ONTARIO COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

— AND —

MR. C.

Before Justice F. Crewe
Heard on January 14, 2016
Reasons released on February 4, 2016

Malcolm Savage ..... for the Crown
David Genis ..... for the accused X.C.

CREWE J.:

1. OVERVIEW

[1] The applicant/accused, X.C., applies for relief pursuant to section 11 (b) of the Charter for a perceived breach of his right to a trial within a reasonable time.

[2] X.C. was arrested on October 18, 2014 and charged with "care and control over 80". The information was sworn on November 19, 2014 and ultimately, after 15 "set date" appearances, the first on November 19, 2014, the last on August 24, 2015, a trial was scheduled for March 15 & 16, 2016.

[3] The period of delay which the applicant submits is subject to scrutiny commences with the swearing of the information on November 19, 2014, and ends with the trial date of March 16, 2016, a total of 16 months.

[4] The period of time critical to the outcome of this application consists of several months during which the setting of a trial date was delayed awaiting the arrival of evidence that did not exist and, more importantly, both parties were in possession of information that it did not exist.

1. Circumstances of the alleged offences

[5] On Saturday, October 18th, 2014 at 1:22 a.m., police attended the scene of a single motor vehicle collision at the intersection of Brimley Road and Progress Avenue in the City of Toronto. Upon the arrival of police, X.C. was standing outside the vehicle, which had collided with a pole on the eastbound off ramp of Highway 401 onto Brimley Road.

[6] X.C. immediately admitted to being the driver of the vehicle, as well as consumption of alcohol. He was unsteady on his feet, and his eyes were bloodshot.

[7] After failing a roadside screening test, X.C. was transported to 41 Division, where he provided samples of his breath with readings of 138 and 132 mg/100 ml of blood.

1. Chronology of the proceedings

[8] The information charging the applicant was sworn on November 19, 2014, just over a month after his arrest. The applicant had retained counsel in advance of his first scheduled court appearance.

[9] No disclosure was available at the first court appearance on November 19, 2014

[10] At the 2nd appearance on December 17, partial disclosure was provided, consisting of videos of the sally port, booking, cells and breath room.

[11] On December 21, a letter was faxed to the Crown Attorney by Mr. Genis, expressing concerns with respect to delay, and detailing the disclosure which remained outstanding.

[12] At the third appearance, January 5, 2015, no further disclosure was available, and the matter was adjourned to January 19, at which time the bulk of the relevant outstanding disclosure was provided, and the matter adjourned to February 10 to allow counsel to review the materials. It is the position of the Crown that February 10, the fifth appearance, is the date at which the defence ought to have to set a trial date. As it turned out, the matter continued to be adjourned for a period of several months, to August 24, 2015, awaiting primarily the disclosure of the in car camera video of the transport of the Applicant to the police division. It is common ground that this is relevant and important disclosure.

[13] On August 24, 2015 defence counsel indicated on record that “We’ve just been recently advised that there is no in-car camera video in existence. So, we’re prepared to proceed on what we have.” A judicial pre-trial was held at that time and the trial date(s) set.

[14] In its response to this application, Crown counsel asserts that knowledge of the non-existence of the in-car video existed long before August 24, 2015. On January 19, 2015, among the items disclosed was a detailed synopsis which indicated, amongst other things, that "There are no in car camera video (sic) for the arresting/transporting officer."

[15] Furthermore, on March 24, 2015, the crown disclosed the notes of the Officer in charge, Det. Kim Bates, wherein the following is indicated "No ICC – using spare scout-710".

[16] Defence counsel indicated during submissions that he simply overlooked the relevant line in the detailed synopsis noted above. Further, upon receipt of Det. Bates' notes, he was unaware that "ICC" stood for "In-car camera". He made no inquiries to ascertain the significance of that entry.

[17] Despite having received the above documents, Defence counsel continued to request the video, both in writing and on record, and the crown, evidently also unaware of the non-existence of the video, continued to order it from the police and agree to the adjournment of the matter pending receipt thereof. All of that said, there is no suggestion by either party that the other acted improperly (and no such finding by this court), but each displayed a regrettable lack of caution and thoroughness in their respective review of the disclosure.

[18] In a similar vein, defence counsel requested (amongst other things) in a February 11, 2015 follow-up letter, the notes of officers Pece and Reeves, whose names were noted in the witness list as testifying officers. On February 23, 2015, The Crown's detailed (written) reply included a note that officers Pece and Reeves "do not have notes".(Exh. 4) The Crown advised on the hearing of this application that these officers are not scheduled as witnesses, and performed merely administrative duties, case preparation. Notwithstanding the written notice of the non-existence of notes, defence counsel continued to request the disclosure of their notes in further correspondence on March 24, 2015 and in court on March 3, 2015. It seems to me a reasonable expectation that upon receipt of disclosure or disclosure-related correspondence from the Crown, defence counsel will review it carefully to determine, before submitting a further written request, that they don't already have what is being requested and that there is a reasonable expectation that it may actually exist. Counsel agreed with that suggestion.

1. Section 11 (b): the analytical framework

[19] The principles that drive applications of this nature are long settled and not in dispute. The factors to be considered are, as set out in R. v. Morin, (1992) 1992 CanLII 89 (SCC), 71 CCC (3d) 1 (SCC), at para. 31:

1. length of the delay;
2. waiver of time periods;
3. reasons for the delay, including:

(a) inherent time requirements of the case;
(b) actions of the defendant;
(c) actions of the Crown;
(d) limits on institutional resources, and
(e) other reasons for delay, and

4. prejudice to the defendant.
5. Analysis

Length of the delay

[20] The first factor, length of the delay, according to Morin, supra, covers the period from charge to trial. “Charge date” has been held to mean, in this context, the date the information was sworn. (R. v. Kalanj 1989 CanLII 63 (SCC), [1989] 1 SCR 1594). This is the date both counsel on this application submit starts the 11(b) clock.

[21] In Morin, supra the Supreme Court set the standard for permissible institutional delay in a routine case such as the instant one at 8 to 10 months. This period is not a fixed standard, and may be reduced or expanded depending on the particular circumstances of an individual case.

[22] The overall length of the delay in this case, from arrest to trial, is the period from October 18, 2014 to March 16, 2016, a total of 17 months. The delay from the swearing of the information to trial is 16 months. This is certainly a period of sufficient duration to merit careful examination by this Court in the context of this application.

[23] On behalf of the Crown, Mr. Savage does not argue that there has been waiver of any periods of delay by the defence. He does, however, submit that the defence bears some responsibility for the delay awaiting non-existent disclosure.

[24] Defence counsel has offered evidence of prejudice to his client as a result of the delay, beyond inferred prejudice. Therefore, having regard for the 4 factors set out in Morin, this application will be determined by analysis of the reasons for the delay, combined with the assessment of prejudice.

Reasons for the delay

(a) Inherent time requirements of the case

[25] This is a relatively routine impaired driving prosecution which was estimated to require two days of court time.

[26] The vast majority of the evidence required to prosecute this matter was generated the day of the applicant's arrest. All that was required for the Crown to provide disclosure was the copying of police notes and videos capturing the various interactions between the applicant and the police. These could all have been available for disclosure at the first appearance in court, especially having regard for the fact the police chose not to have X.C. attend court until one month after his arrest. (see R. v. Taylor [2013] O.J. No. 1266 (OCJ) per Green, J. at para. 23).

[27] The applicant had retained counsel prior to the first appearance in court.

[28] The inherent time requirements of all cases require that a reasonable time be set aside for intake. This period, inherent delay, is regarded as neutral in the section 11(b) calculus. Mr. Genis takes the position that all disclosure and all preliminary matters, including pre-trial conferences, ought to have been concluded by the 4th court appearance on January 19, a period of exactly two months from the date of swearing of the information. Mr. Savage is in full agreement with this submission, which is well supported by the authorities. (see, eg., Morin, supra para 41-3; Lahiry, para. 22; R. v. Meisner [2003] O.J. No. 1948 (Ont. SCJ), paras. 30-32; R. v. Tran 2012 ONCA 18 (CanLII), [2012]O.J. No. 83 (Ont. C.A.) para. 62; Taylor, supra, para. 26).

(d) Limits on institutional resources

[29] On August 24, 2015 the trial date was set for March 15 & 16, 2016. Mr. Genis indicated on record that those were the earliest dates provided. He indicated that his client was not waiving his right under section 11 (b), in fact he asserted it. He was available on dates in every month from September 2015 until the scheduled trial date.

[30] In accordance with the Reasons of Code, J. in R. v. Lahiry,(2011) 2011 ONSC 6780 (CanLII), 283 CCC (3d) 525, at paragraph 26, institutional delay commences when the parties are ready for trial but the system cannot accommodate them. (see also R. v. Meisner, supra at para 37).

[31] Both counsel agree that on the record here, counsel for the applicant was ready to proceed to trial within 30 days after the trial date was set, but space was

simply not available. Both counsel agree that the institutional delay to the scheduled trial date is therefore six months.

(c) Actions of the Crown and (b) defence

[32] The next period under consideration is therefore delay attributable to the Crown. Mr. Savage concedes that the Crown is responsible first of all for the necessary delay between January 19, the conclusion of the agreed two month intake period when all steps necessary to the setting of a trial date should have been completed, and the setting of a trial date. He submits that only the three week delay between January 19 and the next appearance date, February 10, was necessary, and that at that date the defence was in possession of sufficient disclosure to set a trial date and ought to have done so.

[33] Mr. Genis argues that the Crown should be held solely responsible for the 2 ½ month delay between January 19 and April 7th, two weeks after the provision of the last relevant disclosure on March 24th.

[34] It is clear from the authorities that not every single piece of disclosure must be provided prior to the setting of a trial date. In my view the delay in this period which must be attributed to the Crown is that between January 19th and March 3, the court appearance following the Crown's February 23 correspondence advising of the non-existence of notes from officers Pece and Reeves. The notes of these officers, appearing as they did on the crown witness list as testifying officers, are legitimately the subject of a disclosure request, and were indeed specifically requested by defence counsel. Other than the Feb. 23 correspondence, all other relevant disclosure was made by January 19. The notes of the OIC, Det. Bates, which were disclosed on March 24, had not been requested in writing by defence counsel and were, as it turns out, unnecessary to the setting of a trial date. Det. Bates will not be called as a witness, as she has no relevant evidence to provide. Therefore, had counsel fairly reviewed the disclosed materials by March 3, he ought to have been in position to set a trial date at that appearance. In support of this conclusion, I note the comments of defence counsel's agent at that appearance, that "Mr. Genis says he's waiting for disclosure particularly the in-car, the videos, notes of Officers Pays (Ph.) and Rees(Ph.) and Mr. Genis advise(sic) without these disclosures he cannot conduct any meaningful Crown pre-trial…" Therefore a period of 1 ½ months is attributed to the Crown.

[35] The final period of time is the 5 months, 21 days between March 3 and August 24. Both counsel submit that they are mutually responsible for this delay,

which was totally unnecessary as it was spent awaiting the disclosure of evidence both sides should have realized did not exist. Counsel are not agreed as to how the delay ought to be apportioned. Mr. Savage submits that the delay ought to be split 50/50, or just under 3 months apiece. Mr. Genis submits that it is the Crown which bears responsibility to bring the accused to trial, and that in keeping with that duty, should bear the bulk of that delay, perhaps ¾, or as much as all but one adjournment.

[36] Defence counsel is correct in his assertion that the crown bears the responsibility of bringing the accused person to trial within a reasonable time. This principle has been part of the legal framework since Morin, and was recently affirmed by the Court of Appeal for this Province in R. v. Boateng 2015 ONCA 857 (CanLII), at paragraph 32 where Doherty, J.A. writes: "The Crown bears the responsibility of bringing an accused to trial within a reasonable time…the Crown is best positioned to spot and react to potential delay-related problems caused when an institutional participant in the criminal justice system, like LAO, drags its feet and places the rights protected under s. 11(b) in jeopardy. If the Crown fails to react to these delays, it will bear responsibility for them in the s. 11(b) calculus…"

[37] Notwithstanding the above, it is my view that the Crown's position is eminently fair in the circumstances of this case. The crown's position recognizes that both parties are at fault insofar as they both should have realized as of January 19 that the ICCS video did not exist. Neither party gets a free pass on this issue. I would give effect to the Crown's position of equal responsibility for just under three months apiece.

[38] When added to the institutional delay of six months and the initial Crown delay of 1 ½ months, the combined Crown/institutional delay prior to the scheduled trial date is just under 10 ½ months.

[39] Delay caused by actions (or inactions) of the Crown have generally been viewed by courts with less favour than institutional delay. In R. v. Brown [2005] O.J. No. 2395, Justice MacDonnell noted: "I regard the other Crown delay as weighing very heavily against the state. Unlike institutional delay, the other Crown delay was not beyond the control of the individual state actors who caused it. It was the direct result of a simple failure of the police to do their job. As a matter of common sense, that weighs heavily against the Crown: see, eg., R. v. McNeilly [2005] O.J. No. 1438 (Ont.S.C., per Hill, J., at paragraph 72. [Emphasis added.]

Prejudice

[40] The applicant asserts specific prejudice, as well as inferred prejudice, which is also a live factor in view of the inordinate overall delay having this matter brought to trial.

[41] X.C. was employed as a truck driver before his arrest. As a result of the administrative suspension, he was immediately fired. After his licence was re-instated, he was nonetheless told by his former employer that he cannot return to work until this matter has been finalized. As a result, he has been forced to search for other work, and has only been able to find part-time work and has seen his income reduced from $45,000 annually to about $15,000.

[42] In the fall of last year, suffering anxiety as a result of "…my life going nowhere and I could not see the end of the case…", he began to experience insomnia. As a result, he attended at his doctor and was prescribed Apo-Zopiclone sleeping pills. He remains on these to this day. When the suggestion was put to him in cross-examination that these symptoms were the result of the charges, not the delay, he disagreed. He stated that until September (2015), he had been relying on his savings from his previous job to supplement his reduced income. However, his savings were by then almost depleted, and the case was dragging on, and as a result he became anxious and began to lose sleep.

[43] In addition, his application for Canadian citizenship has been placed on hold for at least a year as a result of the charges, although it is not clear whether this would have been alleviated by a trial date later than July 15 of last year, which would have been well within the administrative guidelines. Notwithstanding that, however, it is doubtless a factor that contributed to his feelings of anxiety and insomnia and the feeling that his life was going nowhere. He has in my view suffered demonstrably financially, both in terms of income and the depletion of his savings, and this has unquestionably been exacerbated by the delay in this prosecution. This financial prejudice has contributed to his anxiety and the onset of insomnia, for which he has been reduced to taking prescription medication.

[44] In my view, the further inference of inferred prejudice in these circumstances is a strong one, having regard in particular for the lengthy overall delay in this matter of 16 months; 17 months from the date of arrest. I have in considering this issue reviewed the seminal authorities of Morin, supra; R. v. Askov 1990 CanLII 45 (SCC), [1990] SCJ No. 106 (SCC), R. v. Godin 2009 SCC 26 (CanLII), [2009] S.C.J. No. 26 (SCC), to mention but a few.

Conclusion

[45] The total delay in this case is 17 months, 16 months after the swearing of the information, with a combined institutional / Crown delay of 10 ½ months.

[46] The actions of the crown account for 4 ½ months of that overall delay.

[47] That said, the delay caused by the crown in this case, or at least most of it, is not of the type envisioned by MacDonnell, J. in the Brown case. Notwithstanding that the crown ought to have been aware of the non-existence of the disclosure which ultimately put this prosecution in peril, in my view the Crown acted with good intentions throughout.

[48] In those circumstances, and where the total crown/institutional delay is only marginally outside the guidelines mandated by Morin, the authorities make clear that the issue often comes down to whether there is real prejudice beyond inferred prejudice. (see, eg. R. v. Campagnaro [2005] O.J. No. 4880 (Ont.C.A.) at para. 4) In this case, I am satisfied that there is real prejudice, for reasons noted above.

[49] There are additional considerations. I am instructed by appellate courts that an important consideration in the determination of these applications is the seriousness of the present offences, and I am to have regard for the societal harm wrought by impaired drivers when balancing the interests of the applicant against the societal interest in a trial on the merits. (see, eg., R. v. Bernshaw 1995 CanLII 150 (SCC), [1995] 1 SCR 254 at para 16, and R. v. Lahiry, supra at para 89.)

[50] On the other hand, as noted by Pringle J. in R. v. Avellaneda [2014] O.J. No. 1369 at para. 40: “Although I appreciate that the charges are serious ones, I agree with the defence that in those circumstances the state should have done whatever it could to ensure that the matter came on for trial in a more timely way. It is a two-edged sword for the Crown to rely on the seriousness of the charges as an important factor in the balancing equation when the case was not important enough to provide timely disclosure or give the case priority in the court calendar.”(see also R. v. Kporwodu 2005 CanLII 11389 (ON CA), [2005] O.J. No.1405 (Ont. C.A.)para 189-194).

[51] In that regard, at the time the trial date herein was set, the crown should have been concerned about the constitutional sanctity of this prosecution, having regard for the delay to that point (more than 9 months since the swearing of the information, 10 months since the Applicant’s arrest), and furthermore having regard for the assertion of the Applicant’s 11(b) right on record and in writing. As it is the obligation of the crown to bring an accused to trial in a timely fashion pursuant

to the authorities noted above, efforts ought to have been made at the time of the set date to schedule this trial in a manner that was commensurate with the Applicant's right to trial within a reasonable time, and with the societal interest in a prosecution of the trial on its merits. (see, eg. R. v Brace 2010 ONCA 689 (CanLII), [2010] O.J. No 4474 (Ont. C.A.) at para 16-17). No apparent efforts were made to accommodate this matter in a more timely fashion.

[52] On this application, the onus lies with the applicant. In all the circumstances of this case, it is my view that the applicant has established a breach of his right to a trial within a reasonable time. The application is granted. The proceedings are therefore stayed.

Released: February 4, 2016

Signed: "Justice F. Crewe"