

# In the Provincial Court of Alberta

**Citation: R. v. Nguyen, 2009 ABPC 384**

**Date:** 20091217  
**Docket:** 071014039P101001  
**Registry:** Edmonton

Between:

**Her Majesty the Queen**

- and -

**Ninh Kim Nguyen**

## **Ruling of the Honourable Judge E.A. Johnson on Application for Judicial Stay**

### **INTRODUCTION**

[1] The defence applies for a stay under s. 24(1) as a result of an alleged breach of s. 11(b) of the *Charter*.

[2] For the reasons set out below the application is dismissed.

### **FACTS**

[3] The Applicant filed materials which include transcripts of Court proceedings wherein dates in this matter were set.

[4] The factual history is as follows:

June 25, 2007            Date of alleged offence.

August 31, 2007,        First appearance.

September 7, 2007     Plea of not guilty was entered and trial date was set for March 28, 2008.

March 28, 2008         Accused applied for an adjournment because new counsel had been appointed. A new trial date was set for October 2, 2008.

October 2, 2008	Trial commences in a <i>voir dire</i> . Crown case in the <i>voir dire</i> is completed.
October 6, 2008	Continuation date is set for April 24, 2009.
April 21, 2009	Matter brought forward to adjourn as a consequence of illness of seized trial judge. Continuation date set for November 9, 2009.
October 20, 2009	Accused provides notice to Court and Crown of intention to bring <i>Askov</i> application on November 9, 2009.
November 9, 2009	Issues, including the within application, argued.

[5] The parties agree that the 6 month period from March 28, 2007 - the first scheduled trial date - to October 2, 2008 when the trial started are attributable to the accused whose change of counsel occasioned the delay.

## LEGAL PRINCIPLES

Section 11(b) of the *Canadian Charter of Rights and Freedoms* states:

“Any person charged with an offence has the right

b) to be tried within a reasonable time;”

[6] The principles which guide the within analysis have been addressed by the Supreme Court of Canada in, *inter alia*, *R. v. Morin* [1992] 1 S.C.R. 771 and, more recently, in *R. v. Godin*. 2009 SCC 26.

[7] The purpose of and the interests protected by s. 11(b) were described in *Morin, supra* at paras. 26 - 30 as follows:

“26. The primary purpose of s. 11(b) is the protection of the individual rights of accused. A secondary interest of society as a whole has, however, been recognized by this Court. I will address each of these interests and their inter-action.

27. The individual rights which the section seeks to protect are: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial.

28. The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

29. The secondary societal interest is most obvious when it parallels that of the accused. Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public. As observed by Martin J.A. in *R. v. Beason* (1983), 36 C.R. (3d) 73 (Ont. C.A.): "Trials held within a reasonable time have an intrinsic value. The constitutional guarantee enures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused ..." (p. 96). In some cases, however, the accused has no interest in an early trial and society's interest will not parallel that of the accused.

30. There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In *Conway*, a majority of this Court recognized that the interests of the accused must be balanced by the interests of society in law enforcement. This theme was picked up in *Askov* in the reasons of Cory J. who referred to "a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (pp. 1219-20). As the seriousness of the offence increases so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket."

[8] The factors to consider when addressing whether there has been an unreasonable delay are set out in *Morin, supra*, at para. 31:

"31. The general approach to a determination as to whether the right has been denied 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. As I noted in *Smith, supra*, "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p. 1131). While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

1. the length of the delay;
2. waiver of time periods;
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.

These factors are substantially the same as those discussed by this Court in *Smith, supra*, at p. 1131, and in *Askov, supra*, at pp. 1231-32.

32. The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests

which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. See *R. v. Kalanj*, [1989] 1 S.C.R. 1594. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused.”

## **ANALYSIS OF THIS CASE**

[9] I will consider this case using the above -described analytical framework.

### **The length of the delay**

[10] An inquiry into unreasonable delay is triggered by an application under s. 24(1). If the delay is unexceptionable then no further inquiry is necessary and no explanation called for, unless the accused is able to call into question other factors (*Morin, supra* at para. 35, 36).

[11] This is a fairly straightforward case. Mr. Nguyen is charged with impaired driving and over .08. As was the case in *Morin*, subject to paperwork, the investigation would have been largely complete by the time the accused was released from custody.

[12] As is set out in *Morin, supra* at para. 35, the time period to be scrutinized is the time from the charge to the end of the trial. The information was sworn on August 17, 2007. The trial is not yet complete.

[13] The overall delay from charge to projected trial completion is of sufficient length to raise the issue of its reasonableness.

### **Waiver of time periods**

[14] The Accused says in his written submissions that he has not waived any time periods and the Crown does not take issue with this.

### **Reasons for the delay**

[15] The inherent time requirements for this case are not significant. None of the delays are attributable to the Crown. A delay of 6 months is attributable to the Accused; the first trial date was adjourned at his instance because he changed counsel.

### **Reasons for the delay - Institutional delay**

[16] This is a case involving institutional delay. That is described in *Morin* as the “... period that starts to run when the parties are ready for trial but the system cannot accommodate them” (*Morin, supra* at para. 48). The Accused in his submissions characterizes 19.5 months of the time as institutional delay.

[17] The Court in *Morin* addressed institutional delay in the context of reconciling scarce resources with the notion that trials must be held within a reasonable time. The Court spoke of a guideline period for institutional delay and identified a period of 8 to 10 months of institutional delay as applicable in Provincial Court.

[18] A guideline is one factor to consider. It is not a limitation period; it is not to be applied in a mechanistic fashion. It must yield to other factors. For example, rapidly changing conditions may place a sudden and temporary strain on resources (see *Morin, supra*, at para 51, 52).

[19] Further the application of a guideline will be influenced by the absence or presence of prejudice (*Morin, supra*, para, 53).

[20] The notion of a guideline is for the guidance of trial courts and the periods will require adjustment for local conditions and changing circumstances. The Supreme Court recognized that the provincial courts of appeal will generally be in a better position to assess the reasonableness of their province's institutional limitations and must make that assessment based on correct principles.

[21] The passage of time in this case exceeds the *Morin* guidelines. As set out in *Godin, supra*, at para. 5, this does not on its own make the delay unreasonable.

[22] Here, the allegation of unreasonable delay arises from a combination of factors. The trial began on October 2, 2008. It was not finished on that date and a date for continuation had to be set. On the continuation date, I, as seized trial judge, was not available as a result of unexpected illness. A new continuation date was set for November 9, 2009.

[23] The initial October 2, 2008 trial date fell well within the institutional guideline in *Morin*. The Accused raised *Charter* issues and provided timely *Charter* notice to the Crown. As a result, the trial began in a *voir dire*. The case for the Crown in the *voir dire* was completed on October 2, 2008. What remained was for the Accused to determine whether he intended to call evidence in the *voir dire* and for the parties to make submissions on the issues raised by the *voir dire*, after which a determination would be made respecting what evidence would form a part of the trial proper. The Crown's case finished late in the afternoon on October 2, 2008 and the parties determined that a continuation would be necessary.

[24] The reason for a continuation was that the case did not finish in the time allotted. It is not apparent whether the parties allotted insufficient time or whether there were too many matters scheduled. However, given that *Charter* issues were raised, giving rise to the possible need for an interim ruling, the need for a continuation might have been in the contemplation of the parties. In any event, the Accused took no issue with the timing at that stage.

[25] The adjournment of the continuation (from April 24, 2009 to November 9, 2009), made necessary by illness, was an unforeseen event. I would characterize unexpected illness as being

akin to a “sudden and unexpected strain on resources” as was described in *Morin, supra* at para. 52. There, the Court was referring to a different strains on the system but the description is apposite. Of such an circumstance the Court said: “Such changing conditions should not result in amnesty for persons charged in that region”. Rather, an unusual strain on resources should be treated as one factor in the overall decision as to whether particular delay is unreasonable.

[26] Thus, the delay in this case, was occasioned by the need for a trial continuation and the need to reschedule that continuation as a result of illness.

[27] Counsel for the Accused fairly concedes that none of the delays on its own (that is, the time it took for the trial to begin - the time between the trial date and the first continuation date, and the time between the first continuation date and the second continuation date) falls outside an acceptable time frame. But, he says, the time must be viewed cumulatively and cumulatively it is unacceptable.

[28] While I agree that it is the cumulative time which the Court must examine, it would be an error not to examine each facet of the elapsed time to determine the reasons for the delay.

### **Prejudice**

[29] The Accused does not allege specific prejudice but relies on inferred prejudice arising from the length of time it has taken this straightforward case to reach the stage it has. As the Supreme Court said in *Morin*, the longer the delay the more likely that an inference of prejudice can be drawn.

[30] Prejudice addresses the three interests of the Accused protected by s. 11(b) - liberty, security of the person and right to make full answer and defence.

[31] With respect to the liberty interest, the Accused is not in pre-trial custody nor is he subject to restrictive bail conditions.

[32] With respect to security of the person, he has been subject to the stress and cloud of suspicion accompanying a criminal charge for some time and continues to be until this matter comes to an end.

[33] On the right to make full answer and defence, the Crown has presented its case in the *voir dire* and indicated that it will be calling no further evidence in the trial proper. The Crown’s witnesses have been cross-examined. Thus, the passage of time does not undermine the ability of the Accused to cross examine the Crown’s witnesses as that has already taken place. The Accused has yet to determine whether to call evidence, but his prejudice from the passage of time is significantly less than it would have been if some or all of the Crown’s case remained outstanding.

[34] In considering the issue of prejudice and particularly inferred prejudice, the Alberta Court of Appeal in *R. v. Yelle* [2006] A.J. No. 577 treated the timing of the s. 11(b) application as a

relevant consideration in the context of prejudice. In *Yelle, supra*, the applicants brought a s. 11(b) application at the time the trial reconvened - not when the trial was rescheduled. The Crown argued that failure to complain in a timely fashion undercuts the notion of prejudice. Of that argument, the Court of Appeal said:

“This is a compelling argument. If the respondents were experiencing prejudice as a result of these charges – the stress, stigma, or any other kind of prejudice upon which a judicial stay could be based – and if October 2003 was in fact the earliest time the court had available to continue the trial, it is difficult to understand why they did not bring the s.11(b) application long before October 2003 to end their misery quickly rather than endure it needlessly.”

[35] Here, the November 9, 2009 continuation date was set on April 21, 2009. At that time the timing of the delay would have been apparent and an application could have been made. However, notice of this application was not received until October 20, 2009 and the application was not made until November 9, coinciding to coincide with the continuation of the trial. That is a relevant factor in weighing prejudice.

## CONCLUSION

[36] There has been a significant passage of time since this case began. It merits an examination applying the factors set out in *Morin* and *Godin*. Those factors recognize the interests of the Accused protected by s. 11(b) and the secondary interest of the society in having matters determined on their merits.

[37] Here, the delay arose because of a continuation which was made necessary when the initial trial was not concluded during the time scheduled, and which could not go ahead on the initial scheduled date because of unforeseen circumstances.

[38] No actual prejudice has been demonstrated and inferred prejudice is diminished somewhat by the timing of the within application.

[39] Considering and weighing all of the above I find that the Accused’s right to trial within a reasonable period of time has not been violated.

[40] The application is dismissed.

Heard on the 9<sup>th</sup> day of November, 2009.

Dated at the City of Edmonton, Alberta this 17<sup>th</sup> day of December, 2009.

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E.A. Johnson  
A Judge of the Provincial Court of Alberta

**Appearances:**

M. Jusza  
for the Crown

T. Foster  
Defence