

2007 CarswellSask 493

R. v. Abrey

HER MAJESTY THE QUEEN and COLIN ABREY

Saskatchewan Provincial Court

C.A. Snell Prov. J.

Judgment: September 10, 2007

Docket: None given

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Counsel: Tammy Pryznyk for Crown

Ronald **Piche** for Accused

Subject: **Criminal**; Constitutional

**Criminal** law --- **Charter** of Rights and Freedoms -- Right to be tried within reasonable time -- Pre-trial delay

Accused charged with impaired driving, "over 80", and obstructing peace officer -- Trial was delayed due to Crown's failure to have illegible police notes transcribed and Crown appeal from order for transcription and awarding **costs** against Crown -- Trial was set to begin some 22 to 26 months after offences charged allegedly occurred -- Accused brought application for judicial stay of proceedings due to unreasonably excessive pre-trial delay -- Application dismissed -- Totality of delay, even as delay was largely due to Crown, was not so excessive as to award exceptional remedy of stay of proceedings.

Cases considered by C.A. Snell Prov. J.:

R. v. Hansen (2007), 2007 CarswellSask 54, 2007 SKPC 1, 151 C.R.R. (2d) 262 (Sask. Prov. Ct.) -- referred to

R. v. McAllister (2005), 2005 CarswellSask 285, 2005 SKPC 56, 130 C.R.R. (2d) 294, 263 Sask. R. 47 (Sask. Prov. Ct.) -- considered

R. v. Morin (1992), 12 C.R. (4th) 1, 71 C.C.C. (3d) 1, 134 N.R. 321, 8 C.R.R. (2d) 193, 53 O.A.C. 241, [1992] 1 S.C.R. 771, 1992 CarswellOnt 984, 1992 CarswellOnt 75 (S.C.C.) -- followed

R. v. Righthand (1991), 119 A.R. 234, 1991 CarswellAlta 686 (Alta. Prov. Ct.) -- referred to

Statutes considered:

Canadian **Charter** of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally -- referred to

s. 11(b) -- considered

s. 24(1) -- referred to

Constitutional Questions Act, R.S.S. 1978, c. C-29

Generally -- referred to

**Criminal Code**, R.S.C. 1985, c. C-46

s. 129 -- referred to

s. 253(a) -- referred to

s. 253(b) -- referred to

APPLICATION by accused for judicial stay of proceedings occasioned by unreasonably excessive pre-trial delay.

*C.A. Snell Prov. J.:*

### **Introduction**

1 Mr. Abrey was charged with offences alleged to have occurred on March 28, 2006 as follows: impaired driving (s. 253(a)); operating a motor vehicle while over .08 (s. 253(b)); and obstructing a police officer (s. 129).

2 He applies for a stay of proceedings due to the delay in hearing his trial, which will not likely take place for another four to eight months, resulting in a total delay of 22 to 26 months. While I will outline the various steps in the proceedings in detail below, it may be useful to note at the outset that the delay was caused by the Crown initially breaching its disclosure obligations and then this Court awaiting the results of the Crown appeal against the order granting **costs** to the accused as a remedy for that breach. For the reasons which follow, I have concluded that the accused has not established, on a balance of probabilities, that there has been a breach of his right to a trial within a reasonable time in the circumstances and that the application should be dismissed.

### **History of the Proceedings**

3 The trial was initially set for September 25, 2006, but could not proceed because the Crown refused to provide a typed version of indecipherable police notes, despite several timely requests by Defence counsel for legible notes. In addition, the Crown discovered on the trial date that four pages of the investigating officer's notes had not been disclosed.

4 Defence counsel applied for three remedies; an adjournment, **costs** against the Crown and an order that the

illegible notes be transcribed. Defence counsel also indicated that the accused would be making an application for a stay of proceedings, based on the disclosure breaches, following the provision of the required notice to the Crown.

5 In an oral decision on September 25, 2006 I granted the Defence applications for the adjournment, **costs** and the order that the police officer's notes be transcribed. Defence counsel requested, at the time I made the original order for **costs**, that I require the Crown to pay the **costs** within a specified and short period of time. I declined to do so, indicating that the Crown was entitled to appeal my decision. The Crown did appeal my decision. Initially the Crown appealed both the order for **costs** and the order that the notes be transcribed. However, in the end the Crown maintained its appeal on the **costs** issue alone.

6 During an appearance on November 28, 2006, after the Crown appeal had been filed, Defence counsel indicated that he would take the position that the Crown could not appeal my decision until the end of the case. However, he agreed that it would make sense to await the decision of the Court of Queen's Bench on the summary conviction appeal before proceeding with the trial. It should be noted that the Crown's position was that the trial should not be delayed, as their view was that none of the issues on the appeal would impact the trial. I ruled that the trial should await the appeal decision, in part because I felt it would be important to know if the **costs** order had been upheld, when the time came to rule on the anticipated stay application.

7 The Crown's appeal was dismissed, with **costs** to the accused, on June 20, 2007. Mr. Justice Ball agreed that the Crown's refusal to type illegible notes mandated an immediate remedy, and that **costs** were an appropriate remedy. However, he also ruled that the Crown did have the right to appeal the order immediately rather than having to wait until the end of the trial.

8 With the matter then ready to proceed again in this Court, August 28<sup>th</sup> was fixed as the date for the accused to make his *Charter* application that a stay be entered. Both the Crown and the Court expected that application to be for a stay of proceedings relating to the Crown's breach of its disclosure obligations, as had been indicated by Defence counsel previously. However, the present application is for a stay of proceedings for breach of the accused's right to a trial within a reasonable time, pursuant to s. 11(b) of the *Charter*. Nevertheless, the reason for the delay stems from the Crown's initial refusal to transcribe the officer's notes, and the accused's argument is that a stay is justified on the basis that this is one of the clearest of cases, given the egregiousness of the Crown's refusal to provide legible notes.

### **Evidence Presented on the Application**

9 Mr. Abrey testified that he is 33 years of age and for the last two and a half years he has been a service repairman for Degelman Industries, so presumably he began working for Degelman about a year prior to the date of the alleged offences. He travels significantly throughout the three prairie provinces in the course of his employment: from April to November each year he travels from Mondays to Fridays. He served two months of the three month automatic suspension which was imposed upon his being charged with these offences before he successfully appealed that suspension and had his licence returned. His employer provided a driver in order to permit him to continue with his employment during the time period when he was suspended from driving.

10 Mr. Abrey testified that he believed he had been deprived of opportunities for advancement due to the uncertainty of whether or not he would have a driver's licence following his trial. Two opportunities were for territory manager's positions which are based out of Regina but require year round travel. One opportunity was to do more work in the United States. Those positions would have resulted in significant raises of \$20,000 to \$30,000.

He indicated that he had not had any previous management experience with Degelman. He had worked for Degelman for five years in the early 90's when he was in research and development. His present position requires he manage his own time and customers. He stated that he currently earns \$60,000.00 a year. It is significant that he testified to having recently received a raise.

11 Mr. Abrey also testified that the delay in having his matters proceed has had an effect on his personal life. He indicated that it has caused friction between himself and his spouse, although they are still living together. He stated that he has suffered loss of sleep due to constant concern about his future employment. However, he did not testify to having sought or received any medical attention with respect to his sleep problems.

12 Mr. Abrey was candid in stating that he had no guarantee nor could he state positively that he would have received the managerial jobs, but he also stated that it was made clear to him that there would be no advancement for him until his charges were dealt with. He indicated that he was told this last summer by Mr. Paul Degelman.

### The Law

13 Section 11(b) of the *Charter* provides that any person charged with an offence has the right to be tried within a reasonable time. Sopinka, J. articulated in *R. v. Morin* (1992), 71 C.C.C. (3d) 1, [1992] 1 S.C.R. 771 (S.C.C.) the interests which this section was designed to protect, as follows at paragraphs 26 to 30:

The primary purpose of section 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 interaction.

The right to security of the person is protected in section 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.

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 inures to the benefit of society as a whole and, indeed, to the ultimate benefit of the accused . . . (page 96). In some cases, however, the accused has no interest in an early trial and society's interests will not parallel that of the accused.

There is as well a societal interest that is by its very nature adverse to the interests of the accused (page 787). In *Conway*, [1989] 1 S.C.R. 1659, the majority of this Court recognized that the interests of the accused must be balanced by the interests of society and law enforcement. This theme was picked up in *Ascov* in the reasons of Cory, J., who referred to "a collective interest in ensuring that those who transgressed the law are brought to trial and dealt with according to law" (pages 1219 to 1220). As the seriousness of the offence increases so does the society demand that the accused be brought to trial.

14 The Supreme Court in *Morin* set out the analytical framework which judges are to apply, and the factors to be weighed and balanced, when considering applications of this nature, at paragraph 31:

1. The length of the delay.
2. The 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.
4. Prejudice to the accused.

#### **Length of the Delay**

15 The first question which must be addressed is whether, on its face, the delay is of sufficient length to raise an issue as to its reasonableness. In this case the alleged offence date was March 28, 2006. The application was heard on August 28, 2007 and obviously there will be further delay in order to proceed to trial, should this application be dismissed. At present in this jurisdiction there is a delay of approximately four to eight months to obtain a trial date. Accordingly, there is presently a delay of almost 18 months and as noted above, it may be perhaps as much as 22 to 26 months before this matter can come to trial. While the Crown did not specifically address this issue in its argument, it appears it has acknowledged that this first step has been met and that there is a delay which is sufficient to warrant an inquiry.

#### **Waiver of Time Periods**

16 *Morin* sets out what "waiver" requires at paragraph 38:

Waiver requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver. Such conduct may be taken into account under the factor "actions of the accused" but it is not waiver.

17 At paragraph 44 in *Morin*, the following is set out regarding the actions of the accused:

This aspect of the reasons for the delay should not be read as putting the "blame" on the accused for certain portions of the delay. There is no necessity to impute improper motives to the accused in considering this factor. Included under this heading are all actions taken by the accused which may have caused delay. In this section I am concerned with actions of the accused which are voluntarily undertaken. Actions which could be included in this category include change of venue motions, attacks on wiretap packets, adjournments which do not amount to waiver, attacks on search warrants, etc. I do not

wish to be interpreted as advocating that the accused sacrifice all preliminary procedures and strategy, but simply point out that if the accused chooses to take such action this will be taken into account in determining what length of delay is reasonable.

### **Detailed Chronology of Events -- Delay Attributable to the Accused -- Delay Attributable to the Crown and Inherent Time Requirements**

18 The chronology of events and appearances in this case as set out in the Court record, and as provided by the applicant and marked Exhibit D-1 in these proceedings, is as follows:

- March 28, 2006 -- Date of the alleged offence: Applicant accused served with a promise to attend Court on April 17, 2006.
- April 17, 2006 -- Applicant/accused's date of first appearance pursuant to promise to appear; matter adjourned to May 15, 2006 for election and plea.
- May 15, 2006 -- Applicant/accused appears by counsel and trial set for September 25, 2006.

19 This first period is unexceptional and reflects an ordinary sequence of events where an accused obtains counsel and then a trial date is set. The initial period from March 28 to May 15 reflects the inherent requirements of the case before it is ready to be set for trial and is considered neutral; that is, it is not attributed to either the Crown or the Defence. The delay from May 15 to the first trial date of September 25, 2006 is the systemic delay and is attributable to the Crown.

20 The next period of time concerns the delay occasioned by the orders made on the trial date and awaiting the outcome of the appeal, as follows:

- September 25, 2006 -- Trial does not proceed due to the refusal of the Crown to provide legible notes and a failure to provide all of the police officer's notes; **costs** ordered; matter adjourned for applicant/accused to file application seeking a stay of proceedings pursuant to s. 24(1) of the *Charter* for breach of the Crown's disclosure obligations[FN1]. Matter adjourned to September 29, 2006 to set a date for argument.
- September 29, 2006 -- Argument on the application for stay of proceedings set for December 1, 2006.
- October 13, 2006 -- The Crown provides transcribed notes from Constable Atienne.
- October 18, 2006 -- Crown files Notice of Appeal of Order as to **costs** and order to provide legible notes.
- November 3, 2006 -- The December date is changed to January 29, 2007 to monitor the progress of the appeal.
- January 29, 2007 -- Matter set to March 26, 2007 to be spoken to as no date has yet been set for the appeal.
- March 26, 2007 -- Matter set to be spoken to on June 6, 2007 as appeal expected to be heard on May 31, 2007.[FN2]

- May 31, 2007 -- Argument presented in Court of Queen's Bench on the summary conviction appeal.
- June 6, 2007 -- Conference call with the Court does not proceed due to Defence counsel's absence.
- June 20, 2007 -- Justice Ball dismisses the Crown appeal; orders the Crown to pay **costs** to the respondent with respect to the appeal.

21 One might attribute this period of nine months to the Crown since it is the time required for their appeal to the Court of Queen's Bench. However, as noted earlier, the Crown had requested the trial proceed and it was my order, and Defence counsel's position, that the trial should await the outcome of the appeal. Defence counsel acknowledged that there was no untoward delay occasioned by the appeal, which was dealt with relatively quickly, in his view. Accordingly, in the circumstances I consider this time period to be neutral and not to be attributed to either the Crown or the Defence.

22 The next period of time for consideration is as follows:

- June 27, 2007 -- Conference call with the Court -- August 28, 2007 set for the hearing of the *Charter* application.
- August 8, 2007 -- Notice under the *Constitutional Questions Act* served and filed, applying for a stay of proceedings for unreasonable delay.
- August 28, 2007 -- Argument heard on *Charter* application, decision reserved to September 10, 2007.

23 This time period reflected the inherent time requirements for such an application to be made. In fact, it is somewhat shorter than one might normally expect in this jurisdiction. This delay is attributable to the accused. It is entirely his choice to make this application in lieu of setting a trial date.

24 During argument Defence counsel noted that it would likely be several months before a trial date could be set, given his schedule, to which I responded that I would make every effort to set an earlier trial date. Defence counsel referred me to a decision of my brother judge, Singer, PCJ, in *R. v. McAllister*, [2005] S.J. No. 282 (Sask. Prov. Ct.), and argued that it was not appropriate to assess blame for delay to the accused because his counsel's schedule would not permit him to accept early dates which might be offered.

25 In *McAllister* the Crown felt they should only be assessed fault regarding delay up to the earliest date they made available to the accused for his trial, while the accused argued that to do so would require him to give up his right to counsel of choice. However, in that case the trial date had been adjourned three times due to actions of the Crown, and the difference between the Crown theory and the Defence theory about the length of the delay to be attributed to the Crown was three months. The Court was concerned that an accused should not be penalized, by implying a waiver of a right under the *Charter*, for being cooperative with the Crown on a request for an adjournment. However, while Judge Singer did accept the Defence theory as to the length of time to be attributed to the Crown, and granted the stay on the basis of unreasonable delay, he made it clear that in a case where the lawyer is never available or is not available for an unreasonable period of time, then it may be that the accused would have to make other arrangements.

26 In the result, I have attributed the original four month period to set the first trial date, and an extra four to eight months, being the anticipated delay to the second trial which has not yet been fixed, to the Crown. The other delays are either neutral or to be attributed to the accused.

## Conclusion

27 There is no doubt but that the failure of this case to proceed to trial on the first date set was occasioned by the Crown's egregious failure to comply with its disclosure obligations. Had they responded to Defence counsel's requests for typed notes prior to the trial date the matter would likely have proceeded, despite the Crown's failure to provide four pages of those notes. And, it could be said that all of the subsequent delay is also attributed to the Crown because they appealed the order for **costs**. However, if this Court were to conclude that all of the delay is attributable to the Crown and amounts to an unreasonable delay, then two consequences would flow from that ruling. First, the accused would have received two remedies for the same breach -- the **costs** order and a stay of proceedings. Second, the Crown would have been penalized for having taken an appeal which it had a right in law to pursue at the time it did so, according to Justice Ball, and despite its position that the trial should not be delayed pending the disposition of the appeal.

28 While there can be no fault attributed to the accused with respect to the failure of the first trial to proceed, it was his decision to seek the order for **costs**. This was a tactical and strategic decision made during the course of the trial, which resulted in delay. As I have indicated above, in my view the delay occasioned by the hearing of the appeal, and then the hearing of this stay application, should not be attributed to the Crown, in the circumstances.

29 And while there may be instances, such as occurred in *McAllister*, where the cumulative effect of one or more adjournments reaches the point where a stay is the appropriate remedy[FN3], in the present case that point has not yet been reached. The delay to be attributed to the Crown in this case is 8 to 12 months, which is not, in the circumstances, unreasonable, absent significant prejudice to the accused.

30 With respect to the issue of prejudice, I find that although the accused may have suffered some disadvantage regarding his employment opportunities, he has not suffered actual prejudice to a degree that the charge should be stayed, thus depriving society of its opportunity to have the charges adjudicated upon. In all the circumstances, I find that the accused has not established that his right to a trial within a reasonable time has been breached and the application for a stay of proceedings is dismissed.

*Application dismissed.*

**FN1.** The Defence chronology in D-1 says this application was for a breach of the right under s. 11(b) to a trial within a reasonable time, however that is not correct. The transcript of the proceedings on Sept. 25, 2006, pages 13 to 17 make it clear that the intended application would be for a breach of the Crown's disclosure obligations.

**FN2.** Crown counsel advised during argument that earlier dates had been offered in March for the hearing of the appeal, but Defence counsel was not available for those dates.

**FN3.** On this point I have also reviewed the cases of *R. v. Righthand*, [1991] A.J. No. 601 (Alta. Prov. Ct.) and *R. v. Hansen*, [2007] S.J. No. 60 (Sask. Prov. Ct.), which Defence counsel referred to in the materials filed on this application.

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