

[R. v. T.](#)

Ontario Judgments

Ontario Court of Justice

F.M. Finnestad J.

Heard: October 8, 2008.

Judgment: October 21, 2008.

[2008] O.J. No. 4147 | 2008 ONCJ 510 | 79 W.C.B. (2d) 614 | 180 C.R.R. (2d) 358

Between Her Majesty the Queen, and C.T.

(23 paras.)

**Case Summary**

---

**Criminal law — Constitutional issues — Canadian Charter of Rights and Freedoms — Legal rights — Procedural rights — Delay — Application by the accused for a stay based on delay allowed — The delay between charge and trial was 12 and a half months — Delay fell 2-3 months outside of the upper end of the range — There was inferred prejudice from the delay which was not contradicted by Crown evidence.**

Application by the accused for a stay based on delay. The accused was charged with impaired driving and operating a motor vehicle with more than 80 mg. of alcohol in 100 ml. of blood. There was a delay of 12 and a half months between the date of the charge and the scheduled trial date.

HELD: Application allowed.

The delay fell 2-3 months outside of the upper end of the range. There was inferred prejudice from the delay which was not contradicted by Crown evidence. The charge was serious but not so overwhelmingly serious that the public interest justified an extra delay of several months beyond the guidelines proposed. On a balancing of all the factors the grounds for a stay on the basis of a s. 11(b) violation were established.

**Statutes, Regulations and Rules Cited:**

---

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 11(b)

## **Counsel**

---

**Dominique Kennedy: for the Crown.**

**Michelle Johal: for the defendant C.T..**

---

## **F.M. FINNESTAD J.**

1 C.T. is charged with impaired driving and operating a motor vehicle with more than 80 mg. of alcohol in 100 ml. of blood. He was charged on May 28, 2007. His trial date is scheduled for October 8, 2008. There appears to be nothing extraordinary about this particular case.

2 Mr.T.'s first appearance was on June 12, 2007. The provision of disclosure and the retainer of counsel consumed the time up to September 24, 2007. The time leading up to that date is neutral and is not out of the ordinary in this jurisdiction. I do not find that there was a failure of the defendant to move the matter forward as disclosure was not complete until after the retainer of counsel. It appears that both sides required this initial time period to put themselves in a position to be ready to set a date for trial.

3 On September 24, 2007, counsel for the defence and the Crown had pre-trial discussions and were prepared to set a date for trial. All delay that occurs hereafter is attributable to institutional factors. It is the practice in this Court to require judicial pre-trials for all matters anticipated to require more than a half day of court time, and all drinking and driving cases. At that time there was a significant delay in waiting for judicial pre-trials, and Mr. T.'s pre-trial was scheduled for nearly three months away, on December 18, 2007.

4 On December 18, 2007, after a judicial pre-trial, counsel set a trial date of October 8, 2008. Although unavailability of one Crown witness led to a date being set two weeks after the first date offered, counsel are agreed that the delay here is essentially institutional and is to be assessed as such.

5 There was nothing to suggest that Mr. T. had waived his right to have his trial within a reasonable time. There was further nothing that suggested that Mr. T. had suffered any prejudice beyond the inferred prejudice arising from a lengthy wait for a trial. His affidavit filed in support of this Application essentially stated that he was anxious waiting for his case to come to trial.

6 A consideration of the factors set out in *R. v Morin* yields the following conclusions.

### **Length of the Delay**

7 The length of the operative delay is 12.5 months.

### **Waiver of Time Periods**

8 There has been none.

### **Reasons for the Delay**

9 The inherent time requirements of the case have not necessitated a delay. Counsel have advised that there are not any complications to this drinking and driving case.

10 The actions of the accused have not contributed to the delay.

11 The actions of the Crown have not contributed to the delay.

12 Limits on institutional resources are the primary factor contributing to the delay in this matter. A delay of three months for a judicial pre-trial is attributable entirely to the unavailability of resources to accommodate it at any earlier date. Steps initiated by the judiciary and accommodated by the Crown's office have since been taken to ameliorate this problem in our courthouse, with the effect that judicial pre-trials are now being offered within about two weeks, and in court "on demand" in the case of drinking and driving cases.

### **Other Reasons for the Delay**

13 Crown witness unavailability required that the date be set two to three weeks after the earliest one available to the Court and the defence. This is insignificant

and counsel were agreed that the operative period of delay was based on institutional limitations.

## **Prejudice**

**14** There is no actual prejudice to Mr. T. demonstrated. There is no evidence that he has lost witnesses or memory, nor that he has suffered ill-health or job loss as a result of the length of the wait to come to trial. He had no conditions on his release.

**15** A balancing approach must be taken in considering an application for a stay based on an alleged violation of s. 11(b) of the *Charter*. While that section protects an individual's rights, it also protects society's interests in having those who commit crimes tried quickly and fairly.

**16** Each case is fact-specific and is to be considered individually, not as the result of the application of some mathematical formula or judicially developed limitation period. The presence or absence of actual prejudice can move the acceptable time period in either direction of the 8-10 month guidelines. The question in a case such as this without actual prejudice to move the guidelines in favour of shortening the acceptable time period, is whether there is an "absence of prejudice" such that a period of delay outside of the guidelines would be reasonable in the circumstances.

**17** The Crown submitted that in conducting the balancing of various factors I should consider in the "absence of prejudice" category, Mr. T.'s failure to move the matter forward. Although the Crown would not put it in exactly these words, the argument could be reduced to an assertion that Mr. T. was not interested in a speedy trial because he declined to set a date for trial before disclosure was complete, or his counsel had time to review it. I do not accept that argument. Disclosure was completed only on the date that retained counsel first appeared in court. The defendant should not be held to a higher standard than the Crown. As for the two-week adjournment after disclosure was given, it was not unreasonable to adjourn the matter briefly to review the DVD before determining whether the matter would be proceeding to trial. The disclosure provided was not of trifling relevance; it was a DVD of the defendant showing his behaviour and sobriety at the police station on the night of his arrest. The review of this material was essential not only to issues on any pre-trial to be held, but to the question of whether the matter would be going to trial at all. I do not find that the Crown has

established an absence of prejudice that would justify the deviation of several months from the norm.

**18** Drinking and driving offences are serious and any application alleging a s. 11(b) breach must consider the public interest in having these matters tried on their merits. This public interest is an important one, and must be balanced against the interests of the defendant in having his trial within a reasonable time. The latter interest is also one held by the public: Crown witnesses also need and want to have matters tried while their memories are fresh and the matter still has some relevance to them. The ideal solution is not to dismiss charges but to hold trials within a reasonable time.

**19** The *Canadian Charter of Rights and Freedoms* provides Canadians with the right to trial within a reasonable time, not the right to trial within a reasonable time if they can demonstrate that they were unduly negatively affected by the breach of that right. The Supreme Court of Canada has suggested that 8 to 10 months is a reasonable period of institutional delay in the provincial court. It flows from this that it is entirely possible that a delay that falls outside of this period is unreasonable. In arriving at this guideline the Court considers that there is a certain prejudice flowing simply from being charged that may be changed by the excessive passage of time into a prejudice that also flows from the delay itself. The Court infers prejudice to an accused person once a matter has been unduly delayed. A guideline for acceptable delay is 8 to 10 months, so there may be prejudice inferred in any delay that exceeds that. That guideline may be moved towards a shorter period of time being acceptable where the defendant demonstrates actual and serious prejudice. It can be moved towards tolerating a longer period of time if the Crown establishes that the defendant actually sustained none of the inferred prejudice, actually benefited from the delay, or sought to delay the matter himself.

**20** The interest of the defendant in trial within a reasonable time must be balanced against society's interest in having a trial heard on the merits. Where the charge is one that is very serious, such as one involving violence or other offences against the person, or a breach of trust, that public interest assumes greater weight in the balancing of factors.

**21** All of these factors militate in one direction or the other in the balancing that a trial judge must perform. What of the case such as this where the matter is neither extremely serious nor trivial, and where there is neither actual prejudice nor a demonstration of prejudice less than that inferred from the delay itself? It is simply a case of an uncomplicated matter taking 12.5 months to come to court because

of the limitations on institutional resources. It is my view that in this situation one must have recourse to the guidelines suggested by the Supreme Court of Canada. There is no reason to deviate in one direction or the other: the public interest is neither greater nor lesser than the defendant's right to be tried within a reasonable time and in the absence of factors extending or contracting the acceptable time limit, those guidelines should be respected as being the outer limits of acceptable delay.

**22** In this case, in my view the delay falls 2-3 months outside of the upper end of the range suggested in the guidelines. There is inferred prejudice from the delay which is not contradicted by Crown evidence. This affects the security of the person interests that the *Charter* seeks to protect. The charge is serious but not so overwhelmingly serious that the public interest would justify an extra delay of several months beyond the guidelines proposed. On a balancing of all the factors I find that grounds for a stay on the basis of a s. 11(b) violation have been established and the application is granted.

**23** The Courts have had 18 years since *Askov* and 16 years since *Morin* to work on achieving the goal, and *the right*, of trial within a reasonable time. In this jurisdiction it is now the norm rather than the exception to set trial dates for half, full and multi-day matters in excess of one year after the judicial pre-trial has been held. I have seen both Informations and defendants appear in court on the wrong date over confusion as to in which year their appearance was required. The situation in this court has worsened, rather than improved, since Mr. T. was charged in the spring of 2007 and no silver lining has been noted in the dark cloud hanging over this jurisdiction. It is important that the courts recognize and give effect to this important right guaranteed in the *Canadian Charter of Rights and Freedoms* and that government be held to its responsibility to provide both victims and defendants with trial within a reasonable time.

F.M. FINNESTAD J.