial conference.

Specifically, that Ms. Sundberg in her new statement, alleged that she, Mr. Reinbrecht, and Mr. Reinbrecht's son, (all three passengers in the speedboat at the time of the collision), met with a Kamloops lawyer about a month after the incident. She alleged that the lawyer told them to "keep quiet" or "not say anything" about a certain piece of evidence that was discussed in everyone's presence.

November 21, 2013:

Mr. Mann received a transcript of Ms. Sundberg's video-recorded statement and sent it to Mr. Walker that same day.

November 25, 2013:

Mr. Walker sent a letter to Mr. Mann regarding Ms. Sundberg's allegations.

On that same day, Mr. Mann filed an application seeking directions and advice from the court.

November 26, 2013:

Pre-Trial Conference before Madam Justice Ross

Mr. Walker advised that an ethical matter had arisen, he could no longer conduct the case for Mr. Reinbrecht, and that new counsel would have to be appointed. The Crown then withdrew its application. The trial was adjourned.

January 6, 2014:

Fix Date before Mr. Justice Groves

Mr. Kaatz appeared for that day only for Mr. Reinbrecht. He sought to adjourn the matter three to four weeks for new counsel to be appointed for Mr. Reinbrecht. Crown counsel asked that only a week adjournment occur. A two-week adjournment was granted.

January 11, 2014:

The indemnity agreement was signed by Mr. Reinbrecht.

January 20, 2014:

Fix Date before Madam Justice Holmes

Mr. Kaatz appeared for new counsel for Mr. Reinbrecht, Mr. DelBigio. He sought a two-week adjournment to allow Mr. DelBigio to "get up to speed" and be in a position to fix trial dates. The Crown expressed anxiousness to set a trial date.

February 4, 2014:

The indemnity agreement was signed by the government.

February 4, 2014:

Fix Date before Madam Justice Hyslop

Mr. Kaatz appeared for Mr. DelBigio and a six-week trial, a jury trial at that point, was scheduled for February 2, 2015. There were remarks made about scheduling issues, which I will address later in these reasons.

November 6, 2014:

Pre-Trial Conference before me

Counsel indicated they were still discussing trial issues and asked to adjourn the pre-trial conference to early January. I adjourned only to December 19, 2014.

December 19, 2014:

Pre-Trial Conference before me

The court learned that Mr. DelBigio was no longer able to act for Mr. Reinbrecht and that Mr. Doyle had stepped in to act for him.

The defence confirmed Mr. Reinbrecht's intention to re-elect trial by judge alone. Both counsel agreed that less time would be required than the six weeks that had been set. Both counsel agreed that the trial could start a week later than it had been scheduled, that is February 10. Mr. Doyle was not available the first week of the originally scheduled trial, but both counsel agreed that less than six weeks would be required.

December 22, 2014:

Re-election filed.

The trial was officially set to commence on February 10, 2015.

[13] I held two more pre-trial conferences before the start of the trial on February 10. Between February 10 and May 26, 2015, the trial was conducted, with some periods of adjournment. Counsel provided both written and oral submissions on June 15, 2015. I rendered my decision on October 27, 2015.

THE LAW

[14] Section 11(b) of the Charter guarantees an accused a right to a trial within a reasonable time. It reads:

11. Any person charged with an offence has the right
- (b) to be tried within a reasonable time;

[15] The analytical framework for determining whether this right has been violated was set out by Mr. Justice Sopinka for the majority in *Morin*. The British Columbia Court of Appeal provided a useful summary of that framework in *R. v. Ghavami*, 2010 BCCA 126 at paras. 43-53:

[43] On an application by an accused for a remedy under s. 24(1) of the Charter, a court must first determine the total length of delay from charging to the end of trial. From this number should be deducted any waiver of time periods by the accused. Such waiver can be explicit or implicit, but it must be clear and unequivocal (*Morin* at 789). Once the length of delay is determined, only if the "period is of sufficient length to raise an issue as to its reasonableness" should the s. 11(b) inquiry be undertaken (*Morin* at 789, 810-11).

[44] It then falls to the court to inquire into the reasons for delay. The Supreme Court in *Morin* divided the potential reasons into five categories:

- a. Inherent time requirements
- b. Actions of the accused
- c. Actions of the Crown

- d. Limits on institutional resources
- e. Other reasons for delay

The delay must be apportioned amongst these categories. This is not an exercise in assigning blame, but an attempt to identify the causes of delay.

- [45] The inherent time requirements flow directly from the Crown's charging decision and include the complexity of the case, the time required for preparation, "intake requirements" (consisting of retention of counsel, bail hearings, police and administrative paperwork, disclosure, and the like), and, if necessary, a preliminary inquiry. Inherent time requirements are meant to recognize that "[s]ome delay is inevitable" in the administration of the criminal justice system (Morin at 791-92), and that such delay is not attributable to the Crown.
- [46] Actions of the accused and Crown must be actions within the control of the parties, which are not necessary consequences of the charging decision. The parties must come prepared to explain the reasons for their actions (Godin), such as change of venue motions, attacks on wiretap packets, adjournments which do not amount to waiver (if by the accused), attacks on search warrants, re-election of mode of trial, change of solicitor, failure or delay in disclosure by the Crown, or change of manner of proceeding (summary or indictment) (Morin at 793-94).
- [47] Limits on institutional resources are relevant only insofar as the system cannot accommodate parties who are ready for trial. This type of delay is attributable to the court system itself, and is a flexible consideration that will yield, where necessary, to other factors (Morin at 794-800).
- [48] Other reasons for delay include actions taken by trial judges. This type of action "cannot be relied upon by the Crown to justify [delay]", and can weigh against the Crown even though it is not directly attributable to voluntary Crown action (Morin at 800-1).
- [16] I would pause here to add the observations of Madam Justice Smith in regard to the "other reasons for delay" in *R. v. Nwanebu*, 2014 BCCA 387 at para. 35, where she wrote:
- ... The "other reasons for delay" category includes neutral delay, meaning delay that is not systemic or inherent and is not attributable to either side : *R. v. Port Chevrolet Oldsmobile Ltd.*, 2009 BCCA 357 at para. 86.
- [17] The court in *Ghavami* went on:

[49] Once the court has determined the reasons for the delay, it must turn to the issue of prejudice to the accused occasioned by the delay, bearing in mind that the "question of prejudice cannot be assessed separately from the length of the delay" (Godin at para. 31). The prejudice inquiry examines the effect of delay on the three interests s. 11(b) protects: liberty, security of the person, and the right to a fair trial. As Sopinka J. stated in Morin (at 786-87):

The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

[A] secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public. As observed by Martin J.A. in *R. v. Beason* (1983), 36 C.R. (3d) 73 (Ont. C.A.): "Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused..." (p. 96). In some cases, however, the accused has no interest in an early trial and society's interest will not parallel that of the accused.

[50] Prejudice can be either actual or inferred from the fact of delay, but s. 11(b) must not be allowed to become an offensive weapon in the hands of an accused (Morin at 801-3). The necessary counterweight to prejudice to the accused is the interest of society in law enforcement and "in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (Morin at 787 quoting *R. v. Askov*, [1990] 2 S.C.R. 1199).

[51] Taking all of the above into consideration, the court must balance the factors to determine whether the delay is unreasonable (Morin at 788). As Cromwell J. observed in Godin at para. 18:

[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."

- [52] In our view, balancing makes sense only if weight is attributed to the causes of delay. Inherent time requirements should receive little if any weight, because they are not attributable to either the state or the accused, and because some delay is inevitable. Actual or inferred prejudice to the accused will be accorded a certain weight, but it may be counter-balanced by delay caused or contributed to by the deliberate actions of the defence. Correspondingly, if the organs of state - Crown, justice system, or judiciary - are responsible for some part of the delay, then the public interest will be entitled to less weight when balanced against the accused's right to a timely trial, because the protectors of the public interest have failed to live up to the standard expected of them. However, institutional and judicial delays will be accorded less weight than delays actually within the scope of the Crown's ability to expedite proceedings, because they are not the result of voluntary Crown action.
- [53] By deliberately assigning relative weight to the different causes of delay and balancing them against one another, the judicial reasoning process becomes transparent. Although balancing will inevitably be fact-specific and contextual, it is important that the court's reasoning process not be opaque, so that the accused, the Crown and the public are able to identify why or not a particular delay is unreasonable.
- [18] The role of the burden of proof in this judicial balancing process was explained by Mr. Justice Sopinka in *Morin*. Referencing *R. v. Smith*, [1989] 2 S.C.R. 1120 at pp. 1132-33, the court explained that while the applicant bears the ultimate or legal burden of establishing a Charter violation in this context, a case will only be decided by reference to the burden of proof if the court cannot come to a determinate conclusion on the facts presented to it. A secondary or evidentiary burden may shift to the Crown depending on the circumstances of the case. It will seldom be necessary or desirable to decide this question on the basis of burden of proof. It is preferable to evaluate the reasonableness of the overall lapse of time having regard to all of the factors.
- [19] Mr. Justice Sopinka suggested certain administrative guidelines with respect to institutional delay. Institutional delay of eight to 10 months in Provincial Court and a further six to eight months after committal for trial in superior courts, the court held, would not be unreasonable. He also held that these are administrative guidelines only, intended for the guidance of trial courts generally, and would require adjustments by trial courts in various regions of the country to take into account local conditions and changing circumstances.

ANALYSIS

The Length of the Delay

- [20] The period of time to be scrutinized is the time elapsed from the date of the charge to the end of the trial. The "end of trial" refers to the date the verdict was rendered. Mr. Reinbrecht was charged on December 8, 2011. My decision was delivered on October 27, 2015. Both counsel agree that this is the timeframe that is to be considered in this analysis.
- [21] The total time elapsed from the date of the charge until the verdict was therefore three years, ten months, and seventeen days.
- [22] The total length of the delay in this case is sufficient to raise the issue of reasonableness, so the inquiry must now turn to the reasons why it took this time to bring Mr. Reinbrecht to trial and to have his trial completed.

Waiver of Time Periods

- [23] As I have indicated, any periods of time waived by Mr. Reinbrecht must be deducted from the overall time elapsed. Such waiver must be clear and unequivocal, with full knowledge of the right one is waiving. The Crown bears the burden of proof to establish waiver by the accused.
- [24] On only one occasion did Mr. Walker purport to waive Mr. Reinbrecht's s. 11(b) rights. On June 18, 2013, Mr. Walker applied to adjourn the first trial dates (September 2013) to January of 2014. Although only counsel at this stage for the Rowbotham application process, Mr. Walker expected to be appointed trial counsel and had indicated on a previous occasion he had instructions to appear for Mr. Reinbrecht for the purpose of scheduling matters. Mr. Walker explained at that court appearance that an adjournment of the trial was required as a result of the protracted negotiations between himself and the Attorney General's office over the terms of funding.
- [25] In the course of applying for this adjournment, Mr. Walker advised the court that the four-month delay from September of 2013 to January of 2014, that is the time between the first and second trial dates, would fall at the feet of the defence. As I have outlined, Mr. Mann agreed, as did the court.
- [26] On this application, the Crown submits that Mr. Walker's submissions and position on June 18, 2013 do not constitute waiver of Mr. Reinbrecht's s. 11(b) rights for the four-month timeframe between the first and second trial dates. The defence takes the same position. While they disagree on how that four-month period ought to be attributed, they do agree that there is no issue of waiver for me to consider.

- [27] In light of that position then, I find that the Crown has established no waiver in this case. The overall length of the delay for me to consider in this application remains at 46 months and 17 days.

Reasons for the Delay

December 8, 2011 to September 25, 2012

- [28] This timeframe encompasses the time from the date of the charge, December 8, 2011 to the date of the direct indictment, September 25, 2012.
- [29] In my view, this period of time involves inherent and institutional delay.
- [30] All cases have certain inherent time requirements which inevitably lead to delay. A case must be prepared. The more complicated the case, the longer it will take for counsel to prepare for trial. The inherent time requirements for such cases will serve to excuse longer periods of delay than for less complex cases. Account must be taken of the fact that counsel for the prosecution and for the defence cannot be expected to devote their time exclusively to only one case.
- [31] In addition to the complexity of the case, there are inherent requirements of all cases that include intake requirements. Intake requirements consist of activities such as the retention of counsel, bail hearings, police and administrative paperwork, disclosure, and the like. As the number and complexity of these activities increases, so does the amount of delay that is reasonable. Another inherent delay that must be taken into account is whether a case must proceed through a two-stage process involving both levels of court and a preliminary inquiry. In *Morin*, the Supreme Court of Canada declined to set an administrative guideline for intake requirements.
- [32] Mr. Reinbrecht was charged on December 8, 2011. His appearance in Provincial Court was required by way of a summons on January 19, 2012. He had secured counsel, Mr. Walker, before that date. Mr. Walker appeared for Mr. Reinbrecht at all appearances in Provincial Court. Adjournments took place for disclosure to be provided and reviewed, and discussions regarding a preliminary inquiry took place between counsel.
- [33] Mr. Walker made it clear that his client desired a preliminary inquiry where committal would be an issue, but wished for it to only occupy three to five days of court time, preferably three. He also made it clear that delay was going to be an issue. With committal to stand trial in issue at the preliminary inquiry, Mr. Mann expressed concern that he could not adduce the necessary evidence on behalf of the Crown in three to five days. They discussed the possibility of admissions of certain witness statements and the possibility of a focus hearing.
- [34] On March 22, at the arraignment hearing, Mr. Walker made Mr. Reinbrecht's election and requested a preliminary inquiry. He filed an arraignment report in which he requested a three-to five-day preliminary inquiry. With it, he filed an attachment, a typed document

indicating that he would make certain admissions, but required the Crown to adduce any evidence relating to the issue of "wanton", potential impairment of Mr. Reinbrecht, Mr. Reinbrecht's pre-collision driving, and other issues. At a minimum, Mr. Walker indicated that the Crown would be required to call ten houseboat witnesses, five speedboat witnesses, and any other witnesses that provided evidence of "conduct" of the driver. Reference was made to expert evidence as well.

- [35] Mr. Mann estimated that six days would be required for a preliminary inquiry, but expressed concern about the ability of the Crown to truncate its preliminary inquiry in a case of this nature, as had been requested. At paragraph 7 of Mr. Mann's affidavit, he deposes that the lack of agreement as to committal made it difficult, in the circumstances of this case, where many witnesses claim to have observed relevant evidence of the speedboat's operation, to require the Crown to truncate its case in a preliminary inquiry.
- [36] Having now seen the complex factual matrix of this case to be applied to rather complex legal principles, I can understand why Mr. Mann held this opinion. If committal was in issue at the preliminary inquiry, the Crown would have had to call a large number of civilian witnesses to satisfy the test for committal in the absence of admissions. It is reasonable to conclude that absent those admissions or agreement on committal, six days may not have been sufficient. In any event, on April 5, 2012, a six-day preliminary inquiry was scheduled for January of 2013.
- [37] Parties should not be deemed automatically to be ready to conduct a hearing as of the date the hearing is set. Counsel need time to prepare. These timeframes, time for preparation, are part of the inherent time requirements of a case: *R. v. Tran*, 2012 ONCA 18 at para. 32.
- [38] As the correspondence and affidavit evidence makes clear, the parties were still continuing their preparations throughout the summer and even into the fall when the first pre-trial conference in Provincial Court was held. A large amount of disclosure was provided in those early months on an ongoing basis. Significant time, given the complexities of the case, was needed for counsel to prepare. Defence counsel made several requests for further disclosure and the Crown was working to (and did), provide it.
- [39] Given the complexities of this case, I am of the view that of these first nine months in Provincial Court (December of 2011 to September of 2012, when the direct indictment was preferred), six months should be attributed to intake requirements and preparation. Those six months are considered inherent delay. Three months should be attributed to institutional delay in the Provincial Court.
- [40] The time that would have followed this period until the preliminary inquiry would have been held (September of 2012 to January of 2013), would have been considered further institutional delay in the Provincial Court, had the direct indictment not been preferred and the matter moved to this court.

Effect of the Direct Indictment

- [41] The preliminary inquiry did not occur as a result of the Crown's decision to prefer a direct indictment. This decision was made, the record reflects, at least in part as a result of the Crown's concern about delay. It is not the decision itself that is under scrutiny in this application; it is the effect of the decision on Mr. Reinbrecht's right to be tried within a reasonable time that is to be considered. If any delay can be attributed to this decision, it may be weighed against the Crown when the total effect of the delay is considered: *R. v. Sanghera*, 2014 BCCA 249 per Bennett J.A. at paras. 82-83 and per A.W. MacKenzie J.A. at para. 134.
- [42] The Crown submits that the direct indictment had either a positive effect in abbreviating delay in the Provincial Court or no effect at all. In respect to its submission that it had a positive effect, the Crown highlights that the preliminary inquiry was scheduled to commence approximately four months after the direct indictment was preferred. Had the direct indictment not interfered with that process and the preliminary inquiry held in the timeframe expected, a committal would have followed and the matter would have reached this court at least four months later than it did. Mr. Reinbrecht's Rowbotham application in this court and the process that accompanied it would have occurred in any event.
- [43] In arguing that the court could also view the direct indictment as having no effect on delay, the Crown points to the fact that the first trial date in September of 2013 was set at the beginning of February 2013. The preliminary inquiry, had it actually completed in six days with a decision rendered in January of 2013, would have moved this matter into this court in late January or February and the September trial date may have been set in any event.
- [44] The defence submits that the Crown's decision to prefer the direct indictment had a significant effect in causing delay in this case. By moving the matter to this court for a four-week (or more) trial, instead of a six-day preliminary inquiry (which was all that Mr. Reinbrecht could afford), Mr. Reinbrecht had to make a Rowbotham application, forcing his case to be delayed while that process occurred. The defence says this had to be foreseeable by the Crown. Had the preliminary inquiry been allowed to occur and witnesses examined, the defence urges the conclusion that any number of steps might have occurred that could have resulted in a more expeditious process.
- [45] I agree with the Crown's position on this issue. Based on the guilty verdicts at trial, a committal to stand trial in the Provincial Court would have followed a preliminary inquiry. Mr. Reinbrecht would have been required to make a Rowbotham application in any event. That it took many months longer than it ought to have was, in my opinion, not readily foreseeable by anyone.

[46] With the direct indictment preferred when it was, the matter travelled through Provincial Court during intake and counsel preparation stages, but most of the institutional delay in that court was eliminated. The direct indictment moved the case to this court four months sooner than it would have otherwise moved. It was in this court where its conclusion was prolonged.

September 25, 2012 to January 2014

[47] This takes me to the next period of time that I find it convenient to break the timeframes down into - the time the direct indictment was preferred to the second trial date, January of 2014.

[48] This timeframe, in my view, involves periods of inherent and other reasons for the delay.

[49] There are inherent time requirements in this court. Some delay for intake and preparation for a four- to six-week trial, as opposed to a six-day preliminary inquiry, is inevitable. Mr. Reinbrecht's first appearance in this court occurred on October 22, 2012. As I have outlined, Mr. Walker appeared for him, indicating that his retainer was limited. He was appearing in respect of setting dates and conducting a Rowbotham application, but was not yet trial counsel.

[50] Dates were fixed for Mr. Reinbrecht's first trial a little over three months later on February 4, 2013. During this time, Mr. Walker filed Mr. Reinbrecht's Rowbotham application and started gathering materials in support of it. He and Ms. Zaltz were in contact early and regularly. Their correspondence demonstrates that both of them were working cooperatively to ensure that Mr. Reinbrecht presented the financial materials necessary for him to establish the requirements for state-funded counsel. Mr. Mann was kept informed of the process as it progressed and, at the various court appearances, continued to press for trial dates to be set. Although not formally on the record for trial, Mr. Walker expected to be retained and was cooperative in reserving the September trial dates in his calendar, even as early as December of 2012.

[51] As of early February 2013, while the issue of funding was not yet resolved, Mr. Walker indicated his remaining optimism that he would be retained for trial. The first trial dates were formally set at this time. The Rowbotham application process continued.

[52] Over the next few months, Mr. Walker and Ms. Zaltz spent a great deal of time, the correspondence and transcripts of court appearances reflect, going over and refining what Mr. Reinbrecht was required to provide in terms of financial disclosure to support his application. Both counsel were working toward an agreement that would hopefully see Mr. Walker appointed as trial counsel. Delays in their negotiations occurred as a result of the documentation requested and the time it took for Mr. Reinbrecht to provide it. Delays also occurred as counsel negotiated Mr. Reinbrecht's appropriate contribution and as Mr. Walker sought to negotiate his fees. All of these protracted discussions and negotiations caused Mr. Walker to apply to adjourn the Rowbotham application. It was adjourned several times.

- [53] As I have indicated, the Rowbotham application was eventually heard by Mr. Justice Steeves in late July of 2013. An order was made. A month prior to the Rowbotham application hearing, Mr. Walker recognized that he would not be retained in time to be able to adequately prepare for a trial in September, so he thought it necessary to adjourn the trial until January of 2014.
- [54] In September of 2013, Mr. Walker indicated that the conditions for funding had been complied with and he felt he was retained, although the formal agreements were not yet signed. Preparations for trial commenced in anticipation of the January 2014 trial dates. Although I am aware the final agreements between Mr. Reinbrecht and the Attorney General's office were not signed until January and then February of 2014, Mr. Walker was clear with the court that he felt sufficiently retained in September of 2013 that he would have conducted the trial as scheduled in January of 2014.
- [55] All of this demonstrates that Mr. Reinbrecht's Rowbotham application process effectively occupied the first 12 months in this court and caused the first trial date to be adjourned. Had the Rowbotham application process concluded in the timeframe initially expected by counsel (before or around the time of the February 2013 fix date), which would be a reasonable timeframe, those roughly first four months in this court would have properly been considered intake time and inherent delay, and the next eight months institutional delay. The trial would have occurred in September of 2013. It is very likely that this timeframe, had it unfolded that way, would not have engaged s. 11(b) considerations. As we know, events did not unfold this way.
- [56] This leads me to consider how the time occupied by the Rowbotham application process ought to be allocated.
- [57] As I think I have made clear, the Rowbotham application process was unusually protracted. The application was filed in November of 2012. After several adjournments to allow counsel for Mr. Reinbrecht to obtain the necessary evidence that the Attorney General indicated would be necessary for the application and hopefully a consent order, the hearing was finally held at the end of July of 2013. The hearing was largely occupied with the issue of conditions to be attached to Mr. Reinbrecht's state-funded counsel. It took Mr. Reinbrecht a few months to comply with the conditions ordered.
- [58] The defence submits the delay attributable to the Rowbotham application process ought to fall at the feet of the Crown for two related reasons. First, Mr. Reinbrecht argues that it occurred as a direct result of the Crown's decision to prefer the direct indictment, in a situation where the Crown knew Mr. Reinbrecht could only afford counsel for a short preliminary inquiry. He says the direct indictment effectively forced him into a situation where he had to make the application.

- [59] Once Mr. Reinbrecht was forced to make the application, the process then became protracted because the Attorney General, or the Crown at large, "set up" the Rowbotham process where detailed financial disclosure was required. He says that while it is a laudable goal for the Attorney General to take steps to protect the public purse, the request for such detailed financial disclosure from him caused delay that was out of his control. He says that any delay associated with this process should rest at the feet of the Crown.
- [60] The Crown submits that the delay attributable to the Rowbotham application process ought to be considered neutral in this analysis. The Crown's decision to prefer the direct indictment only caused the case to be brought into its second stage in this court earlier than it otherwise would have been. The Rowbotham application was inevitable.
- [61] The Rowbotham process consisted of steps that were taken by both counsel in furtherance of a common goal of securing counsel for Mr. Reinbrecht. This was something determined by both counsel, Mr. Walker and Ms. Zaltz, to be necessary to protect Mr. Reinbrecht's s. 7 and 11(d) Charter rights to a fair trial. That negotiations and the flow of information took more time than it should have was unfortunate, but cannot fall at the feet of either party.
- [62] I have already addressed the first of these arguments, the effect of the direct indictment, and concluded that it did not contribute to the delay in this case.
- [63] In order to determine how the delay associated with the Rowbotham application process ought to be attributed, a brief review of the basic framework and principles that inform a Rowbotham application is necessary.
- [64] The genesis of what is now called a Rowbotham application was a 1988 decision of the Ontario Court of Appeal - *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.). In that case: the Court concluded that in certain circumstances, a trial judge has the ability to order a conditional stay of proceedings in a case where the accused is unrepresented, cannot afford counsel and cannot receive a fair trial without counsel, in violation of the accused's rights pursuant to ss. 7 and 11(d) of the Charter.
- R. v. Crichton*, 2015 BCCA 138 at para. 19.
- [65] In *Crichton*, Bennett J.A. outlined the framework for a Rowbotham application, commencing with some fundamental principles underlying the right to counsel and the distribution of taxpayer dollars at paras. 21-47.
- [66] Among other principles, Bennett J.A. reaffirmed that the burden is on the accused applicant to establish the basis for the Rowbotham order. She explained that "because the Charter breach is prospective, the burden is a 'very real likelihood' or high degree of probability that the accused will be deprived of a fair trial." The court went on to summarize a number of trial court decisions addressing the issue of financial eligibility. In doing so, she noted a common theme that an accused must not divest himself or herself of assets when he or she knows he or she is facing charges. A person must conduct his or her affairs with financial

prudence. The court then summarized at paras. 48-49:

- [48] Under the constitution, the allocation of taxpayers' dollars is not for the judicial branch of government to decide, except in the face of a Charter challenge or concern for judicial independence . . . Yet, the constitution also imposes a duty on the government to fund a lawyer, outside of the provincially established legal aid scheme, in certain circumstances. An order staying the proceedings is a rare and exceptional order. As noted above, it is only to be invoked in the "clearest of cases". Considering those factors, it is entirely appropriate to require an applicant seeking the funding of counsel by the taxpayer to establish strictly enforced guidelines for financial eligibility.
- [49] In summary, to obtain a conditional stay of proceedings based on a violation of ss. 7 and 11(d), certain financial criteria must be established. First, the applicant's financial circumstances must be "extraordinary". The applicant must provide detailed financial evidence of his or her financial circumstances, which includes supporting evidence. The applicant must save money to hire counsel or contribute to his or her legal fees, and make efforts to borrow money from friends or family. The applicant should try to obtain employment or additional employment if already employed. The applicant should try to find counsel who would be willing to work at LSS [being Legal Services Society] rates. The applicant must reasonably exhaust his or her own assets to pay for counsel before looking to the taxpayer to pay for a lawyer. The applicant must demonstrate that he or she was prudent with his or her personal living expenses and show foresight and planning of his or her financial affairs to pay for a lawyer.
- [67] With this framework and these principles in mind, it is my view that the additional delay occasioned by the protracted Rowbotham application process in this case must be considered in the "other reasons for delay" category and be considered neutral.
- [68] Mr. Reinbrecht needed counsel to represent him at trial in order to protect his constitutionally-entrenched right to a fair trial. He could not afford to fully retain counsel on his own for the trial. The correspondence and transcripts demonstrate that Ms. Zaltz, on behalf of the state, and Mr. Walker on behalf of Mr. Reinbrecht, were both working toward the same goal of securing state funding for counsel to represent him.
- [69] Ms. Zaltz made reasonable requests in compliance with the case law. Mr. Walker asked for assistance from her in terms of what financial information or further financial information would be required. Mr. Walker even sent Ms. Zaltz a draft affidavit from his client to ask her advice on its content.

- [70] Following the requirements set out in the jurisprudence and trying to assist Mr. Reinbrecht in a successful application that might go by consent, Ms. Zaltz rightly asked for a great deal of financial disclosure from him. The burden of proof in such an application is on the applicant. Mr. Reinbrecht's financial circumstances must be found by a court to be extraordinary. In short, it is the law that requires detailed evidence of Mr. Reinbrecht's financial circumstances, not the Crown.
- [71] Mr. Walker rightly took time and care to have Mr. Reinbrecht provide all he could. The time it took was exacerbated because Mr. Reinbrecht moved to Alberta and Mr. Walker practises in Kamloops. Even with all of the information Mr. Reinbrecht did gather over those many months to present to the court at the hearing, the court still found that his financial information was lacking and many conditions were imposed as a result. It took Mr. Reinbrecht a few months to comply with those conditions.
- [72] As I have indicated, the negotiations were also protracted because Mr. Walker wanted to secure, appropriately, optimal financial outcomes for his client in terms of contribution and reasonable counsel fees. In accordance with the case law, Ms. Zaltz took appropriate positions on these issues.
- [73] In the ordinary course, I would expect such an application to take much less time than it did. Completion in the timeframe counsel had hoped, that is roughly within the first four months in this court, is, I think, a reasonable amount of time and should be considered part of the intake process. The intake process is a process that includes retaining counsel. Four months for that intake process in this court is inherent delay in this case.
- [74] As it was, the application process took another several months beyond that intake time, resulting in the loss of the first trial date.
- [75] In my opinion, the time from the preferring of the direct indictment to the fixing of the first trial date in February of 2013 should be attributed to intake time in this court, time to retain counsel for trial, and prepare, among other things. Had the Rowbotham application process actually completed in this timeframe and the case proceeded in the usual fashion to trial in early September of 2013, the roughly seven or eight months between the completion of intake and the September trial date would properly be considered institutional delay.
- [76] However, counsel was not retained in time for the first trial date. Those next seven months were utilized for the Rowbotham application process. In the circumstances I have outlined, those additional months (February to September 2013), cannot lie at the feet of the Crown or the defence and should be considered as falling in the "other reasons for delay" category and considered neutral.

- [77] Mr. Walker applied to adjourn the first trial date in June of 2013 because the Rowbotham process was not yet completed and he was not yet retained as he had hoped. The court was able to provide dates relatively quickly - only four months after the originally-scheduled trial dates. This additional four-month delay occurred as a result of the protracted Rowbotham application process and should be considered under the "other reasons for delay" category and neutral as well.

January 2014 to February 2015

- [78] This leads me to the timeframe between the second trial date (January of 2014) to the third trial date (February 2015). This timeframe involves periods of institutional and other reasons for the delay.
- [79] At a pre-trial conference in September of 2013, Mr. Walker commenced an application to adjourn the January 2014 trial date, which he subsequently abandoned. He advised the court that Mr. Reinbrecht was still in the process of providing material to the Attorney General in compliance with the order of Mr. Justice Steeves and the Attorney General was still preparing the indemnity agreement regarding contribution. He also advised the court that he was prepared to accept a retainer in the "right circumstances", but that retainer was not yet forthcoming, so no counsel was yet appointed.
- [80] Mr. Walker further advised, as I have indicated, that even if he were appointed on that day, the date of the September 2013 appearance, he would not be ready for a January 2014 trial because he wanted to retain a defence expert. The Crown opposed the adjournment application. Mr. Walker then withdrew it and asked to adjourn the adjournment application in order for him to continue efforts to reach a resolution with the Legal Services Society about his rates.
- [81] On October 4, 2013, Mr. Walker advised the court that he had been told by Legal Services that he would be retained. Both counsel began working toward preparing for the January 2014 trial date. As Mr. Walker deposed at paragraph 16 of his affidavit, his negotiations with Legal Services Society continued throughout the fall, but he would have conducted the January 2014 trial in any event. Both counsel continued their preparations, working toward the January trial date.
- [82] This trial date was compromised as a result of an event that could not have been expected by anyone. Britney Sundberg was on the speedboat with Mr. Reinbrecht before and during the collision. She was injured. She provided statements to police that had been disclosed early in the process. She was expected to be a Crown witness at trial.

- [83] Shortly before 20-year-old Ms. Sundberg was due to have a baby in September of 2013, her father telephoned the Crown. Her father told Mr. Mann that his daughter had received a subpoena. She told her father, as communicated by him to Mr. Mann, that she no longer wished to protect the accused. Mr. Mann told Mr. Sundberg that he would have the police contact them to take another statement from Ms. Sundberg. He did so.
- [84] Police then contacted Mr. Sundberg and learned from him that Ms. Sundberg had been seeing a victim service worker, had been having nightmares about the incident, and was about to give birth to her first child. Ms. Sundberg was willing to tell the truth and willing to be interviewed again.
- [85] Police delayed taking this statement from Ms. Sundberg for approximately two months because she was due to and subsequently did give birth. Although I do not have details about the nature of her pregnancy, I am aware from the evidence that she was a young woman, pregnant for the first time, and suffering psychological effects as a result of the collision. I saw and heard Ms. Sundberg testify at trial and it is clear that her suffering continues.
- [86] Ms. Sundberg's statement was taken by police on October 22, 2013. Mr. Mann was advised. Mr. Walker was advised by Mr. Mann of its existence within three days and a copy of the recording disclosed to him within several days. All of this occurred approximately two months before the trial was scheduled to commence.
- [87] Ms. Sundberg said something in her statement that no one anticipated. She alleged that approximately a month after the collision, she participated in a meeting with Mr. Reinbrecht, his son and a lawyer in Kamloops. The lawyer told them to keep quiet or not say anything about a certain piece of evidence that was discussed in everyone's presence. Based on the Crown's understanding that Mr. Reinbrecht had the same counsel from the outset, Mr. Mann contacted Mr. Walker by letter on November 20, 2013 and raised the concern of conflict of interest.
- [88] The two lawyers spoke about the matter by phone the following day. Mr. Walker suggested that Mr. Mann prepare an application to the court setting out the details of what the Crown would be seeking and the evidence upon which it would be based. A hearing of the matter, he said, would have to occur after November 26, in order for Mr. Walker to consider his position and confer with Mr. Reinbrecht. Mr. Walker, of course, vigorously denies these allegations. He suggested there would have to be an adjournment of the trial in light of this new issue.
- [89] The Crown did indeed file an application on November 25, 2013, seeking advice and directions from the court relating to a potential conflict of interest involving counsel for the defence. The Crown's alternative application was for an order appointing independent counsel to cross-examine Ms. Sundberg. The Crown's application was faxed to Mr. Walker the same day. It was filed along with a letter setting out the Crown's position on the application. Mr. Mann expressed that the Crown would take the position at the hearing that, upon the application of the established legal principles, disqualification of counsel was the

appropriate course.

- [90] On November 26, 2013, counsel met before court. Mr. Walker told Mr. Mann there would be no need for the Crown's application to proceed. He had decided to withdraw. Mr. Walker asked Mr. Mann to address the court in terms of adjourning the January 6, 2014 trial date, as Mr. Reinbrecht would need to seek new counsel and it would take some time to prepare for the transfer of disclosure material and work product to his new counsel. The transcript of proceedings of that court appearance, where Mr. Mann spoke, reflects this conversation.
- [91] Mr. Walker did withdraw for ethical reasons. Mr. Mann did advise of the need for an adjournment, which was granted by Madam Justice Ross. The matter was adjourned to January 6, 2014 to give Mr. Reinbrecht time to make efforts to retain new counsel.
- [92] New counsel, Mr. DelBigio, was retained in January 2014. The third trial date was soon scheduled for six weeks, commencing February 10, 2015.
- [93] The scheduling of the third trial date was canvassed by Mr. Mann in his affidavit at paragraph 26:
26. On February 3, 2014, I spoke by telephone with Greg DelBigio, Q.C., who advised that he expected to be counsel who would represent the accused. Mr. DelBigio felt the trial would take six weeks and, because of his schedule, would first be available starting June 16, 2014. We discussed disadvantages of having a potential jury trial in summer. I advised that Mr. McCoy indicated the court's availability September 29 to December 19, 2014. Although Mr. DelBigio said he could be available starting November 17, 2014, he was concerned there was not enough time if the trial was six weeks in length. We discussed dates in January 2015, and although he stated his availability to commence on January 12, 19 or 26, 2015, his preference was to start in February. I spoke by telephone to Mr. McCoy that date, and was advised that the court was available from March to May, 2014, but not in June 2014. The availability in fall had been reduced from October 6, 2014 to December 19, 2014. Mr. McCoy advised that this trial could, with some difficulty be accommodated in January 2015. He stated that the court could accommodate the trial starting Feb 2, 2015. I, thereafter, advised Mr. DelBigio by telephone that the trial could commence February 2, 2015, and he agreed to schedule it for that date.
- [94] That the court was not available to have the trial held in June of 2014 when Mr. DelBigio was available is unfortunate because, although the court has many other cases to consider, some priority must be given to cases that have to be rescheduled. This is particularly so when a trial does not proceed due to circumstances beyond the control of the parties: *R. v. Ghozerash*, 2013 BCCA 272 at para. 47.
- [95] The delay caused from January to June when Mr. DelBigio was available for trial occurred as a result of Ms. Sundberg's unexpected allegation and the withdrawal of Mr. Walker. Given the timing of the allegation and the position that Mr. Walker took, as related by Mr. Mann to the court, it is clear that an adjournment to secure new counsel had to occur. This

occurrence cannot be attributed to any party in my view. The delay of six months from the second trial date until June of 2014, when Mr. DelBigio was ready to proceed, falls under the "other reasons for delay" category and must be considered neutral.

- [96] The delay from June of 2014 until February of 2015, which is eight months, is to be considered institutional delay in this court. I recognize that some portions of this time might possibly be attributed to Mr. DelBigio's calendar or perhaps his preference for starting in February as opposed to January, but I am of the view that the entire timeframe should, in fairness, be attributed all to institutional delay. Those June 2014 dates were available in defence counsel's calendar and the Crown was available as well, but the court was unable to offer those dates.
- [97] Mr. Reinbrecht's counsel again changed in or around December of 2014. I am told that Mr. DelBigio had to withdraw because of a conflict that arose in his calendar. Fortunately Mr. Doyle was able to step in and prepare.

February 2015 to October 2015

- [98] This takes me to the final timeframe to be considered - trial time. The trial from start to finish, including my decision, took eight and a half months. Evidence and submissions occurred over the course of the first four of these months. The final four and a half months were taken to render my decision.
- [99] In allocating the reasons for this delay, I am mindful of the Ontario Court of Appeal's caution in Tran at para. 48:
- [48] I also pause to add the following observation. Judges should be cautious about engaging in a minute analysis of the normal vicissitudes of a trial for the purpose of allocating delay to the Crown or to the defence on s. 11(b) Charter applications - for example, the need to pause to consider unforeseen developments during the trial, the customary requirement to juggle the line-up and availability of witnesses, insignificant administrative glitches or early adjournments. Except in rare cases where unreasonable delay arising from such issues can readily be attributed to one side or the other or to the court system, I would think that delays arising from these sorts of factors during the normal evolution of a trial would be part of the inherent time requirements of the case. [Emphasis in original.]
- [100] Here the trial started one week later than anticipated as a result of both sides agreeing a judge-alone trial would take less time than the six weeks for which it had been scheduled. This accommodated Mr. Doyle's calendar. As I say, he quite helpfully stepped in at the eleventh hour. I do not attribute this one-week delay to anyone. It was a reasonable step to have taken. Both parties agreed, as did the court.
- [101] The roughly 30 days of evidence was heard over the course of approximately three months. A three-week adjournment followed the calling of evidence to allow counsel time to prepare written and oral submissions. Those written and oral submissions were very extensive.

- [102] The evidence in this case was not heard continuously over that roughly three- to four-month period as a result of a variety of reasons not uncommon in longer trials. I do not believe it is necessary to break the time down on a day-by-day basis, but I will highlight one event as notable as I believe it should result in some delay in trial time being attributed to the Crown.
- [103] Early in the trial, the Crown disclosed evidence that should have been disclosed, as I put it at the time, "long ago". This included photographs taken by witness Stephanie Dodds (although I recognize the Crown did not have possession of them until shortly before trial), and transcripts of 9-1-1 calls made at the time of the incident. These were in the possession of the police.
- [104] Upon receiving that and other disclosure, defence requested an adjournment, a brief one, and one was granted. This delayed the progress of the trial for approximately two weeks, but may have also interfered with witness scheduling and availability, a sort of domino effect, that led perhaps to other short delays. In these circumstances, I consider it reasonable to attribute a delay of one month to the Crown during the trial process itself.
- [105] The balance of the time in the trial process itself is inherent delay. The roughly four and a half months it took to render my decision is also inherent delay.

Summary of the Reasons for the Delay

[106] To summarize my breakdown of the reasons for delay, I will provide them in point form:

1. Inherent delay in Provincial Court - six months;
2. Institutional delay in Provincial Court - three months;
3. Inherent delay in Supreme Court - total of 11.5 months, broken down as follows:
 - four months for intake and counsel preparation;
 - three months for trial;
 - four and a half months for my decision;
4. Institutional delay in this court - eight months;
5. Actions of the Crown - one month;
6. Actions of the defence - none;
7. "Other reasons", which are neutral:
 - additional 11 months for the Rowbotham process;
 - six months relating to, I will call it, the Britney Sundberg issue.

Prejudice to the Accused

[107] Prejudice in this context is concerned with the three interests of the accused that s. 11(b) protects: liberty, security of the person and the right to make full answer and defence. The question of prejudice cannot be assessed separately from the length of the delay. The prejudice with which the law is concerned is that arising from the delay, not from the fact of the charge: *R. v. Kovacs-Tatar* (2004), 192 C.C.C. (3d) 91 (Ont. C.A.) at paras. 32-33.

[108] Mr. Reinbrecht submits that some degree of prejudice can be inferred given the length of the delay in this case. I agree. He also submits that he has shown actual prejudice to at least two of his three interests that s. 11(b) protects.

a) Right to Liberty

[109] The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions.

[110] Mr. Reinbrecht was never arrested. He was not held in pre-trial custody. He was not placed on any bail conditions. His attendance at court was secured by way of a summons. From the numerous transcripts filed it appears, from my review of them, that he did not personally appear in court until his trial, having had counsel appear for him.

[111] Mr. Reinbrecht was, as his affidavit discloses, born and raised in Calgary. He worked as a commercial painter for 34 years. He has three children, all of whom currently live in Alberta. At some point subsequent to the events of July 3, 2010, Mr. Reinbrecht moved back to Alberta, where he continues to reside and work today. Mr. Reinbrecht does not suggest that his right to liberty in this context has suffered injury.

[112] I conclude on the facts of this case that Mr. Reinbrecht's liberty interests were not affected by the delay. He has suffered no actual prejudice to this interest.

b) The Right to Security of the Person

[113] The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern, and stigma of exposure to criminal proceedings: *Morin* at 786-787. The court must be careful to distinguish the anxiety, concern, and stigma that arises inevitably from the fact of the charge itself from prejudice that arises from delay: *R. v. Goodkey*, 2013 BCSC 1431 at para. 90, citing *R. v. Horder*, 2012 BCCA 7 at para. 116.

[114] In *Kovacs-Tatar*, the Ontario Court of Appeal explained the distinction that a court must make in this context at para. 32:

[32] There is a difference between prejudice arising from merely being charged with a criminal offence and prejudice arising from delay. In dealing with the appellant's submission it is helpful to briefly review the distinction. In *R. v. Rahey*, [1987] 1 S.C.R. 588, 39 D.L.R. (4th) 481, Wilson J. stated at p. 624 S.C.R. that:

[T]he impairment or prejudice we are concerned with under s. 11(b) is the impairment or prejudice arising from the delay in processing or disposing of the charges against an accused and not the impairment or prejudice arising from the fact that he has been charged. 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).

- [115] Mr. Reinbrecht was interviewed by police in relation to this matter the day after the collision and then again on July 16, 2010. During the latter interview, he was told that he was being investigated criminally. Mr. Reinbrecht lived under the weight of possible criminal charges for 17 months thereafter until he was charged. Once charged, Mr. Reinbrecht lived under the weight of the charges for nearly four years until his trial concluded with guilty verdicts.
- [116] Mr. Reinbrecht described a desire to conclude his trial as quickly as possible throughout. This is consistent with his counsel's assertions throughout the numerous court appearances and throughout the correspondence. Mr. Reinbrecht lived in a small community near where this event occurred. Much discussion and speculation occurred about who was to blame, including discussion and speculation on the level of Mr. Reinbrecht's impairment at the time of the collision. Media coverage gave Mr. Reinbrecht unwanted public attention and fuelled the community's speculations and discussions.
- [117] One Kamloops media outlet obtained a copy of materials filed by investigators in support of a search warrant to obtain samples of Mr. Reinbrecht's blood thought to have been taken in hospital following the collision. Inexplicably, those materials were not asked to be sealed. Some details about Mr. Reinbrecht's history and the investigation were published, adding to his unwanted public attention.
- [118] Mr. Reinbrecht's employment, relationships, and his mental health have all suffered since these tragic events.
- [119] In terms of employment, as Mr. Reinbrecht deposes in his affidavit, his painting business started to fail after the collision. He did not provide details, but does say that some clients cancelled contracts. He believes that many of these cancellations occurred because clients felt he was a person of poor character and lacking in integrity. Potential clients declined to hire him in the event he was jailed and could not complete jobs.

- [120] Mr. Reinbrecht's income suffered as a result. He could no longer financially survive in his small home community. He moved to Alberta. His affidavit does not disclose when he moved, but he deposes that he first moved to Calgary, where he was born and raised. He then moved to a community where one of his children lives and he now resides in another community. He works and earns income there.
- [121] Some work in his new community has been lost or interrupted for court appearances and other meetings in Kamloops. Mr. Reinbrecht says his financial situation has worsened because he has had to sell land he owned with his former partner, Tracy Smith, at a loss. He currently has no assets, other than his commercial pickup truck and his tools.
- [122] In terms of concerns for his personal safety, Mr. Reinbrecht was threatened once at a wedding by a man holding a golf club. No other details are provided. He also says he was "made aware of another person who wanted to shoot me". Again, no further details are provided.
- [123] Socially, Mr. Reinbrecht lost or has been alienated from friends. After the collision, he learned that friends of his girlfriend, Ms. Smith, no longer wanted to socialize with him. This strained his relationship with her. Ultimately, his financially motivated move to Alberta caused him to lose his relationship with her.
- [124] In terms of his mental health, Mr. Reinbrecht deposes that he believes he has been severely depressed since the collision. He has not sought professional help in this regard, but describes going through the motions of life largely for the benefit of family and friends.
- [125] Mr. Reinbrecht feels tremendous remorse for the death of Mr. Brown and injuries to other passengers on the houseboat. Bearing this burden from the time of the collision throughout this process has been devastating to him and his circle of family and friends.
- [126] The negative effects described by Mr. Reinbrecht on his security interest do arise inevitably from the fact that he was investigated and charged. However, it is clear that these effects have been extended by the delay in this case which, for purposes of assessing prejudice in this context, does include pre-charge delay when he was under the weight of the investigation. It is the prolonged nature of these effects due to delay with which the court is concerned in this analysis and where the prejudice arises.
- [127] I conclude that Mr. Reinbrecht has suffered some injury to his security of the person, actual prejudice, as a result of the delay in this case.
- c) The Right to Make Full Answer and Defence
- [128] A long delay may prejudice an accused's ability to make full answer and defence through the unavailability of witnesses or evidence, the failing of memory, the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise raise a defence at trial: Godin at para. 30, referencing Morin at pp. 801-3.

- [129] Given the nature of the evidence at trial, consisting in large measure of civilian witnesses, Mr. Reinbrecht points not only to prejudice that can be inferred, but to actual prejudice arising from the frailty of memory due to the passage of time. The Crown vigorously submits there has been no injury to Mr. Reinbrecht's right to make full answer and defence in the circumstances of this case.
- [130] This case is unique. The protracted Rowbotham application process, as I have found, caused a significant amount of delay. It was an application and a process that furthered the goal of preserving Mr. Reinbrecht's right to a fair trial by ensuring he had counsel for trial. Indeed, the application, protracted as it was, resulted in the appointment of counsel who very effectively represented him at trial. Mr. Reinbrecht now argues that the delay that occurred as a result of that very process has, at least in part, caused injury to his right to a fair trial.
- [131] What also makes this case different from most is that most of the case authorities involve an accused's pre-trial application for a stay of proceedings based upon unreasonable delay. As a result of its timing, courts most often discuss the concept of risk of prejudice to an accused's ability to make full answer and defence as a result of delay. As those trials in those cases have not yet been heard, those courts often found it difficult to quantify that risk.
- [132] In this case, I have heard all of the evidence and conducted detailed assessments of it. I am in a very good position to assess whether Mr. Reinbrecht has suffered actual prejudice to his right to make full answer and defence as a result of delay. I conclude that he has not.
- [133] It is uncontroversial that this case was heavily reliant on the evidence of civilian witnesses. These witnesses were asked to recall events at trial that occurred nearly five years earlier. It is also uncontroversial that memories can fade over time. As in many trials, most witnesses refreshed their memories from statements given to police at or near the time, or in the case of police and the first responders, from their notes taken at or near the time of the event.
- [134] Any potential memory frailties that existed in the evidence of witnesses that could impact the reliability of aspects of their evidence were vigorously and thoroughly exposed in the course of Mr. Doyle's detailed and very effective cross-examinations of them. In assessing the evidence, I was mindful of the potential frailties and took them into account if they arose, but as my reasons for judgment disclose, they arose infrequently.
- [135] Mr. Reinbrecht points to no specific examples but, to my recollection of the nearly 40 civilian witnesses, there was one witness, Mr. Boileau, who testified that the passage of time prevented him from remembering which lights were illuminated on the houseboat when he attended the scene that night on the water. His recollections on this point were recorded in a statement to police taken shortly after the events, and this portion of his statement was admitted by consent as past recollection recorded. That portion of his statement provided evidence in furtherance of the Crown theory. It also provided evidence in furtherance of the defence theory on one point.

[136] Reference was made in Mr. Reinbrecht's notice of application to a witness, Alex McLean. Mr. McLean was called by the defence in regard to a houseboat he saw on the water on the night in question. He was not cross-examined by the Crown. At paragraph 29 of Mr. Reinbrecht's notice of application, it is written:

Alex McLean testified at the trial that he provided a telephone statement to the RCMP shortly after the incident on July 3, 2010. His testimony was not challenged in this regard. No record of that statement exists and same could not be used by him to assist his recollection of the events of July 3, 2010 when he testified at trial almost 5 years later.

[137] I recognize that Mr. Doyle did not press this point in oral submissions, but from what is written at paragraph 29, I take it that Mr. Reinbrecht submits that his ability to call evidence pertinent to his defence was adversely affected by a loss of this statement or perhaps failure of the police to take notes of the phone call, which in some way adversely affected Mr. McLean's ability to refresh his memory that had faded as a result of the delay in this case. If that is indeed how that remark at paragraph 29 was intended to be conveyed, I cannot agree with that proposition.

[138] I have reviewed the evidence of Mr. McLean again. In giving his evidence, Mr. McLean did not assert or give any indication that he had any difficulties with his memory of the events he related to the court. His evidence was detailed and quite specific. In any event, I accepted the evidence of Mr. McLean at trial, but simply concluded that, based upon it, the boat that he saw was not the houseboat at issue.

[139] In the end, I cannot conclude the delay in this case caused any unavailability of witnesses or evidence that affected the ability of Mr. Reinbrecht to lead evidence, cross-examine witnesses, or otherwise raise a defence. The impact of any frailties of memory played very little role in my assessment of the various pieces of evidence, although I was alive to it. In the result, I cannot conclude there has been any actual prejudice to Mr. Reinbrecht's right to make full answer and defence and his right to a fair trial as a result of the delay in this case, even taking into account pre-charge delay.

[140] I accept that the delay in this case allows some risk of prejudice to be inferred, and to that extent, I conclude that the trial process, including the very effective representation he received, minimized that risk to the greatest extent possible.

d) The Balancing Process

[141] In *R. v. Bains*, 2010 BCCA 178, D. Smith J.A. described the balancing process at para. 40:

[40] The final balancing of interests requires a weighing of the accused's right to liberty, security of the person and a fair trial, with society's interest in seeing that those who are charged are brought to trial. The objective of the balancing process is to determine if the extraordinary remedy of a judicial stay of proceedings is warranted in the circumstances.

[142] D. Smith J.A. went on to discuss the process, as described in *Morin*, at para. 41:

[41] Madam Justice McLachlin (as she then was) described the process as, "[i]n the final analysis the judge, before staying charges, must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial" (Morin at 810). She added that:

... simply listing factors does not resolve the dilemma of a trial judge important is how those factors interact and what weight is to accorded to each. In this connection, we must remind ourselves that the best test will be relatively easy to apply; otherwise, stay applications themselves will contribute to the already heavy load on trial judges and compound the problem of delay.

[143] I have already outlined the weighing process that I am to undertake, as expressed by our Court of Appeal in Ghavami.

[144] Mr. Reinbrecht's case had inherent complexity arising from the volume and nature of the evidence and the nature of the factual and legal issues at play. In the circumstances, the inherent delay of six months in the Provincial Court and 11.5 months in this court is not excessive and should be given little weight. The institutional delay in this case does not exceed the guidelines set out in Morin and should also be given little weight. Even if the institutional delay were found to be slightly in excess of the guidelines, in this case I would remain of the view that it should be given little weight.

[145] Other than a one-month portion of trial time delay attributable to the Crown, which is to be given some weight, none of the delay in this case can be attributed to the Crown or the defence. Both sides advocated for and took steps to pursue a speedy trial. The two things that derailed that joint pursuit and created the primary sources of delay in this case - the Rowbotham application process and the allegations of Ms. Sundberg - were things that were not within the control of any party and must be considered as "other reasons" or neutral in the analysis.

[146] Due to the length of the delay, some degree of prejudice to Mr. Reinbrecht should be inferred. In addition, I accept that Mr. Reinbrecht has suffered some degree of actual prejudice related to his interests in security of the person, as I have explained. These injuries to his s. 11(b) rights should be afforded some weight, but in the circumstances of this case, I find that the prejudice suffered by him is not substantial.

[147] Section 11(b) is framed in terms of reasonableness. Courts have refrained from creating limitation periods within which certain types of cases must be tried lest, to quote another case, "the judicial guillotine descend in the form of a stay of proceedings". This inevitably requires the trial court to exercise judgment, having regard to the factors enumerated in Morin. The interests involved do not just include the accused's liberty and security interests and his interest in a fair trial. There are societal interests in ensuring that an accused is tried within a reasonable time to minimize prejudice to him and to ensure he is treated humanely and fairly, but there is also a societal interest in ensuring that accused persons are tried on the merits. As Mr. Justice Sopinka said at p. 13 in Morin "As the seriousness of

the offence increases so does the societal demand that the accused be brought to trial."

[148] Mr. Reinbrecht's verdicts are very serious. His conduct on the night of July 3, 2010, is of a type which, to quote Madam Justice Holmes in *R. v. Sanghera*, 2012 BCSC 711 at para. 123 "tends to undermine the social structure on which Charter and other protections depend". The societal interest in completion of this trial through to sentencing is high.

[149] When I weigh and balance all of these factors, I am satisfied that Mr. Reinbrecht's right to a trial within a reasonable time pursuant to s. 11(b) of the Charter has not been infringed in this case. In the circumstances of this case, the total delay is not beyond the limits of constitutional tolerance. Mr. Reinbrecht's application for a judicial stay of proceedings is dismissed.

"S.A. Donegan J."

DONEGAN J.

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