

In the Provincial Court of Alberta

Citation: R. v. Klein, 2009 ABPC 381

Date: 20091217
Docket: 060624574P10101-0104
Registry: Calgary

Between:

Her Majesty the Queen

- and -

Tyler John Klein

Charter Ruling on Section 11(b) by the Honourable Judge B.R. Fraser

[1] The defence presents a *Charter* Application under Section 11(b), that the Crown has violated the accused's right to be tried in a reasonable time. The charge was laid on the 29th day of May, 2006 and the trial is set to proceed January 11, 2010, a period of just under 44 months and over three and one half years.

[2] On the previous trial date of May 7, 2009, a *Charter* Application was made before this court for a judicial stay on the basis of lack of disclosure by the Crown of specific requests by the defence. That Application was denied, mainly on the basis that the non-disclosure was never brought before the trial court by way of an application for failure to disclose for review by the court, a remedy set out in *R. v. Stinchcombe* (1995), 96 C.C.C. (3d) 318 (S.C.C.), and more recently in *R. v. McNeil*, [2009] 1 S.C.R. 66. When that Application was dismissed, the defence advised the court of its intention to make this Application. It was set down as a pre-trial Application to be heard and decided prior to the new trial date.

[3] The accused is charged with assaulting a police officer, obstructing a police officer, and resisting two police officers, all while the officers were in the execution of their duties on May 29, 2006. On his first appearance, June 20, 2006, the Crown elected to proceed by summary conviction procedure. It was not until March 22, 2007 that the accused entered a not guilty plea, after 16 appearances. A trial date was set for December 12, 2007.

[4] In the first *Charter* notice filed by the defence, a summary of the facts of the incident giving rise to the charges can be gleaned, based on Crown disclosure and potential defence evidence disclosed. It is necessary to have some indication of the facts to determine relevance of further disclosure requests.

[5] It appears the accused, a female and another male were at a restaurant. As they left, the female got in the back of a vehicle, the accused in the front passenger seat and the other male was approaching the driver's side when he was stopped by police who began an investigation of an impaired driver. The police (Constable Kuipers) demanded a roadside breath sample. The accused and the female began yelling to the suspect not to blow, that he did not have to. Constable Duggan advised the accused and the female they were obstructing the police and counselling an offence and if they continued they would be charged. After further words Constable Duggan placed the accused under arrest for obstruction and public intoxication and told him to get out of the vehicle. This information comes from Crown disclosure. Defence witnesses may testify to a slightly different version involving a more aggressive Constable Duggan.

[6] When Constable Duggan could not open the car door, he tried to pull the accused out the window. The accused opened the door and knocked Constable Duggan off balance. The officer grabbed the accused and they both fell to the ground. Constable Kuipers placed the accused in a hold and Constable Duggan 'tasered' the accused in the chest with darts. He then 'tasered' him a second time while he was on the ground surrounded by three officers.

[7] EMS were called to attend to the accused. Crown disclosure indicates the paramedics do not corroborate the officer's view the accused was drunk or impaired, quite the opposite. The male who was the subject of the impaired investigation passed the roadside test.

[8] The issues the defence raises based on this disclosure and defence information are whether Constables Duggan or Kuipers had reasonable grounds to demand a breath sample or to arrest; whether excessive force was used in arresting; whether Constable Duggan followed police policy in using his taser in the circumstances. In order to address these issues the defence requested further disclosure not provided by the Crown. They requested the notes of the three officers involved in the impaired driving investigation that initiated the incident; the AACP use of force guidelines and training material; the audio of the police telecoms/dispatch; Sargent Marston's "Use of Force Report" prepared as a result of the use of the taser; any past disciplinary records involving Constable Duggan pursuant to *R. v. McNeil* (supra). Based on the initial or basic disclosure, these requests were clearly relevant and in no way frivolous requests.

History of The File

[9] From first appearance, June 20, 2006 until November 1, 2006, Mr. Dunn was on the record as defence counsel. He recognized he had a conflict unless the matter could be resolved.

Not being successful, he got off the record and Mr. Chow came on the record. Since then, the matter went over nine times awaiting further disclosure until March 22, 2007 when a not guilty plea was entered and a trial date of December 12, 2007 was set. On April 23, 2007, the matter was brought forward by defence and a new trial date set of January 17, 2008 on the basis the accused was writing exams on December 12.

[10] On the trial date of January 17, 2008, a joint application was made for an adjournment by Crown and defence because further defence disclosure requests had not been met. A new trial date of December 22, 2008 was set. Defence waived its *Askov* rights. On March 10, 2008 the matter was brought forward at the direction of the court because trial courts were to be closed the three days before Christmas. It was put over to March 14, 2008 when a new trial date of December 30 and 31, 2008 was set. On April 30, 2008 the matter was again brought forward by the Crown who applied for an adjournment because the assigned Crown was not available on the trial date. The application was granted and a new trial date was set of May 7 and 8, 2009.

[11] On May 7, 2009, the matter appeared before me and defence made the *Charter* Application for a judicial stay as previously mentioned and it was denied. The trial could not proceed for a number of reasons. First, the defence disclosure requests had still not been met. Second, based on *McNeil* the defence had recently applied for disciplinary records and that procedure was underway. Thirdly the Crown had been advised its primary witness, Constable Duggan, had been injured, was in a cast, was not mobile, and therefore could not attend court. Fourth, Constable Kuipers also did not attend and the Crown did not know why.

[12] This court ordered the Crown to provide the requested disclosure as being relevant and not frivolous. If it was not provided by a certain date, defence would be given leave to re-open its *Charter* Application for a judicial stay. The defence gave notice it would be making this *Charter* Application under Section 11(b). The Crown provided the disclosure satisfactory to the defence. A new trial date was set for January 11, 2010 for two and one half days before me and a date of November 2, 2009 was set to hear the *Charter* Application. On November 2, 2009, both counsel elected to file written submissions rather than make oral submissions. On that basis I set December 17, 2009 to make my ruling prior to the trial date. This is the 27th appearance in court.

[13] Although there are several reasons for the delay in getting this matter to trial, the major reason appears to be non-disclosure by the Crown in response to defence requests for further disclosure of relevant information based on original disclosure of the Crown's case against the accused and the issues presented by that disclosure. The defence made numerous written requests that were either ignored or met with non-compliance. The defence outlines seven written requests for disclosure between December 7, 2006 and November 6, 2007 and I have counted a further 11 times during court appearances the matter went over because defence counsel indicated he was still awaiting additional disclosure.

[14] The period from May 29, 2006 to November 24, 2006, I find to be inherent delay caused by Crown election, initial disclosure request, counsel determining he had a conflict trying to resolve it through early case resolution, not being able to resolve, getting off the record, obtaining new counsel. None of that kind of delay can be attributable to anyone. It amounts to approximately six months.

[15] The delay from November 24, 2006 to March 22, 2007 was for continual requests for additional disclosure which was not complied with by the Crown. This delay is partially inherent delay and partially attributable to the Crown. It amounts to approximately four months.

[16] The delay from March 22, 2007 to January 17, 2008 when the second trial date was set was caused by a systemic delay of nine months and one month of defence delay in delaying the trial from December 12, 2007 to January 17, 2008. Systemic delay counts against the Crown.

[17] The delay from January 17, 2008 to December 22, 2008 is not attributable to the Crown. Defence waived its *Askov* rights. This delay is 11 months.

[18] The delay from December 22, 2008 to December 30, 2008 is a systemic delay caused by the courts changing the system and should not count against anyone. That delay only amounts to one week.

[19] The delay from December 30, 2008 to May 7, 2009 is caused by a combination of Crown not being available and systemic delay in acquiring a new trial date. That delay amounts to four months and counts against the Crown.

[20] The delay from May 7, 2009, the fifth trial date to January 11, 2010, the sixth trial date, is caused by the Crown still not providing the additional disclosure requested and not having their witnesses present for trial. I take into consideration that one police officer was injured and not mobile enough to attend court. There is no explanation for the other officer not being present. I understand the reason for the *McNeil* requested disclosure not being available was due to the lateness of the request because the decision was recent and a new procedure was being put in place to process the request. However, the trial could not proceed without the other disclosure and without the other officer in any event. This delay overall counts against the Crown. It amounts to eight months.

[21] Therefore, the delay attributable to inherent delay is 6 - 10 months, defence waiver is 11 months and one month for a total of 12 months, and Crown delay or systemic delay is zero to four, nine, four and eight months for a total of 21 to 25 months, for a total of 43 months of delay.

[22] In reviewing the *Charter* notices and the disclosure contained therein, it is my view any trial of this matter is simple and straightforward and anything but complex. It appears there would be three police officers and one EMS personnel called to prove the case for the Crown and perhaps the accused and two defence witnesses for the defence, should they decide to call

evidence. The issues appear to be whether the accused's conduct amounts to obstruction, whether there were grounds to arrest and whether excessive force was used. The trial was originally set for two hours. Now it is set for two and one half days. The fact the trial is not in the least complex also counts against the Crown. The disclosure certainly gives rise to a live issue as to whether the accused committed an obstruction or any offence whatsoever.

The Law

[23] The law as to 11(b) rights, the right against unreasonable delay, has been developed in the Supreme Court of Canada in three cases chronologically as follows:

- 1) ***R. v. Askov***, [1990] 2 S.C.R. 1199
- 2) ***R. v. Morin***, [1992] 1 S.C.R. 771
- 3) ***R. v. Godin*** (2009), 245 C.C.C. (3d) 271

[24] In ***R. v. Askov*** (*supra*), the delay was two years and ten months or 34 months. This was considered unreasonable after a review of all the factors.

[25] In ***R. v. Morin*** (*supra*), the delay was 14½ months. This was considered reasonable after a review of all factors.

[26] In ***R. v. Godin*** (*supra*), the delay was two and a half years or 30 months. This was considered unreasonable after a review of all factors.

[27] By comparison the total delay here is 43 months or three years and seven months.

[28] In ***Morin*** (*supra*) the Supreme Court said the general approach is not by the application of a mathematical or administrative formula, but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.

[29] The above authorities have set out five factors to be considered when deciding a stay application under 11(b). They are:

- 1) the length of the delay;
- 2) waiver of time periods;
- 3) the reasons for the delay, including limits on institutional resources and the inherent time requirements of the case;
- 4) prejudice to the accused;
- 5) balancing of the problems that the delay caused the accused against the public interest in seeing criminal charges properly disposed of.

Analysis

1) Length of Delay

[30] The total length of time from first appearance to anticipated beginning of trial is 43 months, or three years and seven months. That amount of time gives rise to a consideration of whether the accused's rights under 11(b) have been infringed, by reviewing the factors enumerated above. The Crown elected to proceed by summary conviction procedure meaning the trial must be held in this court. *R. v. Morin, (supra)* set out a guideline of acceptable institutional delay in this court of eight to ten months. This is not a limitation period but rather a factor to consider when weighing the reasonableness of the total delay. However, when the total delay is more than four times the upper range of that guideline, it is incumbent upon the court to assess the causes of that delay.

2) Waiver of Time Periods

[31] The first trial date was set for December 12, 2007. That trial date was set on March 22, 2007. On April 23, 2007, the matter was brought forward by defence to set a new trial date because the date presently set conflicted with the accused's schooling requirements. This was an appropriate request and brought on in a timely manner. A new trial date was set for January 17, 2008, approximately a month later. This time period is tantamount to a waiver of 11(b) rights. The delay is not caused by the Crown and is not systemic or an institutional delay.

[32] The new trial date of January 17, 2008 was adjourned to a new trial date of December 22, 2008. It was either a defence request for adjournment consented to by the Crown or a joint request. The reasons given were because of non-disclosure and insufficient court time. In any event the defence waived its 11(b) rights for this 11 month period of delay, probably because they were not available for trial at an earlier date.

[33] These two periods of delay, one month and 11 months for a total period of 12 months are considered as waived.

3) The Reasons for Delay

[34] The remaining period of delay is attributable to Crown delay, systemic or institutional delay and inherent delay.

[35] Inherent delay encompasses the time taken to get the case to the point where the parties are ready to set trial dates. It includes the time needed to retain and instruct counsel, conduct show cause hearings, undertake administration and paper work, comply with disclosure

obligations, review disclosure, receive instructions from the accused, attempt to resolve the matter without trial through negotiations between Crown and defence, and as in this case determine if counsel can proceed in light of a conflict, and if not, to obtain new counsel. The more complicated the case, the greater the inherent time requirements will be. Inherent delay is acceptable delay and does not need to be explained and does not count in assessing if the delay is unreasonable.

[36] Systemic or institutional delay starts to run when the parties are ready for trial but the system cannot accommodate them. The *Morin* guidelines apply to systemic delay.

[37] Crown delay is when trial dates have been set but the Crown is not ready to proceed for various reasons such as Crown prosecutor unavailability, witness unavailability, not having met their disclosure obligations, not having scheduled appropriate time for the Crown's case or other reasons.

[38] Both Crown delay and systemic delay will count against the Crown in determining if the delay is unreasonable subject to the adequacy of the reasons given for the delay.

[39] It appears to me both parties were not ready to set the matter down for trial by November 24, 2006. Mr. Chow had just come on the record November 1, 2006 and it was adjourned to November 24, 2006 to allow him to receive instructions and presumably review disclosure. On November 15, 2006 he sent a request to the Crown for further disclosure. The record shows that disclosure was provided by March 22, 2007, after six previous appearances over four months awaiting disclosure. On March 22, 2007, a trial date was set for December 12, 2007. Presumably defence counsel was satisfied with disclosure at that time and both parties were in a position to set the matter down for trial, and did so. However, not all of the time from May 29, 2006 to March 22, 2007, a period of approximately 10 months, can be allotted to inherent delay. It took the Crown over four months to comply with a disclosure request that was a perfectly valid request. There is no explanation for that period of delay. The Crown must be given some time to comply and it is difficult to apportion a reasonable period without knowing what difficulties, if any, the Crown had in complying with the request. The Crown only states the request for technical details of the taser caused a lengthy period of time to obtain because the information is not in the possession of the Crown. While this may be so and would account for more delay than usual disclosure, there is no explanation as to why it would take four months. I point out *McNeil* has determined the Crown and the police are considered one and the same for the purposes of disclosure but no other purpose. I would have thought one month would be sufficient time given that explanation, but giving the Crown the benefit of the doubt, I will credit two months of the four and add this to inherent delay. That increases inherent delay to eight months.

[40] The amount of time waived by defence is 12 months. Therefore, the time of delay left to be explained by the Crown is 23 months.

[41] From the submissions of counsel and the record, it is not clear what disclosure was provided or when and what disclosure was outstanding until May 26, 2009 when it was confirmed to the court all outstanding disclosure requests had been complied with by the Crown. The Crown submissions mention the taser documents took time to collect between November 15, 2006 and March 22, 2007. They mention the discipline records of Constable Duggan were somewhat in limbo because of the timing of the *McNeil* decision and setting up a procedure to comply with the direction of the Supreme Court. A *McNeil* request was not made by defence until requested by the Crown. At the trial date of May 7, 2009, I itemized the outstanding disclosure that had to be provided by May 26, 2009. That was the internal conduct records of Constable Duggan, the police audio dispatch records and the investigation file of Mr. Savard, the other male with the accused who was subjected to a roadside breath test and apparently passed.

[42] In addition, the defence requested back on November 15, 2006, the AACP use of force guidelines and training material which I assume included use of tasers, and Sergeant Marston's "Use of Force" report prepared as a result of Constable Duggan's use of his taser. I assume the guidelines were provided prior to March 22, 2007. I don't know when Sergeant Marston's report was provided. However, there was still outstanding disclosure after March 22, 2007 as evidenced by three further requests for disclosure after that date by defence and the fact the January 17, 2008 trial date was adjourned partially because disclosure was still outstanding. Apart from the difficulty with the *McNeil* application, the Crown has offered no explanation for non-disclosure between March 22, 2007 and May 26, 2009, a period of 26 months which includes the waiver period by defence. The waiver does not prevent the Crown from complying with its disclosure obligations.

[43] The trial could not proceed on May 7, 2009 for two reasons. The first is, disclosure was still outstanding as just reviewed. Second the Crown could not produce its two main witnesses. The Crown has explained the absence of Constable Duggan to my satisfaction. There is no explanation for the non-attendance of Constable Kuipers. I therefore hold the Crown responsible for the adjournment of the trial. Regardless of the witness problem, the defence could not proceed to cross-examine witnesses with the disclosure outstanding in any event. The adjournment is the responsibility of the Crown. The delay from May 7 2009 to January 11, 2010 is a combination of Crown and systemic delay.

[44] The Crown, in its written submissions, faults the defence for not pursuing earlier trial dates and/or advising the Crown or the court of its discontent. It is my view the defence could not pursue earlier trial dates when it did not have the requested disclosure. The defence did advise the Crown of its discontent by seven letters requesting disclosure as well as filing its first *Charter* notice on December 27, 2007, wherein they request a judicial stay firstly because of failure to disclose relevant information and secondly unreasonable use of force. Both are alleged as breaches of Section 7. Sixteen months later on the trial date of May 7, 2009, they still did not have full disclosure. I do not accept this submission of the Crown.

[45] I find the Crown is responsible for the 23 months of delay which is largely unexplained or not satisfactorily explained.

4) **Prejudice to The Accused**

[46] No real or specific prejudice has been shown or articulated by the defence. Rather the defence relies on inferred prejudice based on the length of the delay.

[47] In *R. v. Godin (supra)* the court said this about prejudice at paras. 30 and 31:

Prejudice in this context is concerned with the three interests of the accused that s. 11(b) protects: liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make 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. See *Morin*, at pp. 801-3.

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”.

The court stated at para. 34:

...It was reasonable, in my view, to infer as the trial judge did that the prolonged exposure to criminal proceedings resulting from the delay gave rise to some prejudice.

[48] The first interest is pre-trial custody or bail conditions. Here the accused was arrested and taken before a J.P. the same day. He was released on an Undertaking with two conditions; keep the peace, and not to purchase, possess, use or consume alcohol. Although the second condition does not appear to be very onerous and presumably is based on the Crown allegation he was intoxicated, the fact is the Crown’s own disclosure as to his condition regarding alcohol is not consistent. In fact his friend who he was with that evening, passed the roadside screening device. To have to abide by that condition when he may not have even been intoxicated for more than three and a half years could be considered real prejudice to the accused.

[49] Dealing with the second interest, security of the person, he was certainly subjected to stress and the cloud of suspicion that accompanies a criminal charge. That is particularly so in this case. At the time he was 20 years old. There is a real issue as to whether or not what he did is an obstruction or any crime whatsoever, based on the Crown disclosure. Of course this cannot be determined without hearing the evidence in a trial, but there is a real issue if there were reasonable grounds to arrest. There is a real issue as to whether the force used to arrest was excessive or whether the officer was entitled to use any force whatsoever. This is what the defence was trying to determine by their disclosure requests. The non-compliance with those requests caused a large portion of the delay. Where innocence of any crime and right not to be arrested as well as perhaps being subjected to excessive force by police are real live issues, the stress and cloud of suspicion when charged with criminal offences are exacerbated.

[50] The third interest 11(b) protects is the right to make full answer and defence. Here the Crown's witnesses are all police officers and EMS personnel. They make notes and file reports so their evidence is preserved and the ability to cross-examine witnesses is not particularly prejudiced by delay. The defence has two witnesses to the events who have apparently appeared at trial dates when required to do so. The ability to defend appears intact subject to memory lapse and loss of recall by these witnesses over three and one half years which is always a justified concern.

[51] As was found in *Godin* considering all three interests together, it is reasonable to infer in these circumstances that the prolonged exposure to these criminal proceedings resulting from the Crown and systemic delay gave rise to some prejudice real or inferred and that is my finding.

5) **Balancing Delay Caused to The Accused Against Public Interest**

[52] There is a societal interest in seeing that criminal charges are properly disposed of and this interest must be balanced against the prejudice caused to the accused by delay. It is not enough to say that delay plus prejudice outweigh the societal interest in properly disposing of charges. A balancing must include the issues, the seriousness of the charges and the harm to victims.

[53] This was not a complex case. Quite frankly it was straightforward and should have required very modest amounts of court time. As I have already pointed out, the issues of whether there was an obstruction, grounds to arrest and use of excessive force are very real. The accused has a right to defend himself by raising unlawful arrest. There are no victims in the sense of citizens being harmed, although a police officer may have been a victim which is always a serious matter although there does not appear to be any injuries. The accused appears to have suffered the most being twice tasered. The obstruction could not be considered serious nor could the resisting.

[54] Society not only has an interest in seeing charges properly disposed of but also in having those accused of crimes dealt with fairly. The accused was entitled to timely disclosure and did not receive it. He was entitled to defend himself in a timely fashion. Society has an interest in seeing that happen, particularly when the charges are not serious and the facts are straightforward.

[55] In balancing the prejudice to the accused from the delay against the interests of society, I find the prejudice to the accused in these circumstances outweighs any interest in fairly disposing of the charges at this point.

Ruling

[56] The delay in bringing this matter to trial is 43 months. The Crown is responsible for 23 of those months. There is no satisfactory explanation for this delay largely attributed to non-compliance with valid and proper requests for disclosure necessary to defend on real issues. The *Morin* guidelines set 8 to 10 months as reasonable systemic delay. The delay here is more than a year beyond the top end of those guidelines without a satisfactory explanation. In the circumstances of this case and after considering all five factors, as previously analyzed, I conclude the delay is unreasonable and the accused's right to a trial in a reasonable time pursuant to Section 11(b) of the *Charter* has been violated, infringed and denied.

[57] Section 24(1) of the *Charter* states as follows:

Anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[58] The defence requests a judicial stay of proceedings or costs. This is a court of competent jurisdiction; the trial is set to take place in this court before me. In these circumstances I find a judicial stay is appropriate and just.

[59] I therefore enter a judicial stay of proceedings to all charges.

Dated at the City of Calgary, Alberta this 17th day of December, 2009.

Bruce R. Fraser
A Judge of the Provincial Court of Alberta

Appearances:

Jonathan Hak, Q.C.
for the Crown

David Chow
for the Defence