Court of Queen's Bench of Alberta

Citation: R v Vaillancourt, 2019 ABQB 859

Date: 20191112
Docket: 151299586Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Marc Vaillancourt

Accused

Corrected judgment: A corrigendum was issued on March 9, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

Decision
of the
Honourable Mr. Justice V.O. Ouellette
Unofficial translation from French to English

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1. Introduction

[1] Twenty years after ***R v Beaulac***, [1999] 1 SCR 768 and almost 30 years after the implementation of s 530 of the *Criminal Code of Canada*, are language rights and obligations in minority communities still too little known or are they just taken lightly? Are our institutions

taking the necessary measures to give real meaning to the equality of the two official languages under s 530? Are participants in the criminal justice system proactive enough to ensure the protection of these fundamental rights which can only be exercised if the means are provided and to ensure that they can be exercised as quickly as possible? That is the challenge posed by s 530 in a province where French is the official language of the linguistic minority.

[2] The accused Marc Vaillancourt is French-speaking and he has some rudimentary knowledge of English. A sworn information was filed against Mr. Vaillancourt in the Alberta Provincial Court on October 28, 2015. He is accused of using, possessing or trafficking in a forged document and also of trafficking in property obtained by crime. The indictment against him was filed with the Court of Queen's Bench of Alberta on November 17, 2015. Given the Crown's choice to proceed by way of direct indictment, the accused did not have the opportunity to request a preliminary inquiry. As a result, his trial was scheduled to take place from April 23 to June 8, 2018.

[3] No one notified Mr. Vaillancourt of his right to be tried in French until early 2017. When he finally learned that he had this language right, the only choice open to him was to wait another year in order to be able to exercise it.

2. Issues

[4] A number of issues are raised in this case relating to s 530 of the *Criminal Code*, RSC 1985, c C-46, the impact of the failure to comply with it in general, and whether the failure to comply is particularly significant in assessing the accused's right to be tried within a reasonable time under s 11(b) of the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act*, 1982 being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

[5] I will first an overview of the facts that are important in order to understand the context. I will then summarize the law and the parties' positions. Next, I will consider the issue of delay in the light of s 11(b) of the *Charter*. Finally, I will focus on the obligations under s 530 as well as the consequences of a failure to comply with it generally and in the context of the *Charter*.

III. Facts

[6] The Crown and the defence agree on the following facts:

a) According to the disclosure, the investigation concerning Mr. Vaillancourt began in October 2012. The counts contained in the indictment, however, allege offences dating from April 1, 2011. It was not until June 12, 2013 that the accused was arrested in Laval, Quebec, during a search of a residence located on Boulevard René Laennec in Laval, where Mr. Vaillancourt was present. First, he was arrested by Constable Viens who "mentioned" a charge of fraud. Constable Viens informed Mr. Vaillancourt of his right to counsel and provided him with an opportunity to consult a lawyer to obtain legal advice.

b) Subsequently, on the same day, Mr. Vaillancourt was informed by Constable Deschênes that he was charged with a number of counts against

him, two of which (ss 368(1)(1) and 354.1) are among those counts in the information laid on October 28, 2015 in Alberta and also part of counts 6 and 8 of the direct indictment sworn on November 16, 2015.

c) The disclosure of the evidence does not reveal how Mr. Vaillancourt came to be released following the interrogation by Constable Deschênes which lasted more than five hours. The Crown has recently informed Mr. Vaillancourt that they are not aware of any other information or indictment filed in Quebec concerning the allegations currently before this court.

d) The indictment against Mr. Vaillancourt is based primarily on the evidence arising from two searches of residences in Quebec that took place on June 12, 2013, his statement to Constable Deschênes on the same day, and the evidence relating to the co-accused. Based on the disclosure, the investigation against Mr. Vaillancourt appears to have concluded on March 10, 2014.

e) With respect to June 12, 2013, Mr. Vaillancourt was arrested at 6:22 a.m. (twice the same day) on charges, two of which are among the charges he currently faces. Constables Gauthier, Viens, and Proulx, all three members of the RCMP, entered a residence occupied by Mr. Vaillancourt in Laval. Constable Viens cuffed Mr. Vaillancourt's hands behind his back with two pairs of handcuffs and the officers placed him under arrest. At 6:28 a.m., Constable Viens informed Mr. Vaillancourt of his right to counsel and his right to remain silent. The parties agree that sufficient information to support a charge were present at that time.

f) The police took him to the police station where, at 7:34 a.m., Constable Viens removed the handcuffs and conducted a pat-down search of the accused. The police transferred him to cell M104Q, without his belt or his shoes, until 10:03 a.m. when Constable Viens gave him an opportunity to contact a lawyer. He spent about 9 minutes on the phone. After that, he remained in his cell until 3:10 p.m., when Constable Deschênes came to get him up in order to question him for the next five hours.

g) Constable Viens had told Mr. Vaillancourt that he was under arrest for fraud. Constable Deschênes told him that Mr. Vaillancourt was accused of: "possession of property obtained by crime (s 354(1)); use, possession or trafficking in a forged document (s 368(1)(a)); conspiracy to commit offences; and committing an offence for the benefit of a criminal organization". As I mentioned above, on June 12, 2013, Mr. Vaillancourt was released without having been charged and on no conditions, after the police confirmed that he could return home without their assistance.

h) An information was filed in Provincial Court in Edmonton, Alberta on October 28, 2015 with "no process". It involved four accused persons: Mr. Flindt, Mr. Nault, Mr. Thibault and Mr. Vaillancourt. On November 16,

2015, the Crown filed a direct indictment, identical to the previous information.

i) A warrant for the arrest of the accused was issued on November 27, 2015. The Crown appears to have been in direct contact with Mr. Vaillancourt, as Mr. Vaillancourt signed a promise to appear on January 4, 2016 and provided it to the Crown. On January 22, Mr. Vaillancourt was present in the Court of Queen's Bench of Alberta before Read J. without counsel, but Mr. Curtis Steeves was present as a "friend of the court". Nothing was said about Mr. Vaillancourt's right to stand trial in the official language of his choice. From that time on, all legal proceedings were conducted in English with a French interpreter available to Mr. Vaillancourt.

j) The Crown stated that disclosure would be ready on February 5 and the case was adjourned to March 4, 2016.

k) Mr. Vaillancourt communicated with at least four defence counsel regarding the charges against him, including Mr. Michel Fontaine, Mr. Douglas Lee, Ms. Olivia Balanga-Santos and Ms. Shannon Emery, all of whom spoke French fluently, except for Mr. Lee. Of these four, only Ms. Emery informed Mr. Vaillancourt of his right to have a trial in French. Mr. Lee did not have any interactions in French with Mr. Vaillancourt and, at times, he needed the assistance of a French interpreter when dealing with Mr. Vaillancourt. Mr. Vaillancourt understood that Mr. Lee could not conduct a trial in French.

l) Mr. Lee appeared in the absence of Mr. Vaillancourt on March 4, 2016. Messrs. Nault and Flindt requested more time to retain counsel and Messrs. Vaillancourt and Thibault needed time to consider the disclosure. The matter was adjourned to April 1 to set dates and to give Mr. Lee time to file a designation of counsel.

m) On April 1, the designation was in fact filed, but the notation that was on the file since November 27, 2015 indicating that there was still "no process" was still on the file. Greckol J. then issued a summons to the accused to appear for identification purposes. The matter was adjourned to May 13, 2016 at the request of defence counsel.

n) In the meantime, the Crown sent the court a copy of the promise to appear that Mr. Vaillancourt had signed more than five months earlier. Considering this additional information, I cancelled the summons on April 4, 2016.

o) On May 13, 2016, a summary resolution date was set for August 5, 2016 for Vaillancourt, Nault and Thibault. The parties anticipated the preparation of an agreed statement of facts. Mr. Flindt opted for a trial between April 10 and May 5, 2017. August 5, 2016 was not the earliest available date; in fact, all Fridays were available for this guilty plea, as it

was going to be entered during the Friday QBAC's list. August 5, 2016 was chosen by Mr. Chivers and Mr. Lee based on their schedules.

p) The question of the need for an interpreter was mentioned for the first time in the endorsements on the back of the indictment on August 5, 2016: "Court & counsel – speak to accused interpreter". Mr. Vaillancourt appeared in person before Macklin J., ostensibly for the summary resolution. Mr. Vaillancourt was accompanied by an agent for his lawyer, Mr. Lee. Mr. Vaillancourt and Mr. Nault decided that they were no longer prepared to resolve the matter and requested a trial. Their cases were joined with Mr. Flindt's case for a joint trial. Macklin J. ordered that the dates fixed for Mr. Flindt's trial be extended by two weeks and he also ordered that an interpreter be present for the trial to interpret verbatim. The case was adjourned to October 7 to confirm the trial and pre-trial conference dates.

q) On October 7, the dates were confirmed and the pre-trial conference was scheduled for November 17, 2016. The day before the conference, Mr. Lee requested an adjournment. Mr. Vaillancourt was not present. On November 17, at the hearing before Moreau J. (as she then was), counsel for Mr. Vaillancourt indicated that the accused wanted to avail himself of his right to re-elect from a jury trial to judge alone.

r) The notice of re-election was filed on December 16, 2016, and the matter was brought forward to January 3, 2017 for resolution, at the request of Mr. Vaillancourt. On January 3, Mr. Vaillancourt could not travel to Alberta and the matter was adjourned to January 23, 2017.

s) On January 23, 2017, Mr. Lee requested permission to withdraw from the case. Communication between Mr. Lee and his client had deteriorated and Mr. Vaillancourt had indicated that he no longer wanted to plead guilty. Macklin J. granted Mr. Lee’s request and agreed to be the case management judge. A date was set, namely February 10, to confirm that Mr. Vaillancourt's new counsel, Ms. Emery, would be ready to proceed with the trial on April 10.

t) Neither Mr. Lee nor his agent, Ms. Balanga-Santos, had informed Mr. Vaillancourt that he could have his trial in French, rather than in English with an interpreter. Nor had any judge informed him of this right. At the time the parties presented their oral arguments, they agreed that at an accused’s first appearance in Alberta, neither the judges of the Provincial Court nor the judges of the Court of Queen's Bench would ask the accused as a matter of course in what language he chose to stand trial. Mr. Vaillancourt did not know that he had this right before he met Ms. Emery. Had he known, he would have opted for all proceedings to be in French, since his knowledge of English is limited.

u) On February 8, 2017, Ms. Emery appeared before Macklin J. and indicated that she was not available for any of the dates that had been set for the trial. In addition, if the case went to trial, Ms. Emery indicated that her client would request that his trial be in French. Counsel then requested an adjournment. Macklin J. decided not to adjourn the trial and set February 22 for another pre-trial conference.

v) On February 22, Ms. Emery indicated that she was ready to begin the trial according to the already established schedule, but that she was not available for 9 of the 28 days reserved for the trial. Since the trial would take place in French, however, she was of the view that there would be less time needed for interpretation and that the remaining 19 days would suffice.

w) The Crown raised two objections in this regard. First, it was not convinced that 19 days would be enough to complete the trial, especially since the Crown still anticipated a substantial need for interpretation (28 days were scheduled for the trial). Second, both Mr. Boyd and Mr. Rosborough (Crown prosecutors originally on the record) were unilingual and would not be able to proceed in French; it would take time to find a francophone Crown prosecutor who would have to quickly become familiar with the case.

x) Ms. Emery indicated that if the case was adjourned there would be no waiver of Mr. Vaillancourt's rights under s 11(b) of the *Charter*. Macklin J. declined to comment on the s 11 (b) issue but adjourned the trial. The Crown severed the co-accused from the indictment and obtained the dates of April 23 to June 8, 2018 for Mr. Vaillancourt’s trial, and these dates were confirmed by the judge.

y) The court corresponded with the parties by email and on February 5, 2018, a pre-hearing conference date was set for February 13, 2018. In the meantime, a *Charter* notice was filed on February 12. On February 13, I ordered that the arguments regarding ss 8 and 11(b) be heard on March 8 and 9, 2018. The defence said it would prepare written argument on s 11(b) argument, but that it was waiting for the transcript. I ordered that the written argument be filed on February 28, 2018.

z) Mr. Fontaine is an experienced defence lawyer in Edmonton who is also bilingual in English and French.

aa) Mr. Lee is an experienced defence lawyer. He does not speak French and his communications with Mr. Vaillancourt were conducted in English or through an interpreter (either Ms. Balanga-Santos or a court interpreter).

bb) Ms. Olivia Balanga-Santos is a junior lawyer in Edmonton who is bilingual (English and French).

cc) Mr. Lee was the only lawyer, aside from Ms. Emery, who was retained by Mr. Vaillancourt for this matter. Mr. Fontaine assisted Mr. Vaillancourt with an application to recover seized goods, but he was not retained for the trial. Ms. Balanga-Santos acted as an interpreter and appeared twice as Mr. Lee's agent.

dd) Ms. Balanga-Santos was present on August 5, 2016, when Mr. Vaillancourt agreed to be tried jointly with Mr. Nault's in April 2017. However, she has no recollection of the matter.

ee) The parties informed this court of the practice in the Northwest Territories, where territorial judges always ask at the first appearance whether the accused's choice of language rights had been confirmed. If the judge forgets, the Crown will often pose the question.

[7] In addition to the joint facts and the written agreed statement of facts, the Crown concedes that the total delay between the information and the scheduled end of the trial is beyond the 30-month presumptive ceiling, just under 32 months. Also, the Crown admits and concedes that s 530 of the *Criminal Code* is a quasi-constitutional provision that triggers ss 16 and 19 of the *Charter*. The Crown concedes that s 16 also applies to the courts and specifically to superior courts.

[8] It is also agreed that the trial that had been scheduled for Mr. Flindt was initially scheduled for 18 days from April 10 to May 5, 2017, but that when the accused Vaillancourt, Nault and Thibault were joined with Mr. Flindt, the judge ordered that it be extended for two weeks (April 10 to May 19, 2017). Finally, it is also conceded that Mr. Nault's trial was completed within a six-day period in April 2017.

IV. Law

[9] The Supreme Court's decision in ***R v Jordan***, 2016 SCC 27 created a ceiling beyond which the delay is presumed to be unreasonable. In the event that the Crown proceeds by indictment, this period is 30 months from the date of the charge to the anticipated end of the trial. If the delay exceeds 30 months (less the delay attributable to the defence), the delay is presumed to be unreasonable and the onus is then on the Crown to establish the presence of exceptional circumstances: ***Jordan*** at para 47. Exceptional circumstances may fall into two categories: discrete and exceptional circumstances or events, and the particular complexity of the case. In addition, for cases which were already in the system when ***Jordan*** was issued, being July 8, 2016, a transition period must also be part of the analysis under s 11(b) whereby the new framework of analysis is applied according to the context and with flexibility, while considering the state of law that prevailed before the judgment ***Jordan***.

V. Crown's Position

[10] The time period in this case relevant to the analysis under ***Jordan*** ran from October 28, 2015 to the end of the trial which was scheduled to be June 8, 2018, and Crown accepts that this exceeds the 30-month ceiling set by the Supreme Court in ***Jordan***.

[11] However, the Crown takes the position that there are two time periods which are solely or directly attributable to the defence and a third period to be decided by the court. Those delays attributable solely to the defence are from March 4, 2016 to April 1, 2016 and from April 1, 2016 to May 13, 2016. This is a period of approximately 10 weeks which would bring the net period to 29 months and thus lower than the ceiling set in ***Jordan***.

[12] The Crown also submits that 12½ months should be characterized as defence delay, based on the accused's request for an adjournment of the trial in February 2017.

VI. Accused's Position

[13] Mr. Vaillancourt submits that the delay of almost 32 months between the laying of the charges and the anticipated end of the trial is unreasonable.

[14] Moreover, Mr. Vaillancourt asserts that even the period before the filing of the indictment should be considered under s 7 of the *Charter* or an abuse of process. Mr. Vaillancourt is also of the opinion that there has been a breach of his rights under s 530 of the *Criminal Code* which also results in an infringement of his rights under ss 7, 11(b), 16 and 19 of the *Charter*.

VII. Constitutional Provisions and s 530 of *Criminal Code*

[15] Sections 7, 11(b), 16 and 19 of the *Charter* as well as s 530 of the *Criminal Code* in force during the relevant period provided as follows:

> ***Life, freedom and security***
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> ***Criminal and penal matters***
>
> 11. Any person charged with an offence has the right:
>
> [...]
>
> (b) be tried within a reasonable time; [...]
>
> ***Official languages of Canada***
>
> 16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.
>
> […]
>
> ***Advancement of status and use***
>
> (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

[…]

Language of the accused

530 (1) On application by an accused whose language is one of the official languages of Canada, made not later than

(a) the time of the appearance of the accused at which his trial date is set, if

(i) he is accused of an offence mentioned in section 553 or punishable on summary conviction, or

(ii) the accused is to be tried on an indictment preferred under section 577,

(b) the time of the accused's election, if the accused elects under section 536 to be tried by a provincial court judge or under section 536.1 to be tried by a judge without a jury and without having a preliminary inquiry, or

(c) the time when the accused is ordered to stand trial, if the accused

(i) is charged with an offence listed in section 469,

(ii) has elected to be tried by a court composed of a judge or a judge and jury, or

(iii) is deemed to have elected to be tried by a court composed of a judge and jury,

a justice of the peace, provincial court judge or judge of the Nunavut Court of Justice shall grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.

Idem

(2) On application by an accused whose language is not one of the official languages of Canada, made not later than whichever of the times referred to in paragraphs (1)(a) to (c) is applicable, a justice of the peace or provincial court judge may grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada in which the accused, in the opinion of the justice or provincial court judge, can best give testimony or, if the circumstances warrant, who speak both official languages of Canada.

Accused to be advised of right

(3) The justice of the peace or provincial court judge before whom an accused first appears shall ensure that they are advised of their right to apply for an order

> under subsection (1) or (2) and of the time before which such an application must be made.
>
> ***Remand***
>
> (4) Where an accused fails to apply for an order under subsection (1) or (2) and the justice of the peace, provincial court judge or judge before whom the accused is to be tried, in this Part referred to as "the court", is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or, judge and jury, as the case may be, who speak that language or, if the circumstances warrant, who speak both official languages of Canada.
>
> [...]

VIII. Analysis

[16] The first step according to the analytical framework in ***Jordan*** is to calculate the total delay taking into account, where applicable, the periods of delay attributable solely to the defence.

A. Periods attributable to the accused?

1. Period from March 4 to April 1, 2016

[17] Regarding the period from March 4 to April 1, 2016, it is important first to note that the indictment was filed against four individuals. As established in the facts, the accused Nault and Flindt requested more time to retain counsel and the accused, Vaillancourt and Thibault, also requested more time to consider disclosure. Further, it should be noted that March 4, 2016, was the first day that Mr. Vaillancourt was represented by counsel, after the lawyer filed the designation. Regardless of the fact that Mr. Vaillancourt's lawyer wanted some time to review the disclosure, the case would have been adjourned and was adjourned because two of the accused did not even have a lawyer yet.

[18] With regard to the delays attributable to the actions of the co-accused, this issue has already been considered by the Supreme Court in ***R v Vassell***, 2016 SCC 26. More recently, the Alberta Court of Appeal considered this in ***R v Klassen***, 2018 ABCA 258 at paras 39-40, 88-92 and 95-97.

[19] So even though the four-week delay between March 4, 2016 and April 1 was solely due to Mr. Vaillancourt's request and not because of the co-accused, it seems to me that a period of four weeks for consideration of the disclosure is entirely reasonable given the Crown's position that there was a large number of documents and evidence to review.

[20] In addition, the Supreme Court, in ***Jordan***, clearly stated that the time required to respond to charges is not attributable to the accused, meaning that the accused is permitted the time necessary to review the disclosure, which in this case was voluminous, in order to be in a position to make full answer and defence: ***Jordan*** at para 65; ***R v Cody***, 2017 SCC 31 at para 29. Therefore, this one-month delay (between March 4, 2016 and April 1, 2016) is not attributable to the accused.

2. Period from April 1 to May 13, 2016

[21] On April 1, the case was adjourned to May 13, 2016 and the reason recorded on file was that there was "no process". This explains why the judge, during the appearance on April 1, issued a summons for the accused Vaillancourt to appear before the Court in order to fill the gap of "no process".

[22] However, as agreed in the facts, it appears that the Crown had been in direct contact with Mr. Vaillancourt, as Mr. Vaillancourt had signed a promise to appear on January 4, 2016 and sent it back to the Crown. In fact, he appeared in person before the Court in Alberta on January 22, 2016. It should be noted that Mr. Vaillancourt was not present on April 1, 2016 and that the adjournment ordered by the Court to allow a summons to the accused to appear for identification purposes was not necessary, because he had already appeared.

[23] As agreed between the Crown and the defence, the following fact is also relevant:

> In the meantime, the Crown sent the court a copy of the promise to appear that Mr. Vaillancourt had signed more than five months earlier. Mr. Justice Ouellette, armed with this additional information, cancelled the summons on April 4, 2016.

[24] Following the Crown's application to quash on April 4, 2016, there was no application by the Crown to vacate the May 13, 2016 date that had been set by the court to allow the summons to be served on the accused, even though it had already been done five months earlier. It is therefore difficult in these circumstances to suggest that the delay would therefore be attributable to the accused. This is not a delaying tactic by the accused to push back the trial. In short, there is no doubt, in my view, that this period is not attributable to the accused.

3. Period from February 22, 2017 to June 8, 2018

[25] The facts regarding this period have already been detailed in paragraphs 6(v)-(y) and will not be repeated here. In addition to these facts, the transcript of the appearance on February 22, 2017 before Macklin J. is relevant. During this hearing, Macklin J. confirmed Mr. Vaillancourt's wish to stand trial in French, as had been requested on February 8, 2017, and the judge also confirmed his right to have his trial in French (p. 1).

[26] With respect to the date already set for the trial of the four accused from April 10, 2017 to May 19, 2017, which contemplated an interpreter for Mr. Vaillancourt, word for word, during the trial (see paragraph 6(p) above), his counsel Ms. Emery stated the following regarding her availability for the same period that had already been set (p. 2 of the transcript): "I have almost four weeks that I have available so three-and-a-half is really where I'm at. If the trial were to proceed completely in French where we don't have to have an interpreter for a lot of it, I think actually that would be sufficient". Ms. Emery also confirmed that she had made changes to her schedule so that she could proceed with the trial on the dates originally scheduled (p. 5).

[27] With respect to the possibility of having a bilingual Crown prosecutor for the trial in French, the Crown told the judge that this was practically impossible (p. 8): "I can certainly advise you to get a bilingual Crown up to speed for a six-week trial is virtually impossible with a start date of April 10th". Ms. Emery replied as follows (p. 10): "And with respect to my friend saying it was virtually impossible to get a new Crown to come up to speed on this matter, I only got retained last week". The facts show that Mr. Lee was granted permission to withdraw from the case on January 23, 2017 and that Ms. Emery was not retained until February 8, 2017. She confirmed several times during the February 22, 2017 appearance that she was able to proceed with the April to May 2017 dates so that the trial would not be adjourned.

[28] The transcript and exchanges between the judge and the Crown are such that the Crown indicated that it would not be able to find a bilingual Crown prosecutor between February 22 and April 10, 2017, and further, that it doubted that the time provided for the trial with the adjustments proposed by Ms. Emery would be sufficient. Therefore, Macklin J. indicated that the only option was to adjourn Mr. Vaillancourt's trial to a later date so that he could proceed in French.

[29] Furthermore, this decision was made after the judge raised the issue of delay and s 11(b) of the *Charter*. This discussion took place because Mr. Vaillancourt's trial was going to be adjourned to April 22 to June 8, 2018. The parties agreed that the anticipated end date of June 8, 2018 for the trial was beyond the 30-month ceiling established by the Supreme Court in ***Jordan***.

[30] Therefore, Macklin J. asked the following question (page 12):

> . . . but what I want to know is this: Is the Crown prepared to take the chance - because it is a chance - that Ms. [Emery], on behalf of Mr. Vaillancourt, will bring an 11(b) application at the time of trial? Regardless of whether you become entitled to know the communications that might have taken place between counsel and Mr. Vaillancourt at any given time, regardless of that issue, is the Crown prepared to take the chance that an 11(b) application, on behalf of Mr. Vaillancourt, will be successful?

[31] The Crown subsequently replied that this would be a matter for the court to decide (p. 12: "balancing for the Court"). Macklin J. asked the following question (p. 13): "What you are telling me is the Crown is prepared to take the chance?" The Crown replied: "Well, yes, the Crown is prepared to take that chance, Sir". Macklin J. reiterated the same concern again (p. 13): "I just want to make sure that you are comfortable in an adjournment being granted and your ability to withstand an 11(b) application; because if you are not, you are going to have to consider whether or not you would like this trial to proceed at this time beginning on April 10". In my opinion, this exchange that took place in 2017 is a perfect example of the culture of complacency described in ***Jordan*** and that must change, not only for delays in the legal system, but also with regard to the language rights of the accused. I will come back to this last point a little later in this decision.

[32] It should also be noted that during the hearing before Macklin J. on February 22, 2017, the Crown wondered if, indeed, only Ms. Emery had informed Mr. Vaillancourt of his right to have a trial in French, and no other lawyer on the file. The Crown also raised the issue of whether Mr. Vaillancourt had been made aware in general of his right to have his trial in French.

Indeed, the Crown asked whether Mr. Vaillancourt was prepared to waive solicitor-client privilege. Mr. Vaillancourt agreed and the Crown called Ms. Olivia Balanga-Santos to testify at the hearing before this court on March 8, 2018. Ms. Balanga-Santos' testimony was unequivocal: she did not inform Mr. Vaillancourt of his right to have his trial in French under s 530 of the *Criminal Code*.

[33] In fact, according to the agreed statement of facts filed by the parties, no judge or lawyer (whether Crown or defence), other than Ms. Emery, and no participant in the criminal justice system informed Mr. Vaillancourt that he could be tried in French instead of in English with the assistance of an interpreter. Moreover, the Crown concedes that Mr. Vaillancourt did not know that he had the right to have his trial in French before he met Ms. Emery in February 2017. In addition, all agree that if he had known, Mr. Vaillancourt would have opted for everything to be in French since his knowledge of English is limited.

B. Exceptional circumstances?

[34] The total delay exceeding 30 months is thus presumed to be unreasonable. So the next question is whether there are exceptional circumstances, that is, either discrete circumstances or events, or whether the case is complex.

[35] First, the only exceptional circumstances and events would be the particular issue of the accused's right to be tried in French. However, I do not consider that rights guaranteed by the *Criminal Code* and the *Charter* can be considered as discrete circumstances or events, given their existence since at least 1982 and 1990 with respect to s 530.

[36] With respect to the complexity of this case, the Crown argued that this case was complex because of the number of vehicles involved, according to the evidence. There are only three counts that are closely related and involve specific and limited dates, from 2011 to 2013. Further, the Crown conceded on March 9, 2018, that all the relevant evidence, in its opinion, resulted from the searches that had taken place on June 12, 2013, at two sites owned by Mr. Vaillancourt in Quebec. This would suggest that the main evidence against Mr. Vaillancourt is documentary and likely not complex. In addition, even though Mr. Nault was not implicated in as many stolen cars as Mr. Vaillancourt, he was also charged with three counts almost identical to those against Mr. Vaillancourt and his trial only took six days. Therefore, it cannot be said that this case is particularly complex.

[37] Given that the indictment was filed before ***Jordan***, it is relevant to consider Mr. Vaillancourt's s 530 rights and the effect of the late notice in this regard.

C. Was there a breach of Mr. Vaillancourt's rights under s 530 of the *Criminal Code*?

[38] Subsections 530(1) and (2) of the *Criminal Code* give the accused the absolute right to be tried in the official language of his choice, provided his request is made within the allotted time. Subsection 530(4) makes this right subject to the discretion of the trial judge where the accused's application is made later than as provided for in subsections 530(1) and (2): ***Beaulac*** at paras 7, 28, 31 and 56. Section 530 has been in force in all provinces since at least January 1, 1990. Given that the delay in Mr. Vaillancourt's trial is directly linked to s 530 of the *Criminal Code* as it read at the time, it is necessary to analyze where the responsibilities lie. It is also necessary to

clarify the circumstances of the late application, the reasons for the delay with respect to s 530, and when the accused became aware of his rights.

[39] In ***Beaulac*** at para 20, the majority of the Supreme Court of Canada explained that there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities. Referring to s 2 of the federal *Official Languages Act*, which describes the purpose of that statute, the Court explained that the objective of protecting official language minorities is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. In ***Beaulac***, the court noted the importance of s 16 of the *Charter* which officially recognizes the principle of equality of Canada's two official languages and which formalized the notion of advancement towards equality of status or use of Canada's official languages. The Supreme Court described in paragraph 20 the language rights, as under s 530, and underlines the importance of putting in place the necessary means so that they are not illusory:

> Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees […]. [Citations omitted]

[40] At paragraph 28, the Supreme Court of Canada clearly sets out the courts' obligations of institutional bilingualism under s 530:

> Section 530(1) creates an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own. The courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada. In my view, this is a substantive right and not a procedural one that can be interfered with. […]

[41] In this case, everyone agrees and the facts establish that no lawyer or judge informed Mr. Vaillancourt of his right until February 2017. It is also a fact that Mr. Vaillancourt was not aware of his right to be tried in French, and that if he had been, he would have made such a request immediately. Therefore, it goes without saying that the guaranteed right of Mr. Vaillancourt under s 530 of the *Criminal Code* was violated and that the safeguards of s 530(3) that are in place to ensure that accused persons are systematically informed of their rights have failed. In the following paragraphs, I will consider the consequences of non-compliance with this provision and whether it necessarily results in an infringement of the *Charter* because of the fundamental nature of this language right.

D. Does a violation of subsection 530(3) result in a violation of the rights of the accused under the *Charter*?

[42] The question of whether contravening s 530 necessarily result in a *Charter* infringement is raised by both parties because they agree on the quasi constitutional nature of this provision. This question is certainly relevant in determining the appropriate remedy in the event of a breach. For example, in ***R v Deveaux***, [1999] NSJ No 477, the Nova Scotia Supreme Court held

that a violation of s 530(3) results in a violation of the rights of the accused guaranteed by ss 15, 16 and 19 of the *Charter*. In this case, where the trial was held in English, the appeal was allowed and a new trial in French was ordered in Provincial Court. In contrast, in ***R v MacKenzie***, 2004 NSCA 10, the Nova Scotia Court of Appeal held that a violation of s 530(3) did not result in a violation of ss 15, 16 or 19 of the *Charter* and therefore did not give rise to a remedy under s 24(1) of the *Charter* so as to justify a stay of proceedings: paras 31, 39, 57, 60, 68 and 69. Further in that case, the Court of Appeal concluded that there was no abuse of process and no violation of s 7 of the *Charter*, therefore a stay of proceedings was not justified on these bases either: para 78. However, I note that the Court of Appeal in ***MacKenzie*** does not rule out the possibility of ordering a stay of proceedings where, for example, the violation of language rights is intentional and systemic.

[43] In the present case, the Crown admits and concedes that s 530 of the *Criminal Code* has a constitutional basis which triggers the application of ss 16 and 19 of the *Charter*.

[44] Regarding s 19 of the *Charter*, I note that it applies to courts established by Parliament which probably does not include the Court of Queen's Bench: see for example ***MacKenzie*** at paras 35-39. But there is no doubt that both s 19 and s 16 are relevant to understanding the basis for s 530. They are part of the backdrop.

[45] In my opinion, the accused's argument on the violation of ss 16 and 19 is interesting, but the reasoning of the judgment ***MacKenzie*** is persuasive and, in any event, the circumstances of this case lead me to conclude that there is no violation of these two sections of the *Charter*. Consequently, the violation of s 530 of the *Criminal Code* will not normally give rise to a remedy under s 24(1) of the *Charter*: see ***Mazraani v Industrial Alliance Insurance and Financial Services Inc***, 2018 SCC 50 at paras 46-54 which opens the door to the development of varied and creative remedies. However, any remedy must be appropriate.

[46] There is no doubt that a breach of s 530 of the *Criminal Code* is a “substantial wrong” and not a simple procedural irregularity given the nature of language rights, the purpose of s 530, as well as the requirement of substantive equality: ***Beaulac*** at paras 23, 25, 28, 34, 45, 47, 53 & 54; ***Bessette v British Colombia (Attorney General)***, 2019 SCC 31 at para 38. Illustrating the real importance of this provision, the Court recently confirmed in ***Bessette*** the mandatory nature of s 530 and determined that the courts' failure to comply with it constitutes a jurisdictional error.

[47] The appropriate remedy in most cases of a breach of s 530 is the ordering of a new trial or a new hearing: ***Bessette*** at para 39; ***Mazraani*** at para 48. In this case, the breach of s 530 must be considered in the broader context of the proceedings that began with the indictment in October 2015. As mentioned above, courts are required to be institutionally bilingual in order to ensure substantive equality of Canada's two official languages: ***Beaulac*** at paras 24 and 28. This statement by the Supreme Court of Canada has been in place since 1999.

[48] In ***R v Parsons***, 2014 QCCA 2206, the court clearly stated that all participants in the criminal justice system must play a proactive role under s 530. In the opinion of the Quebec Court of Appeal, defence and prosecution lawyers must promote the full application of ss 530 and 530.1 to ensure equal access to the courts, being access in the official language that the accused declares to be his own: para 35. Not only must trial judges give notice under s 530(3) to all accused (even if they do not identify themselves as speaking French, English or otherwise),

they must also play a proactive role in implementing the protection of the language rights of accused persons. I note that in Alberta, there is a specific ethical obligation for defence lawyers to advise their clients of the right to be able to proceed in either of the official languages: *Law Society of Alberta, Code of Conduct*, r 3.2-7, 3.2-8 (updated to April 26, 2018). With respect to the Crown, a prosecutor has, at a minimum, an obligation to act in the interest of the public and the administration of justice: *Law Society of Alberta, Code of Conduct*, r 5.1-4. I also note, in passing, the practice in the Northwest Territories where prosecutors confirm with the accused in the event of an oversight by the judge.

[49] In this case, there was obviously a problem on the part of the courts and also on the part of the lawyers who did not notify Mr. Vaillancourt of his rights.

[50] It is also clear that the Crown was not in a position to fulfill its obligations of bilingualism which ensue from the application of s 530.

[51] In short, several aspects are problematic. It is true that the obligation s 530(3) imposes on judges was not respected here, but considering that part of the evidence was in French and that an interpreter was planned, counsel had several indicia that s 530 could be raised. The Crown took the position that it could not find a bilingual prosecutor to conduct the trial that would begin two months later. The fact remains that if Mr. Vaillancourt's lawyer could be ready to conduct this trial with two months of preparation time, there is no reason why the Crown could not do the same, or at a minimum, it should have found the means to do so considering s 530 of the *Criminal Code*. In fact, Mr. Vaillancourt made sure to select a lawyer who would be available for trial on most of the dates that were originally scheduled and then effectively did not request an adjournment. A culture of complacency with regard to rights as significant as language rights is contrary to the principles laid out by the Supreme Court.

[52] In my opinion, there is no reason why this trial could not have been completed in 19 days as proposed by counsel for Mr. Vaillancourt.

[53] First, the dates that were originally set between April 10 and May 19, 2017, or 28 days, contemplated four accused with word-for-word interpretation during the entire trial.

[54] Second, the number of days proposed by Mr. Vaillancourt's lawyer, which were essentially within the same dates originally set for April and May, would have been sufficient, given that the trial would have been conducted in French and there would not be the constant need for word-for-word interpretation for the duration of the trial. There would have been a certain amount of interpretation, but that would have been only for the witnesses who did not speak French.

[55] Third, even if Mr. Nault did not have so many charges against him, the bulk of the trial would likely have been with the same witnesses, and Mr. Nault's trial took a total of only six days to complete.

[56] In summary, Mr. Vaillancourt was ready to stand trial in French in April and May 2017, but the court had to adjourn the trial because the Crown took the position that it did not believe that it would be able to find a bilingual prosecutor within the two months before the trial began and that the number of days (19) would be sufficient. This argument that 19 days would not suffice is not convincing and is rejected. Clearly, 19 days were ample time for the trial of a single accused.

[57] In the result, as noted by the judge on February 22, 2017, if the trial was to be adjourned because the Crown was of the view that it could not have a bilingual prosecutor who would be ready for April 10, nor that the trial could be conducted within the proposed 19 days, the new trial date scheduled to end on June 8, 2018, would exceed the ceiling established in ***Jordan***. The Crown's position was that it was ready to take that chance.

E. Is the delay justified through the application of the transitional exceptional circumstance?

[58] The final issue is whether the transitional exceptional circumstance justifies the delay. I believe it is important to reiterate a few key points. On February 7, 2017, Mr. Vaillancourt was informed of his right to be tried in French. On February 8, 2017, counsel for Mr. Vaillancourt informed the case management judge that Mr. Vaillancourt was considering the possibility of requesting a trial in French. Counsel also informed the case management judge that she was not available for the trial dates, as she was new counsel of record and had other trials scheduled for April 10 to May 19, 2017. Counsel for Mr. Vaillancourt applied to adjourn the trial, which application was dismissed by the case management judge.

[59] Again, during the appearance before the case management judge on February 22, 2017, counsel for Mr. Vaillancourt confirmed that her client now wanted to be tried in French, which was granted by the case management judge. Counsel also informed the court that she would be ready to proceed with the trial starting on April 10, but that she was not available on every day scheduled for the original trial. The Crown indicated that the trial could not be completed within 19 days as proposed by counsel for Mr. Vaillancourt. In addition, the Crown confirmed that there was no Crown counsel available to conduct the trial in French.

[60] Following lengthy discussions between the lawyers and the case management judge on February 22, 2017, the case management judge said he had no other choice but to adjourn the April 2017 trial, given the position of the Crown.

[61] In conclusion, Mr. Vaillancourt's request for adjournment on February 8, 2017 was refused. Furthermore, he did not request further adjournments, as he was in a position to proceed with his trial in French as of April 10, 2017. However, it is also important to note that the court initially failed in its obligations thus contravening s 530, and that the Crown did not have the necessary bilingual resources, resulting in a failure to respect the spirit of s 16 of the *Charter*.

[62] As for Mr. Vaillancourt, he did not contribute to the delays in this case. He wanted his trial to proceed as planned, despite the late notice of his language rights in February 2017. If we apply the analytical framework in ***R v Morin***, [1992] 1 SCR 771, much of the delay in this case is institutional. The importance of Mr. Vaillancourt's rights, the fact that he was ready to proceed (and the Crown was not), the fact that this right under s 530 is recognized, codified and the subject of clear jurisprudence, as well as the real prejudice inherent not only as to the delay, but also to the lack of protection of his rights for a significant period of time, lead me to conclude that the transitional exceptional circumstance does not justify the delay in this case.

[63] The Crown has not demonstrated that the delay is justified by the transitional exception.

[64] Given this conclusion regarding s 11(b) of the *Charter*, it is not necessary to consider the issue relating to s 7 of the *Charter*.

IX. Conclusion

[65] For all of these reasons, I find that Mr. Vaillancourt's right to be tried within a reasonable time under s 11(b) of the *Charter* has been infringed. The violation of s 11(b) of the *Charter* in the present context of the failure to respect his language rights under s 530 of the *Criminal Code* and in the light of s 16 of the *Charter*, leads me to conclude that a stay of proceedings under s 24(1) of the *Charter* and as contemplated in ***Jordan*** must follow.

Heard on the 8th and 9th days of March, 2018.
Dated at the City of Edmonton, Alberta this 12th day of November, 2019.

V.O. Ouellette
J.C.Q.B.A.

Appearances:

J.P. Quenneville
Alberta Justice
for the Crown

Shannon Gunn Emery
Gunn Law Group
for the Accused

Corrigendum of the Decision
of
The Honourable Mr. Justice V.O. Ouellette

The date filed needed to be changed from 20210309 to 20191112.