

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN
Respondent

— AND —

DOUGLAS BALDWIN
Applicant

Before Justice Peter Tetley
Application Heard July 23, 2009
Ruling on Section 11(b) Application released August 11, 2009

Mr. D. Parke..... for the Crown
Mr. I. Isenstein for the accused Douglas Baldwin

Tetley J.:

[1] This is a ruling on application by Douglas Baldwin for an order pursuant to section 24 (1) of the *Charter* staying the charge before the court on the basis that the applicant's right to be tried within a reasonable time as required by section 11 (b) of the *Charter* has been violated.

Chronology of Proceedings

[2] On June 13, 2008 the applicant was arrested on charges of impaired care and control of a motor vehicle, (s. 253 (a) of the *Criminal Code*) and care and control of a motor

vehicle while the concentration of alcohol in his blood exceeded the legal limit contrary to s. 253 (b) of the *Criminal Code*.

[3] For reasons that remain unexplained the formalization of the charges by way of a sworn information, or charging document, did not occur until August 6, 2008, two days prior to the applicant's initial court appearance.

[4] The applicant retained the services of legal counsel in advance of the first court appearance. On June 20, 2008 Mr. Baldwin's lawyer, Irwin Isenstein, forwarded a detailed faxed request to the Crown seeking disclosure of the Crown's case.

[5] The initial disclosure request was met by a faxed response from the Crown on August 8, 2008, the date of the applicant's first court appearance. The letter confirmed disclosure materials had been provided at the time of the August 8, 2008 court attendance.

[6] A subsequent defence request for additional disclosure followed on August 21, 2008. Defence counsel's faxed letter to the Crown on that date included a request for a copy of any audio or video recordings of the applicant that may have occurred during his processing at the Toronto Detachment of the Ontario Provincial Police.

[7] The case was adjourned until September 5, 2008 from the second appearance date of August 22, 2008 to allow sufficient time for the additional requested disclosure to be forwarded. This reason for the adjournment was confirmed in Mr. Isenstein's August 26, 2008 faxed letter to the Crown, receipt of which was acknowledged by the Crown on September 2, 2008.

[8] As no response material had been received by September 5, 2008 the matter was initially adjourned to September 15, 2008 and subsequently to September 29, 2009. In the interim an apparently largely undecipherable copy of one of the investigating officer's notes was received by defence counsel with no response being provided to counsel's previous request for any existing videotape or DVD recordings of his client while in police custody.

[9] By faxed letter from the Crown's office dated September 24, 2008, Mr. Isenstein was informed that no video or DVD recordings had been made of the applicant during the processing of the charges at the Toronto Detachment of the Ontario Provincial Police. Receipt of this information prompted Mr. Isenstein to inquire as to the reason why the usual process of recording the booking of an arrested individual as well as the breath test procedure was not carried out following the arrest of Mr. Baldwin.

[10] On October 3, 2008 a date of July 24, 2009 was scheduled for the trial of the impaired care and control offence with the over 80 care and control offence being withdrawn that day at the Crown's request. A six hour trial time estimate was indicated based on discussions that were reportedly conducted by Mr. Isenstein and Assistant Crown Attorney Harold Dale. The only alternative earlier trial date offered by the Court was February 24, 2009, a date that could not be accommodated by the Crown.

[11] Surprisingly, on January 26, 2009, Mr. Isenstein received a letter from the Case Management Co-ordinator of the Crown Attorney's office in Newmarket in "response" to counsel's September 24, 2008 inquiry as to the rationale for the non-recording of his client's processing. The single paragraph reply was not particularly enlightening and indicated that no video was available of Mr. Baldwin's breath test procedure as the O.P.P. were in the

process of changing the employed technology from “VHS to DVD” at the time of the applicant’s arrest.

[12] In keeping with the local practice direction this s. 11(b) application was originally brought in advance of the July 24, 2009 trial date. On the date initially scheduled for the hearing of his application, July 3, 2009, the s. 11(b) application was adjourned to the previously scheduled trial date. The adjournment was not opposed by the Crown and was predicated on the fact Justice Kenkel was known to be involved in another continuing trial on July 29, 2009 that would effectively preclude him from trying Mr. Baldwin’s case on that date.

[13] Following arraignment before me on July 23, 2009 submissions were received on the s. 11(b) application. These submissions occupied the bulk of the court day as there was no opportunity for review of the supporting materials prior to the transfer of the matter to the court where I was scheduled to preside on a continuing all day matter that did not proceed.

[14] As a result of the length of time required to consider counsel’s submissions on this application, including *viva voce* testimony from the applicant, the trial proper was subsequently adjourned to November 16, 2009. As a consequence of the pre-existing court schedule this was the first date able to be offered by the court for the “continuation” of this trial.

Identified Issues

A) The Applicant’s Position

[15] On behalf of the applicant Mr. Isenstein notes the following facts:

- (i) 13 months has passed since the date of the applicant's arrest (June 13, 2009) until the first trial date (July 23, 2009);
- (ii) The information was not sworn in this matter until two days before the applicant's first scheduled court appearance on August 8, 2008. This fact effectively prevented the applicant from relying on the delay arising between the time of his arrest and the formalization of the charge in the s. 11(b) analysis, a period of time when he would nevertheless have been subject to the mandatory 90 day administrative driver's licence suspension;
- (iii) Uncertainty existed regarding the issue of whether the applicant was subject to videotape recording or some other form of audio-visual recording during the time he was in police custody, this uncertainty led to some delay in the setting of the date for trial;
- (iv) The applicant ought not to be criticized by the Crown for failing to advance argument on the s. 11(b) application in advance of trial given the applicant's efforts to comply with the local practice direction in that regard, the anticipated unavailability of the scheduled trial judge to hear the case, and the Crown's consent to adjourn the hearing of the s. 11(b) application until the trial date;
- (v) The total trial time estimate of six hours, having previously been jointly purposed by Crown and defence, ought not now be criticized as a gross under-estimation of the actual trial time required by this case. Accordingly, it is unfair for the Crown to now contend the court ought not consider the period of delay, for 11(b) purposes, from the first trial date, July 23, 2009, until the second trial date, November 16, 2009;
- (vi) On consideration of all the noted factors the defence submits the length of delay here is sufficient to warrant s. 11(b) scrutiny as prescribed by the Supreme Court of Canada in *R. v. Morin* 1992 CanLII 1189 (S.C.C.), 71 C.C.C. (3d) 1 S.C.C., leading to the conclusion the applicant's *Charter* entitlement to be tried within a reasonable time has been infringed.

B) The Position of the Crown

[16] On behalf of the Crown Mr. Parke submits the following:

- (i) Regardless of the reason for the delay in the laying of an information in this matter the time between the arrest of an accused and the laying of an information is not to be considered in the s. 11 (b) analysis: see *R. v. Kalanj* [1989] 1 S.C.R. 1594 (S.C.C.);
- (ii) The uncertainty and delay in addressing the defence requests for disclosure of any post arrest audio/video recordings of the

applicant while in police custody should not be attributed as an action, or inaction as the case may be, by the Crown contributing to the delay in issue. The requested materials, even if they do or did exist, are not viewed as essential or required prerequisites to the setting of a date for trial;

- (iii) The period of 9 months and 21 days from the set date of October 3, 2008 until July 23, 2009 is submitted as being within the eight to ten month trial time guidelines referenced by the Supreme Court of Canada in *Morin*. In the absence of any evidence of specific prejudice to the applicant's liberty, security of person, or fair trial interests, a stay of proceedings is not viewed by the Crown as being warranted here.

Applicable Legal Considerations

[17] As first outlined by Sopinka J. in the 1992 decision *R. v. Morin*, the following factors are required to be considered by the Court in assessing whether or not the delay is reasonable:

- (i) the length of the delay;
- (ii) waiver of time periods;
- (iii) the reasons for the delay, including:
 - a) the inherent time requirements of the case;
 - b) the actions of the accused;
 - c) actions of the Crown;
 - d) limits or institutional resources;
 - e) other reasons for the delay.
- (iv) prejudice to the accused.

[18] I turn now to consider this application within the context of the *Morin* factors noted.

Length of Delay

[19] The timing of the swearing of the information until the date when this trial will be in a position to be considered on its merits is fifteen months (August 6, 2008 – November 16,

2009). The period of delay raises the issue of reasonableness.

[20] The delay arising from September 5, 2008, when I surmise the defence would have been in a position to set a trial date had the Crown responded with more timely and informative disclosure, until the first trial date of July 23, 2009, a period in excess of ten months, is also sufficient to raise the issue of reasonableness.

Waiver of Time Periods

[21] I conclude the applicant did not waive any period of delay in this case.

Reasons for Delay

(a) Inherent Time Requirements of the Case

[22] The delay arising from the fact the information in this case was not sworn until almost two months after the applicant's arrest is the subject of a separate abuse of process application and is not a factor that I have found necessary to directly consider in determining the outcome of this application.

[23] If, as the Crown submits, the original trial time estimate of six hours was inadequate, the inference being the case is of greater complexity than its assigned trial time would indicate, it is difficult to assign responsibility for that matter to the defence.

[24] As I understand it the Crown proposed to call four police officers and a tow truck driver with no defence evidence being contemplated. Given the trial time estimate was arrived at by two experienced lawyers and sanctioned by the Court at the time the trial date was set, I conclude the inherent time requirements of the case were not such as to warrant

assessment of this matter as a complex case.

[25] Apart from a lack of diligence by the Crown in providing a timely and informative response to the video recording issue I conclude the bulk of the delay in issue is systemic. In other words, the criminal justice system in this jurisdiction was unable to accommodate this relatively straightforward criminal matter prior to July 23, 2009, a period of more than eleven months after the information in this matter was sworn and a period of more than ten months after the defence should have been in a position to schedule a trial date.

b) Actions of the Accused and the Crown

[26] I would attribute the period from August 6, 2008 to September 5, 2008 as a reasonable intake period in this case. The period of time from the date of the arrest until the swearing of the information is not a factor to be considered in the s. 11(b) analysis for the purpose of calculating the length of the delay in issue. It would nevertheless be unfair, in my view, to accept the Crown's submission that a two month intake period be ascribed here (from the date the information was sworn on August 6, 2008 until October 5, 2008 when the trial date was set) particularly when the initial disclosure request by the defence was made on June 20, 2008 and ought to have been able to be answered in its entirety on or before September 5, 2008.

[27] Taking all of these factors into consideration I conclude the operative delay is from September 5, 2008 until November 16, 2009, a period of more than fifteen months. As the applicant attempted to comply with the local rules of practice by bringing the s. 11(b) application before the assigned trial judge in advance of trial, only to be thwarted in that initiative by the fact that judge had been pre-assigned to preside on a trial continuation in

another case, the applicant cannot be faulted for raising the s. 11(b) issue at trial. A review of the transcript from July 3, 2009 that was not available at the time this matter was argued confirms a lack of opposition by the Crown to the adjournment of this application to the trial date.

[28] The fact the entirety of the date initially set to try this case was of necessity directed to the hearing of the s. 11(b) application was unavoidable in the circumstances and should not now be held to undermine the relative merits of the application. The fact this application was not heard earlier is in large measure due to the lack of requisite institutional resources and has not been caused by a lack of due diligence on the part of the defence.

[29] As noted, the Crown did not object to the application being adjourned to the trial date and should now be precluded from taking exception to the fact the case was unable to be heard as scheduled. That eventually might reasonably have been anticipated when the s. 11(b) application was initially adjourned without opposition. These comments should not be viewed as a negative critique of Mr. Parke's able submissions as these submissions were made, as noted, in the absence of the July 3, 2009 transcript.

c) Institutional Delay

[30] As detailed previously, the bulk of the accumulated period of delay under consideration here, from the date the original trial date was set, is institutional delay. A further period of institutional delay will arise from the first trial date, July 23, 2009, until the second trial date of November 16, 2009. As noted, November 16, 2009 was the first date the court was able to offer to accommodate this trial continuation.

[31] The institutional delay in this matter is therefore at least thirteen months. This period of delay is well beyond the *Morin* guidelines that direct uncomplicated summary conviction matter should generally be able to be tried within a period of eight to ten months.

d) Prejudice

[32] Applicant's counsel submits the applicant has suffered anxiety and stress as a result of his over-long exposure to these proceedings. As he recovers from a stroke, sustained after his arrest, the applicant has continued to face the uncertainty that arises while this matter remains unresolved. Not knowing if his licence will be subject to a prohibition order has made the largely self-employed applicant reluctant to take on new clients out of concern that he may not be able to adequately meet any presently incurred contractual obligations if he is unable to lawfully operate a motor vehicle.

[33] A period of additional delay arising from the fact the evidence in this case will not be adduced until November is submitted as increasing the likelihood of some impairment of the applicant's ability to defend the charges: see Cromwell J's decision in *R. v. Godin* [2009] S.C.J. No. 26 (S.C.C.) at paras 36 and 37.

[34] Finally, increased costs will be incurred by the applicant as a result of the additional court date required to try this matter.

[35] I am therefore satisfied, in addition to such prejudice as may be reasonably inferred as having arisen from the delay, the applicant has demonstrated some actual prejudice.

Conclusion

[36] I am mindful that s. 11(b) of the *Charter* aims to protect both the individual rights

of an accused and the interests of society. It guarantees the right of an accused to be tried within a reasonable time by protecting the following individual rights:

- (i) the right to security of person by minimizing the anxiety and stigma of exposure to criminal prosecution;
- (ii) the accused's right to liberty by minimizing the effect of pre-trial custody or restrictive bail conditions;
- (iii) the accused's right to a fair trial by ensuring that criminal prosecutions take place while the evidence is fresh and readily available.

[37] This section of the *Charter* also protects society's interest in law enforcement by encouraging the prosecution of serious criminal cases such as drinking and driving offences on their merits in a timely and fair fashion. As the seriousness of the offence increases there is a corresponding societal demand that the accused be brought to trial and the charges dealt with on their merits.

[38] The applicant was arrested more than thirteen months ago. A period of fifteen months of largely institutional delay will ensue from the date the information was sworn until the first witness is called in this case. Apart from a relatively brief neutral intake period and a period of one month of delay, that I have concluded can be fairly attributed to the Crown's failure to respond in a timely manner to a reasonable defence request for disclosure, the balance of the delay under consideration here arises as a consequence of the limited institutional resources available to try this charge in a timely manner.

[39] I am not persuaded that the applicant's request for confirmation of the presence or absence of a viewable record of his processing by the police following his arrest was unreasonable. The compelling nature of such evidence in an impaired driving trial, if it exists, is well known and has been confirmed by almost every judge in this jurisdiction. See

Regina v. Chechel, [1999] O.J. No. 5167 (O.C.J.) and *R. v. Godfrey* [2005] O.J. No. 2597 (S.C.O.) as but two examples of judicial recognition of the importance of a video record of the accused's booking and breath room attendances in such cases.

[40] The defence has demonstrated actual prejudice arising as a consequence of the delay in the prosecution of this charge and potential infringement of the applicant's ability to make full answer and defence.

[41] Having considered all of the factors in *R. v. Morin* I conclude the applicant has established infringement of his right to be tried within a reasonable time.

[42] Accordingly, the charges will be stayed pursuant to s. 24(1) of the *Charter*.