WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,
>
> (ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
>
> (iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Milani, 2014 ONCA 536
DATE: 20140709
DOCKET: C56451

Goudge, van Rensburg and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Donald Milani

Respondent

Christopher Webb, for the appellant

Seth P. Weinstein and Jill Makepeace, for the respondent

Heard: January 22, 2014

On appeal from the order of Regional Senior Justice Helen M. Pierce of the Superior Court of Justice, dated December 4, 2012, with reasons reported at 2012 ONSC 6892.

van Rensburg J.A.:

OVERVIEW

[1] This is a Crown appeal of an order staying proceedings against the respondent for breach of his rights under s. 11(b) of the *Canadian Charter of Rights and Freedoms*. The respondent, who was originally charged with certain

offences and discharged following a preliminary inquiry, was charged with the same offences under a preferred indictment some 23 years later. The appeal raises the issue of whether the respondent was “a person charged with an offence” during the intervening period.

[2] For the reasons that follow, I would allow the Crown’s appeal, set aside the order staying the prosecution against the respondent, and remit the matter back to the trial judge.

BACKGROUND

(1) Facts

[3] In the mid-1980s, a series of home invasion sexual assaults were perpetrated against five complainants. The respondent Donald Milani was charged with offences arising out of those assaults in December 1987.

[4] Evidence collected from the crime scenes included imprints of the assailant’s footprints and tire treads, as well as samples of bodily substances believed to have originated with the perpetrator. A beer bottle from which the assailant was believed to have drunk was also seized from one of the residences.

[5] At the time, DNA technology was not advanced enough to connect the respondent to semen and saliva seized at the crime scenes. The Crown’s case against the respondent relied entirely on circumstantial evidence.

[6] An information was laid against the respondent on December 22, 1987. Following a preliminary inquiry, the respondent was discharged on November 27, 1989, in respect of all offences except one, for which he was committed to trial. He was acquitted at trial, and that charge is not at issue on this appeal.

[7] DNA analysis advanced in the years that followed. In 2008 and 2009, the police resubmitted samples of semen and saliva seized at the crime scenes to the Centre of Forensic Sciences (the "CFS"), which concluded that it was likely that the DNA on the exhibits matched the respondent's DNA: "The probability that a randomly selected [unrelated] individual…could coincidentally share the observed DNA profile [was] estimated to be one in 18.8 billion."

[8] The Crown preferred an indictment against the respondent on July 23, 2010, and on August 17, 2010, he was arrested and charged with 19 counts relating to four of the home invasion sexual assaults. He was released on bail, and his trial was scheduled for January 2013. In the intervening years, between his discharge and the new charges, the respondent had been unaware that there was any ongoing investigation into his involvement in the sexual assaults.

(2) The Stay Application: Positions of the Parties

[9] The respondent brought an application seeking a stay of proceedings under section 24(1) of the *Charter*, alleging the infringement of his rights under sections 7 and 11(b). On a motion for directions the trial judge directed that the

application proceed as a pre-trial motion. After hearing evidence in a *voir dire* and submissions, the trial judge concluded that the respondent's rights under s. 11(b) had been infringed and she stayed the charges. Having determined the application based on s. 11(b), she did not deal with the parties' arguments respecting the alleged s. 7 breach.[1]

[10] It is important to understand the respondent's position with respect to delay in this case. On the application, the respondent asserted that the total period of time to be assessed for s. 11(b) purposes began to run when he was first charged in 1987, and continued to run after his discharge in 1989. There was no assertion of unreasonable delay in the proceedings leading up to the respondent's discharge in 1989. Likewise, no unreasonable delay was asserted for the period between the preferment of the new indictment in 2010 and the anticipated date of trial. Rather, the period in question was comprised of the "gap" years between his discharge in November 1989, and the preferring of the new indictment in July 2010.

[11] The respondent did not contend that the entire "gap" period constituted an unreasonable delay, and did not claim institutional delay as a factor. He submitted that the period from 1987 (when he was originally arrested) to 1995 was inherent time necessary to permit the advance of DNA science. The

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[1] These reasons will not address the s. 7 issues, as they have not been determined, and were not addressed in the trial judge's decision, or on this appeal.

respondent argued that the period between 1995 to 2010 constituted unreasonable delay that was attributable to the Crown, arising from:

- the failure of police to request further testing between 1995 and 1997 of the items they had seized;
- the failure of police to submit the beer bottle for analysis as early as 1998;
- the delay by police in submitting items for testing in October 2007 after a decision was made identifying these items 13 months earlier;
- a further 13 month delay between the submission of certain items to CFS and its report;
- an eight month delay in informing the officer in charge of the investigation that a new saliva sample was required from the applicant;
- a three month delay in obtaining the saliva sample; and
- a delay of 20 months in obtaining a preferred indictment.

[12] It was acknowledged that there was no actual prejudice to the respondent during the “gap” period when he was unaware of the ongoing investigation or pending charges. Rather, the respondent argued that the delay in getting the case to trial far exceeded the guideline in *R. v. Morin,* [1992] 1 S.C.R. 771, and as such, that prejudice should be inferred.

[13] The Crown's position on the application was that this case should be characterized as a "cold case", and that the court should not, through the vehicle of a *Charter* application, "micromanage" the police investigation. The Crown asserted that the time before the indictment was preferred should be considered pre-charge delay and not counted against the Crown for the purposes of the s. 11(b) analysis. The Crown argued that the time counted as delay should run from when the indictment was preferred, as the respondent was not "a person charged with an offence" during the "gap" period running from his discharge in 1989 until the indictment was preferred in 2010.

(3) Decision Below

[14] In her detailed reasons for decision on the application, the trial judge reviewed the chronology of the case and legal principles applicable to s. 11(b). She then considered what period ought to be considered in the s. 11(b) analysis. The trial judge held that the time for assessing delay for the purposes of s. 11(b) ran from the date of the laying of the first information in 1987. She referred to *Re Garton and Whelan* (1984), 47 O.R. (2d) 672 (H.C.) and *R. v. Antoine* (1983), 41 O.R. (2d) 607 (C.A.), as authority for the proposition that, in cases where an accused has been discharged after a preliminary inquiry and a preferred indictment is subsequently sought, the time for assessing unreasonable delay for s. 11(b) purposes runs from the date of the initial information.

[15] The trial judge noted that there were contradictory trial level authorities on the treatment of the "gap" period for the s. 11(b) purposes, but she concluded that *R. v. Antoine* remained the governing authority, that had not been affected by the Supreme Court's decision in *R. v. Potvin,* [1993] S.C.J. No. 63. In *Potvin*, the Supreme Court held that s. 11(b) did not apply to the period between a trial decision and the conclusion of an appeal.

[16] The trial judge then reviewed the delay from the time when the charges were first laid against the respondent. She concluded that the length of the delay (some 24 years) warranted inquiry into the reasons for the delay. She observed that the respondent had not waived any time periods, that there was an inherent delay in the period between the accused's initial arrest and 2005, when DNA analysis was developing, and that there were no actions of the respondent that increased the time to proceed to trial.

[17] The trial judge rejected the Crown's position that the period of police investigation prior to the preferred indictment should be considered as "pre-charge investigation delay" and not accounted for in the s. 11(b) analysis. With respect to Crown delay, the trial judge found that there was an unexplained Crown delay in submitting exhibits to the CFS, in sending the saliva samples to complete the CFS analysis, and in the CFS's reporting time. There was also some unreasonable delay in the preparation by police of a disclosure package to be submitted to Crown counsel for consideration in preferring an indictment. The

trial judge found that there was a total of 32 months of delay attributable to the Crown. (On the appeal, the parties agreed that there was a calculation error and that the period of unreasonable delay on the facts found by the trial judge was in fact 26 months.)

[18] The trial judge then addressed the question of prejudice. While there was no evidence of actual prejudice, she concluded that there was inferred prejudice to the respondent as a result of the Crown delay. She referred to the decision of the Supreme Court of Canada in *R. v. Godin,* [2009] 2 S.C.R. 3 as authority that prejudice to an accused's right to make full answer and defence may be inferred from the length of the delay alone. The trial judge concluded that the length of unreasonable delay for which the Crown was responsible led to an inference of prejudice.

[19] The trial judge noted that it is a principle of law that cases should be tried on their merits. However, she also noted that the *Charter* guarantee of a trial within a reasonable time was designed to protect citizens from protracted proceedings, where their liberty is at risk for an extended period of time. She observed that in this case, there was an extraordinary 301 month delay from the laying of the initial information in 1987 until trial. The trial judge concluded that the limits prescribed by *R. v. Morin* were greatly exceeded in this unusual case, and that the respondent's s. 11(b) rights were breached. The charges against him were therefore stayed.

ISSUES

[20] The following issues arise in this appeal:

1. Did the trial judge err in concluding that the respondent was a "person charged with an offence" under s. 11(b) of the *Charter* during the "gap" period?

2. If the time for s. 11(b) runs during the "gap" period, did the trial judge err in concluding that the respondent suffered prejudice?

3. Did the trial judge err in ordering a stay of the proceedings?

ANALYSIS

[21] Section 11(b) of the *Charter* states that "Any person charged with an offence has the right…to be tried within a reasonable time."

[22] The first step in a s. 11(b) analysis is a determination of whether the delay at issue is of sufficient length to raise a question as to its reasonableness. The period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. In this context, "charge" means the date on which an information is sworn or an indictment is preferred. In the current case, it is this analysis that is determinative of the outcome. Assessing when the accused is actually "charged" is the first step in measuring the length of any potential delay. 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 the issue of reasonableness of the

period by reference to other factors, such as prejudice: *R. v. Morin*, [1992] S.C.J. No. 25, at paras. 32-36.

[23] If the length of the delay raises an issue as to its reasonableness, it must then be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanation for the delay, and the prejudice to the accused: *R. v. Morin*, at para. 32.

[24] The standard of review for the application of the *Morin* factors and the characterization and allocation of various periods of time in a s. 11(b) analysis is correctness: *R. v. Khan*, 2011 ONCA 173, 277 O.A.C. 165, at para. 18, leave to appeal ref'd [2011] S.C.C.A. No. 195; *R. v. Schertzer*, 2009 ONCA 742, 255 O.A.C. 45, at para. 71, leave to appeal ref'd [2010] S.C.C.A. No. 3.

[25] The trial judge held that s. 11(b) "refers to any person *charged* with an offence," and therefore concluded that "the time for assessing delay for the purposes of a s. 11(b) analysis runs from the date of the laying of the first information". As a result, the trial judge found that the constitutional clock in this case ran from the date of the laying of the first information in 1987 until trial on the indictment that was preferred in 2010.

[26] The time frame to be considered in computing trial within a reasonable time generally runs only from the moment a person is charged. A person is "charged" when an information is sworn or an indictment is preferred. Thus,

delays occurring in the pre-charge period, including in the investigatory or pre-charge stage, are not subject to analysis under s. 11(b): *R. v. Carter*, [1986] 1 S.C.R. 981, at paras. 11, 13; *R. v. Kalanj*, [1989] 1 S.C.R. 1594, at para. 17; *R. v. Morin*, at para. 35.

[27] The trial judge did not misstate the law with respect to when the constitutional clock in a s. 11(b) analysis begins to run. However, the conclusion that the laying of an information is the beginning of the period to be considered under s.11(b) is not determinative of whether the constitutional clock stopped running upon the respondent's discharge in 1989, and therefore whether the "gap" period is to be considered in the s. 11(b) analysis.

[28] In cases where an accused proceeds to trial, s. 11(b) protects against delay until the trial is concluded. This is because, while the case is still pending, a determination of the accused's guilt or innocence has not occurred, and the accused is therefore subjected to stress and anxiety. The stigma of being an accused ends when the saga of a trial is at an end and the decision is rendered: *R. v. Rahey*, [1987] 1 S.C.R. 588, at para. 40.

[29] But what of cases where an accused who has been charged does not proceed to trial? Put differently, in what circumstances other than those where an acquittal or conviction has been entered, will the constitutional clock stop running for the purposes of s. 11(b)?

[30] In my view, the trial judge erred in answering this question by relying on the decision of this court in *R. v. Antoine*, and a case of the High Court citing *Antoine*, *Re Garton and Whelan*. The Supreme Court's jurisprudence on s. 11(b) has evolved significantly since the cases relied on by the trial judge were decided. A close examination of the more recent Supreme Court cases of *R. v. Kalanj* and *R. v. Potvin*, supports the conclusion that the "gap" period should not be included in the s. 11(b) analysis. These cases explain that s.11(b) protects against the harms that result from post-charge delay but not against the similar harms caused by pre-charge or appellate delay.

(i) *R. v. Antoine* and *Re Garton and Whelan*

[31] *R. v. Antoine* is a 1983 decision of this court. The accused had been charged with fraud. Eleven months after he was charged, the indictment was quashed by the trial judge because of a perceived defect in the name of the victim. Six days later, a second indictment was sworn alleging the same offence, but curing the defect. A total of 26 months elapsed from when the first information was laid and the accused's trial date.

[32] Martin J.A. held that, in determining whether an accused's s. 11(b) rights were violated, the court should "examine the entire period between the laying of the initial information and the trial of the accused": at para. 25. The balance of the court's reasons consisted of a review of the factors that ought to be considered in

s. 11(b) applications, and the application of the factors. Ultimately, the court concluded that no violation of s. 11(b) had occurred.

[33] While the court in *R. v. Antoine* stated that “the preferable approach is to examine the entire period after the laying of the first information”, it also found that the defects in the first indictment were technical in nature, did not result in prejudice to the accused and likely could have been cured through amendment.

[34] The “gap” in *Antoine* was a period of only six days between the time the first information was quashed and the second, more particularized information was sworn. For all practical purposes, this was a single proceeding. Indeed, this is how the decision was interpreted when it was considered by this court in *R. v. Padfield*, [1992] O.J. No. 2813 (C.A.).

[35] In *Padfield* the accused was initially charged with two counts of indecent assault and was committed to stand trial on the charges. A month later the Crown presented an indictment containing three charges. The trial court had stayed two of the three charges on the basis of unreasonable delay and directed that the third charge proceed to trial. The appeal court concluded that all three charges in the second indictment had their genesis in the first information, and stayed the third charge. The court referred to *Antoine* as authority that where the charge in a second information is “no more than an amended version of the initial charge”, the constitutional clock must tick from the laying of the first information.

[36] *Re Garton and Whelan* is a 1984 decision of the Ontario High Court of Justice, and arose in the context of an application by a private person under the *Criminal Code* for the consent of a justice to prefer an indictment. The accused had been discharged following a preliminary inquiry into a charge of murdering his spouse. The Crown had refused to prefer an indictment and seven years later, the family of the deceased applied for judicial consent to lay a preferred indictment.

[37] The application judge, Evans C.J.H.C., after a thorough analysis of all the evidence provided in support of the application, declined judicial consent. Given this conclusion, he noted that it was unnecessary to consider the s. 11(b) argument raised by the accused, however he proceeded to do so. He concluded that the accused's s. 11(b) rights should be considered and had in fact been impaired.

[38] There were three important factors identified by the court. First, the accused was aware throughout the intervening period of the ongoing efforts to have him prosecuted. Second, there had been no change in the evidence against the accused. Evans C.J.H.C. noted that this was not a case where a continuing investigation by the authorities had unearthed strong new evidence inculpating the respondent, and he characterized this as a circumstance to be taken into account in determining whether a trial of the respondent at this late stage would be reasonable. Third, the application judge found that the accused would suffer

real prejudice should a trial be heard after the delay. Prejudice could be presumed in a case that would rely on witnesses' fading memories.

[39] *Re Garton and Whelan* was referred to by this court in *R. v. G.W.R.*, [1996] O.J. No. 4277 (C.A.), a case involving an appeal from a decision staying charges under sections 7 and 11(b) of the *Charter*. There was evidence that the Crown had withdrawn a charge against the accused for contributing to juvenile delinquency many years earlier, and the accused relied on the entire period for his s. 11(b) argument. The court noted that there was nothing in the record to show that the earlier charge related to the same conduct that formed the basis of the later sexual assault charges against the accused. The court went on to state that there was no indication that once the purported charge of contributing was withdrawn, the respondent believed that he was still under investigation or in jeopardy in relation to this same conduct, and there was no evidence of oblique motive or bad faith on the part of the Crown in its discretion to withdraw the contributing charge. The court concluded that, accordingly the time from the withdrawal of the charge until the laying of the new charges did not continue to run for the purposes of s. 11(b) of the *Charter*. The court contrasted the situation with *Re Garton and Whelan* "where although the accused was discharged at the preliminary inquiry he was aware that the police and the deceased's parents were actively continuing the investigation" (at para. 10). While this court did not dispute the authority of *Re Garton and Whelan,* it interpreted the case to require

some knowledge on the part of the accused that there was an active investigation underway, before the s. 11(b) clock would run in the absence of active charges.

[40] As observed, *R. v. Antoine* and *Re Garton and Whelan* can be interpreted in such a way that they would not apply to the circumstances of this case. The respondent however relies on the fact that the Supreme Court of Canada in *R. v. Kalanj* referred to these decisions, albeit with little analysis, and stated: "these cases support the proposition that pre-charge delay is not relevant under s. 11(b), by holding that the time commences to run from the date the original information was sworn": at para. 20. To the extent that this statement, which was made in *obiter* and without analysis of the point, may appear to endorse a broader interpretation of these cases, I would agree with the appellant that any such interpretation has been overtaken by the court's reasoning in *R. v. Potvin*.

(ii) *R. v. Kalanj* and *R. v. Potvin*

[41] In my view, the Supreme Court's reasoning in its jurisprudence holding that pre-charge delay and appellate delay are not covered by s. 11(b) is much more helpful in answering the question of when the constitutional clock in s. 11(b) should be deemed to start and stop.

[42] In considering the scope of the protection of s. 11(b), the Supreme Court determined in *R. v. Kalanj* that its protection does not extend to the period before

a person is charged with an offence (to pre-charge delay). This means that although a person charged with an offence can claim the protection of s. 11(b), the delay to be considered and the resulting impact on the accused's rights will not include delay that occurred in the investigation of the offence before the charges were laid. Extending s. 11(b) to the pre-charge period would be unworkable. As McIntyre J. observed in *R. v. Kalanj* at para. 19, the courts are not equipped to fix a time limit for the investigation of a given offence as the investigatory period is unpredictable, circumstances will differ from case to case and much information gathered in an investigation must, by its very nature be confidential.

[43] The focus of s. 11(b) is accordingly on the prejudice that flows from unreasonable delay "in being tried on criminal and quasi-criminal charges": *R. v. Kporwodu* (2005), 75 O.R. (3d) 190 (C.A.), at para. 162. That is evident from the bulk of s. 11(b) jurisprudence that focusses on unreasonable delay in the trial process due to institutional delay and Crown delay. From this one might conclude that the protection of s. 11(b) protects the interests of a person who has been charged, *and* is subject to the processes of the court.

[44] In my view, the reasoning of the Supreme Court in *R. v. Potvin,* wherein the Court concluded that s. 11(b) does not apply to appellate delay, supports such an interpretation.

[45] In *Potvin,* the accused had been tried and acquitted and the acquittal was the subject of a Crown appeal. He asserted that there had been unreasonable delay in the appellate process and sought a remedy under s. 11(b). The question was whether he was a "person charged with an offence" during the prosecution of the appeal. Sopinka J., after referring to *Kalanj* and the principle that pre-charge delay was outside the scope of s. 11(b), stated the specific question before the court as "whether the consequences of delay resulting from an appeal…are distinguishable from pre-charge delay and can be attributed to the existence of a formal charge": para. 62. He answered that question in the negative and stated, at para. 63:

> Clearly, during the period after an acquittal and the service of a notice of appeal, the person acquitted is not a person charged. No proceeding is on foot which seeks to charge the person acquitted. Upon the appeal's being filed there is a possibility, the strength of which will vary with each case, that the acquittal will be set aside and the charge will be revived. The plight of the acquitted person is that of one against whom governmental action is directed which may result in a charge. In this respect the former accused is like the suspect against whom an investigation has been completed and charges are contemplated awaiting a decision by the prosecutor…

[46] Accordingly, the reasoning of the court in *R. v. Potvin* suggests that the period that is relevant for a s. 11(b) analysis is the period when there is a proceeding "on foot"; that is, there must be active charges outstanding against the person. In the words of Sopinka J., "s. 11(b) does not apply unless the

restriction of the interests which the subsection protects results from an actual charge”—thus, “[c]ircumstances which produce the same consequences do not qualify for the protection of this provision unless those consequences proceed from a formal charge”: at para. 62. *R. v. Potvin* therefore suggests that charges must be pending and not anticipated or spent in order to attract the protection of s. 11(b).

(iii) Conclusion

[47] Section 11(b) serves to protect the charged person’s right to freedom and to be dealt with fairly and without delay within the court system. The objective is to have an efficient system for dealing with accused persons. The ambit of s. 11(b) does not extend on a societal level to the speedy investigation of crime. Extending the protection of s. 11(b) to persons who are not actively charged with an offence would not advance the objectives of this protection.

[48] There is a caveat however. There are circumstances in which unilateral state action may control whether or not charges are withdrawn or relaid. In such circumstances, where the formal charge has been withdrawn with the intention of laying a new charge, or an information has been quashed with a new information laid, it makes sense to consider the entire period from when the first charges were laid as part of the s. 11(b) analysis. In such circumstances, the person, although not formally charged during the “gap” period, remains subject to the

judicial process, and his s. 11(b) interests will continue to be affected by the knowledge or expectation that further charges are imminent. It is reasonable to conclude that he remains subject to the process of the court. That is precisely what occurred in *R. v. Antoine*.

[49] For all of these reasons, I would interpret s. 11(b) as being engaged during any period that an accused person is in fact subject to charges, or when a person no longer actively charged remains subject to the very real prospect of new charges.

[50] In this case, as a practical matter, the respondent was not subject to charges between the time of his discharge in 1989 and when the indictment was preferred in 2010. There was nothing in the court system while the science of DNA analysis progressed, or while the police continued their investigation. Moreover, the respondent was unaware of any ongoing investigation. This is a situation where it was appropriate to stop the clock for the purpose of assessing the respondent's s. 11(b) rights to a trial within a reasonable time. While the relevant period for s. 11(b) purposes initially started when the respondent was first charged in 1987, it stopped upon his discharge in 1989. It began to run again only when the indictment was preferred in 2010.

[51] Accordingly, I conclude that the trial judge erred in including the "gap" period between the respondent's discharge on the original charges and when the

indictment was preferred for the purpose of the delay analysis under s. 11(b). It was acknowledged that this was the only period of relevance to the stay application, as there was no unreasonable delay in the processing of the original charges and in the progress of the charges following the preferred indictment. As such, the s. 11(b) application ought to have been dismissed.

[52] This conclusion is sufficient to dispose of the appeal. The trial judge's treatment of the question of prejudice to the respondent and her stay analysis, are only issues once a determination is made that there was a delay that is contrary to s. 11(b). Having found there was no such delay, it is unnecessary to consider the two other issues raised by this appeal.

[53] Finally, I note that, while it was acknowledged in the pre-trial motion and on this appeal that there was no evidence of actual prejudice to the respondent, the respondent and the trial judge referred to the *possibility* that the passage of time since the events in question could have an impact on the trial. One of the complainants is now deceased, and another was not cross-examined at the preliminary inquiry about the beer bottle found in her home, which only became significant as a result of the recent DNA evidence. Whether and the extent to which these and other factors arising from the passage of time might affect the respondent's right to make full answer and defence, and trial fairness, should be addressed in context in the course of the trial, including, through the respondent's s. 7 application, which remains outstanding.

DISPOSITION

[54] For these reasons, I would allow the appeal and dismiss the application to stay the charges against the respondent under s. 11(b) of the *Charter*. I would refer the matter back to the trial judge for trial, including the disposition of the respondent's s. 7 application.

Released: July 9, 2014
"KMvR"

"K. van Rensburg J.A."
"I agree S.T. Goudge J.A."
"I agree G. Pardu J.A."