Re-Chartering an Old Course Rather than Staying Anew in Remedying Unreasonable Delay under the Charter

Justice Casey Hill
Superior Court of Justice (Ontario)
Jeremy Tatum, Law Clerk
Superior Court of Justice (Ontario)
September 2012

Reasons for the delay

inherent time requirements

The inherent time requirements of a case generally refer to the time taken to get the matter to the point where both parties are ready to set trial dates (the intake period), assuming the availability of adequate institutional resources[74]. All prosecutions have certain inherent time requirements that cause delay.[75] These are considered neutral in the section 11(b) calculus[76]. Examples include the retention of counsel,[77] bail hearings, police and administrative paperwork, disclosure[78], rescheduling after a mistrial[79], and delay resulting from the resolution of legal issues, unless bad faith can be attributed to either party[80].

At least three decisions have held that approximately two months of intake or preparation time is appropriate for straightforward or routine forward cases[81].

---

[74] *MacDougall*, *supra*, note 14, at para. 44.

[75] In *Meisner*, *supra*, note 46, at para. 32, Hill J. held that an intake period of two months was then a typical feature of cases entering provincial courts. In *R. v. Chrostowski*, [2006] O.J. No. 1306 (S.C.), at para. 39, Dambrot J. held that a period of two to three months was appropriate.

[76] E.g. *MacDougall*, *supra*, note 14, at paras. 44-45; *Allen, supra*, note 23, at para. 27; *R. v. Roncaioli*, 2011 ONCA 378, [2011] O.J. No. 2167, at para. 30. Inherent time requirements are to be distinguished from the average time to process a case. All cases have inherent time requirements.

[77] More time must be allowed as part of inherent time requirements for an accused to retain counsel where Legal Aid is involved: see *N.N.M.*, *supra*, note 71. No appellate authority exists yet on whether the conduct of Legal Aid could ever appropriately be considered the source of institutional delay. Presumably, the accused would have to show that the delay of the trial date was attributable to the system, that there had been systemic failure through no fault of the accused: see *R. v. Stevens*, 2011 ONSC 5130, [2011] O.J. No. 3397, at para. 32, *per* Harvison Young J.

[78] *Morin*, *supra*, note 4, at para. 42, *per* Sopinka J. (La Forest, Stevenson and Iacobucci JJ. concurring).

[79] In *R. v. W.B.*, *supra*, note 38, at para. 61, Rosenberg J.A. concluded that "some short period of delay" after a mistrial is properly characterized as part of the inherent time requirements of the case. However, it is incumbent on the Crown to take all necessary steps to ensure that the new trial commences without further delay: see *R. v. Satkunanathan*, [2001] O.J. No. 1019 (C.A.), at para. 55.

[80] *R. v. Branson*, 2009 CarswellOnt 7859, [2009] O.J. 5362 (S.C.), at para. 6, *per* Backhouse J.; *R. v. Payne*, 2010 ONCJ 152, [2010] O.J. 1750, at para. 40, *per* Dawson J.

[81] E.g. *Morin*, *supra*, note 4; *Meisner*, *supra*, note 46; and *Lahiry*, *supra*, note 5 for simple/routine drinking and driving cases.

However, a more complicated case involving, for example, fraud[82], spousal assault and sexual assault[83], or a multiple accused police corruption and conspiracy case[84] will invariably result in longer periods of preparation and delays than more straightforward cases[85].

The inherent time requirements of a case may also require a preliminary hearing or some reasonable period of delay in arranging a judicial pre-trial in busy judicial centres to help ensure overall timeliness of the system[86]. In at least two cases, the Ontario Court of Appeal appears to have treated the delay needed to schedule a Judicial Pre-Trial (JPT) as institutional delay and the period between the scheduling of the JPT and the hearing as inherent time requirements[87]. More recently, the court clarified that a period of delay in arranging a JPT should be treated as part of the inherent time requirements of the case, as long as the court is subsequently available within a reasonable time[88]. The same standard exists with adjournments caused by the unexpected

---

[82] The Court in *Morin* gave the example of a fraud or conspiracy case involving many documents, witnesses and intercepted communications to be transcribed and analyzed.

[83] *R. v. C.R.G.* (2005), 77 O.R. (3d) 308 (C.A.). There the court held that seven and a quarter months was a reasonable intake period. Six months was allocated in *R. v. Modaressi*, 2012 ONSC 1205, [2012] O.J. No. 861, at para. 27, *per* Himel J.

[84] *R. v. Schertzer*, *supra*, note 39, at paras. 77-80 where the court held that the neutral intake period extended to over eleven months.

[85] *Morin*, *supra*, note 4, at para. 41. For informative discussion of Canadian courts" challenges with and the backlog of complex criminal cases, see The Honourable Patrick Lesage and Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures*, Submitted to the Attorney General of Ontario (November 2008), online:

http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/lesage_code_report_en.pdf.

[86] *Tran, supra*, note 39, at paras. 33-37. *Also, R. v. Emanuel*, 2012 ONSC 1132, [2012] O.J. No. 709, at paras. 16, 20-21.

[87] In *R. v. C.R.G.*, *supra*, note 83, at para. 30, Rosenberg J.A., for the court, held that the delay needed to schedule the judicial pre-trial is properly considered to be institutional delay, not an aspect of the inherent time requirements of the case. See also *R. v. Chatwell* (1998), 38 O.R. (3d) 32 (C.A.), at para. 11, leave to appeal refused, [1998] S.C.C.A. No. 84. This can be contrasted with the more recent decision in *R. v. Nadarajah*, 2009 ONCA 118, [2009] O.J. No. 394, at para. 20.

[88] *Tran, supra*, note 39, at para. 34; *Khan*, *supra*, note 64. Scott Latimer, "Defining JPT time for section 11(b) purposes", (2011) 84 C.R. (6th) 244.

actions of the accused

The Supreme Court confirmed in *Askov* that voluntary acts or omissions on the part of an accused that cause or directly contribute to delay must be taken into account in the section 11(b) assessment[97]. Although the Crown is tasked with bringing the accused to trial, both the Crown and defence must account for their actions. Delays characterized as resulting from the actions of the accused are voluntarily taken or chosen for some proper purpose relating to the defence[98]. Examples of such delays include change of venue motions, attacks on wiretap packets, adjournments that do not amount to waiver, attacks on search warrants, and re-election of mode of trial[99]. Further, while an accused is constitutionally entitled to bring a section 11(b) application, or other constitutional challenge, an adjournment because the trial could not be reached after the application was heard is attributable to the defence[100]. Again, this is not to penalize the accused for exercising his or her constitutional rights, but rather an account of the reason for the adjournment[101].

In the context of the section 11(b) analysis, the actions of the accused, and defence counsel, are especially relevant to the assessment of specific prejudice. This includes adjournments flowing from a lack of diligence in pursuing and picking up disclosure[102], the unnecessary pursuit of every possible piece of information rather than a focused attack on the merits[103], failing to attend court

---

[97] *Askov*, *supra*, note 3, at paras. 62-3, *per* Cory J. (Dickson C.J., La Forest, L'Heureux-Dubé and Gonthier concurring). Also, e.g. *Sharma*, *supra,* note 46, at p. 827, where the Court was critical of the lack of protestation and effort on the part of the accused to secure an earlier trial date.

[98] *MacDougall*, *supra*, note 14, at para. 48; *Morin*, *supra*, note 4, at paras. 44-5; *Askov*, *supra*, note 3, at paras. 62-3.

[99] *Morin*, *supra*, note 4, at para. 44.

[100] *N.N.M*, *supra,* note 71, at para. 65. Also, *R. v. Harrison*, [1991] O.J. No. 881 (C.A.).

[101] *Ibid*.

[102] E.g. *Richards*, *supra*, note 91; *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 37; and *R. v. Bramwell*, [1996] B.C.J. No. 503 (C.A.), at para. 33, aff'd [1996] 3 S.C.R. 1126.

[103] *Schertzer*, *supra*, note 39, at para. 131.

appearances[104], under-estimating trial time, and not giving notice of intended *Charter* applications at the time of scheduling[105], and failing to put the Crown on notice or not producing evidence in a timely manner of prejudice allegedly being suffered because of delay in the proceeding[106]. Again, tactical decisions by defence counsel that delay the hearing and disposition of a matter will be attributed to the accused or considered inherent time requirements of the case[107].

Adverse inferences will continue to be available where the accused does not seek to expedite, or take the next step in, the proceeding, and repeated adjournments will accordingly be attributed to the accused[108]. However, the Supreme Court has more recently clarified that section 11(b) does not require that defence counsel hold themselves in a state of perpetual availability[109]. A reasonable explanation for being unavailable will not count as waiver or delay attributable to either the Crown or the accused. Nor will delay be attributed to the accused when a single date is declined in circumstances where the Crown is responsible for the case having to be rescheduled[110]. What is required is reasonable availability and cooperation on the part of both parties.

actions of the crown

As stated by Sopinka J. in *Morin*, this aspect of the reasons for the delay is concerned with actions of the prosecution which caused or contributed to delay in the completion of the trial of an offence[111]. As with the accused, this factor does

---

[104] For example, in *Qureshi*, the proceedings had to be adjourned five times because one of the co-accused failed to appear in court.

[105] *Tran*, *supra*, note 39; *Baldini*, *supra*, note 23.

[106] *Bennett*, *supra*, note 45, at para. 109; *R. v. Vertilib*, [2006] O.J. No. 660 (S.C.), *per* Molloy J., aff'd [2008] O.J. No. 1223 (C.A.).

[107] *Kugathasan*, *supra*, note 95, at para. 15.

[108] *Qureshi*, *supra*, note 14, at para. 40.

[109] *Godin*, *supra*, note 33, at para. 23.

[110] *Ibid*.

[111] *Morin*, *supra*, note 4, at para. 46.

"We don't see it your way …"

Finally, in turning to some international treatment of remedy for breach of the constitutional right to trial without unreasonable delay, and away from our adoption of much of the American approach in *Wingo,* we see a somewhat different trend in New Zealand, Australia, India, South Africa, the Caribbean, the United Kingdom, and much of the European community. Indeed, by the point

---

2012 CM 4003, at paras. 22-5, 36 (delay considered as "mitigating factor" in sentencing); *R. v. Nesbitt,* 2012 BCCA 243, [2012] B.C.J. No. 1156, at paras. 7, 30, 42-3 (N. rehabilitated in 6 years following offence – factor necessarily impacts on fit sentence); *R. v. Rashid*, 2010 ONCA 3789, 259 C.C.C. (3d) 289, at paras. 8-9 (delay in bringing accused before court in a timely way for bail hearing reflected in sentence discount); *R. v. Steadman,* 2010 BCCA 382, [2010] B.C.J. No. 1826, at paras. 11, 15, 18 (delay an appropriate sentencing consideration); *R. v. Liwyj*, 2010 CMAC 6, at paras. 51-4, 56 (trial judge erred in failing to consider in penalty phase "the serious consequences of delay on the Appellant"s life"); *R. v. Witen,* 2012 ONSC 4151, [2012] O.J. No. 3226, at paras. 22, 33, 35, *per* Hambly J. (no section 11(b) *Charter* breach identified; however delay a mitigating factor on sentence – "Mr. Witen has been subject to the charges for an additional 30 ½ months than would have been the case if this matter had proceeded to trial uninterrupted"). See also *R. v. Donald*, 2010 SKPC 123, 363 Sask. R. 195, at paras. 44-79, *per* Kalmakoff J.; *R. v. Knockwood,* 2012 ONSC 2238, [2012] O.J. No. 1592, at paras. 54(11), 55, 69-72, *per* Hill J. (failure to prepare a *Gladue* report in a timely fashion):

> 54 (11) the information relevant to an Aboriginal offender"s background should be brought before the court "in a comprehensive and timely manner" (*Ipeelee/Ladue,* at para. 60) and "[e]xtensive delays in having matters dealt with is very much at odds with a restorative approach" important to Aboriginal culture: *R. v. Oakoak,* 2011 NUCA 4, at para. 26.
>
> 55 Apart from the last observation relating to an adequate and timely *Gladue* report, s. 720(1) of the *Code* requires the court to determine the appropriate sentence "as soon as practicable after an offender has been found guilty".
>
> …
>
> 69 The sentencing hearing in this case ought to have proceeded in early December 2011. Instead, the sentencing occurred 4 months later and 8 months after the offender's plea of Guilt. This is not as soon as practicable.
>
> 70 The circumstances of the delay are important:
>
> (1) almost immediately after the court's order for a *Gladue* report, Quebec probation services reported that because *Gladue* reports are not prepared in that province one would not be prepared
>
> (2) Ms. K.K., an Aboriginal person, was compelled to settle for an offer of a PSR with "*Gladue* content"
>
> (3) Quebec probation services balked at preparing the report in a timely fashion
>
> (4) while the report was filed with the court within the prescribed time, it had no *Gladue* content, was otherwise content-inadequate, and typed in the French language which the offender could not understand
>
> (5) upset, insulted and afraid that the court would not receive the background information necessary to understanding who she was as an offender, Ms. K.K. on her own attempted to get a *Gladue* report in Montreal only to find that she would have to pay for such a report
>
> (6) the Province of Quebec may get to the training necessary for the preparation of *Gladue* reports over a dozen years after the *Gladue* case was decided
>
> (7) the offender has suffered stress and upset as a result of the delay in preparation of the report and the sentencing itself.
>
> 71 The outrageousness of this story is self-evident. A shameful wrong. Contempt for the rights of Aboriginal Canadians. A denial of equality.
>
> 72 The state misconduct is measured as much in the circumstances and consequences of the delay for Ms. K.K. as it is in the actual months of delay. But for the intervention of Mr. Diana and the work of Mr. King, the damage would have been further aggravated. The misconduct falls squarely to be addressed by a *Nasogaluak* remedy.

when *Mills* was decided in 1986, the European Court of Human Rights in Strasbourg had already headed in a different direction[250] in its interpretation of the trial-without-unreasonable-delay right in Article 6.1 of the *European Convention on Human Rights* (the *Convention*)[251].

As a general observation, it can be said that *none* of these jurisdictions view a stay or prohibition of proceedings as the minimum remedy available for a breach of the right to be tried without unreasonable delay. Prejudice is inferred from a finding of unreasonably prolonged proceedings. Actual prejudice is relevant only to the question of sufficient redress and not to the question of breach. Depending on the circumstances of a breach of the right, a court may exercise its discretion in favour of selecting from a range of remedies.

---

[250] See, for example, *Eckle v. Germany,* [1982] ECHR 4 (July 15, 1982) which considered the points of inquiry in a delay case to be the complexity of the matter and the conduct of the parties in the context of the length and reasons for the delay. Prejudice was not considered on the violation issue but rather as an aspect of remedy which could include a reduction in sentence. In *Corigliano v. Italy,* [1982] ECHR 10 (Dec. 10, 1982), given the circumstances, the Court was satisfied that an acknowledgment of declaration of a breach of Art. 6.1 together with costs afforded sufficient redress.

[251] The *Convention* applies to criminal, civil and some administrative and discipline proceedings. Signatory or member nations of the *Convention* of September 1970 in turn, over time, assigned *Convention* rights priority in domestic law through Parliamentary statute or state constitution. Article 6.1 provides that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

A person alleging a breach of this right must have an effective remedy in his or her own country by virtue of Article 13 of the *Convention:*

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

On the principle of subsidiarity, only after an aggrieved party has exhausted his or her domestic remedies for an alleged violation of the Art. 6.1 right, may resort be had to the European Court of Human Rights for review on the issue of breach and, under Art. 41, on the issue of remedy:

> If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Member states are bound by the Court"s determinations pursuant to Art. 46:

> The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

In New Zealand, everyone charged with a criminal offence has "[t]he right to be tried without undue delay"[252]. In the context of a criminal proceeding, a charged person may seek judicial review of an allegation of breach of the right. In 1995, after considering a number of authorities, including the Canadian cases of *Mills, Askov* and *Morin,* and the USSC *Wingo* precedent, the New Zealand Court of Appeal set its own course[253].

---

[252] *New Zealand Bill of Rights Act 1990,* s. 25(b). The *Act* does not provide an express remedy for a violation of a proclaimed right.

[253] In *Martin v. Tauranga District Court,* [1995] 2 NZLR 419 (C.A.), a 5-judge panel reversed the lower courts and ordered a stay of proceedings on account of excessive delay. Each judge rendered a decision. In summary:

- *the **fair trial interest*** – impact of delay upon a person"s fair trial right are considered separately as that right is discreetly protected by s. 25(a) of the *Act* (Richardson J. (p. 426), McKay J. (p. 433), Casey J. (at pp. 429-30)
- ***actual prejudice*** is relevant only to the issue of remedy – Casey J. (pp. 429-30), (Richardson & Hardie Boys JJ. not dealing with the issue and *contra* Cooke P. (p. 424), McKay J. (p. 433)); with Casey J. stating:

> If prejudice to the accused were to be taken into account as a factor in determining whether the delay has been undue, the immediate question is "what weight is to be attached to it?" It is not difficult to predict that if there has been no prejudice, or there has been a positive advantage from the delay, there will be a natural tendency for the Court to accept this as the dominating factor, thereby deflecting the purpose behind the section of ensuring the speedy disposal of charges. This tendency can be seen in the decision of the majority in *R. v. Morin*; the lack of proved prejudice was the deciding factor in their refusal to grant a stay, even though they held that the delay was longer than it should have been.
>
> Considerations of prejudice (or the lack of it) seem to be more naturally relevant to the question of the appropriate remedy, as suggested by Lamer J. in the second of his propositions in *Mills v. The Queen* cited earlier in this judgment.

- *the **appropriate remedy***:

Cooke P.

> "A standard remedy under the Bill of Rights for undue delay should logically be a stay" (p. 424).
>
> Where a breach found, "it would normally be unsatisfactory (to say the least) for the state to insist on trial thereafter. A trial would then *ipso facto* be in breach of the right of the person charged to be tried without undue delay" (p. 425).

Richardson J.

> Where the delay has not affected the fairness of any ensuing trial through, for example, unavailability of witnesses or the dimming of memories of witnesses so as to attract consideration under s 25(a), it is arguable that the vindication of the appellant's rights does not require the abandonment of the trial processes: that the trial should be expedited rather than aborted and the breach of s 25(b) should be met by an award of monetary compensation. That would also respect victims' rights and the public interest in the prosecution to trial of alleged offenders.
>
> There is also a further and wider question. It is whether the *prima facie* remedy for breach of some provisions of the Bill of Rights should be money damages and whether other remedies such as the exclusion of evidence should be granted only where, weighing all public interest considerations, monetary relief is not adequate to vindicate the right breached ... But the objective is to vindicate human rights, not to punish or discipline those responsible for the breach. The choice of remedies should be directed to the values underlying the particular right. The remedy or remedies granted should be proportional to the particular breach and should have regard to other aspects of the public interest (p. 427).