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A policy of delay? The cost of s.11(b) Charter violations in Alberta

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Cases Considered:

R. v. Rajasansi, 2009 ABQB 674;
R. v. Klein, 2009 ABPC 381;
R. v. Nguyen, 2009 ABPC 384

Back in December, CBC News reported on the stay of proceedings in the trial against Kulwinder Singh Rajasansi and Wesley Keane Sinclair. The two men were charged with sexually assaulting a young woman in October, 2004. The reason for the stay? It took the case 35 months to get to trial - that's one month shy of 3 years.

What peaked my interest even more was when less than 3 weeks later and on the same day the Alberta Provincial Court posted two sets of reasons on the very same issue. On December 17, 2009 the court issued reasons in *R. v. Nguyen* and *R. v. Klein*. Delay of trial isn't something that springs up out of nowhere – these cases take months to grow into a challengeable delay. I decided to look more closely at s.11(b) *Charter* challenges in order to examine how they have recently been dealt with in Alberta.

There are two leading Supreme Court of Canada cases that deal with s.11(b): *R. v. Askov*, [1990] 2 S.C.R. 1199, and *R. v. Morin*, [1992] 1 S.C.R. 771. These two cases outline the tests for length of delay as well as what sort of activities constitute a prejudicial delay. Section 11(b) of the *Charter* provides that:

> s.11 Any person charged with an offence has the right
>
> (b) to be tried within a reasonable time.

The purpose of s.11(b) was explored by Sopinka J. in *Morin*:

> The individual rights which the section seeks to protect are: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial.
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> 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.
>
> 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 (at paras. 27-9).

In order to protect these rights and to ensure that confidence in the judicial system is maintained, Sopinka J. also outlined guidelines for determining when a delay of trial will have infringed on these rights:

> 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,
>
> (c) actions of the Crown,
>
> (d) limits on institutional resources, and
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> (e) other reasons for delay; and
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> 4. prejudice to the accused (at para. 31).

The reasons also discuss some specifics on precisely how these factors are determined. For example, cases that are more complicated will demand more preparation and, subsequently, will take more time to be brought properly to trial. A case that requires preparation of a large amount of evidence such as a fraud case will be given a longer time frame than cases that are relatively straight-forward. Questions around delay will also take into account where the delay stems from. Delay by the Crown will be counted in favor of the accused while delay by the accused will not be considered.

Institutional delay is a central concern in *Morin*. Sopinka J. indicates that the time limit of 6 to 8 months to bring a case to trial outlined in *Askov* has been treated as a limitation period by the courts.

This is not the treatment the Court endorses in *Morin*. Each case needs to be considered in light of changing conditions that strain the court's resources.

Turning back to the 3 Alberta cases at hand, consider the positions of the parties regarding the delay in light of *Morin*. In *R. v. Rajasansi*, the Court found that the majority of the delay was attributable to the Crown. The issues surrounding the disclosure of forensic evidence in this case led McIntyre, J. to comment:

> This case … is not a complex case. The delay of 38 months in bringing it to trial is striking. The delay is almost entirely attributable to the Crown. It is in large part unexplained and unjustified. Critical evidence such as the October 20, 2004 lab report was not disclosed until 55 months after it was produced. The defence made repeated requests for disclosure with no result (at para. 98).

The application in the *Nguyen* case was dismissed because the majority of the delay was attributable to an unforeseen event, namely the illness of the trial judge. The accused could not establish that the delay created prejudice against him. The application in *Klein*, on the other hand, led to a stay of proceedings on all charges. Fraser J. indicated in his reasons that the delay of 43 months is mostly attributable to the Crown (23 months of Crown delay) and the Crown's "non-compliance with valid and proper requests for disclosure necessary to defend on real issues (at para. 56)."

These delays seem incredible. And these are not the only recent cases in Alberta that have been stayed due to delay: other 2009 cases include *R. v. Swindler*, 2009 ABPC 344 (stay due to a 42 month delay attributable in part to the actions of the Edmonton Police Service); *R. v. Nemanic*, 2009 ABPC 279 (stay due to 22.5 months of Crown and institutional delay); and *R. v. Rimmer*, 2009 ABPC 110 (stay due to a 20 month delay by the Crown).

I am not a legal expert. As a first year law student at the University of Calgary, I am just cutting my teeth on this marvelous beast we call the law. But I am a citizen who is subject to the laws of Canada and these cases give me pause. When a person is charged with a crime there are a range of issues they have to deal with: besides the financial cost of having to hire a lawyer, there is the embarrassment of being charged, the stress of the ongoing case, and the stigma attached to being named as an accused. When these cases are dragged out 20, 30, even 40 months longer than necessary due to delays by police services, Crown prosecutors and judicial institutions it makes one question how effective these entities are. During my first few months of law school I have had the opportunity to meet individuals working for these entities – they are capable people. So why, then, are there such delays?

In *Morin* Justice Sopinka writes that one of the reasons that the Supreme Court has imposed a flexible time limit for delay of trial is "to avoid each application pursuant to s. 11(*b*) being turned into a trial of the budgetary policy of the government as it relates to the administration of justice" (at para. 50). This is a wise position for the Court to take as it is not their place to question the wisdom of government actions, particularly how they spend our tax dollars. That being said, as citizens the

responsibility of questioning how budgetary policy relates to the administration of justice lies with us. I would suggest that many of these delays are due to a lack of resources and a budgetary policy that puts a low priority on the carriage of justice. How can we have confidence in a justice system that is so strapped that it can not manage to try cases in a timely fashion? This hurts all of us: the accused who is not able to clear his or her name; the complainant who does not receive justice for the hurt against them; and the community at large that questions whether the judicial system can actually enforce the law.

I do not think this is the end of this issue. In a quick count of Alberta cases dealing with s.11(b) issues, there appears to be a growing trend: at least 2 cases in 2006; 4 in 2007; 9 in 2008; and 10 last year. With the announcement of the provincial budget expected any day it will be interesting to see how the Alberta government plans to deal with this and a slew of other issues facing the legal community in the province. The attitude of the government seems to be that we can not afford to put more money towards our justice system. My question is, when you consider the number of cases being stayed due to unreasonable systemic delays, can we afford not to?

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