

TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CITY OF YELLOWKNIFE

Respondent

-and-

SERGE PETITPAS

Applicant

REASONS FOR DECISION

of the

HONOURABLE JUDGE CHRISTINE GAGNON

This is a translation of the
original written reasons, which
were filed July 4, 2014

Heard at: Yellowknife, Northwest Territories

Date of Hearing: May 16, 2014

Date of Decision: July 4, 2014

Counsel for the Applicant: Serge Petitpas

Counsel for the Respondent: Paul Falvo

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INTRODUCTION

- [1] The Applicant alleges that his right to be tried within a reasonable time has been infringed and that the only available remedy is a stay of proceedings. The backdrop to this application is the right of a French-speaking accused to speak his language before the courts and to have his trial in French.
- [2] I granted the application on May 16th, 2014 and gave summary reasons forthwith in order not to add to the delays already incurred. Here are the complete reasons in support of my decision.

CHRONOLOGY

- [3] The Applicant received the Notice of Violation number 147393 on May 22, 2013. The document was written entirely in English and contained very little information. On its face is identified a vehicle and a registered owner, namely the Applicant, Serge Petitpas, residing at 5304, 49th Street, and a telephone number is also indicated. The other details indicate an offence to the Highway Traffic Bylaw on a private property and that towing was requested. The Notice further mentions a voluntary payment \$50.00, and that should the defendant fail to pay within 21 days of the Notice being issued, a summons may be issued to compel him to appear before the court.
- [4] On July 16, 2013, an Information was sworn before Justice of the Peace Stephen Lacey, in which the City of Yellowknife alleged that the Applicant contravened section 58 of the Highway Traffic Bylaw. Offences to municipal bylaws are prosecuted pursuant to the *Summary Conviction Procedures Act*.¹
- [5] There is no trace of a summons or of an affidavit of service on file, but the Applicant appeared before Justice of the Peace E. Kieken in the Justices of the Peace Court on January 14, 2014, and entered a plea of Not Guilty. He asked that his trial be in French. Proceedings were adjourned to the Territorial Court on January 21st, in order to schedule the trial in front of a French-speaking judge of that court, since there are no French-speaking Justices of the Peace in Yellowknife.
- [6] On January 21st, 2014, the trial was set for March 28, 2014. A French-English interpreter and a bilingual court reporter were reserved for that date.
- [7] On February 27, 2014, counsel for the City of Yellowknife brought the matter forward to March 4, 2014 in order to request an adjournment of the trial. The application was adjourned for one week, to March 11th. On that date the Applicant appeared and did not oppose the City's application. The

¹ RSNWT 1988, ch. S-15

trial was adjourned to May 21st, 2014, and the interpreter and court-reporter were cancelled.

[8] The matter was again brought forward on April 1st, 2014, this time before this judge in order to address two scheduling conflicts. On one hand, this judge had learned that she had been assigned to hear a French trial in Inuvik, on the same date as the Applicant's trial; then the court reporter, who was available on the initial trial date of March 28th, was not able to come to Yellowknife on May 21st because her services were required for a jury trial in Ottawa.

[9] The trial date was changed for May 12th, 2014, upon the parties agreeing that the hearing would be audio-recorded rather than being recorded by a court reporter.

[10] On May 9th, 2014, Counsel for the City of Yellowknife brought the case forward again to request an adjournment of the May 12th trial, on the ground that its bilingual prosecutor was ill. Mr. Petitpas, this time, opposed the application and it was adjourned to May 16th, along with the trial. On Monday May 12th, Mr. Petitpas served on the City of Yellowknife an application pursuant to sections 11b) and 24(1) of the *Canadian Charter of Rights and Freedoms*.

POSITIONS OF THE PARTIES

[11] The Applicant alleges that the delays are not justified and that they are unreasonable. He says he has suffered a prejudice due to having had to attend court many times to respond to adjournment requests. He further argues that the issue of prejudice must be considered together with the length of the delay, relying on the case of *Godin*, of the Supreme Court of Canada. In the present case, the delay is of almost one year for a matter for which the voluntary payment is \$50.00.

[12] The Respondent replies that the delays are justified and that they are not unreasonable. They allege that the first part of the delay is of an administrative nature and that this delay is the same of all accused. The second part of the delay, namely from January 14, 2014 to this date of May 16th, 2014, results from the request by the Applicant to have a French trial. The Respondent has cited the difficulty of delivering services in French in Yellowknife and submits that they have been diligent under the circumstances.

[13] This application raises two issues: first, the assessment of the reasonableness of the delay and second, the implementation of the right of an accused person to address the tribunal in French.

THE REASONABLENESS OF THE DELAY

[14] Section 11b) of the *Canadian Charter of Rights and Freedoms* recognizes the right of an accused person to have his trial within a reasonable time. The reasonableness of the delay is assessed in relation its length from which are deducted any period waived by the Defense, then the reason(s) of the delay, the prejudice to the accused and the interests which section 11b) seeks to protect.²

[15] The examination of the reasons for the delay includes delays that are inherent to the nature of the case, acts of the parties, limits on institutional resources, and other reasons.³

[16] Courts have found a difference between inherent and institutional delays. An inherent delay includes the time that is necessary to accomplish certain things, including administrative proceedings. An institutional delay is the period between the moment at which the parties declare themselves ready to be heard and the time at which the system may hear them because of the non-availability of judicial resources.⁴

² *R. v. Godin*, 2009 CarswellOnt 3101, at paragraph 18

³ *R. v. Morin*, 1992 CarswellOnt 984, at paragraph 31

⁴ *R. v. Camiran*, 2013 CarswellQue 2294, at paragraphs 13 and 15

[17] In the matter of *R. v. Morin*, Sopinka, J, of the Supreme Court of Canada has said that

The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in *Smith, supra*, "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p. 1131).

1. The length of the delay:

[18] This factor requires the court to examine the period that runs from the accusation to the end of the trial. The accusation is the date at which an Information is sworn or at which an Indictment is preferred.⁵

[19] In the case before me, the Notice of Violation was filled on May 22, 2013 by an Officer pursuant to section 137 of the bylaw and left on the windshield of the Respondent's vehicle, according to section 10(3)(b) of the *Summary Conviction Procedures Act*,⁶ which states that such delivery "shall be deemed to be personal service of the summons on the owner of the vehicle". By effect of the law, this Notice of Violation constitutes an accusation as contemplated in *Morin*. So from the accusation to the trial, 359 days have passed.

[20] At first glance a delay of almost 12 months to have a trial for a parking ticket appears unreasonable. It is necessary to proceed to the next step of the analysis.

2. Waiver:

[21] The Applicant has not waived any period in the calculation of the delay.

⁵ *R. v. Morin*, [1992] 1 R. C. S. 771, at page 789

⁶ R.S.N.W.T. 1988, ch. S-15

3. Reasons for the delay:

a) Inherent delays

[22] In the present case, the first inherent delay is the period of 21 days stated on the Notice of Violation to make the voluntary payment.

[23] After this time, the Notice of Violation is forwarded to the Enforcement division of the City of Yellowknife. Mr. Doug Gillard explained that the City is not authorized to use its Notice of Violation as an Information pursuant to the *Summary Conviction Procedures Act* and that a *Criminal Code* Form 2 Information must be sworn. The court was not informed of the reason for this situation and can only observe that in other instances the City uses Summary Offence Ticket Informations (SOTI) rather than swearing an Information.

[24] The Information was sworn thirty-four days after the initial 21-day delay. If the Notices of Violation that the City uses do not comply with the territorial legislation and they may not be used for the purposes of section 137 of the Highway Traffic By-law, I conclude that the City is responsible for the delay inherent to the preparation of the *Criminal Code* Form 2 Information.

[25] The next inherent delay is the one that was incurred between the laying of the Information and the first appearance before the Justices of the Peace court. This six-month delay was explained by Mr. Gillard, who said that they made a policy decision based on the fact that certain offenders were difficult to trace. He has noted during his years of service in the enforcement division that certain offenders moved without making an address change before a summons could be served on them. Based on his experience, if the date of the first appearance has been set too soon after the Information was sworn, they had to adjourn this appearance for lack of service, which resulted in a delay. He then decided to set the date of this first appearance six months after the date the Information was sworn, in order to give City employees sufficient time to serve the summons on the accused.

[26] If Mr. Gillard explained why the service of a summons can take more time than expected, he offered no evidence to justify why the first appearance must be six months following the laying of the Information, especially in Yellowknife where Justices of the Peace court sits regularly. In

the case before me, there is no affidavit of service on file, therefore no evidence of when the summons was served on the Applicant, although Mr. Gillard testified that the Enforcement division had been able to confirm the Applicant's address. I infer from this acknowledgment that the Applicant's situation was not complex and that but for the administrative policy, the Applicant could have appeared in court much earlier than January 14, 2014.

[27] The delay of six months between the time the Information was sworn and the first appearance is unreasonable because the length of this delay was set as a result of an arbitrary policy decision.

[28] The next inherent delay was incurred as a result of the Applicant asking to have his trial in the French language, which meant that the file was referred to the Territorial court. This delay was for seven days.

[29] The subsequent delay of nine weeks was due to the necessity of finding bilingual personnel for the trial. The reasonableness of this delay must be assessed in conjunction with the criterion pertaining to the limits on institutional resources.

b) Actions of the Accused

[30] No delay was the result of an action by the Accused (Applicant). The court does not consider the fact that the Applicant requested to have his trial conducted in the French language to be an "act of the Accused" because he was exercising a legislated right.

c) Actions of the Prosecution

[31] The Respondent requested two adjournments because of the unavailability of its agents, which resulted in an additional delay of almost two months. The requests for adjournments were directly related to the limits on institutional resources.

d) Limits on Institutional Resources

[32] A few of the City of Yellowknife's employees are able to speak both the English and French languages. The court heard that Ms. Kerry Penney,

legal counsel for the City, understands French and can read it, but that she is not proficient enough in the French language to conduct a trial using it. Ms. Penney explained that the City of Yellowknife had a French-speaking enforcement officer and that he was expected to act as its agent for the purpose of the trial before the Territorial court. She added that if she and this enforcement officer are unavailable, no one else can replace them. The City of Yellowknife has recently identified a private practice lawyer who could occasionally play that role. This attorney was in fact the one acting on behalf of the Respondent for the purpose of the present hearing.

[33] The Justices of the Peace court does not count among its ranks any French-speaking justice of the peace. As a result, any French-speaking accused who wishes to speak French during his trial before a justice of the peace, cannot do it without the assistance of a French-English interpreter.

[34] There is no qualified French-English interpreter residing in Yellowknife for the purpose of conducting a trial in the French language. Court Services must contract this service from outside of the Territory and in general employs an interpreter from Edmonton, Alberta.

[35] When a request is made to a Justice of the Peace for a French trial, the matter is referred to the Territorial court to be heard by this judge.

[36] Court Services provide court-reporting services to the Northwest Territories courts. All the local court-reporters are English-speaking and they use an English transcription system. When a French trial is requested, Court Services contracts the services of a bilingual court reporter who resides in Ontario. This person may be unavailable, sometimes for long periods, because of commitments in Ontario. When this bilingual court-reporter is unavailable, the court has the option to record the hearing mechanically. This is what happened in the present case.

[37] Finally, Court Services benefits from the services of a French-speaking clerk and sheriff, who are based in Yellowknife and may travel as needed.

[38] The Supreme Court of Canada in the matter of *Askov*,⁷ stated that limits on institutional resources cannot be used as a justification for a delay. They add that:

“It is the Crown which is responsible for the provision of facilities and staff to see that accused persons are tried in a reasonable time”.

[39] In the present case, all the delays from the date of the first appearance were incurred directly or indirectly because the Applicant asked to be tried in French. The delays were caused by the difficulty for the Respondent (which includes for these purposes, Court Services) to assemble the necessary French-speaking personnel. While it can be said that due to the rarity of the request for a trial in French, one must expect delays, one must nevertheless be reminded that French is an official language of our country, as is English, and that as such, services in French should be available with the same rapidity as those in English.

4. The prejudice to the accused:

[40] The Supreme Court of Canada is of the view that in certain circumstances, prejudice may be inferred from the length of the delay.⁸ It is the position adopted by the Applicant. The Respondent replies that the fine that the Applicant risks to incur is minimal. They add that the Applicant’s right to liberty and security, as well as his right to make full answer and defence have not been threatened, due to the relatively benign character of this matter.

[41] The Applicant cited the numerous appearances in court to respond to adjournment requests by the prosecution and stated that this caused him inconveniences. Given the nature of the offence, namely a violation to a regulatory disposition pertaining to parking, the length of the delay (359 days from the charge, if one accepts that the Notice of Violation is the charge; or more than ten months from the laying of the information) six months of which are due to an unjustified administrative policy, causes a prejudice to the Applicant.

[42] I add that the Applicant suffers a specific prejudice due to the lack of institutional resources that are necessary to hold a French trial in the Northwest Territories. A French-speaking accused has the right to expect the same level

⁷ [1990] 2SCR 1199

⁸ *R. v. Morin*, [1992] 1 S.C.R. 771, Applicant’s factum, under tab 4

of services in his language as an English-speaking accused. Otherwise, what is the purpose to state in a law that French and English are the official languages of Canada?

CONCLUSION

[43] I come to the conclusion that the Respondent is responsible for the totality of the delay incurred in the present matter and that this delay, although explained, is unjustified. As a result, the right of the Applicant to have his trial within a reasonable time has been violated. It is appropriate to grant a remedy pursuant to section 24(1) of the *Canadian Charter of Rights and Freedom*.

THE APPROPRIATE REMEDY

[44] It is well established that a fair and just redress for an unreasonable delay is a stay of proceedings.⁹

[45] No other remedy was suggested by the parties. I conclude that a stay of proceedings must be ordered.

DATED THIS 28TH DAY OF JULY, 2014 AT YELLOWKNIFE, NORTHWEST TERRITORIES

"Christine Gagnon"
CHRISTINE GAGNON, T.C.J.

⁹ *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Smith* [1989] 2 S.C.R. 1120; *R. v. Askov* [1990] 2 S.C.R. 1199

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