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Another kind of trial delay

By Amanda Winters

Cases Considered:
R. v. Asiala, 2010 ABQB 450

Earlier this year I wrote an ABlawg post discussing s. 11(b) of the *Canadian Charter of Rights and Freedoms* in relation to three Alberta cases decided in late 2009 (see A policy of delay? The cost of s.11 (b) Charter violations in Alberta). Section 11(b) of the *Charter* guarantees the right to be tried within a reasonable time. In my post, I noted that trial delays appeared to be a growing trend that should be closely monitored by the citizenry, particularly as they relate to government policy in allocating budgetary resources for judicial services. What I neglected to say is that sometimes delay has nothing to do with government policy, lack of judicial resources or even the tactical advantage gained by one or both sides in a case. On rare occasions delay is caused by the human element of the judicial system.

In July 2010, the Court of Queen's Bench heard *R. v. Asiala*, an application flowing from a summary conviction charge heard in the Provincial Court. The accused was charged in October, 2007 with impaired driving and made his first appearance in December of the same year. The trial was set for December, 2008 and was heard at that time, along with a voir dire regarding the admissibility of the breathalyzer certificate and a *Charter* argument that the accused had been deprived of his right to counsel. The trial judge reserved judgment until January, 2009. Reasons were not ready in January and the parties were excused until May. In May, the trial judge decided that the breathalyzer certificate was admissible but he did not give a decision on the *Charter* argument brought by the accused. The *Charter* issue was held over until June, 2009, but following a series of appearances and adjournments no decision was forthcoming from the trial judge. In April 2010 the accused sought further *Charter* relief for trial delay from the Court of Queen's Bench. In July, 2010, Justice P.J. McIntyre allowed the application and entered a stay of proceedings.

In his analysis of the *Charter* application for unreasonable delay, Justice McIntyre focused on the question of whether the Crown is responsible for judge-instigated delays. The delays that followed the appearance in May 2009 were due almost entirely to the trial judge being on medical leave. This was not an instance of institutional delay, nor was it the fault of the Crown (although it was noted (at para. 29) that the Crown had commenced and not proceeded with an application under s. 669.2 of the *Criminal Code* to have a new trial judge appointed). Nevertheless, the verdict was held in limbo and the entire matter was dragged out for 32 months. In instances like this where the delay is caused by the court itself, who is on the hook for the delay?

The Supreme Court of Canada considered this question in *R. v. Rahey*, [1987] 1 S.C.R. 588. Addressing the test for unreasonable delay under s. 11(b) of the *Charter*, the Court explained that when an accused is faced with a request from the bench to waive the time period for an adjournment, this waiver must be weighed differently than a request from the Crown. Justice Bertha Wilson had this to say on the issue:

> I think that in general the defence is in a very delicate position when it comes to complaining about the conduct of a trial. Accordingly waiver should not, in my view, be deemed to have occurred where counsel has consented to a judge-generated adjournment and no such waiver should therefore be deemed to have occurred in this case. (at para 72)

Justice Gerard La Forest agreed, stating:

> In practice, however, an accused's consent to delay may be merely *pro forma*. Where, as in this case, an adjournment is sought by a judge who has before him the accused's motion for a directed verdict, the accused in fact has little choice but to agree. (at para 100)

Justice La Forest went on to point out that the "burden of establishing the expeditiousness of a trial is on the state, not the accused" (at para 127). As such, and rightly noted by Justice McIntyre in *Asiala* (at para. 29), when time periods are waived to accommodate a request from the bench and this results in a significant delay in the trial, it is the state that must bear the consequences. Considering the length of the delay, the reasons for delay, and waiver by and prejudice to the accused, Justice McIntyre held that the accused's s. 11(b) rights had been violated and entered a stay of proceedings.

Although judge-instigated delay seems to be rare, *Asiala* is not the first instance where this type of delay has been successfully challenged in Alberta. In *R. v. Wong*, 2000 ABQB 618, the accused brought *Charter* challenges under both ss. 7 and 11(b) related to trial delays in Provincial Court. Justice Sanderman heard the application and dismissed the s. 7 challenge out of hand. While addressing the s. 11(b) argument, Justice Sanderman explained that while it was possible to review a matter in order to establish that a trial judge has been a "flagrant contributor to trial unfairness" (at para. 21), it is a sensitive matter. Judges performing these reviews should be loathe to intrude on a trial judge's decision unless the delay was "obvious and with such revealing characteristics to warrant interruptive superior court intervention." (at para 21). To resolve the matter in *Wong*, Sanderman J. brought to light the personal and medical issues that caused the judge-instigated delay. The judge was not faulted for the circumstances but the court acknowledged that, nevertheless, the delay was substantial. Coupled with the other delays in the matter, the court concluded that the cumulative effect violated the right of the accused to have the trial heard in a timely fashion. A stay of proceedings was entered.

Susceptibility to illness is a human condition that society has learned to accommodate. Even in situations where a person's legal rights are at stake, our judicial system does have some flexibility for those occasions when judges must take care of their health. However, this flexibility has been tempered by *Charter* protections and their interpretation by the courts. Where an accused consents to a delay requested by the bench, that waiver will be viewed in a somewhat sceptical light. Further, if there is an inordinate delay caused by the bench, an accused will be due the same remedy that he or she would be granted if the delay were caused by the Crown or by the judicial system on an institutional level.