Case Name:
R. v. Chartier

Between
Her Majesty the Queen, and
Chad Denim Chartier, Accused

[2014] A.J. No. 1141

2014 ABPC 230

Docket: 131408734P1

Registry: Edmonton

Alberta Provincial Court

E.A. Johnson Prov. Ct. J.

October 16, 2014.

(118 paras.)

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- Delay -- Trial within a reasonable time -- Protection against arbitrary detention or imprisonment -- Remedies for denial of rights -- Specific remedies -- Stay of proceedings -- Application by accused for stay of proceedings on basis of breach of accused's s. 9 and 11(b) Charter rights allowed -- Accused was charged with impaired driving and operating motor vehicle with blood alcohol over legal limit -- Application was based on fact that when accused first appeared in court, there was no Information before court and there was subsequent four and one-half months' delay due to police service policy trumping Criminal Code provision -- Warrant was result of procedure not authorized by law -- Unreasonable delay resulted from failure to comply with Criminal Code -- Stay of proceedings ordered.

Application by the accused for a stay of proceedings or other relief on the basis of a breach of the accused's s. 9 and 11(b) Charter rights. The accused was charged with impaired driving and operating a motor vehicle with a blood alcohol over the legal limit. The accused's application was based on the fact that when he first appeared in court in October 2013, there was no Information before the court and he was told his charges were "not in the system". The accused lived a 10 to 11 hour drive from the court where he

appeared in Edmonton. The Edmonton police service had a policy that if a person charged lived more than 40 kilometres outside Edmonton, they would not be given two different dates for fingerprinting and appearing. As a result, the officer waited to set a date for when the accused appeared for fingerprinting and the Information was not sworn until after that time. The accused was subsequently arrested after the Information was sworn and a warrant issued. He was detained in custody several months later in February 2014 and then released on bail. The matter was put over several times between March 2014 and June 2014. The accused alleged that the time to bring the matter to trial was unreasonable and so his s. 11(b) Charter right to be tried in a reasonable time was breached. The accused also alleged his arrest constituted an unreasonable detention and was therefore a breach of his s. 9 Charter right.

HELD: Application allowed. The accused's s. 9 and 11(b) Charter rights were breached. A stay of proceedings pursuant to s. 24(1) of the Charter was directed. The scheme set out in the Criminal Code sought to minimize the need for arrest and detention unless necessary. The time within which an Information had to be sworn depended on the means by which the accused was compelled to appear at court. Issuance of the Promise to Appear in this case engaged the s. 505 Criminal Code provisions that required the Information be laid "as soon as practicable". However, that was not done. The Promise to Appear issued did not comply with a policy that the accused would not be required to attend at court more than twice due to the fact he lived 10 to 11 hours from the court. Because the Promise to Appear did not conform to the policy, a decision was made to wait to see if the accused attended at court, at which point, the Information would be taken before a justice. It did not make sense to proceed in such a manner. The way the policy was applied appeared to trump the Criminal Code, even though the effect was exactly the opposite of what the policy intended. There was no question the accused was detained when he was arrested in February 2014. In terms of whether the detention was arbitrary, the warrant was the result of a procedure which was not authorized by law -- that an Information was not laid despite the time limit in the Criminal Code and based on the accused's residency. As such, the detention was arbitrary because it was rooted in an arbitrary process. The trial was scheduled for more than a year after the alleged offence, which warranted an inquiry. Although the time between when the accused was compelled to appear to answer a sworn Information and the trial was unremarkable, the four and one-half months' delay prior to the March appearance was of concern. The delay resulted from the flawed process followed and the failure to comply with the Criminal Code. The delay was unreasonable due to the four and one-half additional months to bring the matter to trial, along with the reason for the delay and the prejudice the accused suffered. A stay was appropriate because to proceed with the trial in the face of a breach would be to participate in a further violation.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 9, s. 11(b), s. 24(1)

Criminal Code, R.S.C. 1985, c. C-46, Part XVI, s. 145(5), s. 145(6), s. 253(1)(a), s. 253(1)(b), s. 496, s. 497, s. 498, s. 502, s. 504, s. 505, s. 505(a), s. 505(b), s. 508

Counsel:

B. Smith, for the Crown.

M. Pagels, agent for, R. Ziv, for the Accused.

Decision

E.A. JOHNSON PROV. CT. J.:--

I. INTRODUCTION

1 The Accused is charged pursuant to ss. 253(1)(a) and 253(1)(b) of the *Criminal Code* with impaired driving and operating a motor vehicle with a blood alcohol over the legal limit. His trial is scheduled to be heard on October 31, 2014.

2 The Accused filed a *Charter* Notice alleging a breach of s. 11(b) and s. 9 of the *Charter of Rights and Freedoms*. He brings this application in advance of the trial for relief by way of a stay or other appropriate relief. This application was heard on August 21, 2014. This is the Court's decision on that application.

3 This application is based on the fact that when the Accused made his first court appearance as required by a Promise to Appear, there was no Information before the Court. Subsequently, a warrant was issued for his arrest. Several months after his unsuccessful appearance, pursuant to the Promise to Appear he was detained briefly in custody and subsequently released on bail.

4 The Accused says under the unique circumstances of this case, that the time taken to bring the matter to trial is unreasonable and, as a result, his right to be tried within a reasonable time under s. 11(b) of the *Charter* has been breached.

5 Further, the Accused says that his arrest under these circumstances constitutes an unreasonable detention and a breach of his rights under s. 9 of the *Charter*.

6 For the reasons set out the Court finds that the rights of the Accused under s. 9 and s. 11(b) of the *Charter* have been breached.

7 The Court directs a stay pursuant to s. 24(1) of the *Charter*.

8 On the 9th of October, the Court advised the parties of its decision and directed a stay, indicating that reasons would follow. These are those reasons.

II. FACTS AND EVIDENCE

9 The Court heard testimony from the Accused and from Sergeant Junck who was responsible for dealing with the Promise to Appear and securing the warrant for the arrest of the Accused. As well, the Information and Endorsements are before the Court.

A. Relevant Events and Dates

10 The relevant dates as reflected in the Information and Endorsements follow.

11 September 21, 2013. This is the date on which the offences with which the Accused is charged are alleged to have occurred. On this day, the Accused was arrested and released on a Promise to Appear ("PTA"). The PTA required him to attend at the Criminal History Unit at the downtown headquarters of Edmonton Police Service ("EPS") for fingerprinting on October 11, 2013 and to appear at the Case Management Office at the Law Courts, in Edmonton on October 18, 2013. The PTA showed an address for the Accused in Peachland, British Columbia.

12 October 11, 2013. The Accused appeared for fingerprinting.

13 October 18, 2013. The Accused appeared at the Case Management Office of the Provincial Court in answer to the charges. No Information had been sworn. He was told that the charges were "not in the system".

14 November 29, 2013. An Information was sworn and a warrant issued for the arrest of the Accused.

15 February 13, 2014. The Accused was arrested in Jasper, Alberta pursuant to the warrant. He was released on a Recognizance with a $400.00 deposit. The Recognizance required him to appear at the Law Courts in Edmonton on March 3, 2014.

16 March 3, 2014. The Accused appeared at the Case Management Office and put the matter over to April 28, 2014.

17 April 28, 2014. The Accused appeared at the Case Management Office and put the matter over until May 29, 2014.

18 May 29, 2014. Counsel appeared on behalf of the Accused and put the matter over to June 12, 2014.

19 June 12, 2014. Counsel entered pleas of not guilty, scheduled the matter for trial on October 31, 2014 and scheduled a pre-trial application date for June 26, 2014.

20 June 26, 2014. The pre-trial application did not proceed as a result of the unavailability of a witness. It was rescheduled for August 21, 2014 when the within application was heard.

B. Circumstances of the Accused

21 The Accused lives in Peachland, British Columbia. His home is a 10 or 11 hour drive

from Edmonton. He works as a commercial painting foreman.

22 He was arrested on the within charges on September 21, 2013 and released on a PTA. His license was not suspended.

23 In response to the PTA, the Accused drove to Edmonton on October 11, 2013 to provide his fingerprints and stayed with his sister until October 18 to avoid having to make the long drive twice in a short period of time.

24 He missed work to do that.

25 On October 18, 2013, the Accused appeared at the Case Management Office. He said that he showed up but there was "nobody else on this end" - that he was told by the person behind the desk that "it wasn't in the system or something". He asked the individual he spoke to to stamp the PTA to indicate that he made an appearance.

26 After that, he said he received a call from a sheriff. His description of the conversation was that the sheriff asked for his address for service of a summons. He recalled being told if there was no address a warrant would be issued. He said he gave the sheriff his address in Peachland (the same address as appears on the PTA). He did not recall being asked for an address in Edmonton. The sheriff asked him to call back. He did not have the sheriff's number.

27 He acknowledged being told that if there was not an address available for him a warrant would be issued. He said he believed he had provided an address.

28 Later, he received another message from the sheriff asking him to call back but said the sheriff did not leave a number.

29 The next event from the perspective of the Accused was being arrested in Jasper on February 13, 2014. He was there with his work as a commercial paint foreman. He was travelling from a gas station to a job site when his vehicle was pulled over. He was arrested, handcuffed and his vehicle was towed. He was held for an hour or two and released on a Recognizance after paying $400.00. The Recognizance required him to appear at the Law Courts in Edmonton on March 3, 2014.

30 He appeared on March 3, 2014 and put the matter over to April 28.

31 After the March appearance, he received an "offer" letter from the Crown sent to his address in Peachland, B.C. indicating what the Crown would be asking in the event of a guilty plea. That letter included in the caption "Court Date, April 1, 2014", and said in the concluding paragraph that the offer was open until the "next Court date of April 1, 2014". The Accused said he called the Crown's office to confirm that he needed to appear on April 1 and was told that he did.

32 As a result, the Accused appeared on April 1, 2014. Again, his matter was not before the court. He was told that his court date was, in fact, April 28, 2014. The date on the

Crown's letter was an error. He missed work to make this appearance.

33 Between April 28 and May 29, 2014, the Accused retained counsel. Before that time, he requested and received disclosure.

C. Evidence of Sergeant Junck

34 Sergeant Junck is in charge of the Charge Report Management Unit. That Unit is responsible for processing and disclosing all charge reports.

35 The PTA issued to the Accused came to his unit. He noted that the PTA set out two dates - one for fingerprinting and one for a first appearance.

36 He said it is EPS policy that, where persons who are charged with offences reside more than 40 kilometres outside Edmonton, they should not be given two separate dates for fingerprinting and appearing at the CMO. The policy requires that those two appearances be on the same date, on the basis that it is unreasonable to require people who live far out of the city to appear on two different days.

37 He described what would happen when this policy is not followed. He said:

> "A. ... As such, it is contrary to EPS policy to process PTAs.
>
> The Court: Sorry? Say that again? Contrary to EPS policy?
>
> A. Yeah to have that processed in the Courts. The JP's won't confirm it because it is ... it's stated unreasonable to have a person that resides more than 40 kilometres outside the City of Edmonton to have to come to Edmonton on one date for fingerprinting and then a second date a week later for court".

38 Sergeant Junck said he contacted the member in charge (who issued the PTA) and they determined to wait for the date set for the Accused to appear for fingerprints. He said he determined that if the Accused appeared for fingerprints, the file would be processed (that is, an Information would be sworn and confirmation of the PTA would be sought).

39 He said as a result of an administrative error the file was diarized for October 18 (and not October 11 - the date for fingerprinting) and by the time the file came forward it was too late to have an Information sworn and confirmed before the Accused's court date.

40 Sergeant Junck determined that the Accused had appeared for fingerprinting.

41 He testified that he called the Accused on his cell phone on October 18 and determined that the Accused had made an appearance, had left the City and was on his way home. He testified that he told the Accused the following:

> "I explained the circumstances of what has happened with his particular file, advised him of the options that we had at the time. Basically if he could provide an -- or an address in Edmonton where he resided, we could have a new long form summons drawn up, sworn before the courts, and issued to him at that address. Barring that, the only other option if we couldn't locate him would be to request a warrant."

42 Sergeant Junck said the Accused said he would call back with an address but did not.

43 Sergeant Junck said that it was his view that that if the Accused did not supply an address in Edmonton, the only other option would be to seek a warrant.

44 Sergeant Junck had the impression that the Peachland address was a mailing address. It would appear that he formed that impression from something the officer in charge told him. The Accused did not tell him that.

45 Sergeant Junck said he called the Accused again sometime the following week and left a message to call him. His notes do not indicate whether he left his phone number but he believes he did. He said he called again on November 15 and left another message. He believes he left his telephone number.

46 On November 27, 2013 Sergeant Junck determined that a warrant would be necessary. He said he "deemed it" that the Accused was avoiding him by not returning his calls. He said:

> "Once I made the decision that a warrant request be done, I completed my supplementary report and then the whole package with attachments was taken over to our ... our members to prepare an Information, and then have it taken before the justice of the peace to have that warrant sworn. Once the justice of the peace swears, confirms the warrant, it's then copied over to our CPIC unit in EPS and it's placed on the system as a warrant."

47 The Information was sworn on November 29, 2013. A warrant in the public interest was issued on November 29, 2013. The warrant shows the same address in Peachland, British Columbia as it appears on the PTA.

48 Sergeant Junck was asked why not ask for a long form summons and he said:

> "I suppose it could but it would defeat the purpose, if he's not residing there, why would we send it to that address? And our document service people don't deal with B.C."

49 Sergeant Junck had no further involvement in the file.

III. POSITIONS OF THE PARTIES

50 The Accused says that his *Charter* right under s. 11(b) to be tried within a reasonable period of time have been breached by the unusual circumstances of this case, the delay in bringing him before the Court and the prejudice he suffered as a result. He also says his arrest in February 2014 was arbitrary and breached his right to be free from arbitrary detention under s. 9 of the *Charter*. He seeks a stay under s. 24(1) as a consequence of the alleged s. 11(b) breach and a stay or alternative remedy such as costs for the breach of s. 9.

51 The Crown says the period of time it has taken to bring the Accused to trial is not unreasonable and accordingly, there has been no breach of s. 11(b). The Crown says that the facts do not reveal a breach of s. 9 and even if there were a breach, a stay would not be appropriate because of the actions of the Accused who, despite knowing of the charges against him, chose to go on with his life.

52 The issue of a remedy other than a stay was not fully canvassed by the parties. It was agreed that if the Court were to find a breach and to find that a stay was not appropriate, the parties would be given the opportunity to make further submissions with respect to remedy.

IV. STEPS TAKEN TO COMPEL THE APPEARANCE OF THE ACCUSED

53 At the heart of this case are the events which resulted in the fruitless appearance by the Accused on October 18, 2013 to answer to a charge which was not before the Court, and the subsequent arrest of the Accused in Jasper in February 2014.

54 In order to properly characterize these events and address their propriety, it is necessary to analyse the statutory framework within which they took place and the requirements of the *Code* respecting the manner in which accused persons are compelled to appear before the Court.

A. Part XVI of the *Code* -- Compelling the Appearance of the Accused

55 Part XVI of the *Code* addresses the procedure for, *inter alia*, compelling the appearance of an accused. The provisions are not a model of drafting clarity.

56 There are several means by which an accused person can be brought before the court. Arrest is one, but there are others which avoid arrest or detention of the accused. Some means to compel appearance pre-date the charge, and are issued by the police.

57 Generally, the scheme set out in the *Code* seeks to minimize the need for arrest and detention of an accused unless such is necessary.

58 Section 496 addresses release of an accused without warrant and provides for the issuance of an appearance notice by a peace officer. Section 497 addresses a situation where an accused has been arrested by a peace officer and provides for release with a summons or an appearance notice. Section 498 addresses a situation where there an

accused has been has been arrested and released by an officer in charge and provides for release with a summons, a promise to appear, a recognizance or an undertaking. Each form of release document sets out a date in the future on which the accused must appear in court. Release under each of these documents takes place before the Information is sworn.

> The charge against an accused is set out in an Information which must be sworn. Section 504 provides that any person who believes on reasonable grounds that a person has committed an offence may lay an Information under oath before a justice. The justice must ("shall") receive the Information where it complies with the requirements of s. 504. The role played by the justice under s. 504 has been described as ministerial or administrative rather than judicial - the justice has no discretion to refuse it provided it meets the statutory requirements in s. 504. (See: *R. v. Jeffrey* (1976), 34 C.R.N.S. 283 (Ont. Prov. Ct); *R. v. Whitmore* (1988), 41 C.C.C. (3d) 555 at 563 considering the predecessor to s. 504).

59 The time within which an Information must be sworn depends on the means by which the accused has been compelled to appear before the court. Where (as in this case) an accused has been released by the police under s. 496, 497 or 498, s. 505 requires that the Information "shall" be laid before a justice "as soon as practicable" and in any event before the date set out for the accused to appear in court:

> **505.** Where
>
> (*a*) an appearance notice has been issued to an accused under section 496, or
>
> (*b*) an accused has been released from custody under section 497 or 498, an information relating to the offence alleged to have been committed by the accused or relating to an included or other offence alleged to have been committed by him shall be laid before a justice as soon as practicable thereafter and in any event before the time stated in the appearance notice, promise to appear or recognizance issued to or given or entered into by the accused for his attendance in court.

60 Appearance documents issued by the police are to be confirmed by a justice. Section 508 sets out the process and obligations of a justice who receives an Information under s. 505. While receipt of the Information is considered an administrative action, confirmation of the appearance document is considered a judicial function, although the standard is relatively low -- the justice must consider whether there is some evidence that the accused has committed the offence and some evidence on the essential elements. (See *Whitmore, supra*, at p. 562 - 568).

61 Section 502 of the *Code* provides that where an appearance notice, promise to

appear or recognizance has been confirmed by a justice (as contemplated in s. 508) a warrant may issue for an accused who fails to make the required appearance (either for fingerprinting or in court). Where process has been confirmed, a person who fails to appear either for fingerprinting or in court may be charged under s. 145(5).

B. Steps Taken to Compel the Appearance Of The Accused In This Case

62 On the offence date, the Accused was released and given a PTA as contemplated by s. 498 of the *Code*. The PTA was in Form 10 which includes a statement acknowledging that the accused person understands that failure to attend for fingerprinting or to court is an offence under s. 145(5) and (6) of the *Code*. The PTA sets out ss. 145(5), (6), as well as s. 502.

63 The issuance of the PTA engaged the provisions of s. 505 which require that the information be laid "as soon as practicable and in any event before the date set for appearance in court" -- that is, before October 18, 2013.

64 That was not done in this case. Sergeant Junck explained why.

65 Sergeant Junck first described the EPS policy not to require persons who live more than 40 kilometres out of Edmonton to be required to come to the city twice -- once for fingerprinting and once for a court appearance. This is a laudable policy insofar as it seeks to minimize the need for out-of town persons who are charged with offences to travel long distances twice in a relatively short period of time.

66 The PTA issued to the Accused did not comply with the EPS policy. It was for that reason, according to Sergeant Junck, that it was determined that an Information would not be laid before a justice and confirmation of process would not be sought.

67 It is at this point that the rationale provided by Sergeant Junck for proceeding (or not proceeding) as he did, breaks down.

68 Sergeant Junck says that, because the PTA did not conform to the EPS policy, a decision was made to wait and see whether the Accused attended for fingerprinting and, if he did, to take the Information forward to a justice. The file should have been diarized for October 11, 2013 for this purpose. Instead, it was diarized for October 18. By the time it was brought forward it was too late to have an Information sworn before the Accused's court appearance.

69 He said that it was his understanding that the justices of the peace will not confirm process where the accused person lives more than 40 kilometres out of town. The Court treats that statement as evidence of Sergeant Junck's understanding and not as evidence of actual practice of the justices of the peace.

70 Proceeding in the fashion Sergeant Junck did makes no sense.

71 Section 505 *requires* that an information be laid before a justice within the time frame set out in the *Code* -- that is, as soon as practicable and in any event before the time set for the accused person's court appearance (in this case before October 18). The operation of s. 505 is not contingent on the residence of the accused person.

72 The decision not to go forward with the Information as required by s. 505 was effectively a decision not to comply with the *Code*, for reasons that are irrelevant to the scheme set out in Part XVI.

73 The Court notes that the considerations to which a justice must have regard in exercising his or her administrative role under s. 504, and judicial role under s. 508 do not relate to the distance of the accused person's residence from the judicial centre.

74 It would appear that EPS policy as understood or applied by Sergeant Junck has trumped the requirements of the *Code*.

75 Moreover, assuming the rationale of the EPS policy is to minimize travel by an accused person, the effect of what happened here is exactly the opposite.

76 The Accused was issued a PTA which purported to compel his appearance and which warned him of the possible criminal consequences if he failed to appear. He complied. That is what is expected of a citizen. He made a lengthy and fruitless trip to Edmonton.

77 What followed is also concerning. After October 18, the matter languished for more than a month after which time an Information was sworn and a warrant was issued, notwithstanding that the address of the Accused was known from the outset.

78 The evidence of the Accused and Sergeant Junck is somewhat different relative to their interactions, but both say Sergeant Junck contacted the Accused after the October 18 Court appearance.

79 The Accused says he understood from Sergeant Junck that he (Sergeant Junck) needed an address for the Accused. The Accused said he gave the Sergeant his address in Peachland. He said he subsequently received a message from Sergeant Junck who did not leave a number to call back.

80 Sergeant Junck says he told the Accused he needed an address in Edmonton and if he could not be located that a warrant would be issued. He said he likely left his number when he left messages but could not say for sure. He says he reached the conclusion that the Accused was avoiding him and made the decision to request a warrant. He also says he was told the B.C. address was just a "mailing address", but he does not appear to have made any effort to address this with the Accused.

81 The Court accepts the evidence of the Accused that he gave Sergeant Junck his address in B.C. and that he did not understand that he was supposed to have an address in Edmonton. The Court accepts that the Accused did not have a number to call Sergeant

Junck back.

82 It is not clear from the evidence why Sergeant Junck thought the Accused needed to give him an address in Edmonton particularly when the Accused did not live in Edmonton. There does not appear to be any statutory authority for that requirement. Indeed, it would be inappropriate for an accused person to give the police an address at which he does not reside. A requirement that an accused person must have an Edmonton address, failing which, a warrant should be issued for his or her arrest, is not based in any requirement of the *Code*. It is an arbitrary requirement.

83 Sergeant Junck sought a warrant because he "deemed" the Accused was avoiding him, although he was aware of an address for the Accused.

84 An Information was sworn and a warrant issued. Apart from the materials on the Court file, there is nothing further to indicate what was before the justice who issued the warrant. I do not understand this application to be a collateral attack on that decision, but the circumstances leading to the issuance of the warrant are relevant to the Court's overall consideration of the alleged *Charter* breaches.

V. SECTION 9 OF THE *CHARTER*

85 Section 9 of the *Charter* provides that everyone has the right not to be arbitrarily detained or imprisoned. In order for a detention to be non-arbitrary, "... it must be authorized by a law which is itself non-arbitrary." (*R. v. Grant* [2009] 2 S.C.R. 353 at para. 56).

86 The Accused was arrested and detained in February 2014, his vehicle was seized, he was handcuffed and held for an hour or so before he was released, whereupon he was required to post $400.00 cash to secure his release.

87 There is no question that he was detained. Was his detention arbitrary?

88 The immediate cause of his detention was the warrant obtained by Sergeant Junck which was "on the system" and pursuant to which the peace officers who effected his arrest were acting. Arrest with a warrant is provided for in the *Code*. Officers acting on a warrant cannot be faulted for doing their jobs. If the Court were to look only at the arrest divorced from the entire factual matrix in which it arose, the detention would not be arbitrary.

89 However, Courts are directed to take a generous and purposive approach in assessing *Charter* rights.

90 Here, the Accused had done what he reasonably believed was necessary in response to the PTA and from his further interaction with Sergeant Junck.

91 The warrant was the end result of a procedure which was *not* authorized by law -- that is, a decision *not* to lay an Information and have process confirmed notwithstanding

the mandatory time limit set out in s. 505 of the *Code*, and instead to proceed on arbitrary requirements and unfounded assumptions respecting the Accused's residency.

92 If the Court takes into account the entire circumstances, it must conclude that, under the circumstances, the detention of the Accused was arbitrary because it had at its root an arbitrary process.

93 The Court finds a breach of s. 9 of the *Charter* arising from the detention of the Accused in February 2014.

VI. SECTION 11(B) OF THE *CHARTER*

94 Section 11(b) of the *Charter* ensures the right of a person charged with an offence to be tried within a reasonable period of time.

95 The primary purpose of s. 11(b) is the protection of the individual rights of accused. Those rights are (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial. See: *R. v. Morin*, [1992] 1 S.C.R. 771.

96 Society has secondary interests which are parallel and adverse to the interests of an accused.

97 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.

98 However, there is collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. As the seriousness of the offence increases, so does the societal demand that the accused be brought to trial.

99 An application under s. 11(b) requires the Court to balance the interests of the accused and those of society. It is not a mathematical exercise. Some delay is inevitable. The question is when it becomes unreasonable.

100 In *Morin, supra*, at pp. 787 and 788 the Supreme Court of Canada identified the factors which a Court must consider in addressing reasons for delay, including: length of the delay, waiver of time periods by the Accused, reasons for the delay, including inherent time requirements of the case, actions of the Accused, actions of the Crown, limits on institutional resources, and other reasons for delay and prejudice to the accused.

101 An inquiry into unreasonable delay is triggered by an application under s. 11(b). in *Morin, supra* at p. 789 the Court indicated that an inquiry

> "...should only be undertaken if the period is of sufficient length to raise an issue as to its reasonableness. If the length of the delay is unexceptional, no inquiry is warranted and no explanation for the delay is called for unless the applicant is able to raise other factors such as

prejudice."

102 What is the length of and reasons for the delay in this case?

103 The trial is of the Accused is scheduled to be heard more than a year after he was first required to appear in answer to his alleged offence, and more than 13 months after the alleged offence itself. An inquiry as to the reasons for such a delay is warranted.

104 The Court is required to examine the period from the charge to the end of the trial. Generally, a person is "charged" when the Information is sworn (see *R. v. Kalanj*, [1989] 1 S.C.R. 1594), however, this will not invariably be the case, particularly when there has been non-compliance with s. 505 of the *Code* (see: *R. v. Goreski* 2011 ABPC 361). In *Goreski*, the Court found that under those circumstances the issuance of the Promise to Appear provided the appropriate starting point from which to consider delay under s. 11(b).

105 Here, the parties differ with respect to the question of when the Accused was "charged" for the purpose of s. 11(b) of the *Charter*. The Crown submits that the appropriate date would be October 18, 2013, the date on which the Accused was first ordered to appear in Court. The Accused submits that the time should begin to run on the offence date -- September 21, 2013.

106 Following the rationale in *Goreski*, the Court finds the start date for measuring delay to be the offence date of September 21, 2013, however, as will become clear it makes no difference in the result.

107 Each case has inherent time requirements -- time needed to process the charge and have the matter brought to Court. Here, the Accused was to appear for fingerprinting on October 11 and in Court on October 18, 2013. The period between September 21 and October 18 to have the matter processed and brought to Court is not, *per se*, unreasonable.

108 However, the matter was *not* processed properly and that fact gave rise to a 4.5 month delay from October 18, 2013 (the date on which the Accused appeared and there was no Information before the Court) and March 3, 2014 (the date on which he was compelled to appear to answer a sworn Information).

109 The balance of the elapsed time after that and before trial is relatively unremarkable. Between March 3 and May 29, 2014 (slightly less than 3 months) the Accused made 2 court appearances, sought and received disclosure and retained counsel.

110 On May 29, 2014 the trial date was set for October 31, 2014 -- a further delay of 5 months. This period is generally classified as institutional delay -- the time between the point at which the parties indicate that they are ready for trial and the point at which the Court can accommodate the trial. In *Morin*, the Supreme Court indicated that a guideline for institutional delay in Provincial Courts (subject to unique local requirements) would be 8 to 10 months. The 5 month time frame in this case is well within the *Morin* guidelines. The parties were able to get an early trial date.

111 It is the 4.5 months of delay prior to the March appearance that is of concern to the Court. That delay was the result of the flawed process followed by the police, featuring a failure to comply with the *Code*. The rights of the Accused under s. 9 were breached as a result of that process and during that period.

112 The fact that the Accused must travel from B.C. to make his appearances in Edmonton is not, *per se*, prejudice. However, fruitless trips and missed work as a consequence are prejudicial. The Court notes that the Accused made a second fruitless appearance in Edmonton on April 1, 2014 as a consequence of an error on the part of the Crown's office. While this error did not have the effect of prolonging this matter, it does nothing to enhance the perception of the public respecting the administration of justice.

113 It is clear that an application under s. 11(b) is not a mechanistic arithmetic exercise. The actual period of delay is to be considered together with any prejudice, and the rights of the Accused balanced against the rights of society

114 Here, the Court finds the additional delay of 4.5 months added to the total time it has taken to bring this matter to trial, coupled with the reason for that delay and the prejudice suffered by the Accused, results in an unreasonable delay.

115 The Court recognizes the societal interest in having matters brought to trial. That interest is balanced against society's interest in maintaining confidence in the administration of justice.

116 In this case, that balance tips in favour of the Accused. The result of that balancing is a finding that the rights of the Accused under s. 11(b) of the *Charter* have been breached.

VII. REMEDY

117 The relief sought for a breach of s. 11(b), if granted, is generally final. If a delay is found to be unreasonable, the remedy is a stay. To proceed in the face of a breach would be to participate in a further violation.

> *R. v. Rahey*, [1987] 1 S.C.R. 588 at para 48, see also see: *R. v. Thomson*, 2009 ONCA 771 at para 9; *R. v. Steele*, 2012 ONCA 383 at para 31; *R. v. MacIntosh*, 2011 NSCA 111 at para 107; and *R. v. Durocher*, 2012 ABQB 705 at para 92.

118 Accordingly, the Court directs a stay pursuant to s. 24(1) of the *Charter*.

Dated at the City of Edmonton, Alberta this 16th day of October, 2014.

E.A. JOHNSON PROV. CT. J.