

The Forest of Delays

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Case Commented On: *R v Vassell* [2016 SCC 26 \(CanLII\)](#)

Section 11(b) of the [Canadian Charter of Rights and Freedoms](#), guarantees that any person charged with an offence has the right to be tried within a reasonable time. In *R v Vassell* [2016 SCC 26 \(CanLII\)](#) the Supreme Court of Canada reiterated that the Crown is responsible to deliver on this right. The approach that had been developing in Alberta courts was that the right would only be violated where the actions of the Crown caused excessive delay – institutional delays and delays caused by anything other than Crown actions were considered neutral or less important and did not trigger section 11(b). The Supreme Court in *Vassell* rejects this approach: the Crown is responsible for bringing the accused to trial within a reasonable time and therefore for all delays, regardless of their cause, trigger section 11(b) unless the accused explicitly or implicitly waives their right to be tried within a reasonable time.

Facts

The accused was charged on April 11, 2011, and convicted of one count of possession of cocaine for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*, [SC 1996 c 19](#) on April 22, 2014. The Alberta Court of Appeal had found that at no time did the accused waive his rights under section 11(b), and he was not responsible for any of the delay. (*R v Vassell* 2015 ABCA 409 at paras 1-2) The delay was caused by several factors, including the decision of the Crown to try the accused along with six other individuals (*Vassell* CA at para 3), strategies undertaken by his co-accused (*Vassell* CA at para 45), the Crown prosecutor unexpectedly had to attend a funeral (*Vassell* SCC at para 9), and a very late decision to call expert evidence – evidence that was ultimately not called (*Vassell* SCC at para 11). The appeal came to the Supreme Court as of right from a dissent by Justice O’Ferrall of the Alberta Court of Appeal.

The Decision

Justice Moldaver wrote the judgment of the Supreme Court, and expressed general agreement with Justice O’Ferrall on the section 11(b) issues. (*Vassell* SCC at para 2). Other arguments had been raised in the lower courts, but were not addressed in the Supreme Court decision. The core of Justice O’Ferrall’s dissenting opinion on the section 11(b) issue was that:

...the Crown must bear some responsibility for delay where it results from a failure to apprehend the parameters of the case in a timely fashion.

In the end, the appellant waited three years for a three-day trial. This should not have happened. While the Crown’s conduct of the prosecution certainly did not reach the point of bad faith, had the Crown a better grasp of its case against these various accused, before it decided to proceed against them together on a joint indictment, the time to trial would

have been much more reasonable. Furthermore, if the Crown's failure to properly apprehend its case against these individuals resulted from a lack of prosecutorial resources, this was, nevertheless, a failure for which the Crown must bear responsibility in the context of determining whether the delay in this case was unreasonable. (*Vassell* CA at paras 53,54)

At the Supreme Court Justice Moldaver stated the issue this way:

... a more proactive stance on the Crown's part was required. In fulfilling its obligation to bring all accused to trial within a reasonable time, the Crown cannot close its eyes to the circumstances of an accused who has done everything possible to move the matter along, only to be held hostage by his or her co-accused and the inability of the system to provide earlier dates. (*Vassell* SCC at para 7)

The delay in this case was ultimately the result of the Crown decision to try seven individuals at once, and while the Crown was entitled to proceed in this manner, the Crown was also responsible for ensuring that this decision did not infringe the right of the accused to trial within a reasonable time. The Crown is ultimately responsible for any delays not caused by or waived by the accused (Justice O'Ferrall, *Vassell* CA at 54).

To explain the importance of this decision, consider as examples two recent Alberta cases that preceded the Supreme Court's *Vassell* decision that demonstrate trends in section 11(b) jurisprudence. In *R v Chang* [2016 ABQB 297 \(CanLII\)](#) and *R v Warring* [2016 ABQB 236 \(CanLII\)](#) the court categorized each period of delay, and separated from consideration those for which the crown was responsible and those which the crown was not responsible for (*Chang* at paras 70-101, *Warring* at paras 113-171). Both *Chang* and *Warring* cite *R v Panousis* [2003 ABCA 294 \(CanLII\)](#) for the principal that the Crown "is in no way compelled to explain its procedural choices" (*Chang* at para 94, *Warring* at para 158). Both cases also say that inherent time requirements "are neutral in the s. 11(b) reasonableness assessment and do not count against the Crown or the accused". These elements of the section 11(b) analysis are likely incorrect after the Supreme Court's decision here in *Vassell*. However I note that neither *Chang* nor *Warring* turned on these points, and it is not clear that the Supreme Court's *Vassell* decision would have altered the outcomes of those cases. The *Vassell* decision appears to alter the trends in section 11(b) jurisprudence to diminish the duty of the Crown to provide a trial within a reasonable time and to engage in an extensive categorization of delay periods that avoids considering the length of the delays as a whole.

Conclusion

The Supreme Court reiterates a point from *R v Godin* [2009 SCC 26 \(CanLII\)](#) that when courts are considering whether there has been a breach of section 11(b) they "must be careful not to miss the forest for the trees." (at para 3) I expect this decision will lead to two changes in decisions regarding section 11(b). First, courts will keep in mind that the Crown has a duty to provide the accused with a trial within a reasonable time, and second, the decisions regarding section 11(b) breaches will hopefully include a less technical accounting of time. These changes are relatively minor course corrections, but by cautioning against the diminishing of Crown responsibility and excessive technicality, the Supreme Court has acted to protect the relevancy and strength of the section 11(b) right to trial within a reasonable time.

As a final point, the clarification that the Crown is responsible for ensuring the accused receives a trial within a reasonable time makes the lack of judicial resources in Alberta a more serious problem. The lack of judges in Alberta lengthens the delays involved in obtaining trial dates. To re-iterate a common theme on this blog: the vacancies on the superior courts are a serious problem for our justice system, and Alberta needs a full complement of judges to properly protect both the public and the rights of the accused.

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