

CITATION: R. v. Zhu, 2015 ONSC 7942
COURT FILE NO.: CR-14-048
DATE: 2015-12-17

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

Her Majesty The Queen,

Respondent

- and -

Yu Bo Zhu,

Applicant

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) *Alex Hardiejowski*, for the Crown
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) *Patrick C. Fagan*, for the Applicant
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) **HEARD:** October 22, 2015,
) at Kenora, Ontario

Madam Justice H.M. Pierce

Reasons on Application for Stay of Proceedings for Undue Delay

Introduction

[1] Mr. Zhu applies for a stay of proceedings pursuant to s. 24(1) of the *Charter of Rights and Freedoms*, arguing that his right to be tried within a reasonable time, as guaranteed by s. 11(b) of the *Charter* has been breached. He was arrested on May 2, 2013, as a consequence of a roadside stop and charged with a single count of possession of marijuana for the purpose of trafficking. As of the date this application was heard on October 22, 2015, the charges had been outstanding for 905 days or almost 30 months.

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[2] The applicant submits that in this case, the Crown's delay in providing basic disclosure for a straight-forward case led to excessive delay. He says that delay breached his *Charter* rights and interfered with the public interest in trying cases.

[3] In *R. v. Morin*, [1992] 1 S.C.R. 771, the Supreme Court of Canada established a guideline for trial courts when considering an individual's right, pursuant to s. 11(b) of the *Charter of Rights and Freedoms*, to be tried within a reasonable period of time. Those guidelines suggest between 8 – 10 months of institutional delay in the provincial courts and 6 – 8 months after committal for trial, a range of between 14 – 18 months.

[4] The Crown disputes that Mr. Zhu's case has been unduly delayed by late disclosure.

[5] As the cumulative delay in Mr. Zhu's case falls outside the *Morin* framework, further inquiry is warranted.

Principles of Law

[6] Section 11(b) of the *Charter of Rights and Freedoms* guarantees the right to be tried within a reasonable time. The Supreme Court of Canada developed the principles attributable to this constitutional guarantee in *R. v. Askov*, [1990] 59 C.C.C. (3d) 449 (S.C.C.) and subsequently in *R. v. Morin*, [1992] 71 C.C.C. (3d) 1 (S.C.C.).

[7] In *Askov*, the court recognized that the guarantee in s. 11(b) has several purposes: for accused persons, to protect their rights to be tried within a reasonable time; for society, to ensure that those who are charged are dealt with according to law, and that those on trial be treated fairly, with minimal prejudice: para. 44.

[8] The court in *Askov* recognized that it is difficult for persons charged and their families to await resolution of the charges: para. 43. As well, the court observed that delays in trials affect witnesses: they may become unwell or unavailable; their memories may erode; and the stress of a pending trial may also weigh on them: para. 45.

[9] In *Morin*, the Supreme Court emphasized that the primary purpose of s. 11(b) is the protection of an accused person's rights, and that the interests of society are secondary.

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[10] In *Morin*, at para. 31, the Supreme Court identified the following factors for consideration under a s. 11(b) *Charter* application:

- 1) the length of the delay;
- 2) waiver of delay;
- 3) the reasons for the delay, including
 - (a) inherent time requirements for the case;
 - (b) actions of the accused;
 - (c) actions of the Crown;
 - (d) limits on institutional resources;
 - (e) other reasons for delay; and
- 4) prejudice to the accused.

As the court noted at para. 32 of *Morin*, the court is required to balance these factors in assessing whether the delay is unreasonable. The onus is on the applicant to establish a breach of his right to trial within a reasonable time.

[11] In this case, the Crown argues that certain time periods have been waived by the applicant. In *Morin*, the court subtracted from any delay time periods said to be waived by the accused in order to examine whether the remaining times were reasonable: para 37. It is, therefore, useful to consider the nature of waiver in this context.

[12] Waiver of s. 11(b) rights by an accused person must be clear and unequivocal, made in the knowledge of the rights and the effect that his or her waiver will have on those rights. Waiver can be explicit or implicit, but if implicit, it must not be merely inadvertent. As Cory J. stated in *Askov* at para. 65,

...there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s. 11(b) guarantee, understood its nature and has waived the right provided by that guarantee.

See *Morin*, para. 38.

[13] The Supreme Court of Canada in *R. v. Smith*, (1989), 52 C.C.C. (3d) 97 at 109, held that agreement to a future court date will, in most circumstances, be considered a waiver, observing:

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Agreement by an accused to a future date will in most circumstances give rise to an inference that the accused waived his right to subsequently allege that an unreasonable delay has occurred. While silence cannot constitute waiver, agreeing to a future date for a trial or preliminary inquiry would generally be characterized as more than silence. Therefore, absent other factors, waiver of the appellant's 11(b) rights might be inferred based on the foregoing circumstances.

[14] The court in *Morin* also commented on the nature of inherent time requirements, holding that each case contained inherent time requirements; the more complex the case, the longer it will take counsel to prepare for and conduct the trial. Common inherent requirements include retaining counsel, bail hearings, police and administrative paperwork, disclosure, whether a preliminary inquiry is held, and if so, whether further pre-trial meetings and added court dates will be required: paras. 41 – 43.

[15] In considering actions of the accused when evaluating delay, the court described actions of the accused which are voluntarily undertaken. Examples include change of venue motions, attacks on wiretap packets, adjournments that do not amount to waiver, attacks on search warrants, changes of solicitor, re-election, etc.: *Morin*, paras. 44 – 45.

[16] Actions of the Crown may also be considered for the purposes of considering delay. The court in *Morin* cites examples such as adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc.: para. 46.

[17] Limitations on institutional resources are another potential reason for delay. Inherent delay and institutional delay are not the same. See: *R. v. Lahiry*, [2011] O.J. No. 5071, (Sup. Ct.) para. 2. At para. 47 of *Morin*, the court noted that institutional delay runs from the time the parties are ready for trial but the system cannot accommodate them. In *Lahiry*, Mr. Justice Code observed that "It is rarely true that counsel is immediately available for trial, when setting a trial date. " Rather, after counsel complete the preliminary steps during the intake period, and set the date for trial, they must accommodate trial preparation in their schedules: para. 34. Thus, the whole time from setting the trial date until trial cannot be characterized as entirely systemic delay: para. 35.

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[18] In *Morin*, the court held that acceptable institutional delay in the provincial court ranged between 8 – 10 months and a further 6 – 8 months after committal for trial; para. 55.

[19] Prejudice to the accused is the final factor to be considered in analysing s. 11(b). The purpose of s. 11(b) is to protect an accused from restrictions of his right to life, liberty, security of the person, and the right to make full answer and defence. As well, s. 11(b) serves to expedite trials and minimize prejudice. Prejudice may be inferred from long delay or it may be specifically proven: *Morin*, paras. 61 – 63.

[20] In *R. v. Godin*, [2009] 2 S.C.R. 3, the Supreme Court of Canada examined the case in light of the *Morin* guidelines. The delay in *Godin* was 30 months for a case that was not complex. The court reiterated that prejudice may be inferred from the length of the delay; it may also affect an individual's ability to make full answer and defence: para. 37. It also noted that although there is a strong societal interest in having cases tried on their merits, delays may interfere with the liberty interests of accused persons and the quality of evidence: paras. 40 – 41.

Discussion

[21] Following his arrest on May 2, 2013, Mr. Zhu was represented at his bail hearing by Winnipeg counsel, Mr. Gunn. The applicant was released on terms and retained Mr. Fagan to act for him.

[22] Mr. Fagan retained an agent, Mr. Downs, to appear in the Ontario Court of Justice on July 4, 2013, with instructions to file a designation of counsel and adjourn the case at least three weeks to permit the defence to gather and review disclosure. This represents about 62 days of inherent time.

[23] Mr. Fagan sent his first written request for disclosure was faxed to the federal prosecutor at Kenora on July 19, 2013.

[24] The case returned to the Ontario Court on August 29, 2013. Mr. Fagan's agent, Mr. Down, appeared and indicated that despite having requested disclosure on July 19, none had been received. Mr. Down sought a further adjournment for a few weeks pending receipt of

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disclosure. Mr. Poirier who appeared for the federal prosecution on that day was not aware that a designation of counsel had been filed and seemed unaware of the request for disclosure. He indicated that the disclosure was not complete. In order to convenience Mr. Poirier, the case was adjourned to October 31, 2013, to await disclosure. Time elapsed is 56 days of inherent time to respond to the disclosure request.

[25] On October 28, 2013, Mr. Fagan wrote again to the federal prosecutor at Kenora, attaching his request for disclosure dated July 19, 2013, and noting that despite the passage of more than three months, no response and no disclosure had been received. Mr. Fagan cautioned that his client would not be able to take a position with respect to election or plea until the disclosure was provided. This should have been a red flag for the prosecution. It was an indication that there would be no implicit waiver in future adjournments.

[26] On October 31, 2013, Mr. Poirier was in the Ontario Court and Mr. Fagan was represented by an agent, Mr. Thompson. Mr. Thompson advised the court that Mr. Fagan had requested disclosure on July 19 and October 29, 2013 and had not yet received disclosure. Mr. Poirier stated that he didn't know what the disclosure requests were but acknowledged that there was disclosure that had not been sent by way of discs. The court proposed to remand the case for a few weeks; however, Mr. Poirier was occupied in a jury trial in November and asked for a date in early December. The case was adjourned to December 5, 2013, to complete disclosure. I find that the applicant did not waive this time. Time elapsed: 64 days attributable to the Crown.

[27] On December 5, 2013, Mr. Burke, the federal prosecutor at Kenora appeared for Mr. Poirier and Mr. Thompson appeared as Mr. Fagan's agent. Mr. Burke advised the court that Mr. Poirier was assigned the file in September. Despite two requests and various adjournments, disclosure was still not sent. Mr. Thompson suggested that the case be adjourned a few weeks pending receipt of disclosure. The presiding judge recommended that Mr. Burke put pressure on Mr. Poirier to call Mr. Fagan about the disclosure. The case was then adjourned to January 2, 2014. There is no implicit waiver for this adjournment. Time elapsed: 28 days attributable to the Crown.

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[28] Finally, on December 19, 2013, Mr. Poirier sent partial disclosure that was received in Mr. Fagan's office on December 24.

[29] By January 2, 2014, Mr. Thompson re-attended in Ontario Court as agent for Mr. Fagan, Mr. Burke as agent for Mr. Poirier. Mr. Thompson indicated that he received his instructions on December 20, and admitted that disclosure might have been sent following that time. He requested a further adjournment of one month. Mr. Burke expressed embarrassment that disclosure had not been provided and offered to e-mail Mr. Poirier about the matter. The case was adjourned to January 30, 2014, when Mr. Poirier was expected to be in court. I find that this adjournment was not implicitly waived. Time elapsed: 28 days attributable to the Crown.

[30] Mr. Fagan wrote to Mr. Poirier on January 8, 2014. He advised that disclosure was received in his office on December 24, 2013, but it was incomplete as the will-say, reports and notes of the third officer present at the traffic stop were not included. He also reported that some of the hand-written notes of the primary investigating officer were indiscernible. He urgently requested the missing disclosure and a legible copy of the notes that were sent, failing which his client could not make an election.

[31] Unhappily, Mr. Poirier misplaced Mr. Fagan's letter of January 8. Mr. Fagan sent a duplicate copy of the letter on January 29, 2014. Later that day, Mr. Poirier faxed the hand-written notes of the third officer. As well, he attempted to transcribe the illegible portions of the investigating officer's notes with limited success.

[32] On January 30, 2014, Mr. Poirier was not in court but appeared by his agent, Mr. Burke. Mr. Fagan's agent, Mr. Thompson, also appeared, indicating that the defence intended to seek a stay of proceedings pursuant to s. 24 of the *Charter* for breach of Mr. Zhu's right to be tried within a reasonable period of time. The complaint made was the timeliness of disclosure that the Crown had as early as May 3, 2013. By this time, the Crown had not yet sent a clean copy of the investigating officer's notes. The court adjourned the matter to February 6, 2014, to allow the defence to seek a date for the application. The delay was not waived. Time elapsed: 7 days attributable to the Crown.

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[33] On February 5, Mr. Poirier faxed Mr. Fagan a clean copy of the investigating officer's notes together with supplemental disclosure, advising that a CD of the materials will follow by courier. Hard copies were received by the defence on February 10, 2014.

[34] On February 6, 2014, Mr. Thompson appeared again as Mr. Fagan's agent and the provincial Crown appeared for the federal Crown. The defence requested a further adjournment to March 6 to get full disclosure. It was adjourned accordingly. Time elapsed: 28 days attributable to the Crown.

[35] The case returned to Ontario Court on March 6, 2014. Mr. Poirier appeared and Mr. Fagan was represented by his agent, Mr. Thompson. An election to the Superior Court was made and the defence asked to set a date for a preliminary inquiry. At the Crown's request, the defence was ordered to file a statement of issues on or before April 17, 2014. The defence proposed May 14 - 16 as potential days for the preliminary inquiry but those dates were not available to the court. Next, the defence suggested dates in October but the court declined to assign those dates without a specific waiver of the delay. No other dates were suggested by the court. Mr. Poirier indicated that the Crown's principal witness was not available until September, in any event. Later he stated the witness was not available until August. The case was adjourned to April 17, 2014, accordingly. Time elapsed: 42 days of institutional delay.

[36] By April 17, 2014, the statement of issues was filed. Mr. Poirier appeared by his agent, Mr. Burke, and Mr. Fagan was represented by Ms. Roehrig. The defence asked to schedule a preliminary inquiry and provided dates in October. On the previous appearance, Mr. Poirier advised that its principal witness would not be available until after August. The court did not have the October court schedule and asked the defence for September dates which Ms. Roehrig did not have. Counsel agreed that an adjournment was necessary and the case was put to May 15, 2014, to schedule a preliminary inquiry. Time elapsed: 29 days of waived time.

[37] On May 15, 2014, the federal Crown was represented by the provincial assistant Crown Attorney, Ms. Dewson, and Mr. Fagan was represented by Ms. Scharfe. Ms. Scharfe asked to set the preliminary inquiry, indicating that Mr. Fagan had suggested five days for each of October,

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November and December. None of these dates were acceptable to the Crown who asked to have the case adjourned to June 5, 2014. Time elapsed: 21 days attributable to the Crown.

[38] On June 5, 2014, Mr. Poirier appeared in court in person and Mr. Fagan by teleconference. Mr. Fagan reviewed the difficulties he has had in setting a date for preliminary inquiry and indicated that he was not available in July and August. The first date Mr. Fagan had available was October 17, 2014. He specifically refused to waive Mr. Zhu's s. 11(b) rights. The Crown agreed with that date which was fixed for preliminary inquiry. Time elapsed: 134 days of inherent time.

[39] The preliminary inquiry proceeded on October 17, 2014 and the accused was committed to trial. This involved one day of neutral time.

[40] The Crown filed an indictment dated November 12, 2014 in the Superior Court. By the time the matter appeared in Assignment Court in the Superior Court on December 8, 2014, Mr. Fagan had not yet received a copy of the indictment from Mr. Poirier. Time elapsed: 52 days of inherent time.

[41] Mr. Gunn appeared as Mr. Fagan's agent on December 8, 2014, requesting that the case be adjourned to the January 19, 2015 Assignment Court in order to take instructions from Mr. Zhu and schedule a trial date. Mr. Poirier did not appear at Assignment Court and did not retain an agent to appear on his behalf. Thus, no meaningful business could be discussed. Time elapsed: 42 days attributable to the Crown.

[42] On January 19, 2015, both counsel were represented by agents who asked for a pretrial date. A pretrial was scheduled for February 2, with Mr. Fagan likely to attend by teleconference. Mr. Fagan's agent also asked that a trial date in June or July be set after the pretrial. Time elapsed: 14 days of inherent time.

[43] On January 30, 2015, Mr. Hardiejowski for the prosecution faxed a pretrial conference report to Mr. Fagan. As a result of reviewing the Crown's pretrial report, the defence requested disclosure of a rental contract that had not previously been disclosed.

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[44] The pretrial did not proceed on February 2, 2015 because the Crown had not filed its pretrial brief and there was reference in the brief to the rental contract which had not been disclosed. On February 3, the defence wrote to the Crown to request a copy of the contract. The case was further adjourned to March 4, 2015 for a pretrial conference. Time elapsed: 30 days attributable the Crown.

[45] Following completion of the pretrial, the case was adjourned to Assignment Court on March 23, 2015 at which time, with the Crown's consent, the defence re-elected trial by Superior Court judge without a jury. Counsel proposed that one day for pretrial applications would be required and two days for trial. The court advised that the pretrial applications should be scheduled at least 60 days in advance of trial. The court offered July 7, 27, 30 and 31 for pretrial motions but none of these dates were available to Mr. Fagan. This time, 19 days, is inherent.

[46] On March 23, the assistant trial coordinator was unable to schedule the matter without determining the schedule for circuiting judges. The case was adjourned to Assignment Court on May 25, 2015 to set a trial date. Time elapsed: 63 days attributable to institutional delay.

[47] On May 8, 2015, Mr. Fagan wrote to the court to request to appear by teleconference on May 25. That request was approved and Mr. Fagan was so advised by the court on May 11. Unfortunately, Mr. Fagan made many attempts to appear at Assignment Court by telephone without success. The fact of the teleconference approval was apparently overlooked and the matter was adjourned to the next Assignment Court on June 22, 2015. Once again, the Crown did not appear and the court erroneously overlooked Mr. Fagan. The court subsequently advised Mr. Fagan's assistant that there had been a "mix-up." Time elapsed: 28 days attributable to institutional delay.

[48] The case returned to Assignment Court on June 22, 2015. Both Mr. Fagan and Mr. Poirier appeared. Pretrial applications were scheduled to be heard October 22 and 23. Time elapsed: 122 days of inherent delay.

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[49] The applications proceeded on October 22, 2015, with decision on the s. 11(b) application reserved. A stay was granted on the s. 8 application. One day of neutral time was expended.

Summary

[50] The charges have been outstanding approximately 905 days or about 30 months from arrest to the date this application was argued. Of that time, 29 days were waived by the applicant. There were two days of neutral time expended and 337 days of inherent delay. By contrast, there were 133 days of institutional delay, (more than four months), which counts against the Crown. Of the institutional delay, 42 days arose in the Ontario Court and 91 days in the Superior Court.

[51] The Crown was responsible for a total of 313 days or more than ten months of delay. Of that delay, 241 days occurred in the Ontario Court and 72 days in the Superior Court. The bulk of the delay caused by the Crown relates to timely disclosure. Other delays resulted when the Crown failed to attend scheduling courts.

Prejudice

[52] In this case, there is no evidence of actual prejudice to the applicant. However, prejudice may be inferred from the delay in proceeding to trial. The applicant need not demonstrate that he has suffered actual prejudice in order to argue that his *Charter* rights to be tried within a reasonable period of time have been breached.

[53] The Supreme Court of Canada in *Askov* recognized the "exquisite agony" of those awaiting trial. It was described thus at para. 43:

There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial.

[54] In *R. v. Godin*, [2009] 2 S.C.R. 3, para. 30, the Supreme Court described prejudice when a trial is delayed as relating to three interests of the accused: liberty (including pretrial custody or

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bail conditions); security of the person (the right to be free of stress and suspicion resulting from a criminal charge); and the right to make full answer and defence.

[55] Society has an interest in having cases tried, but that is not an over-riding interest. It must be balanced against the interests of the accused to be treated fairly.

[56] The Crown is responsible to bring accused persons to trial within a reasonable period of time. Here, the Crown often proceeded in a casual, disorganized manner. It did not proffer any explanation for the delay in making full disclosure in what is a straightforward case. The result is that the guidelines set out in *Morin* were exceeded and the trial of this case unreasonably delayed.

[57] The application is granted. The proceedings are stayed pursuant to s. 24(1) of the *Charter of Rights and Freedoms*.

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The Hon. Madam Justice H.M. Pierce

Released: December 17, 2015

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