

Citation: *R. v. Dumouchel*, 2015 YKTC 7

Date: 20150223
Docket: 13-00145
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Chisholm

REGINA

v.

ANICK DUMOUCHEL

Appearances:
Leo Lane
J. J. McIntyre

Counsel for the Crown
Counsel for the Defence

RULING ON APPLICATION

Introduction

[1] Anick Dumouchel is charged with the indictable offence of theft over \$5000, contrary to section 334(a) of the *Criminal Code*. The offence is alleged to have occurred between December 1, 2012 and February 13, 2013 in Whitehorse, Yukon. The trial of this matter is scheduled to proceed on March 9, 2015. Ms. Dumouchel has filed an application for a judicial stay of proceedings pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the '*Charter*'), on the basis of a breach of her right to trial within a reasonable time as guaranteed by s. 11(b) of the *Charter*.

History of the Proceedings

[2] The history of this matter is relatively straightforward. In February 2013, the Whitehorse RCMP began an investigation into an alleged theft by Ms. Dumouchel from her employer.

[3] A one count Information alleging theft over \$5000 was laid on May 28, 2013. Ms. Dumouchel, who had moved to Quebec, was served with a summons on June 19, 2013. The first appearance in this matter occurred on July 10, 2013. Ms. Dumouchel had retained counsel by July 22, 2013. On August 30, the accused elected to be tried in Territorial Court and entered a not guilty plea.

[4] The Crown estimated that the trial would take one day and the matter was adjourned to December 10, 2013 for trial. On December 2, the Crown applied to adjourn the trial of the matter as new disclosure had been forthcoming from the complainant. After a number of further court appearances to sort out disclosure issues, the parties agreed on April 25, 2014 to a three-day trial commencing October 27, 2014.

[5] It should be noted that although some further disclosure had been received by the defence on April 25, the October 27 to 29, 2014 trial dates were set on the understanding that all remaining disclosure would be forthcoming.

[6] The Crown did provide further disclosure to the defence on June 20, 2014. A pre-trial conference was held on September 24, 2014, at which time the October trial dates were confirmed.

[7] On October 23, 2014, the Crown applied to adjourn the second scheduled trial, as a result of yet further disclosure having been provided by the complainant. The application was granted. New trial dates of March 9 to 12, 2015 were scheduled shortly thereafter.

Analysis

[8] As pronounced in *R. v. Morin* [1992] 1 S.C.R. 771, at 787-788, the factors to be considered in a s. 11(b) delay application are:

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

[9] The British Columbia Court of Appeal composed a helpful summary of the *Morin* framework in *R. v. Ghavami*, 2010 BCCA 126, at paras. 43-51:

43 On an application by an accused for a remedy under s. 24(1) of the *Charter*, a court must first determine the total length of delay from charging to the end of trial. From this number should be deducted any waiver of time periods by the accused. Such waiver can be explicit or implicit, but it must be clear and unequivocal (*Morin* at 789). Once the length of delay is determined, only if the "period is of sufficient length to raise an issue as to its reasonableness" should the s. 11(b) inquiry be undertaken (*Morin* at 789, 810-11).

44 It then falls to the court to inquire into the reasons for delay. The Supreme Court in *Morin* divided the potential reasons into five categories:

- a. Inherent time requirements
- b. Actions of the accused
- c. Actions of the Crown
- d. Limits on institutional resources
- e. Other reasons for delay

The delay must be apportioned amongst these categories. This is not an exercise in assigning blame, but an attempt to identify the causes of delay.

45 The inherent time requirements flow directly from the Crown's charging decision and include the complexity of the case, the time required for preparation, "intake requirements" (consisting of retention of counsel, bail hearings, police and administrative paperwork, disclosure, and the like), and, if necessary, a preliminary inquiry. Inherent time requirements are meant to recognize that "[s]ome delay is inevitable" in the administration of the criminal justice system (*Morin* at 791-92), and that such delay is not attributable to the Crown.

46 Actions of the accused and Crown must be actions within the control of the parties, which are not necessary consequences of the charging decision. The parties must come prepared to explain the reasons for their actions (*Godin*), such as change of venue motions, attacks on wiretap packets, adjournments which do not amount to waiver (if by the accused), attacks on search warrants, re-election of mode of trial, change of solicitor, failure or delay in disclosure by the Crown, or change of manner of proceeding (summary or indictment) (*Morin* at 793-94).

47 Limits on institutional resources are relevant only insofar as the system cannot accommodate parties who are ready for trial. This type of delay is attributable to the court system itself, and is a flexible consideration that will yield, where necessary, to other factors (*Morin* at 794-800).

48 Other reasons for delay include actions taken by trial judges. This type of action "cannot be relied upon by the Crown to justify [delay]", and can weigh against the Crown even though it is not directly attributable to voluntary Crown action (*Morin* at 800-1).

49 Once the court has determined the reasons for the delay, it must turn to the issue of prejudice to the accused occasioned by the delay, bearing in mind that the "question of prejudice cannot be assessed separately from the length of the delay" (*Godin* at para. 31). The prejudice inquiry examines the effect of delay on the three interests s. 11(b) protects: liberty, security of the person, and the right to a fair trial. ...

50 Prejudice can be either actual or inferred from the fact of delay, but s. 11(b) must not be allowed to become an offensive weapon in the hands of

an accused (*Morin* at 801-3). The necessary counterweight to prejudice to the accused is the interest of society in law enforcement and "in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (*Morin* at 787 quoting *R. v. Askov*, [1990] 2 S.C.R. 1199).

51 Taking all of the above into consideration, the court must balance the factors to determine whether the delay is unreasonable (*Morin* at 788). As Cromwell J. observed in *Godin* at para. 18:

[18] The legal framework for the appeal was set out by the Court in *Morin*, at pp. 786-89. Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that s. 11(b) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important, however, not to lose sight of the forest for the trees while engaging in this detailed analysis. As Sopinka J. noted in *Morin*, at p. 787, "[t]he general approach ... is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which [s. 11(b)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay."

Length of Delay

[10] The threshold question is whether the delay is of such length as to raise the spectre of unreasonable delay which may have prejudiced the accused's s. 11(b)

Charter rights.

[11] The *Morin* guideline of eight to ten months for bringing matters to trial in provincial or territorial courts may be adjusted in recognition of the local conditions in the various regions of the country (*Morin* at 799).

[12] In the matter before me, the first trial date was scheduled to occur approximately six months from the time the charge was laid. Although the estimated trial time was one day at that point, even if four days of trial had been required, as is presently the case, securing trial dates within the six to seven month range in this jurisdiction would, no doubt, have been achievable.

[13] The overall delay in this case from the laying of the information to the dates scheduled in March 2015 is more than 21 months. The accused did not expressly or implicitly waive any of the delay, and explicitly advised the Court on March 21, 2014 and October 14, 2014 that she was not waiving her *Charter* rights.

[14] A delay of such length requires further review.

Reasons for Delay

i) Inherent time requirements

[15] This factor recognizes the fact that the process of moving a matter to the trial stage involves many different functions, each of which takes a certain amount of time. This stage encompasses such things as the retention of counsel, bail hearings, the production of disclosure by the Crown and the review of disclosure by defence. The more complex the case, the longer the delay to be expected at this stage.

[16] A not guilty plea was entered and a one-day trial set within three months of Ms. Dumouchel being charged. The case appeared straightforward. However, as the complainant came forward with more documents, the complexity of the matter increased.

[17] The difficulty is that the complexity of this matter should have been apparent during the police investigation, which commenced in late February 2013. The allegation in a nutshell is that during the course of her work, the accused did not deposit into the company bank account all of the money she handled daily.

[18] This is what may be described as a paper case. Indeed, the Crown intends to call only three witnesses. There is no expert evidence. Although counsel have described the case as complex from a document standpoint, it is not legally complex.

[19] If all the disclosure had been provided in a timely fashion, the inherent delay may have been greater, however, in the circumstances I am not going to speculate as to how much longer it would have taken before the first trial date was scheduled. Accordingly, I find the delay attributable to inherent time requirements is three months.

ii) Actions of the Accused

[20] I do not find the accused contributed to the delay in this matter. On both occasions where the Crown sought trial adjournments, new disclosure had been unearthed. After the first trial date was adjourned on December 2, 2013, the Crown provided further disclosure to the accused on January 24, 2014. Counsel for the accused wrote to the Crown on February 13, 2014, advising of issues with respect to the disclosed documents and pointing out certain documents that were missing.

[21] The Crown provided further disclosure in April and June 2014.

[22] There is no indication that the accused wished this matter delayed. In fact, as will be set out below, when examining the issue of prejudice to the accused, her actions are those of someone who wished the matter dealt with expeditiously.

iii) Actions of the Crown

[23] The adjournments of the first two trial dates were at the behest of the Crown. Instead of the trial occurring six months after the laying of the charge, another 15 months of delay has been occasioned by these adjournments.

[24] The Crown indicates that the local RCMP does not have a specialized commercial crimes unit, and that this ultimately led to delays. The police, for example, declined to receive pertinent documents from the complainant. These documents were ultimately received by the Crown and disclosed, but delay was sustained. What appears to have been a relatively straightforward investigation was not adequately conducted before a charge was laid. A lack of police resources locally cannot excuse the delay to the accused's trial.

iv) Limits on Institutional resources

[25] No delay in this matter was occasioned by limits on institutional resources.

v) Other reasons for delay

[26] No other reasons for delay exist in this case.

Prejudice to the Accused

[27] The Crown argues that the prejudice suffered by Ms. Dumouchel is not significant. The accused was never placed on restrictions, having been summoned to Court. The accused has had her counsel make all Court appearances. As the case is document heavy, the accused's ability to defend herself has not diminished with time.

[28] While it is true that Ms. Dumouchel was not placed on restrictions awaiting trial and has never physically appeared in Court on this matter, it appears her ability to defend herself has been negatively impacted.

[29] The two trial adjournments occurred because the complainant (the former owner of the business) advised the Crown of further disclosure in her possession just prior to the respective trial dates. On the second occasion, the complainant advised the Crown that she had found a box of documents containing financial records.

[30] The accused, however, states that she prepared spreadsheets in the course of business which accounted for all the monies she handled. She left those spreadsheets at her place of work when she ended her employment. This fact was raised with the Crown in the written correspondence of February 13, 2014. These spreadsheets have never been obtained by the Crown and disclosed.

[31] In *Morin*, the Supreme Court of Canada stated that prejudice to the accused can be inferred from 'prolonged delay' (p. 801). In the matter before me, Ms. Dumouchel has also led evidence as to specific prejudice.

[32] In February of 2013, she became aware that she might be the subject of a police investigation. She contacted the police in Whitehorse and in late February, received confirmation of the investigation. She indicated to the RCMP that she would make herself available to speak to the investigator. In fact, she phoned the police in Whitehorse on five further occasions and was left with the impression she would be contacted for an interview. Despite her apparent willingness to be interviewed, she never was.

[33] She indicates she was shocked to be served with a summons by the Sûreté de Québec in June 2013. Ms. Dumouchel has no prior criminal history. She made immediate efforts to speak to and retain counsel.

[34] Ms. Dumouchel advises that she has been under stress since the accusation arose. She took time off work and was prescribed medication for depression. She indicates the criminal proceedings have affected her relationship with her children, as she has not been able to be the type of mother she was before these proceedings commenced.

[35] She attempted to commence studies in nursing in the spring of 2014, but was unable to continue due to the negative effects on her of the outstanding criminal charge.

[36] She received employment as a personal social worker in a hospital in the fall of 2014, but because of this outstanding criminal charge, she has been put on probation and she has been advised that her employment will be terminated shortly unless the criminal matter has been resolved in her favour.

[37] She has booked flights to the Yukon on two occasions for her scheduled trial dates, with money borrowed from her mother. She has lost money on the cancellation of these tickets.

Balancing

[38] Considering all of the above, I am to balance the various factors, taking into account the s. 11(b) protected interests, in order to determine whether the period of delay is unreasonable.

[39] In *R. v. Rivest*, 2013 YKTC 53, Ruddy J. stated in this regard:

The Supreme Court of Canada in *Morin* observed that s. 11(b) has a primary and secondary purpose. While the primary purpose is to protect the individual rights of the accused, there is a secondary public interest. Part of the public interest is a societal demand that alleged offenders be brought to trial to be dealt with according to the law (*Morin*, paras. 26-30). Both of these aspects need to be considered and weighed in an overall balancing of the factors set out in *Morin*. It is only if delay is unreasonable within the overall factual context that a s. 11(b) breach is made out and a s. 24(1) remedy becomes available. (para 52)

[40] In *Ghavami*, the Court addressed the competing interests:

...Actual or inferred prejudice to the accused will be accorded a certain weight, but it may be counter-balanced by delay caused or contributed to by the deliberate actions of the defence. Correspondingly, if the organs of state - Crown, justice system, or judiciary - are responsible for some part of the delay, then the public interest will be entitled to less weight when balanced against the accused's right to a timely trial, because the protectors of the public interest have failed to live up to the standard expected of them. ...(para 52)

[41] The theft allegation faced by the accused is a serious one. The alleged circumstances include a breach of trust element. However, in weighing the public interest, I take into account the state's role in this lengthy delay.

[42] If this matter had been properly investigated, a trial could have taken place in a timely fashion. Instead, the matter has dragged on for 15 months after the originally scheduled trial.

[43] Aside from three months of inherent delay, the 18 month period required to bring this matter to trial is well beyond the eight to ten month guideline set out in *Morin*. None of this delay can be laid at the feet of the accused.

[44] The Crown has not been able to adequately explain the significant delay. A timely trial has not been achieved solely because of the manner in which the Crown handled the file.

[45] Having balanced the relevant factors, I find that Ms. Dumouchel has met the burden of establishing a violation of her right to be tried within a reasonable time. As a result, pursuant to s. 24(1) of the *Charter*, I direct a judicial stay of proceedings of the charge she is facing.

CHISHOLM T.C.J.