Information No.11-576

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

V.

DAVID AND MARILYN ROBINSON

****

R E A S O N S F O R J U D G M E N T

BEFORE HER WORSHIP JUSTICE OF THE PEACE L. GIRAULT
On December 21, 2012 at CORNWALL, Ontario

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APPEARANCES:

Mr. Pilon — Provincial Crown
K. Andrews — Counsel for Defence

ONTARIO COURT OF JUSTICE

T A B L E O F C O N T E N T S

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FRIDAY, DECEMBER 21, 2012

THE COURT: I guess I picked a good day for the decision.

MR. ANDREWS: I just wanted to apologize it was - I left almost three hours ago from Ottawa, Your Worship, and it's just been an unbelievable drive.

THE COURT: Well I hope you took a couple of minutes anyway to settle down.

MR. ANDREWS: Yeah, well the white might be coming out of my knuckles.

THE COURT: As any decision anyway the first few pages are kind of you know not really though provoking so you can catch your breath while...

MR. ANDREW: Thank you.

THE COURT: ...going through that.

MR. ANDREWS: I appreciate it thank you.

R E A S O N S F O R J U D G M E N T

L. GIRAULT (Orally):

So anyway just, I'll start off just by saying, I'm not providing citations or anything for the cases. I mean obviously you're all very familiar with it, you've provided them in your material. Okay, so this is a decision with respect to the motion Marilyn and David Robinson. So, the applicants, David and Marilyn Robinson - and actually I should say just for the record they're present and Mr. Andrews as well and Mr. Pilon on behalf of the prosecution and I'm sorry, I should have addressed that to begin with.

So, the applicants, David and Marilyn Robinson, brought a pre-trial motion which was heard on the 21st and 23rd of November 2012 to have all charges stayed as a result of alleged Charter violation pursuant to section 7, 8, 10(b) and 11(b) of the *Canadian Charter of Rights and Freedom*. After some debate the Charter violation for unreasonable search and seizure was adjourned for a hearing to another date. The subject of this motion will only address the alleged 10(b) and 11(b) Charter breaches.

The defendants claim their right to be tried within a reasonable time has been violated due to delay in obtaining disclosure in a timely manner and by the Crown's failed application to have counsel for the defendants removed from record. They argue that their right guaranteed by the Charter to retain and instruct counsel of their choice has been compromised by the Crown's application. They claim they have suffered irreparable prejudice as a result. The defence claims the Charter violations individually and or cumulatively constitutes a clear case of abuse of process. The remedy sought is pursuant to section 24(1) to have all charges stayed.

The burden of proof for Charter violation rests with the applicants. They bear the responsibility to show to the court that they cannot receive a trial that is fundamentally fair. The onus of proof on the alleged breaches is on a balance of

probabilities. Furthermore even if the court finds that individually or collectively the alleged breaches constitutes an abuse of process, the court can only impose a stay in the clearest of cases.

So I'll just provide some background. David and Marilyn Robinson as indicated were charged on the 11th of May, 2011 with 14 counts under the *Ontario Society for the Prevention of Cruelty to Animals* subsequently referred to as the *OSPCA*. Four counts are pursuant to section 11.2(1)of the Act alleging that an animal to wit, cattle was in distress, seven counts pursuant to section 11.1(1) alleging the defendants failed to provide the prescribed standard of care for cattle and calves and lastly two counts under section 13(5) that they failed to comply with an order of the O.S.P.C.A.

In December 2010 an inspector with the Society attended the Robinson's dairy farm and made certain observations of the cattle. As a result of this inspection two orders to comply were issued to David Robinson. The first one dated the 9th of December 2010, it was included at tab 2(a) of the applicants record this order required him to ensure that all chains and ropes securing the cattle were not too tight; ensuring that the hooves were trimmed in a humane manner; ensure that cattle have access to clean, potable water at all times and provide a sufficient quality and quantity of suitable food to allow for normal growth and the

maintenance of normal body weight and lastly ensure that the cattle had adequate bedding.

A second order was issued on December 19th, 2010 with the following requirements; to have the heard examines by a veterinarian with special attention to their body condition, feed requirement, water concerns, lack of bedding and secondly to follow the recommendations of the veterinarian consulted and provide to the investigating officer a copy of the vets written report outlining the examination findings.

The O.S.P.C.A. has authority to remove animals if orders are not complied with or if the animals are in immediate need of food, care or treatment. The owner or custodian of the animals has the authority to appeal the orders to the animal care review board subsequently referred to as the ACRB. Apparently after some efforts to comply with the requirements, Mr. Robinson availed himself of the appeal process. The hearing took place over several days and concluded on the 13th of May, 2011. By May 20th, 2011 all outstanding orders were revoked by the O.S.P.C.A. and these can be found at tab 2(f) of the material. While the matter was still before the ACRB the Robinsons were charged and the information is dated the 11th of May, 2011. Mr. Kurtis Andrews who had been retained for the ACRB hearing continued to act as counsel for the *Provincial Offences* charges.

I will now deal with the 10(b) Charter Right to Counsel. 10(b) of the Charter says that;

"Everyone has the right to on arrest or detention to retain and instruct counsel without delay and be informed of the right."

The courts have also recognized that an accused may retain counsel of their choice since the solicitor-client relationship is dependent on complete trust and confidence. To interfere with this right should only be exercised in the most necessary circumstances and only on the strongest of grounds. Quoting from *R. vs. McCallen* at tab four of the applicants material;

"Without adequate safeguards the resulting contest may be unfairly weighted in favor of the state. The right to have the assistance of counsel is high on those protections for the accused persons which enable them to fully defend the charges brought against them. Including with this fundamental right to counsel, the additional right to choose one's own counsel enhances the objective perception of fairness because it avoids the specter of state or court interference in a decision that quite properly should be the personal decision of the individuals whose interests are at stake and whose interests the counsel will represent."

The prosecution advanced a motion to have Mr. Andrews removed from record in February, 2012. This came about because Mr. Andrews commissioned an affidavit from a Crown witness, Dr. Armstrong, without having a third party present. Ironically, Dr. Armstrong is also a veterinarian for the Robinsons at least at some point in time during these events. On The 30th of November, 2011 when Mr. Andrews forwarded this affidavit along with a covering letter to Mr. Pilon in an attempt to

resolve the charges as expeditiously as possible. Instead, Mr. Pilon initiated an investigation which was conducted by the O.P.P. regarding the actions of Mr. Andrews.

The prosecution contends the application was brought for salutary purposes because defence counsel may have been in an untenable position of both counsel and witness for the defendants. Mr. Pilon relied on the rules of the Ontario Court of Justice in criminal proceedings, rule 24 and heavily on the case of *R. vs. Bevan*. At paragraph 17 of the *Bevan* case it states;

"prudent and experienced counsel will not however, engage in interviews with an opposing witness and in particular a complainant," and I emphasis this "without having a third party witness present."

Justice Rozon who heard the application for removal of counsel ruled at page nine;

"Having considered the case law and the evidence of Mr. Andrews, as well as Mr. Robinson (sic) the veterinarian. When I say the evidence of Mr. Robinson (sic) I refer to the DVD. The fact that I have heard no evidence at all that Mr. Andrews could bring likely relevant or necessary evidence in the case at bar, I find that there is no foundation or factual basis to support the Crown's application for the removal of counsel, Mr. Kurtis Andrews."

The prosecution contends that Justice Rozon's choice of words should be read as there was no foundation or factual basis to support the Crown's

application but not necessarily to bring it forward.

In order to properly assess Justice Rozon's conclusion I think it's important to read the decision in its entirety. In my view she did turn her mind to the concern raised in *Bevan* even though she did not express the quote from it. At page eight of her decision she says;

"In the case before me today. Dr. Armstrong is not a client of Mr. Kurtis Andrews, therefore there is no solicitor-client privilege. Dr. Armstrong is not the complainant in these proceedings, the OSPCA is. Dr. Armstrong is a veterinarian that was called by the defendant to attend his farm and assess the cattle and advise him in regards to dealing with the O.S.P.C.A. orders. I'm, assuming he was paid by the Robinsons for that service. The affidavits were prepared from notes taken by Mr. Andrews at the animal care review board from testimony given by Dr. Armstrong at that hearing. The affidavits were not prepared as a result of an interview one on one. Dr. Armstrong was not forced or bullied into signing the affidavit."

Based on this, I am convinced that Justice Rozon meant that the Crown had no foundation nor any factual basis not only to support the application but to bring the application for the removal of counsel. Mr. Pilon also emphasized the fact that he specifically enquired of the court whether he would need to address whether the application was frivolous and or vexatious. The court declined to hear from him on that point and therefore he argues this court cannot make such an inference.

Mr. Andrews claims that the application interfered with the solicitor-client relationship and that it has caused irreparable harm. Since the onus on the Charter breach rests with the defendants, the Robinsons lead evidence to substantiate their claim. I will turn to the issue of prejudice to the defendants later on in my decision.

The 11(b) Charter, the alleged violation of unreasonable delay, section 11(b) reads;

" Any person charged with an offence has the right to be tried within a reasonable time."

As stated in R. V. Morin at tab seven of the book of authorities;

"The right to security of the person is protected in section 11(b) by seeking to minimize the anxiety, concern, stigma if exposed to criminal proceedings. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh." The court further states; " The general approach to determination as to whether the right has been denied or not is notby the application of a mathematical or administrative formula but rather by 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"

Both counsels agree that the almost 19 month delay at this stage of the proceedings necessitates an inquiry. Not surprisingly the defence attributes the entire delay to the prosecution based on untimely disclosure, administrative errors and the motion brought to have counsel removed from record. The prosecution contends that the defendants

acquiesced to the delay by the manner in which they choose to conduct their defence. The factors which the court must recognize in conducting its analysis for delay are the length of the delay, secondly waiver of any time period, thirdly reason for the delay which is the inherent time to prepare a case, actions of the accused, actions of the Crown, limits on institutional resources and four the prejudice to the accused.

With respect to the length of the delay, at the time of this hearing a trial date had yet to be set even though almost 19 months had passed. Pending the decision of these alleged Charter violations two dates were set. One for March 18 and 19, 2013 to hear the section 8 Charter violation and five days for trial between the 17th and the 21st of June, 2013. Earlier dates had been offered but Mr. Pilon was not available because of prior commitments in Criminal Court. It could be argued that the defence application regarding delay is somewhat premature since at the time of the hearing no trial date had been set. However, defence counsel argued that the time delay at this stage is already *Prima Facie* excessive. Even though that courts have generally contemplated the scrutiny from the laying of the charges to the conclusion of the trial I don't think that it would be inappropriate to consider the entire time frame up to and including the scheduled trial date in June of 2013. If nothing else in order to avoid wasting

court resources and duplicating hearings it's best to conduct the analysis in a global context.

Based on submissions of counsel, transcripts and the endorsement on the information the following time frames are at play. December, 2010 the Ontario S.P.C.A. investigates the Robinson farm. On the 11th of May, 2011 the charges are laid while the Robinsons are still at the ACRB hearing which concluded on and I think I may have had a typo here. I wrote the 17th but it seems memory serves me that it's the 13th, in any event one of those two dates. I highlight this because the timing of swearing of the information in my view is somewhat unusual. It is customary in strict liability offences to have the administrative tribunal hear and conclude the matter before Quasi Criminal proceeding are undertaken. In these types of situations the governing body seeks to redress the deficiencies rather that resort to prosecution. The final decision of course rests with the Crown or the prosecution and it's obvious that it the right, that it was exercised in this case.

Next date of issue is the 28th of June, 2011 which is the first appearance. Mr. Andrews is already retained and requests disclosure. A JPT date is set at the first instance and scheduled for the 13th of July with a return date of the 20th of July, 2011. Initial disclosure is provided almost immediately. September 14th, 2011, both Mr. Andrews and Mr. Pilon appear and request an adjournment to

the 13th of December, 2011 for an ongoing JPT. No other comments are made on record. 13th of December, 2011 Mrs. Riviere prosecutor for the City of Cornwall appears on behalf of both counsel. The record indicates that a JPT scheduled for December 7th was cancelled at the request of the Crown and adjourned to the 11th of January, 2012. It should be noted that at this stage Mr. Pilon had already received the affidavit of Dr. Robinson (sic) via the letter of Mr. Andrews yet no comment were made on the record as to any concerns that the Crown may have had regarding conflict.

On the 11th of January, 2012 again both counsel, Mr. Pilon and Andrews appear and request an adjournment to the 10th of April, 2012. Nothing is placed on the record by either party. The 14th of March, 2012 a JPT that was scheduled was adjourned to the 28th of March at the request of the Crown. 10th of April , 2012 counsel discuss an appropriate adjournment date to have Mr. Pilon bring the notice of motion to remove counsel. Mr. Andrews inquires whether outside counsel will be required, Mr. Pilon is unable to respond to the inquiry at this point. The matter is adjourned to the 15th of May for the Crown to file the notice of motion. On the 15th of May indeed that date was set to be heard on the 12th of June, 2012. The 12th of June, 2012 the motion was to be heard but due to an administrative error the presiding Justice was not prepared to hear the arguments. The court and the Crown were not available in July and so it was adjourned to the

22nd of August. Mr. Pilon for the first time addresses the time issue beginning at line 30 of the transcript. I read from Mr. Pilon;

"The other comment I think just needs to be put on the record is that we had looked at dates possibly in the next couple of weeks. The court, if memory serves, was not available the month of July. I wasn't available for the month of July, I understand that the other was in court for a portion and neither or both of my friends for a portion." I take it he must refer to Mr. Andrews and Mr. Lamb who had represented Mr. Andrews. In any event; " We're really looking at the earliest date in August time frame that's available."

That's the end of that. On the 22nd of August, 2012 the court heard the motion and was adjourned for a decision to the 11th of October, 2012. The court at that time ruled in favor of the defence. At this point the court also addressed issues of setting Charter motion dates and trial dates. The court suggest Charter motion dates for the 21st and 22nd of November and they were indeed set. And a trial date to proceed anytime in December of 2012 or January 2013. At line three of page 10 of the transcript Mr. Andrews states, I'll quote from him;

"Sure and may I just, just speak first of all with respect to setting a date for trial. It would actually be somewhat premature at this point to set a date for trial because there is still some outstanding disclosure that we're waiting on. We wouldn't be prepared to set that date yet. However, we are prepared to set the date for our Charter Application."

Again four JPT dates were set; 13th of July, 2011, 14th of September, 2011, 11th of January, 2012 and the 28th of March, 2012.

Dealing with the issue of waiver of delay, so far as what the courts recognize and need to be addressed. Both counsel agree that waiver under 11(b) can be waived, it can be expressed or implied but for it to be valid it must be informed, unequivocal and freely given. Reasons for delay that the court has to consider: Inherent time requirements; the evaluation of this factor must be done on a case by case basis. To a large extent the preparation time will depend on the gravity of the offence, the number of charges, the number of witnesses to name only a few. It's also understood that neither the defense nor the Crown can be expected to devote their entire time to only one case. *Morin* also recognizes the difference for the inherent time delay in the case involving a simple summons or an arrest or detention of an accused. The less complex the case, the shorter the delay.

Generally speaking delays occasioned by the actions of the agencies and delays for the production of disclosure are attributable to the prosecution.

Actions of the accused that the courts have deemed to consider; again the court in *Morin* considered that while not blameworthy, at times, the actions of the accused may cause delay. The court gave examples of such as motions for change of venue,

attacks on wiretaps, obviously not pertinent to this but just to give examples. Adjournments which do not amount to waiver, attacks on search warrants, change of counsel. At paragraph 44 the court said;

> "There is no necessity to impute improper motives to the accused in considering this factor. Included under this heading are all the actions taken by the accused which may have caused delay. In this section I am concerned with actions of the accused which are voluntarily undertaken."

And the court certainly stressed that point.

The actions of the Crown to a large extent the nearer or the actions of the accused just from the other perspective because again the courts have recognized that it would be delay in providing disclosure, change of venue and bringing motions for this particular case it would be a motion to remove counsel. Again this factor is not to assign blame but serves as a mean whereby actions of the prosecution may cause a delay.

Limits on institutional resources. Institutional delay has been recognized as the most common factor in criminal proceedings for delay. Yet in Provincial Offences institutional delay is the least common of factors. Trial dates are offered within a very short period of time and certainly they could have been in this particular case.

Other reason for delay. While not exhaustive, the court in *Morin* addressed the category of delay "actions by trial judges". It goes on to say;

"Such delay is not institutional in the strict sense. Nevertheless, such delay cannot be relied up on by the Crown to justify the period under consideration."

Basically such a delay would count against the prosecution.

Prejudice to the defendant. Just as the onus to demonstrate a Charter breach rests with the defendants so does the onus that the Robinson's suffered prejudice in their ability to receive a fundamentally fair trial or to make full answer and defence. This case does not raise the prejudice to liberty or security of the person. But as stated in *Morin* a prejudice can be inferred or proven. I am in agreement that 19 months have now elapsed and by the time the trial date is reached more than 25 months will have elapsed. Suffice to say that prejudice at this stage can be inferred from the significant time delay especially for a prosecution of this nature.

Prejudice can be both tangible, for instance, if there is deceased witnesses, fading memories, financial duress or intangible which would be public embarrassment, loss of reputation in the community. The defendants provided affidavit and *Viva Voce* evidence that they have suffered prejudice based on the application to remove counsel. While they continue to have faith in Mr. Andrews that faith has been questioned and shaken. Mrs. Robinson quantifies that it at 96 percent while Mr. Robinson is perhaps more cynical and

pragmatic is basically resigned to the fact that they have spent so much time and money with him that their options are limited.

Both the Robinson have testified that they have suffered significant financial repercussions as a result of these court proceedings. On the one hand to respond to the charges and on the other to retain counsel to respond to the Crowns application to have counsel removed. They had to sell their milk quota thereby affecting some of their livelihood. They have testified they also sold off some cattle that they otherwise could possibly have kept. Other cattle they keep because as Mrs. Robinson indicates she wants them to die at home because they've been good for them. Theses cows obviously bring no financial return it would be quite the opposite.

It was obvious during their respective testimony that the court proceedings have taken a toil on them. Mrs. Robinson appeared stressed, confused, frustrated and quite frankly overwhelmed by the whole process. Mr. Robinson while more, as indicated, pragmatic still exhibited signs of stress. He testified that he attended every court appearances but as he said; he couldn't take it anymore. So while he was at the courthouse he was not present when Justice Rozon gave her decision in October of 2012. He had pre-existing health issues that have be exacerbated by the prolonged court proceedings. It is obvious that the longer these

matters remain unresolved, the financial repercussions escalate. The court also stated in *Morin* that;

> "While Pre-charge delay may in certain circumstances have an influence on the overall determination as to whether post charge delay is unreasonable but in of itself is not counted in determining the length of delay."

Considering the fact that Robinsons retained counsel to the ACRB hearing their financial plight will have started well before the charges were laid. Financial prejudice is only one factor to consider in determining the prejudice suffered by the defendant but a considerable one nonetheless. They also claim that their reputation as dairy farmers has been soiled in the community not necessarily by the nature of the charges but by the unproven allegations published in the July, 2011 edition of the Eastern Ontario Farmers Forum newspaper. It should be noted that Mr. Pilon had nothing whatsoever to do with the release of this document.

Prejudice just like any other factor has to be weighed on a case by case basis. For a career criminal, reputation in the community may have limited value. But for people like the Robinsons stature in the community and their reputation as dairy farmers may have great significance.

So the analysis for delay; let me start by saying that institutional delay has no bearing on this particular case. *The court could, at any time,*

have provided motion and trial dates in a short notice. What needs to be determined is when the parties were ready to set a trial date and the other factors of analysis.

So trial readiness; So while redundant to say , the defendants are facing Provincial Offences charges involving cattle. A cursory glance of the material shows that there are many triable issues and the defence pursued those by way of pre-trial discussions with the Crown. The case in and of itself does not appear to be overly complex even though there is a significant amount of material that has been filed and I will get to that later. Insofar as trial readiness is concerned I consider the transcripts filed and the supporting material provided by both parties. The investigation by the O.S.P.C.A. was complete and disclosure provided early on in the proceedings. Again the first JPT was scheduled as well early and subsequent ones no reasons on the record were given even though a number of them were adjourned.

The court cannot surmise, lack of a proper record, the reason for the additional judicial pre-trials. *R. v. Tran* does state that;

> "Some reasonable period of delay in arranging a judicial pre-trial should be treated as part of the inherent time requirements of the case."

It does not, in my view though, go on to say that all judicial pre-trials are inherent but rather a reasonable period.

While there are conflicting statements made by the defense and specifically by Mr. Andrews with respect to trial readiness. I accept that the Robinson's position has been to resolve these charges quickly from the outset. Even before the charges were laid they showed some diligence in having the matter resolved. I based this conclusion on the letters of Mr. Andrews found at tab 2(d) of the applicants material dated the 23rd of March, 2011, the 29th of March, 2011, the 1st of April, 2011 and the 5th of April, 2011 where he seeks confirmation from the O.S.P.C.A. that all matters have been dealt with to their satisfaction.

And while this is pre-charge I just take it into consideration of what is, you know, the intent of the parties. There is no response received from the S.P.C.A. to those letters. My view, this is further substantiated by Mr. Andrews letters to the Crown of September 13, 2011, November 7th, 2011, November 30th, 2011, January 9th, 2012 and lastly October 12, 2012. These letters and the actions of the defendant. For instance, counsel was retained at the first appearance, JPT's were set early, disclosure of the defence case outweighed to a large extent some of the comments on record and in the applicants factum that they cannot set a trial date until all disclosure is provided.

This is the distinction with the *Kovacs-Tatar* case that is cited by Mr. Pilon. In that case the

accused had been offered three trial dates but the accused declined. In the Robinson case there is no indication that trial dates were offered and declined. Since there is no obligation on the prosecution to disclose every last bit of evidence before the trial date is set, Mr. Pilon could have requested that one be set earlier on. At that point, if the defence had declined to do so a negative inference could have been made.

I also note that the material provided by the applicants at paragraph 41 indicate that, and I see a note here; upon conclusion of the January 11, 2012 JPT the parties were instructed by the presiding justice of the peace to attend the next JPT with available dates to set any pre-trial and the trial date. Because of the Crown application for removal of counsel all these issues were in hiatus until October of 2012. Accordingly I conclude that other than the inherent time requirement for the preparation of his case, scheduling the pre-trial or judicial pre-trial accounts for the period of May, 2011 to the 30th of November, 2011 and this time is neutral. I use the 30th of November, 2011 date because from that point on Mr. Andrews status as counsel was in limbo whether he knew it or not. Shortly after this he was being, you know the matter was being investigated by the O.P.P. This leaves 10 to 11 month period and this is the time frame that must be evaluated.

The issue of waiver; the Supreme Court decision *Morin* at paragraph 17(sic) states;

> "If the length of the delay warrants an inquiry into the reasons for delay, it appears logical to deal with any allegations of waiver before embarking on the more detailed examination of the reasons for the delay. If by agreement or other conduct the accused has waived in whole or in part his or her rights to complain of delay then this will either dispose of the matter or allow the period waiver to be deducted."

It further states at paragraph 38;

> "Waiver requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver. Such conduct must be taken into account under the factors, actions of the accused, but it is not waiver."

Mr. Pilon contends that the applicants position on the record vis-a vis delay shows a complete lack of concern for their right to a speedy trial and should be considered an express or implied waiver of their rights. I do not agree with this characterization. The higher courts are quite clear that waiver must be informed, unequivocal and freely given. There's been no acknowledgement on the record of any waiver of 11(b). Quite frankly given the delay of this case I am surprised that the prosecution did not ask for an 11(b) waiver.

The actions of the defendants; The prosecution argues that the manner in which the defence chose to conduct itself and its case should be taken into account in determining if the delay is

unreasonable. Mr. Pilon argued that the case grew exponentially as the defence made repeat disclosure requests, and tabulates them at 59, and raised other various issues. Several examples of those were outlined at paragraph 175 of the respondent's factum. By the conclusion of these particular motions which I heard it was determined however that essentially all matters had been dealt with other then the section 8 Charter violation. Mr. Pilon argued that the time and effort it took to respond to the defence request should be counted as neutral time.

I did peruse the disclosure request of the defendants filed at tab 16. Many of the items requested are standard material which should be disclosed without much problem. For instance the notes of the visits to the Robinson Farm, item 8, the notes of the investigators and the veterinarians who attended the farm, items 12 to 19, those would be standard. The training of the O.S.P.C.A. officers, item 20 to 23, may have some questionability to that quite frankly but depending on the circumstances. Some of the requests, however, I found neither essential, certainly not for the fixing of a trial date. Such as item 1, 5, 6, and 10 and some of these quite frankly the prosecution could have asked the court to determine whether they were relevant material that needed even to be disclosed. So other then third party records for internal documents in the possession of the O.S.P.C.A. I see no indication that the

prosecution however objected to providing any of the disclosure all be it that I find that it was - some of it was a little bit extensive, if I can put it that way.

The defence material indicates that they've diligently followed up on disclosure requests and JPT's. Tab 17 of the material discloses follow up letters and I've already alluded to those. In one of them Mr. Andrews states;

> "In advance of next month's JPT scheduled for 10:00 a.m. on December 7, 2011, please find attached a synopsis of our disclosure requests. Please reply and indicate whether or not you expect to provide any more disclosure prior to the JPT. Although I trust that the Crown is responding as diligently as possible, I am concerned that we have progressed very little in this regard since the last JPT."

In a letter dated November 30, 2011 from Mr. Andrews to Mr. Pilon which included the affidavit of Drs. Gray and Armstrong, the defence states;

> "In advance of the next pre-trial, December 7th, I would like to provide the Crown with some information which might serve to affect your position going forward. I provide it to you in advance of the pre-trial in the hope that was can resolve this matter as quickly as possible and it is my intention that you have sufficient time to satisfy yourself respecting the reliability of this information."

The defence obviously has no obligation to disclose its case, its defence to the prosecution. Yet in this letter Mr. Andrews provides an outline of it to the Crown in hope of resolving the matter. I have read the cases of *R. v. Lahiry* and *R. v. Tran*

and recognize that the defence certainly bears some responsibility for the delay regarding the disclosure. It is an ongoing process which they explored, as I indicated earlier, extensively.

However, I balance that as well with some of the disclosure was provided by the Crown unsolicited which showed that they felt it needed to be disclosed and some of it, of course, part of those 59 points that were raised by Mr. Pilon would have been canvassed as a result of the application to remove counsel and, you know, an example of that would be the DVD of the interview of Dr. Armstrong and what not. So, the vicissitudes of the case of the case in my view created a climate that disclosure was always a troubling and an ongoing issue in this particular case.

Actions of the Crown; insofar as responding to disclosure requests I agree with Mr. Pilon's assertion that no case is an island and that he must balance these requests with his other responsibilities. However, any delay in obtaining some very basic disclosure requests from the O.S.P.C.A. is attributable to the prosecution. For instance, why would it take in excess of 12 months to obtain particulars of the charge. The court certainly cannot expect perfection but delay for such simple requests are attributable to the prosecution. In general terms, it appears sufficient disclosure was provided to enable the defendants to set a trial date certainly by the end

of 2011 but I see no comments by the Crown or no efforts to force the defendant to at least to give that offer to the defendants.

The adjournments; the adjournments of two JPT's is entirely attributable to the Crown even though the court recognizes and again to quote Mr. Pilon to a certain extent; "that people have lives, they get sick, they make mistakes." This does not eliminate the computation of the time and it is still assessed to the prosecution.

Application for the removal of counsel; I was not a party to the extensive arguments put forth before Justice Rozon when she heard the application to remove counsel. It is rare indeed for such an application to be brought before the court and in my view even more so when the prosecution does not allege misconduct on the part of the defence. The case of *Bevan* is used as a barometer but the fact situation was entirely different. *Bevan* dealt with a domestic assault where the alleged victim had been interviewed. There is a greater risk of interfering with a witness who may be vulnerable. *Bevan* states at paragraph 18;

> "The conduct of a trial and defence of allegations of domestic violence can be fraught with issues of credibility, particularly that of a complainant. There are seldom third party witnesses to instances of domestic violence and the reliability and credibility of a complainant can become crucial. When that complainant has recanted..." as in the *Bevan* case "...her evidence becomes fertile ground for cross-examination. Even more so when there has been a disavowal of the

recantation and subsequent allegation of charges of uttering threats and obstruct justice against the originally accused person." End quote.

The similarities between *Bevan* and Robinson are tenuous at best. Irrespective of the reason or the lack thereof to bring this particular application suffice to say that the delay incurred from the 30th of November, 2011 when the prosecution was first notified of the affidavit to June 2012 is attributable to the actions of the Crown. It doesn't matter that the court made no finding of frivolous or vexatious actions. This particular period of time accounts for the greater portion of the delay. I have based it from the 30th of November, 2011 to the 22nd of October, 2012 when the decision was given. Even if I were to consider the date of January, 2012 when the Crown first notified Mr. Andrews that this had become an issue and that this would be investigated there's still like 10 month delay attributable at that point.

Other reason; the first date scheduled for hearing the motion to remove counsel in June, 2012 had to be adjourned because of an administrative error. Again while the court recognizes that people make mistakes and it is not intentional the courts have deemed these delays to be attributable to the prosecution. This cover the period then from June 2012 to October 2012.

The Supreme Court in *Askov* has said;

"Although the primary aim of 11(b) is the protection of the individual's right and the provision of fundamental justice for the accused, nonetheless there is, in my view, at least by inference, a community or societal interest implicit in section 11(b). That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Secondly, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest."

It goes on to say that;

"There are as well important practical benefits which flow from a quick resolution of the charges. There can be no doubt that memories fade with time...not only is there erosion of the witnesses' memory with the passage of time, but there is bound to be an erosion of the witnesses themselves."

This could be, obviously, a very live issue in this case.

In summary, the delay was not institutional and I find that the parties could have been in a position to set a trial date as early as the end of November 2011 and at the latest January 2012. Irrespective of which time frame used the delay is in excessive for Provincial Offences trials both in the Cornwall area and the east area in general. On a balance of probabilities I find the defendants have proven delay and that the prosecution has not justified it. They have provided some reasons for it especially as it relates to the disclosure component but in my view have failed in all other aspects. As such I find that a breach under

section 11(b) has occurred. I must now turn my mind as to whether the breaches amount to an abuse of process and whether the remedy under section 24(1) should be considered.

On the abuse of process issue; both counsels agree that different Charter guarantees may engage the doctrine of abuse of process. And that its main purpose is to protect the integrity of the justice system by the unfair and oppressive treatment of a defendant by the prosecution. As stated in *Nixon*, the Supreme Court of Canada has identified two categories of abuse which can be caught by section 7 of the Charter. Prosecutorial conduct affecting the fairness of the trial and B prosecutorial conduct that contravenes the fundamental notions of justice and thus undermining the integrity of the judicial process.

It went on to say that the doctrine of abuse of process seeks to achieve the appropriate balance between societal interest and individual concerns. Prosecutorial misconduct, while relevant, is not a prerequisite. What is of significance is the effect of the conduct.

I begin to asses to societal interest by quoting from Mr. Pilon's written argument at paragraph 17 (sic) of his written material and he states; "Moreover, the respondent submits that any affront to fair play and decency caused by the state's misconduct or abuse in this case does not otherwise

negate the compelling societal interest in prosecuting the applicants for having allegedly committed regulatory offences that could, ultimately, impact on public health and safety."

Mr. Pilon then further refers to in his pleadings to *R. v. Beckstead* at paragraph 11 where he says;

"Before staying charges the court must be satisfied that the interest of the applicant in having a prompt trial outweighs the interest of society in bringing the applicant to trial."

This is a case of impaired driving, the *Beckstead* case. He goes at paragraph 52 to say;

"Since drinking and driving offences remain virtually public enemy number one."

It's important and I'm going to skip through that but he identifies this as public enemy number one. That it's important that there is a compelling societal interest in prosecuting these offences and I concur with that assessment, surely.

However, to use serious *Criminal Code* offences and public welfare offences, where the public is at risk, as analogies to this case are an exaggeration. The *OSPCA* is necessary legislation but I concur with the findings of the court in *R. v. Bingley* when it says;

"This is not to suggest that animal protection under a provincial public welfare statue is any less worthy a legislative objective than the targeting of criminal misconduct under a federal statute but obviously the court is cognizant of the fact, that in the hierarchy of offences it does not rank in the same order as an offence involving the infliction of cruelty or deprivation or distress upon a human being."

I end the quote. There are no direct societal interest to be preserved. Whatever concerns the O.S.P.C.A. had over the care of the animals was also addressed as far back as the 20th of May, 2011 when all orders were revoked.

Indeed, I would think that if the public was aware of the facts of this prosecution, it would be shocked to know the judicial resources including the police resources that were involved and it could be the court time, the preparation time, the motion time, the reading time to name only a few that were allocated to this case. The misguided application to remove counsel created a whole new specter to this case and it had severe implications for the defendants. On the one hand financially since they had to fight the motion and hire another lawyer. On the other it did affect, albeit it did not break, the trust between solicitor-client. I quote from *R. v. McCallen;*

> "Absent compelling reasons involving the public interest, the government and the courts need not be involved in decisions about which counsel clients choose to act on their behalf."

And it's repeating what I said earlier.

Insofar as the interest of the defendants are concerned the prejudice they suffered up to this stage whether it be financial and or public embarrassment is disproportionate to the public's interest in prosecuting the charges. They have suffered more punishment than any sentence they would ultimately receive if convicted. In a final

analysis, the court has to be fair, it has to be just. I find there has been a violation under section 10(b) of the Charter.

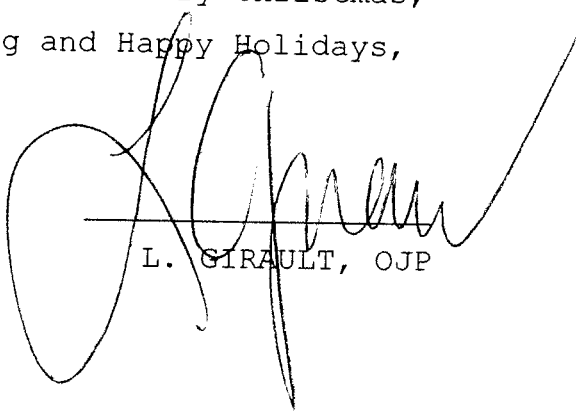
The path to this prosecution has been unique. At the end of the day, quite frankly, there are no winners. Not the public, whose faith in the proper functioning of the system must be somewhat shaken. Not the Robinson's because they have not been exonerated on the merits of the case. Despite the many triable issues Mr. Andrews has not explored those. Questions will remain over the treatment of their cattle.

I adopt the wording for granting of a stay of proceedings for abuse of process from *R. v. Nixon* at paragraph 42;

> "Regardless of whether the abuse caused prejudice to the accused fair trial interests or to the integrity of the justice system; is that set out in *Canada v. Tobiass*. A stay will only be appropriate when the prejudice caused by the abuse will be manifested, perpetuated or aggravated through the conduct of a trial or its outcome or two; no other remedy is reasonably capable of removing that prejudice."

As such based on the cumulative nature of the Charter violations and taking into account that in my view this is the clearest of cases, especially as it relates to the prejudice. The only remedy capable of removing the prejudice to David and Marilyn Robinson is to enter a stay of proceedings.

I will in a final note indicate too. I'll follow Justice Renaud's lead and I will say that I have to commend both counsels for their written and oratory skills. I'm sure that you will dissect my decision word by word and that you'll have an opportunity to find areas where I may have misspoken and what not which is what fuels, you know, court processes at infinitum at times. But while I give you that accolade I must say that I do question a little bit of the common sense that was exercised quite frankly by both counsel in the manner in which these matters have proceeded. On that note I will conclude. I will wish everyone a Merry Christmas, a Happy New Year, safe driving and Happy Holidays, thank you.



L. GIRAULT, OJP

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FORM 2
Certificate of Transcript
Evidence Act, subsection 5(2)

I, Sheri Delorme, certify that this document is a true and accurate transcript of the recording of R. v. David and Marilyn Robinson in the Provincial Offences Court held at Cornwall, Ontario taken from Recording No. 20121221_090858, which has been certified in Form 1.

Date

Sheri Delorme
Certified court reporter