

Court of Queen's Bench of Alberta

Citation: R. v. Asiala, 2010 ABQB 450

Date: 20100706
Docket: 071326144U2
Registry: Calgary

Between:

Her Majesty the Queen

Respondent

- and -

Jouko Ilmari Asiala

Applicant

**Reasons for Judgment
of the
Honourable Mr. Justice P.J. McIntyre**

[1] This application flows from a summary conviction charge. Thirty-two months after the date of the charge, and 18 months after the argument to exclude the certificate of analysis, the Applicant still has no decision on the admissibility of this critical piece of evidence. The *Canadian Charter of Rights and Freedoms* states that anyone charged with an offence has the right to be tried within a reasonable time. The Supreme Court of Canada has held that an expected period of institutional delay is 8 to 10 months: *R. v. Morin*, [1992] 1 S.C.R. 771. The Applicant seeks judicial stay of proceedings. The Crown says the delays are caused by the Applicant's 2009 application to this Court for prohibition and this application.

Facts

[2] The Accused was charged on October 23, 2007 with driving with more 80 mg of alcohol in his blood and driving while his ability to do so was impaired on October 19, 2007. The Crown proceeded summarily. The accused first appeared December 14, 2007. His case adjourned to January 11, 2008 for his plea. He did not enter a plea. The case adjourned to February 7, 2008. On February 7, 2008 the accused entered a not guilty plea. The court set a trial date of December 31, 2008. The trial started December 31. It has not concluded.

[3] The endorsements on the Information show:

- 1) October 23, 2007: Charges are sworn
- 2) February 7, 2008: trial set for December 31, 2008
- 3) December 31, 2008: trial, voir dire, trial judge reserves decision
- 4) January 26, 2009: trial Judge not ready to give decision, trial judge excuses accused's attendance for next date
- 5) May 21, 2009: trial judge decides one argument, not the Charter argument, denies application for mistrial, trial adjourned to June 9, 2009 for decision on Charter argument
- 6) June 23, 2009: notice of motion for prohibition served on Provincial Court
- 7) June 30, 2009: trial judge advised notice of motion to be heard in court of Queen's Bench on September 16, 2009. Trial adjourned to September 21, 2009 for continuation
- 8) November 5, 2009: trial adjourned to February 2, 2010 for continuation
- 9) February 2, 2010: Counsel is advised trial judge on medical leave. Trial adjourned to March 17, 2010 for decision
- 10) March 17, 2010: trial adjourned to March 19 for decision
- 11) March 19, 2010: trial adjourned to June 22, 2010 for decision
- 12) April 7, 2010: notice of motion for charter relief served on Provincial Court
- 13) June 22, 2010: trial adjourned to July 7, 2010 pending this application (advice during this application).

[4] I have been provided with copies of the trial and adjournment transcripts. These provide more detail than the endorsements. I have also been provided a copy of the decision of Kent J. on the application for prohibition (unreported, October 14, 2009).

[5] The trial started December 31, 2008. The arresting officer was the only Crown witness. There was a voir dire on the admissibility of the certificate of analysis. The defence did not call evidence. The voir dire finished. Counsel made submissions. Defence counsel objected to the introduction of the certificate of analysis on two grounds. The first ground was that the Crown had failed to produce the original certificate of analysis. A carbon copy had been produced. There was evidence the arresting officer had inadvertently destroyed the original. The second ground was a *Charter* argument. Defence counsel said that the arresting officer failed to advise the Applicant the nature of his jeopardy in deciding whether to speak to a lawyer. Further, counsel argued the advice the officer gave was calculated to deter the Applicant from contacting a lawyer. The *Charter* argument took most of the time spent in argument.

[6] The trial judge was not in a position to give an immediate decision. The case adjourned to January 6, 2009 to set a date for decision.

[7] The case adjourned to January 26, 2009 for decision. On January 26, the trial judge was not ready to give his decision. He said he could then deal with part of the argument. He did not say to what part he was referring. He said he had a transcript of the trial. The case then adjourned to January 30, 2009, to set a date for decision. The decision date was set to May 21, 2009. The accused was present on December 31, 2008, January 26, 2009 and May 21, 2009.

[8] On May 21, 2009, after stating he had reviewed all the cases, the trial judge ruled that the certificate of analysis was admissible; that it was not necessary to produce the original certificate. He did not rule on the *Charter* argument. He then said Exhibit A on the voir dire would be Exhibit 1 on the trial. Defence counsel and Crown counsel reminded the trial judge about the *Charter* argument. Defence counsel named eleven *Charter* cases that had been cited in argument. The trial judge thought the only issue was whether a copy was admissible. He said he misunderstood whether there was still a *Charter* argument. He seemingly forgot that he already had a transcript of the evidence and the argument, as he had earlier advised on January 26, and which he found during the course of submissions on May 21. Defence counsel then made an application for a mistrial because the trial judge had not dealt with all the issues in the argument. He reminded the trial judge the *Charter* argument had taken over an hour. That motion was denied without reasons. The trial judge then said he was prepared to consider the *Charter* argument and would review the transcript, having “not reviewed the arguments properly at all”.

[9] The case was adjourned to June 9, 2009 to set a date for decision. June 16, 2009 was chosen. On June 16, the case was adjourned to June 23 to set a trial continuation date. On June 23 the case was adjourned to June 30 to set a trial continuation date. On June 30 defence counsel confirmed to the court that a notice of motion had been filed in the Court of Queen’s Bench for September 16, 2009 seeking prohibition. The case was adjourned to September 21, 2009 to set a date for the trial continuation. Applicant counsel conceded he had asked Crown counsel that the case be held in abeyance while he made this application.

[10] The Queen's Bench application was adjourned to October 2, when counsel for the Applicant argued for prohibition and a stay. Much of the time was spent trying to understand the May 21 transcript: first whether the trial judge already had a transcript, second whether it was just a transcript of the evidence and not the argument. It became clear the trial judge had a transcript of the evidence and the argument from January. Kent J. gave an oral decision on October 14, 2009, denying the application for prohibition. She said she could not decide from the May 21 transcript whether the trial judge had dismissed the *Charter* argument without considering it. It was clear he had forgotten the argument. She was not satisfied there was enough evidence to say he had prejudged the argument. She also commented on the time for trial: "Here we know that five months after the trial the judge was not able to decide the case, because he had not taken the time to review his file and know what the issues were". She then stated that this was not a case where the state has not been diligent: "Rather this is a case where the judge has not been diligent". She said no case was cited to her where the failure of the judge to give a specific period of time causes a *Charter* breach. She held: "It is appropriate to permit the trial judge to finish the case".

[11] The trial judge did not finish the case. The Provincial Court case had been adjourned to October 13, and to November 5, 2009. On November 5, 2009 the court set a date for February 2, 2010 for trial continuation. The trial judge was not in court on February 2. Rather, the Assistant Chief Provincial Court judge told counsel the trial judge was on medical leave, but only for a couple of weeks (transcript page 2, line 5). Counsel for the Applicant did not consent to the adjournment, stating that his client had come down from Red Deer and that the matter had been set over 3 times in 15 months. The case was adjourned to March 17, 2010 before another Provincial Court judge and then to March 19, 2010. On March 17 Applicant counsel did not consent to the adjournment, noting that this would be the 4th adjournment in 15 months. He explained that he was given one day's notice of the adjournment and was able to advise his client not come to court. He also stated he would be making application for a stay. Crown counsel advised that it would be making an application under section 669.2 of the *Criminal Code* to reassign the matter to another judge (Transcript page 11). No such application has been made.

[12] On March 19 the Assistant Chief Judge adjourned the case to June 22, 2010. Counsel for the Applicant asked for an explanation for the absence of the trial judge, which the assistant chief judge took as an inquiry as to the nature of the trial judge's medical problems, something counsel would not be entitled to know. In any event, no further information was forthcoming about when or if the trial judge might be back. It is agreed that from information obtained by the Crown on June 24, 2010 that the trial judge was on medical leave from January 21, 2010 to May 10, 2010. Applicant counsel repeatedly advised the assistant chief judge that motion would be taken to this court. The assistant chief judge stated: "This is the third time you have told me that, I could care less frankly, you do what you've got to do".

[13] Defence counsel filed this motion in this court with a hearing scheduled for June 24.

Positions of the Parties

[14] The Applicant says that he has been denied his right to a trial within a reasonable time. The Crown says the delay in this case has been caused by the two Queen's Bench applications, first for prohibition, and second for a stay of proceedings.

[15] The Crown says the application for prohibition and the later application for *Charter* relief suspended proceedings in Provincial Court. Thus, the trial judge could not have given a decision, citing *R. v. Batchelor*, [1978] 2 S.C.R.988 and the Court of Queen's Bench Criminal Rules. *Batchelor* was an application for prohibition and to quash the proceedings. As well, the Ontario rules required that the record be returned to a superior court. Neither the 2009 prohibition application or this application are applications in the nature of certiorari nor has there been any endorsement on the applications that the records be returned to the Court of Queen's Bench. McFadyen J. (as she then was) in *C.P. Express & Transport v. Alta. Prov. Ct. and A.G. (Can.)* (1984), 55 A.R. 199 (Q.B.), Rev'd on other grounds (1985) 60 A.R. 380 (C.A.), rev'd [1986] 2 S.C.R. 711 made these distinctions. She held at paragraph 17: " These rules are not applicable to an application for prohibition alone". See also paragraph 21. At paragraph 24 she stated: "The jurisdiction of the Provincial Court is not suspended by the service of a notice of motion for prohibition. The court retains its jurisdiction to proceed. In certain circumstances the court may find it advisable and in keeping with judicial dignity to adjourn the proceedings to await the decision of the superior court." I agree with the reasoning of McFadyen J. These applications did not suspend the jurisdiction of the Provincial Court. The trial judge could have issued a written decision or asked the parties to appear for an oral decision.

[16] Counsel agreed that should I find there has been an unreasonable delay, a stay is appropriate under section 24 (1) of the Charter.

Analysis

[17] This section engages whether the Crown is responsible for Judge-instigated delays, whether there was unreasonable delay, and what role illness of the judge plays in this assessment.

[18] In *R. v. Rahey*, [1987] 1 S.C.R. 588, the Court held that where a trial judge is said to be the cause of a violation of an accused's s. 11 (b) *Charter* rights, a Superior Court is a court of competent jurisdiction for an application under s. 24 (1) of the *Charter*. Section 11 (b) covers delay during the trial for which the judge is responsible. The judge had adjourned his decision on the motion for a directed verdict many times during an 11-month period. He gave his decision a day after the accused filed a motion for *Charter* relief in the Superior Court. The court held this was an unreasonable delay and entered a stay. At paragraph 43 Lamer C.J. stated that if the overall period of time elapsed since the charge was unreasonable "there is a need for an explanation, and none was offered.". *Rahey* was later cited by McLachlin J. (as she then was) in *R. v. McDougall*, [1998] 3 S.C.R. 45 at paragraph 49 as an example of a case where the Crown may be held responsible for delays caused by the trial judge.

[19] In *R. v. Morin*, Sopinka J. stated that to assess whether delay has been unreasonable, the courts must look at the length of the delay from the date of the charge to the end of the trial, less any waiver of time periods by the accused. Then the reasons for the delay, as well as the prejudice to the accused and the interests protected under s. 11 (b) must be considered in deciding whether the period of time is unreasonable: *Morin* at p. 788.

[20] In light of *Morin* and *R. v. Godin*, 2009 SCC 26 [2009] 2 S.C.R. 3, the interests protected under s. 11 (b) are:

- 1) the right to liberty as regards to pre-trial custody and bail conditions;
- 2) the right to security of the person, by seeking to minimize the anxiety and stigma associated to criminal proceedings; and
- 3) the right to full answer and defence “insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence”: *Godin* at para. 30; *Morin* at 786-788.

[21] In *Morin*, Sopinka J. explained the primary purpose of s. 11(b) is to protect the individual rights of the accused. He also referred to *R. v. Conway*, [1989] 1 S.C.R. 1659 in which it was stated the protection of s. 11(b) interests must be balanced by the interests of society in law enforcement: *Morin* at 786-787.

[22] Sopinka J. further listed at 787 and 788 the factors to be considered in assessing whether the delay is unreasonable:

- 1) The length of the delay;
- 2) Waiver of time periods by the accused;
- 3) The reasons for the delay, including
 - a) 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 delay; and
- 4) Prejudice to the accused.

[23] Recently, in *Godin*, Cromwell J., writing for the Court, reiterated the principles stated in *Morin*:

[18] The legal framework for the appeal was set out by the Court in *Morin*, at pp. 786-89. Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(b) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important, however, not to lose sight of the forest for the trees while engaging in this detailed analysis. As Sopinka J. noted in *Morin*, at p. 787, “[t]he general approach ... is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which [s. 11 (b)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.”

I Length of the delay

[24] In *Morin*, it was held that the Court must examine the period from the charge to the end of the trial. This trial has not yet ended, thirty-two months after the charge.

[25] In *Morin*, Sopinka J. at 799 suggests a period of institutional delay between 8 to 10 months for institutional delay in the provincial courts. See also *Godin* at para. 5.

II Waiver of Time Periods

[26] A waiver of time periods by the accused will occur “[i]f by agreement or other conduct the accused has waived in whole or in part his or her rights to complain of delay then this will either dispose of the matter or allow the period waived to be deducted.”: *Morin* at 790. For the accused to waive s. 11(b) rights, the waiver must be clear and unequivocal with the complete understanding of the rights that are waived and the impact of the waiver. However, acquiescence to the inevitable does not constitute a waiver: *Morin* at 790. Applicant counsel concedes that he asked that the matter be held in abeyance when he made his 2009 prohibition application.

III Reasons for the Delay

a) Inherent Time Requirements

[27] This is not a complex case. The Crown intended to call and only called one witness. Presumably, if the Applicant’s arguments have been unsuccessful, counsel would agree the evidence on the voir dire be admitted as evidence at the trial. Despite the simplicity of this case, I am prepared to hold the delay from October 23, 2007 to January 26, 2009 to be reasonable.

b) Actions of the Accused

[28] As mentioned in paragraph 9 above, the Applicant concedes he asked the Crown that the case be held in abeyance from June 23, 2009 until October 14, 2009 for the prohibition application. Otherwise, the Applicant says the time periods from May 21, 2009 until June 22, 2009; from October 15, 2009 until January 25, 2010; and March 19, 2010 until June 22, 2010 should be counted against the Crown. The Applicant says these delays represent almost 6 months of additional and unnecessary delay, and when combined with the delay from December 31, 2008 to May 21, 2009 yield a delay of more than 10 months.

c) Actions of the Crown

[29] *Rahey* is authority for the proposition that the Crown may be responsible for judge instigated delays. *MacDougall*, and *R. v. Gallant*, [1998] 3 S.C.R. 80 deal with illness of the same judge. At paragraph 52 McLachlin J. stated:

In summary, where the trial judge falls ill and is expected to return, the Crown must balance two competing factors: (1) the need to proceed with the utmost care and caution when considering the removal of a judge seized with a case in order to protect judicial independence and fairness to the accused, and (2) the need to protect the accused's s. 11(b) rights and prevent undue prejudice to the accused. The practical question is whether the apprehension of a violation of the accused's s. 11(b) rights has reached the stage where it outweighs the general rule that the judge seized of a case should conclude it. Where the apprehension of a s. 11(b) violation outweighs this general rule, the Crown has a duty to apply to remove and replace the seized judge. If the Crown fails to do so, any resulting delay will be counted against the Crown in the s. 11(b) assessment.

As mentioned above, on March 17, 2010 Crown counsel advised that it had decided to apply under section 669.2 of the *Criminal Code* to have a new trial judge. I have not been told why the Crown did not proceed with that application. Time from March 17, 2010 to June 22, 2010 must be counted against the Crown. I acknowledge that such an application requires some delicacy, but after the adjournment on February 2, 2010 on the basis of an expected medical leave for 2 weeks, something should have been done by the Crown. Further, I hold on the basis of *Rahey* that failure by the Crown to make such an application is not the only time that Judge instigated delays will be held against the Crown. Illness is only one of the factors that contributed to the delay. These delays were not the fault of the Applicant. The Applicant repeatedly asserted his 10(b) rights.

d) Limits on Institutional Resources

[30] The parties have not argued the delay was due to limits on institutional resources.

IV Prejudice

[31] As stated in *Godin* at para. 31, the prejudice needs to be considered with the length of the delay:

The question of prejudice cannot be considered separately from the length of the delay. As Sopinka J. wrote in *Morin*, at p. 801, even in the absence of specific evidence of prejudice, “prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn”. Here, the delay exceeded the ordinary guidelines by a year or more, even though the case was straightforward. Furthermore, there was some evidence of actual prejudice and a reasonable inference of a risk of prejudice.

[32] Justice Cromwell added that proof of actual prejudice was not necessarily required to establish a s.11. (b) violation.

[33] In light of *Godin*, prejudice need to be considered together with delay. I find that, in this case, prejudice may be inferred from the length of the delay and the lack of justification for the delay. Moreover, there is evidence of actual prejudice for the Applicant. Although the Crown stated it did not “accept” the Applicant’s affidavit, he was neither cross-examined nor contradicted on it.

[34] Counsel for the Applicant referred to the many delays in this case and the repeated attendances by the Applicant at court. He referred to the affidavit of the Applicant in support of the prejudice. In addition, he made specific reference to the statement of the assistant chief judge, referred to earlier, when he stated: “This is the third time you have told me that, I could care less frankly, you do what you’ve got to do”. This statement is criticized by the Applicant, but properly understood is simply an affirmation that defence counsel are entitled to make such applications as they see fit.

Conclusion

[35] Thirty-two months following the date of the charge, the Accused has not received a verdict. The trial judge adjourned four and one-half months for decision. In May of 2009, he dismissed one argument and forgot the other. This one witness trial has not been completed one and one-half years after argument on the admissibility of a certificate of analysis. The Applicant has waived the time period from June 23 to October 14, 2009, for a total of three and one-half months. The Crown has not moved to have a judge reassigned. The Applicant’s constitutional right to be tried within a reasonable period of time has been breached. I enter a stay of proceedings.

Heard on the 24th day of June, 2010.

Dated at the City of Calgary, Alberta this 6th day of July, 2010.

P.J. McIntyre
J.C.Q.B.A.

Appearances:

Shirley A. Jackson, Q.C.
Alberta Justice
for the Crown

Mark Gottlieb
for the Applicant