

## ONTARIO COURT OF JUSTICE

|                       |   |                   |
|-----------------------|---|-------------------|
| B E T W E E N :       | ) |                   |
|                       | ) |                   |
| HER MAJESTY THE QUEEN | ) | Ms. E. Rokach,    |
|                       | ) | For the Crown     |
|                       | ) |                   |
| — AND —               | ) |                   |
|                       | ) |                   |
|                       | ) |                   |
| TREVOR MAXWELL        | ) | Mr. A. Weisberg,  |
|                       | ) | For the defendant |
|                       | ) |                   |
|                       | ) |                   |
|                       | ) |                   |
|                       | ) |                   |
|                       | ) |                   |

**LIPSON J.:**

### **SECTION 11(b) RULING**

[1] This is a ruling on an application by Mr. Maxwell for an order pursuant to section 24(1) of the *Charter* staying the charges before the court on the basis that his right to be tried within a reasonable time as required by section 11(b) of the *Charter* has been violated. Those charges are impaired operation, drive over 80 mgs and fail to remain at the scene of an accident.

[2] This case has a somewhat unusual history. That is because the alleged offences occurred on March 24, 2004, which was also the day Mr. Maxwell was arrested. He appears today, some 29 months later, for his trial. Mr. Maxwell attended court on May 10, 2004 in accordance with his promise to appear. No information had been filed with the clerk. The presiding justice told the applicant that he could expect the police to pursue the matter by possibly serving a summons on him for a future court date.

[3] Nothing happened in this case for over a year. Finally, on July 15, 2005, the applicant was summoned to court for October 5, 2005. There was no satisfactory explanation why a 2 month 10 day delay between the time of summons and first appearance was necessary. Mr. Maxwell did attend court on October 5, 2005 and

several times thereafter in order to obtain disclosure. This case was not judicially pre-tried until January 19, 2006. Disclosure remained outstanding. On February 16, 2006 there was still important disclosure outstanding, that being the DVD of the applicant's booking and breath room attendances. Nevertheless, the parties agreed to a target trial date of November 16, 2006. Defence counsel finally obtained the DVD on July 15, 2006.

[4] In determining whether or not the delay is reasonable, the court is, as stated by the Supreme Court of Canada in *R. v. Morin* (1991), 71 CCC (3d) 1 (S.C.C.), required to consider the following factors:

- (1) the length of the delay
- (2) waiver of time periods
- (3) the reasons for the delay, including
  - a. the inherent time requirements of the case
  - b. actions of the accused
  - c. actions of the Crown
  - d. limits on institutional resources and
  - e. other reasons for the delay
- (4) prejudice to the accused.

[5] The delay between the arrest of an accused and the laying of a charge is not counted in the s. 11(b) analysis: see *R. v. Kalanj*, [1989] 1 S.C.R. 981 (S.C.C.). Nevertheless, it seems to me that delay does play a role in assessing the actions or, to be more accurate, the inaction of the Crown in providing timely disclosure, which contributed to significant delay in this matter being set for trial.

[6] Let us look at the *Morin* factors as they apply to this case.

[7] **1.Length of delay**

[8] Defence and Crown agree that the delay of approximately 16 months between the time of the swearing of the information until today's trial date raises the issue of the reasonableness of the delay.

[9] **2.Waiver of time periods**

[10] Crown concedes that the Applicant did not waive any period of delay in this case.

[11] **3.Reasons for delay**

[12] **a) inherent time requirements of the case**

[13] The inherent time requirements take into account such factors as retaining counsel, bail hearings, disclosure, counsel availability and preparation and whether the case requires a “two-stage” trial process. As was pointed out by the Court in Morin, the length permitted with respect to inherent time requirements depends on the complexity of the case. This intake period is considered to be neutral time.

[14] Here the Crown submits that the appropriate intake period is from the date the information was sworn, July 15, 2005, to the date of the applicant’s second appearance on October 26, 2005 which totals three months and eleven days.

[15] The applicant had retained counsel by the time of his first appearance on October 5, 2005. The Crown should have been prepared to make full disclosure by this date. It must be remembered that the arrest in this case took place in March, 2004. There was an extreme lack of diligence on the part of the prosecution in re-issuing a summons for Mr. Maxwell. Surely the Crown would be expected to be in a position to provide full disclosure to the defence by the time an information was sworn on July 15, 2005, some 14 months later. The defence should have had full disclosure by the time of the first appearance on October 5, 2005.

[16] I would attribute the period of July 15, 2005 to October 5, 2005 as a reasonable intake period in this case and that is probably being over generous to the Crown.

[17] The operative delay is therefore from October 5, 2005 to the trial date of November 16, 2005- 13 months and 11 days.

[18] **b) actions of the accused and the Crown**

[19] In its factum, the Crown submits that any delay following the intake and prior to the December 13, 2005 set date for the judicial pre-trial is attributable to the applicant. It is certainly true that the defence maintained it was not in a position to set a trial date until the DVD of Mr. Maxwell’s booking and breath room attendances on the date of his arrest were disclosed. In this case, the DVD was not disclosed by the date of the judicial pre-trial on January 19, 2006. It was not disclosed by February 16, 2006 when the trial was set. It was disclosed on July 15, 2006. The defence had repeatedly requested the DVD from the Crown on the record and in writing from the time of Mr. Maxwell’s earliest appearances. The Crown’s answer is that the DVD

does not constitute essential disclosure. It submits that disclosure of the DVD was not necessary for the purposes of setting a date.

[20] The issue is whether the DVD is essential disclosure? It has been a long-standing practice of the police to videotape an accused's booking and breath room appearances in drinking and driving cases. The importance of these tapes was articulated by my colleague Gorewich J. several years ago in *R. v. Chechel*, [1999] O.J. No. 5167 (OCJ) where he stated, "the behaviour which is portrayed on tape conceivably goes to the root of the issue, that is the impairment of the applicant by alcohol." Wilson J. in *R. v. Godfrey*, [2005] O.J. No. 2597 (Ont. Sup. Ct.) stated "early disclosure of the videotape taken at the police station should be routine and the norm in routine cases."

[21] It seems to me that if this issue was ever controversial, the time has long passed when it should continue to be so. There will be exceptionally few cases where the booking-breath room DVD does not constitute essential disclosure. In most contested drinking and driving cases, either Crown or defence plays the DVD during the trial. Defence counsel and their clients require timely disclosure of the DVD in order to make informed choices as to how best to proceed. What is shown on the DVD can have a crucial influence on the choice of plea or trial strategy. What is displayed on the DVD is always relevant to a myriad of *Charter* and non-*Charter* issues. Another important aspect to be considered is that of trial management. One of the primary functions of the judicial pre-trial is to properly assess the time requirements of any given case. The pre-trial judge and counsel factor the playing of the DVD into this estimate. Defence and Crown need to review the DVD in order to participate meaningfully in a judicial pre-trial.

[22] All of the above considerations apply to this case. There is also one additional consideration here. Because of the delay in laying the information, the Crown was required to proceed by indictment. Timely disclosure of the DVD well before the judicial pre-trial was essential in order for the defence to determine whether to waive the limitation period and allow the Crown to proceed summarily. If not, the defence had to decide whether to elect trial in provincial court or have a preliminary hearing. Again, the decision by counsel whether to have the DVD played in court would impact on the time estimate for the case.

[23] Despite the failure of the Crown to provide timely disclosure of the DVD, the applicant tried to expeditiously move the case along by setting a judicial pre-trial and a trial date without this disclosure.

[24] The delay from October 5, 2005 to December 13, 2005 when the judicial pre-trial was set is attributable to the Crown because of its failure to disclose essential disclosure, that being the DVD.

[25] **c. institutional delay**

[26] Following the judicial pre-trial on January 19, 2006 there was further delay as the Crown attempted to provide the disclosure of the DVD, which it did not. The Crown also proposed a resolution for the defence to consider. The defence required two weeks to consider the Crown offer. The next delay was from February 2 to February 20 for the Crown to disclose the DVD, which it did not. The trial date was set on February 20 for November 16, 2006. The institutional delay comprises the periods December 13, 2005 to January 19, 2006 and February 20, 2006 to November 16, 2006. The institutional delay is therefore ten months and six days, just beyond the *Morin* guideline of 8-10 months.

[27] **4. Prejudice**

[28] Counsel for the applicant submits the delay in this case has impaired Mr. Maxwell's ability to make full answer and defence. Mr. Maxwell testified that he has been unable to locate an important witness who was a co-worker on the date of the incidents giving rise to the charges before the court. This witness would have testified as to the applicant's consumption of alcohol. It is submitted that this is highly relevant evidence with respect to a potential "evidence to the contrary" defence. The applicant was not challenged in cross-examination on this assertion.

[29] I am satisfied that, in addition to the inferred prejudice from the delay, the applicant has demonstrated actual prejudice.

[30] **Conclusion**

[31] Mr. Maxwell was arrested 29 months ago. There has been 16 months of delay from the laying of the information to today's trial date. Apart from two weeks of delay that can be attributed to the defence, the rest of the operative delay in this case results from limits on institutional resources and the inability of the Crown to provide essential disclosure in a timely fashion. The defence has demonstrated actual prejudice to the applicant's right to make full answer and defence. Having weighed all of the factors set out in *R. v. Morin*, I am satisfied that the applicant has established that his right to be tried within a reasonable time has been violated. In the result, the charges before the court are stayed pursuant to section 24(1) of the *Charter*.

