Court of Appeal for Saskatchewan **Citation: *R v Pankiw*, 2016 SKCA 60**

Docket: CACR2544 **Date: 2016-05-03**

Between:

James Kyle Pankiw

Appellant

And

Her Majesty the Queen

Respondent

Before:	Ottenbreit, Caldwell and Ryan-Froslie JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Madam Justice Ryan-Froslie
In concurrence:	The Honourable Mr. Justice Ottenbreit The Honourable Mr. Justice Caldwell
On Appeal From:	2014 SKQB 381, Saskatoon
Heard:	17 September 2015
Counsel:	Mark Brayford Q.C. and Brian R. Pfefferle for the Appellant W. Dean Sinclair Q.C. for the Respondent

Ryan-Froslie J.A.

I. INTRODUCTION

[1] James Kyle Pankiw appeals a decision of the Court of Queen's Bench (*R v Pankiw*, 2014 SKQB 381, 462 Sask R 217), acting as a summary conviction appellate court [appeal court], which upheld his conviction in Provincial Court of driving while over .08 contrary to s. 253(1)(b) of the *Criminal Code*. It took 27 months for Mr. Pankiw's charges to proceed to trial. Mr. Pankiw asserts most of that elapsed time was due to the Crown's failure to provide full disclosure and, as a result, his s. 11(b) *Charter* right to trial within a reasonable time was breached. It is his contention the trial judge misconstrued the reasons for the elapse of time and that the appeal court judge erred in failing to redress that error. He also argues the appeal court judge erred in upholding the trial judge's finding that Mr. Pankiw was not acting in self-defence or in defence of his property when he committed the offence in issue.

[2] In my view, Mr. Pankiw's position with respect to the issue of unreasonable delay has merit. I would grant him leave to appeal as required by s. 839(1) of the *Criminal Code*, allow the appeal and enter a judicial stay of proceedings pursuant to s. 24(1) of the *Charter*.

II. CIRCUMSTANCES OF THE OFFENCE

[3] Mr. Pankiw, who lives on an acreage with his family, was home alone on the night of July 25, 2011. After eating supper and drinking a few beers, he fell asleep on the couch in front of the television. He awoke around 2:00 a.m. to the sight of two flashlight beams in his backyard. When Mr. Pankiw went to investigate, he saw some individuals fleeing towards the roadway. While he gave chase, by the time he got to the roadway they were gone.

[4] Mr. Pankiw turned back towards his home and noticed his deck lights being flashed on and off. The only way this could occur is if someone was inside his house where the light switch is located. He ran back to the house and discovered an ottoman had been knocked over, the television turned off and the stereo turned on; however, no one was in the house. Mr. Pankiw then went back outside and noticed a set of tail lights on the roadway. He got in his truck to pursue the vehicle. When Mr. Pankiw caught up to the vehicle, he contacted 911 to request

police assistance and provided the license number and a description of the vehicle to the 911 operator. The operator told Mr. Pankiw she would have a police officer call him right back.

[5] RCMP Cpl. Pankratz called Mr. Pankiw at 2:20 a.m. and they spoke for some eight or nine minutes. Mr. Pankiw terminated the call when the vehicle he was following suddenly drove into the ditch where it appeared to become stuck. Mr. Pankiw stopped, exited his truck and approached the car. A middle-aged man was in the driver's seat with his window down. Mr. Pankiw demanded that the man get out of his vehicle and open the trunk, so Mr. Pankiw could see what had been stolen from him. The driver refused, managed to get the car unstuck and re-entered the highway.

[6] Mr. Pankiw had to find an approach to turn his truck around before he could resume following the vehicle. He eventually caught up to a blue car, which he believed was the one he had been following earlier, although he now saw two people in the vehicle. Mr. Pankiw again called 911 and spoke to the operator who transferred him to Cpl. Pankratz. As he spoke with the officer, Mr. Pankiw tried to get in front of the vehicle he was following and force it to pull over. He was unable to do so.

[7] The vehicle Mr. Pankiw was following was being driven by Julie Frasz, whose boyfriend was in the passenger seat. Ms. Frasz testified that she noticed a truck behind her, which she felt was following too close. When she slowed down, so did the truck. When she sped up, the truck followed suit. When Ms. Frasz passed a semi, the truck blocked her return to the right-hand lane. The truck followed Ms. Frasz into Saskatoon, where the driver of the truck maneuvered his vehicle in front of hers, forcing her to stop.

[8] It was Mr. Pankiw who stopped the Frasz vehicle. When he got out of his truck, he saw Ms. Frasz behind the wheel and realized he had been following the wrong car. Ms. Frasz's boyfriend had called the police and, when they arrived, Mr. Pankiw's alcohol level was tested by means of an approved screening device [ASD]. Mr. Pankiw failed that test and was taken to the police station where he provided two Intoxilyzer samples. The samples produced readings indicating Mr. Pankiw's blood-alcohol content was 0.15 mg at 4:02 a.m. and 0.14 mg at 4:25 a.m.

[9] Mr. Pankiw was charged with impaired driving and driving while his blood-alcohol content was over .08. His trial did not proceed until October 29, 2013, approximately 27 months later. Mr. Pankiw argued that delay had been caused by the Crown's failure to provide proper disclosure, including evidence of his conversations with Cpl. Pankratz and the maintenance, usage and calibration records for the ASD and the Intoxilyzer used to test him. He contended the delay was unreasonable and thus violated his s. 11(b) *Charter* right to a trial within a reasonable period of time. He also claimed that his drinking and then driving was justified by necessity and was done in self-defence and defence of his property.

III. THE TRIAL JUDGE'S DECISION

[10] The trial judge found that the 27 months which had passed between the laying of the charges (July 27, 2011) and the start of the trial (October 29, 2013) was excessive but not unreasonable. Given the *Charter* issues raised by the defence, including the constitutionality of s. 259 of the *Criminal Code* and certain sections of *The Traffic Safety Act*, SS 2004, c T-18.1, the disclosure issues that required judicial resolution, and the raising of the defences of necessity and officially induced error, the trial judge found this case was more complicated than a standard drinking and driving case. The trial judge concluded that Mr. Pankiw's legal counsel had explicitly waived 1.5 months of the delay. Of the remaining 25.5 months, he determined only 5.5 to 8 months were attributable to the Crown's failure to disclose relevant information to the defence, while the remaining time was given neutral consideration because both parties were responsible for it, or the delay was inherent to the case or was institutional in nature. He also concluded that Mr. Pankiw had suffered "minimal" prejudice as a result of the delay and that that prejudice did not outweigh society's interest in bringing the matter to trial. He thus determined there had been no breach of Mr. Pankiw's s. 11(b) *Charter* right to trial within a reasonable time. In arriving at his conclusion, the trial judge referred to the Supreme Court of Canada decisions in *R v Morin*, [1992] 1 SCR 771 [*Morin*]; *R v Godin*, 2009 SCC 26, [2009] 2 SCR 3 [*Godin*]; and this Court's decision in *R v Pidskalny*, 2013 SKCA 74, 417 Sask R 124 [*Pidskalny*].

[11] The trial judge convicted Mr. Pankiw of driving while over .08 contrary to s. 253(1)(b) of the *Criminal Code* and stayed the charge of impaired driving.

[12] The *Criminal Code* provisions with respect to the defences of self-defence and defence of property were amended after the commission of the offences in issue, but before Mr. Pankiw's trial. The new provisions came into effect on March 11, 2013. The trial judge found, relying on *R v Pandurevic*, 2013 ONSC 2978, 298 CCC (3d) 504, that the new provisions should be applied retrospectively, as the purpose of the amendments was to consolidate the defences and make the sections easier to understand and apply.

[13] The trial judge went on to further conclude that Mr. Pankiw did not drink and drive to defend or protect himself or his family. He held that the Crown had satisfied him beyond a reasonable doubt that the requirements of self-defence had not been established as no force had been used against Mr. Pankiw and his belief that a threat of force was being made against him or his family was not substantiated by the evidence.

[14] The trial judge also concluded that the Crown had proven beyond a reasonable doubt that defence of property had not been established. First, Mr. Pankiw's belief that someone had taken his property was not supported by the evidence and, second, his act of driving after he had been drinking for the purpose of retaking property he was not even sure had been stolen was not reasonable.

[15] Mr. Pankiw appealed the trial judge's decision to the Court of Queen's Bench, arguing that the trial judge erred in law (i) by failing to find that the delay of the trial was a violation of his s. 11(b) *Charter* rights; (ii) by failing to acquit him on the basis of the defences of self-defence or defence of property; and (iii) because the decision was contrary to the law and the evidence and was thus unreasonable.

IV. THE APPEAL COURT'S DECISION

[16] The appeal court judge dismissed Mr. Pankiw's appeal. He determined the trial judge had correctly identified and applied the test for unreasonable delay as set out by the Supreme Court of Canada in *Morin* and that the trial judge's decision with respect to that issue did not disclose

any reviewable error. He also held that the trial judge had carefully considered the issues of both self-defence and defence of property and had not erred in his assessment of the law with respect to those defences. He found the trial judge's verdict was both reasonable and supported by the evidence and was one that a properly instructed jury acting judicially could reasonably have rendered.

[17] Mr. Pankiw now appeals that decision to this Court. His right of appeal is limited to questions of law alone (s. 839 of the *Criminal Code*) and the standard of review to be employed by this Court when reviewing the appeal court's decision is one of correctness (*R v Shepherd*, 2009 SCC 35 at para 20, [2009] 2 SCR 527).

V. ANALYSIS

[18] This appeal raises two discrete issues, namely, whether the appeal court judge erred in law alone (i) in his review of the trial judge's assessment of the delay experienced in this case and its effect on Mr. Pankiw's right to a trial within a reasonable time as guaranteed by s. 11(b) of the *Charter*, and (ii) in sustaining the trial judge's findings that the defences of self-defence and defence of property were not established in the circumstances of this case.

A. Unreasonable delay

[19] Section 11(b) of the *Charter* provides that a person charged with an offence has the right to be tried within a reasonable period of time.

[20] In *Morin*, Sopinka J. writing for the Supreme Court of Canada held that the primary purpose of s. 11(b) is the protection of an individual's rights to liberty, security of the person, and a fair trial. Those rights were described by Sopinka J. at page 786 as follows:

> 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.

[21] Justice Sopinka also found society has a secondary interest under s. 11(b) and that that interest is of a dual character: first, in seeing those accused of crimes are treated humanely and

fairly and, second, in assuring those who transgress the law are brought to trial and dealt with according to the law.

[22] Whether delay results in a breach of s. 11(b) of the *Charter* is not merely a function of time, but rather involves the assessment of a number of factors, including the length of the delay, whether the delay was waived, who or what was responsible for the delay and any prejudice suffered by an accused person as a result of it. The legal analysis to be employed was set out by Sopinka J. in *Morin* at 787-788:

> 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:
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> 1. the length of the delay;
> 2. waiver of time periods;
> 3. the reasons for the delay, including
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> (a) inherent time requirements of the case,
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> (b) actions of the accused
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> (c) actions of the Crown,
>
> (d) limits on institutional resources, and
>
> (e) other reasons for delay; and
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> 4. prejudice to the accused.
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> These factors are substantially the same as those discussed by this Court in *Smith*, *supra*, at p. 1131, and in *Askov* [[1990] 2 SCR 1199], at pp. 1231-32.
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> 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.
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> (Emphasis added)

[23] Counsel for Mr. Pankiw raises a number of arguments with respect to the appeal judge's decision to uphold the trial judge's conclusion that the delay in this case did not amount to an infringement of Mr. Pankiw's s. 11(b) rights. Two of those arguments are particularly cogent and, in my view, are dispositive of this appeal. The first is that the trial judge mischaracterized a significant portion of the delay, which should have been attributed to the Crown. The second is that the trial judge erred in his assessment of the prejudice experienced by Mr. Pankiw as a result of the delay. These errors in turn adversely affected the trial judge's balancing of the s. 11(b) interests.

[24] At the appeal court level, the standard of review for the application of the *Morin* factors and the characterization and allocation of various periods of time in a s. 11(b) analysis is correctness (see *R v Sanghera*, 2014 BCCA 249 at para 63, 313 CCC (3d) 113, aff'd 2015 SCC 13, [2015] 1 SCR 691; *R v Khan*, 2011 ONCA 173 at para 18, 270 CCC (3d) 1, leave denied [2011] 2 SCR viii; *R v Vassell*, 2015 ABCA 409 at paras 5-6, 331 CCC (3d) 97). In this case, where the Court is sitting on appeal from the decision of the appeal court judge on questions of law alone, the issue is whether the appeal court judge failed to appropriately identify or apply the correct standard of appellate review or otherwise erred in law alone.

[25] The facts relevant to the issue of delay are set out in the trial judge's decision: *R v Pankiw*, 2013 SKPC 173 at paras 1 to 43, 431 Sask R 108. For the purposes of this appeal, it is sufficient to outline, in general terms, the delay involved, providing particulars only with respect to the time periods where, in my view, the appeal court judge failed to see that a mischaracterization had occurred at the trial level.

[26] Mr. Pankiw was charged with impaired driving and driving while over .08 on July 27, 2011. His first request for disclosure was made on August 2, 2011 – just five days after the charges were laid. Mr. Pankiw's first court appearance was August 10, 2011, at which time the Crown provided an initial disclosure package. The case was then adjourned by consent to September 6, 2011, and defence counsel expressly waived any delay occasioned by the adjournment. This was then followed by 12 further appearances and adjournments until May 16, 2012, when Mr. Pankiw entered a not guilty plea: September 6 and 19, October 5 and 27, November 21, December 14, 2011, January 17, February 6 and 29, March 22, April 18 and

May 10, 2012. While the trial judge's decision indicates the first adjournment was from August 10 to September 16, 2011, those dates are not supported by the Provincial Court records, which show the matter was in fact adjourned to September 6. The date in the trial judge's decision may simply reflect a typographical error, nevertheless it resulted in the trial judge overstating the period defence counsel expressly waived by 10 days. That error was not raised before this Court and, in my view, would have had no effect on the ultimate decision. Accordingly, in my analysis I have used the 49 days found by the trial judge as being the period waived by the defence.

[27] Of the 12 adjournments made between August 10, 2011 and May 16, 2012, nine of them related to disclosure issues. No reasons were provided for three of the adjournments: November 21 to December 14, 2011 (three weeks), March 22 to April 18, 2012 (four weeks) and April 18 to May 10, 2012 (three weeks). Of those three adjournments, defence counsel only waived the delay caused by the April 18 to May 10 adjournment. During that same 9.5 month period, the Crown provided additional disclosure on October 5 and 27, 2011 and on January 4 and 19, 2012. I also note that, while the May 10, 2012, adjournment had been requested by defence counsel and related to disclosure issues, the Crown opposed that adjournment indicating it was prepared to set a trial date.

[28] Following the May 10 adjournment, Crown and defence counsel contacted the Provincial Court's case manager and obtained a tentative trial date of November 5, 2012. Ongoing disclosure issues were noted by the case manager. Earlier trial dates – October 11 and 29, 2012, were available but for undisclosed reasons were not accepted.

[29] On May 16, 2012, Mr. Pankiw entered a plea of not guilty to the charges and the November 5 trial date was formally set.

[30] On September 7, 2012, at a case management conference, it was determined one day would not be sufficient to complete the trial and new dates of March 4 and 5, 2013 were scheduled. Disclosure was noted as "ongoing" and, in fact, on January 30, 2013, further disclosure was provided by the Crown.

[31] On February 15, 2013, Mr. Pankiw's legal counsel served the Crown with notice pursuant to *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01, indicating, among other things, his intention to argue Mr. Pankiw's section 11(b) *Charter* rights had been violated by the Crown's refusal to provide complete disclosure, which resulted in unreasonable delay.

[32] On February 28, 2013, the Crown sent yet another disclosure package to defence counsel that included some of the maintenance records with respect to the Intoxilyzer and the ASD.

[33] On March 4, 2013, the trial began with an application by defence counsel for disclosure of the complete calibration, maintenance, history and usage logs, and related certificates with respect to the Intoxilyzer and the ASD, the can-says from all officers dispatched or in direct communication with Mr. Pankiw at the time of the offence, and copies of any searches and inquiries made by the officers involved in the investigation. The trial was adjourned so that the trial judge could render a decision with respect to the disclosure issue. That decision was given on March 27, 2013, and Mr. Pankiw was partially successful in his application. The trial judge determined no further disclosure was required with respect to the police officers involved, but that the records relating to the Intoxilyzer and ASD had to be provided to defence counsel. The matter was adjourned to April 15, 2013, to give the Crown a reasonable opportunity to make that disclosure. The Crown did not fully comply with the disclosure order until June 17, 2013, necessitating four further adjournments (April 15 and 25 and May 9 and 23, 2013).

[34] On June 18, 2013, the trial was set to resume on October 29, 2013. The post-plea delay at that point was approximately 17.5 months.

[35] The trial judge began his analysis of unreasonable delay by correctly setting out the approach to be followed as identified by Sopinka J. in *Morin*. He found it took just over 27 months for the charges to reach trial – a period of time he found raised a question as to the reasonableness of the delay, which necessitated further examination. In accordance with Sopinka J.'s approach, the trial judge then went on to determine that the defence had waived 49 days of that time, decreasing the period requiring explanation to 25.5 months. Thereafter, he looked at the reasons for the delay, including: (i) the inherent time requirements for the case; (ii) the actions of the defence; (iii) the actions of the Crown; (iv) the limits on institutional

resources; and (v) other reasons, being the length of time it took him to render decisions with respect to the disclosure and delay applications.

[36] In his analysis, the trial judge combined his assessment of the Crown and defence's conduct, which had contributed to the delay. While at paras 58 and 71 of his decision he found that the delay was primarily due to disclosure issues and as a result "a large portion" of the delay must lie at the feet of the Crown, he concluded at para 77 by finding only "somewhere between 5 ½ to 8 months of the delay was attributable to the Crown's failure to disclose … ." Two months of that allotted time related to the Crown's tardy response to his disclosure order, with the balance being attributed to the pre-plea period.

[37] Of particular relevance to this appeal are the trial judge's comments found at paras 67 to 71 of his decision:

> [67] In this case, Mr. Brayford made the Crown aware of his disclosure concerns in mid September, 2011 and continued to reiterate them almost monthly until May, 2012. I do not find that the Crown was ignoring his requests but it appears they were trying to locate the disclosure he was requesting and/or were considering whether it was relevant and thus something they had to disclose. Over this time period some things were being disclosed to the Defence but not all of what Mr. Brayford expected. Eventually on May 11th, the Crown in a letter, told Mr. Brayford that the disclosure he was requesting did not exist and consequently disclosure was, in their view, complete.
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> [68] This statement by the Crown proved not to be true as on January 30, 2013, the Crown disclosed some correspondence identifying the officer who had involvement with the accused before his arrest for the drinking and driving charges. An officer whose notes, according to the Crown in May, 2012, did not exist. As a result, Mr. Brayford pursued a disclosure application for further police officers' notes which he felt must exist and other more technical information regarding the breath testing instruments used on the accused. He was successful in part. Thereafter it took the Crown just shy of three months to comply with the Court's Order.
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> [69] In my view, these delays are delays that were occasioned by the Crown's refusal to provide the Defence with relevant information to which they were entitled and which lay in the hands of the Crown. It should not have been difficult to find out Constable Pankratz's name, locate him and disclose to the Defence the one page of information he had in relation to this case. It should not have been a question as to whether the Defence was entitled to disclosure of the Intoxilyzer and roadside screening device records for the instruments the accused blew into on the night in question in light of the comments made by Madam Justice Deschamps in *R. v. St.-Onge Lamoureux*, [2012] S.C.J. No. 57 (S.C.C.) (for a detailed discussion of these comments, see my earlier decision in *R. v. Pankiw*, *supra*, at paragraphs 43, 44 and 45).
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> [70] Mr. Brayford made the Crown aware of his disclosure concerns at a very early stage of the proceedings and continuously thereafter. **I am satisfied on the facts of the case that have been presented to me in both the disclosure application and in this application that the information that he was requesting could very well have some**

> **bearing on the defences he wished to run for the accused.** Eventually he made an application for this disclosure that ultimately was successful in part.
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> [71] **I am satisfied that the Crown must bear the burden of their refusal, reluctance or inability to locate the disclosure that Mr. Brayford was requesting and that the Court ordered produced, and as a result, a large portion of this delay must lie at their feet.** Specifically, I am satisfied that but for the periods of time when Defence waived delay **and the inherent time to get this case ready for plea, the time to May 16, 2012 is delay that is the Crown's responsibility. I am also satisfied that following my March 27th Order that the Crown provide the Defence with certain documents, the Crown did not satisfy the Order in a timely fashion.** In my view, it was not difficult to obtain the documents in question from the police. They either had to simply print them out of their approved instruments or they had to copy them from their maintenance binders or record keeping systems. I am prepared to accept that one month would have been a reasonable time to comply with the Order. **Therefore, I also find the Crown responsible for the delay from April 25 to June 18, 2013.**

[38] The appeal court judge found the trial judge did not err in his analysis. His conclusions with respect to unreasonable delay are found at para 18 of his decision, which reads as follows:

> [18] In the s. 11(b) decision, the trial judge referenced the *Morin* test and proceeded to apply it. He properly found that the length of the delay in this case from the time of the laying of the charges on July 26, 2011 to the start of the trial on October 29, 2013 was a delay of approximately 27 months, a period which he held could be considered excessive in a normal drinking and driving case. In accordance with the *Morin* test, the trial judge also considered the issue of waiver of time periods and the reasons for the delay. I am satisfied that he correctly did so in respect to the evidence before him. **While the 27-month delay did exceed the guideline for a standard summary conviction case, which is 8-10 months, this was not a standard drinking and driving case. Much of the delay was attributable to the legitimate issues raised by defence counsel in the nature of disclosure as required by the recent Supreme Court of Canada decision in the case of *St-Onge*.** At para. 77 of his s. 11(b) decision, the trial judge found that of the 27 months of delay, the defence had waived 1 ½ months, 5 ½ to 8 months of the delay was attributable to disclosure issues, and the remaining time was either waived by the defence, given neutral consideration because both parties were responsible for the delay, was inherent to the case, or was institutional in nature. I am satisfied that the trial judge was correct in his assessments in this regard and provided adequate reasons for his findings.
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> (Emphasis added)

[39] In my view, the appeal court judge's conclusions ignored a number of legal errors in the trial judge's *Morin* analysis, including (i) his failure to attribute all the delay relating to the Crown's failure to make disclosure to the Crown, (ii) his determination that Mr. Pankiw suffered "minimal" prejudice as a result of the delay, and (iii) the effect of those errors on the trial judge's balancing of the interests protected by s. 11(b) of the *Charter*. Let me explain.

1. Delay attributable to the Crown

a. Pre-plea period

[40] The pre-plea period spanned just over 9.5 months, from July 27, 2011 to May 16, 2012. This period was significantly longer than normal due to the Crown's failure to provide disclosure, i.e., it exceeded the inherent time requirements. The trial judge found as a fact that the disclosure requested could very well have some bearing on the defences Mr. Pankiw wished to raise (trial judge's decision at para 70). Of the 9.5 months, the trial judge found just 49 days (1.5 months) were waived by defence counsel, leaving close to 8 months to be explained.

[41] Since the Supreme Court of Canada decision in *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*], it has been well-settled that the Crown has a duty to disclose to an accused person all information in its possession that is reasonably capable of affecting the accused's ability to make full answer and defence, whether it intends to use that evidence at trial or not. While the duty is not without limits, it is of broad, general application. See *R v Askov*, [1990] 2 SCR 1199 at 1223 [*Askov*]. For disclosure purposes, the Crown includes peace officers. As Sopinka J. so eloquently stated at para 12 of *Stinchcombe:*

> … the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. …

[42] The Supreme Court of Canada in *R v St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 SCR 187 [*St-Onge Lamoureux*], discussed the Crown's specific obligation to provide disclosure in the context of drinking and driving offences in light of the 2008 amendments to the *Criminal Code* which did away with the so-called *Carter* defence. In light of those amendments, Deschamps J., writing for the Court, stated the following with respect to the disclosure of evidence relating to the reliability of Intoxilyzers and ASDs:

> [48] The prosecution gains a clear, albeit limited, advantage from the requirement, since evidence to the contrary is limited to the real issue: whether the test results are reliable. The evidence to be tendered relates directly to an instrument that is under the prosecution's control. The prosecution must of course disclose certain information concerning the maintenance and operation of the instrument, but it is free to establish procedures for tracking how such instruments are maintained and operated. Moreover, the prosecution has control over the people who maintain and operate the instruments.

[43] Prior to *St-Onge Lamoureux*, the Crown had a general obligation to provide disclosure, which also included information relating to the operation and maintenance of Intoxilyzers and ASDs (see e.g., *R v Bourget* (1987), 35 CCC (3d) 371 (Sask CA)).

[44] Crown disclosure, or lack thereof, may have a profound effect on the speed with which a matter is brought to trial. In *Pidsklany*, Caldwell J.A. of this Court commented on how the Crown's failure to provide disclosure may result in adjournments, which protract the proceedings:

> [27] **While the line between an adjournment which may be characterised as "voluntary" and one which is "beyond the control of the accused" may be a fine one, in my opinion, in that Mr. Pidskalny's adjournment request was predicated on disclosure concerns of which the Crown was well-aware and which were ultimately resolved in his favour (see: *R. v. Pidskalny*, 2011 SKQB 256, rev'd, in part, 2012 SKCA 28), it was not voluntary and, indeed, may be characterised as being beyond his control.** Furthermore, it cannot be said that Mr. Pidskalny did nothing to prevent the resulting delay. He was diligent in his repeated requests for disclosure and, once it became clear such disclosure would not be forthcoming before the preliminary hearing, he sought an adjournment to pre-empt further delay. While I recognise that an accused's request for an adjournment might well be wholly tactical in nature and thus the resulting delay would properly fall at the feet of the accused, this is not, to my thinking, one of those circumstances. Mr. Pidskalny's motivation for requesting an adjournment of the preliminary hearing was to obtain better and more complete disclosure from the Crown, in accordance with its obligations and consist[ent] with his interest [in] a prompt adjudication of this matter on its merits. On the facts, his request proved prudent because the Crown did not provide Mr. Pidskalny with the outstanding *undisputed* disclosure materials until about one week before the preliminary hearing.
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> (Emphasis added, footnotes omitted)

[45] While the trial judge had quoted Caldwell J.A.'s comments from *Pidskalny*, in my view, he did not apply them to the circumstances of this case and the appeal court judge erred by failing to recognize that. As in *Pidskalny*, Mr. Pankiw's requests for adjournments were predicated on disclosure issues, of which the Crown was well aware and which in part were ultimately resolved in Mr. Pankiw's favour (see *R v Pankiw*, 2013 SKPC 47, 416 Sask R 206). Mr. Pankiw was diligent in his repeated requests for disclosure, and when it became apparent no further disclosure would be made he served notice of his application. I can see nothing on the facts that would distinguish this case from *Pidskalny*. Thus, in the circumstances of this case, all the delay occasioned by the Crown's failure to disclose ought to have fallen at the Crown's feet. This includes a large portion of the pre-plea period. During that period, even if one allots two to three months for defence counsel to review disclosure and enter a plea, there is still five to six

months of delay (over and above what was expressly waived) that must, in my view, be attributed to the Crown. While the trial judge found the Crown was responsible for the delay during this period, he did not ascribe all of it to the Crown. I say this because the total delay he characterized as being due to the Crown was only 5.5 to 8 months, of which 2 months related to the post-plea period, leaving 3.5 to 6 months attributable to the pre-plea period.

b. Post-plea period

[46] Mr. Pankiw's post-plea period spanned 17.5 months. No part of that delay was waived by Mr. Pankiw.

[47] The trial judge indicated that normally trials in Provincial Court in Saskatchewan were being set within six months of a plea being entered and, in fact, those time periods were adhered to in this case (see para 75 of trial judge's decision). The trial judge determined that even though this case involved *Charter* challenges and some unusual defences, it still should have been brought to trial within eight to ten months from the charges being laid.

[48] Mr. Pankiw's trial ostensibly began on March 4, 2013 – 9.5 months post-plea; but, it began with an application by defence counsel for disclosure. The disclosure application was partially successful and the trial judge ordered the Crown to provide further disclosure with respect to the maintenance, usage and calibration of the Intoxilyzer and ASD. The trial had to be adjourned to October 29, 2013, because the Crown did not actually provide the required disclosure until June 17, 2013 – three months after the order for disclosure had been made. The trial judge only attributed two months of that almost eight-month period (March 4, 2013 to October 29, 2013) to the Crown. In my view, this constituted an error and the appeal court judge ought to have remedied it.

[49] First, the trial judge only allocated two of the three months it took the Crown to comply with his disclosure order to the Crown, because "one month would have been a reasonable time to comply … ." The Crown had already had significant time to disclose, including the inherent delay necessary to get the matter to trial. As pointed out by Sopinka J. in *Morin*, attributing delay to the Crown or defence counsel with respect to a s. 11(b) application does not require a finding of blame-worthy conduct. Rather, the question is: who is responsible for the delay in getting the

matter to trial? Justice Sopinka's comments at p. 794 of *Morin* are particularly apropos to Mr. Pankiw's case:

> (c) Actions of the Crown
>
> **As with the conduct of the accused, this factor does not serve to assign blame. This factor simply serves as a means whereby actions of the Crown which delay the trial may be investigated. Such actions include adjournments requested by the Crown, failure or delay in disclosure**, change of venue motions, etc. An example of action of this type is provided in *Smith*, *supra*, where adjournments were sought due to the wish of the Crown to have a particular investigating officer attend the trial. As I stated in that case, there is nothing wrong with the Crown seeking such adjournments but such delays cannot be relied upon by the Crown to explain away delay that is otherwise unreasonable.
>
> (Emphasis added)

(See also *R v MacDougall*, [1998] 3 SCR 45 at para 49 and *Godin* at para 11.) In other words, all three months it took for the Crown to comply with the disclosure order should have been attributed to the Crown in accordance with the law.

[50] Second, the Crown must bear responsibility for all the delay resulting from its failure to provide disclosure, including any adjournment of the proceedings flowing from that failure. Justice Caldwell explained this in *Pidskalny*:

> [28] Now, the Crown submits that not every single piece of disclosure needs to be provided to an accused before the preliminary hearing. I agree with this as a general proposition and in no way do I mean to say here that the Crown's disclosure obligations must be fully satisfied before a matter may proceed to the preliminary hearing. That is neither the state of the law nor, indeed, what occurred in this case. **Nevertheless, the Crown will bear the consequences where its late or inadequate disclosure directly results in the postponement or interruption of the preliminary hearing and thereby adds to the delay (see: *R. v. Thomson*, at paras. 16-18). On the facts of this case, I am simply not persuaded that the judge erred in finding that the Crown's inaction with respect to timely and adequate disclosure had led to the adjournment of the preliminary hearing and, therefore, that that delay ought to be attributed to the Crown. I say this simply because I have before me the fact that a judge found Mr. Pidskalny's disclosure concerns to have been well-founded considering the nature of the case and the nature of the requested disclosure.** Having no reason to look behind this finding, it would appear that Mr. Pidskalny's adjournment request was prudent and possibly staved off even further delay.
>
> (Emphasis added)

[51] Based on the trial judge's findings, the whole of the delay from March 4, 2013, to October 29, 2013, flowed from the Crown's failure to disclose and, accordingly, he should have attributed all of it to the Crown. Any other attribution is simply not supportable on the facts as

found by the trial judge. This includes the time it took the trial judge to render his decision (three weeks), which was not inordinate. I say this because it was the Crown's actions that necessitated the need for that decision, just as they necessitated numerous adjournments during the pre-plea period. The length of time it takes a judge to render a decision might, in some circumstances, warrant a characterization of that delay as due to "other causes". However, as Sopinka J. pointed out at page 800 in *Morin*, such a delay, even if attributable to "other causes" cannot be relied upon by the Crown to justify the period under consideration.

[52] If one adds this 8 month period to the 5 to 6 months of pre-plea delay attributable to the Crown, the total delay for which the Crown must bear responsibility increases from the 5.5 to 8 months found by the trial judge, to 13 to 14 months. This is a significant increase and results in a considerable period of delay, especially when one considers this case should have proceeded to trial within 8 to 10 months. It also constitutes more than half of the 25.5 months of delay in issue.

[53] The appeal court judge erred by failing to appreciate the above errors had occurred.

2. Prejudice

[54] Prejudice is the fourth factor to be taken into account when considering whether a delay is unreasonable. In my view, the trial judge's errors in his attribution of the delay by necessity impacted his analysis of the prejudice experienced by Mr. Pankiw such that, had the appeal court judge identified those errors, he would have been driven to reassess the prejudice suffered by Mr. Pankiw as a result of that delay.

[55] Prejudice can be established in one of two ways – by inference or by providing evidence of actual prejudice. "Inferred prejudice" relates to an accused person's right to security of the person, which is not restricted to his or her physical integrity (e.g., imprisonment pending trial), but also encompasses his or her psychological integrity, which includes the stress and embarrassment associated with criminal charges. Justice Lamer dissenting in *R v Mills*, [1986] 1 SCR 863 at 919-920 described this psychological prejudice as follows:

> … it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (A. Amsterdam, loc. cit., at p. 533). These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction. …

See also *Morin* at 801-803; *Godin* at para 31; and *Pidskalny* at para 43.

[56] While negative consequences will normally flow from a person being charged with a criminal offence, one of the purposes of s. 11(b) is to limit the impact of those consequences. It is, on this basis, that delay results in inferred prejudice because the negative consequences of being charged with a criminal offence are necessarily protracted as a result of such delay.

[57] At paras 81 and 82 of the trial judge's decision, he concluded:

> [81] I have no reason to doubt the veracity of these paragraphs in the accused's affidavit. However, it is apparent that most of the prejudice the accused is complaining about is prejudice as a result of the charges, not prejudice as a result of the delay.
>
> [82] For example, the accused states that these charges are embarrassing and stressful for him and his family because they have been reported in print media, electronic media and on the Internet. However, in that same paragraph he says that this embarrassment would be significant even if disclosure had been promptly provided and the matter proceeded to trial in a more timely fashion. By his own admission, it is not the delay that has caused embarrassment and stress to his family, it is the fact that he has been charged that has caused this prejudice.

[58] While the trial judge is correct that much of the prejudice claimed by Mr. Pankiw in his affidavit flows from the laying of the charges themselves, he ignored the fact that those negative consequences – stress and embarrassment experienced by Mr. Pankiw and his family as a result of reports in the print and electronic media and on the internet – are legally recognized as being protracted and exacerbated by the length of the delay. In my view, given the significant period of delay involved, this prejudice would be more than minimal based on the evidence accepted by the trial judge.

[59] Moreover, as Sopinka J. stated in *Askov* at 1232: it is "open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay." (See also *R v Smith*, [1989] 2 SCR 1120 at 1138; *Morin* at 801; and *Godin* at paras 31-34.) Mr. Pankiw is a politician, who has served two terms in Parliament. He filed affidavit evidence attesting that, while he has been no stranger to controversy, "the public disapproval of a pending impaired driving prosecution" made it impossible for him to be as active in politics as he would have liked. While the trial judge found evidence of actual prejudice to Mr. Pankiw, including stress and embarrassment as a result of the charges "carrying on" and that Mr. Pankiw's ability to pursue his political aspirations were legitimately put on hold, he

determined that prejudice was minimal at best. In my view, given the length of the delay, the inferred and actual prejudice suffered by Mr. Pankiw had to have been more than minimal otherwise the legal threshold would be too high and would undermine the societal and individual interests protected by s. 11(b) and 24(1) of the *Charter*.

[60] Finally, the trial judge's conclusion that the unreasonable delay did not affect Mr. Pankiw's ability to make full answer and defence is not supported by the evidence or his own findings. Mr. Pankiw did not receive disclosure of Cpl. Pankratz's *name*, or the documents prepared by him with respect to their conversations at the time of the offence, until January 30, 2013 – 18 months after the charges had been laid. The only documentary evidence with respect to those conversations was an "occurrence summary" prepared by Cpl. Pankratz. That summary was attached to an email in which Cpl. Pankratz stated: "Sean, here you go. I have no notes, this is the only report." The occurrence report itself is very short, it simply reads:

> *Summary*: Com is chasing down a car with people that were in his yard tonight-com saw them in his backyard with flashlights .. -suspect veh is a 4 door blu chev lumina, sk ..com is follwing in a whi dodge ram truck...going 115 kms. currently on .11 hwy - heading sb - 10 miles s of casa rio. Mbr called com, com advised veh turned around and was now within city limits, heading nb on Circle Dr..Info passed on to SPS as mbr was 10-35 at res. NFAR.C/H. GP

[61] Eighteen months post-offence when disclosure was made, Cpl. Pankratz's conversations with Mr. Pankiw would not be fresh in his mind and, other than the occurrence summary, there was nothing to aid him in refreshing his memory. Certainly, Cpl. Pankratz's recollection of events would have been relevant to potential defences, especially with respect to the impaired driving charge and whether he had made any observations of Mr. Pankiw's impairment at the time of the conversations in issue. Thus, the delay undoubtedly prejudiced Mr. Pankiw's ability to make full answer and defence.

[62] The trial judge's error in mischaracterizing the delay attributable to the Crown directly impacted his prejudice analysis: first, because the length of delay as found by him was significantly less than the facts disclosed; and second, because the length of delay by necessity impacted the degree of prejudice, both actual and inferred that Mr. Pankiw had suffered as a result. Moreover, while the trial judge found as a fact at para 70 of his judgment that "… the information he [Mr. Pankiw] was requesting could very well have some bearing on the defences …" Mr. Pankiw wished to pursue, the trial judge failed to apply that finding of fact to the

question of whether Mr. Pankiw's ability to make full answer and defence had been adversely affected by the delay. In the circumstances it is abundantly apparent that Mr. Pankiw had suffered more than minimal prejudice, and the appeal court judge erred in upholding the trial judge's findings on that issue.

3. Balancing of Interests

[63] The final step in the Morin analysis is to determine whether the delay in issue was unreasonable and thus breached s. 11(b) of the *Charter*. In making that determination, the trial judge needed to balance the interests which s. 11(b) is designed to protect, namely Mr. Pankiw's right to trial within a reasonable period of time and society's interest in seeing those who transgress the law are brought to trial and dealt with according to law.

[64] In this case, the trial judge's errors in the characterization and attribution of the delay in issue affected his prejudice analysis and, by necessity, also affected his balancing of the interests protected by s. 11(b) of the *Charter* and thus his ultimate conclusion that the delay in issue was not unreasonable. Given that it took 27 months (25.5 of which required explanation) to complete a trial which should have been concluded within 8 to 10 months; that 13 to 14 months of that delay were attributable to the Crown's failure to disclose, and given the prejudice (actual and inferred) suffered by Mr. Pankiw, in my view the balance between society's interest in seeing individuals who drink and drive be brought to trial and Mr. Pankiw's s. 11(b) right to trial within a reasonable time is tipped in Mr. Pankiw's favour. The delay was unreasonable and thus breached Mr. Pankiw's s. 11(b) *Charter* right. The appeal court judge erred by failing to properly apply the appellate standard of review on questions of law to the trial judge's *Morin* analysis. Accordingly, the appeal must be allowed. The appropriate remedy is a stay of proceedings (see *Pidskalny* at paras 48-52; *R v Walker*, 2013 SKCA 95 at para 43, 423 Sask R 125; *R v Rahey*, [1987] 1 SCR 588 at para 48).

[65] As this appeal can be determined on the issue of unreasonable delay, it is not necessary to address the other grounds raised by Mr. Pankiw's appeal.

VI. CONCLUSION

[66] Leave to appeal is granted. The appeal is allowed and a judicial stay with respect to both the impaired driving charge and the charge of driving while over .08 is entered pursuant to s. 24(1) of the *Charter*.

"Ryan-Froslie J.A."

Ryan-Froslie J.A.

I concur. "Ottenbreit J.A."

Ottenbreit J.A.

I concur. "Caldwell J.A."

Caldwell J.A.