Application for Stay of Proceedings

The *Canadian Charter of Rights and Freedom* states, in part:

Section 11: Any person charged with an offence has the right:

(b) – to be tried within a reasonable time

(d) – to be presumed innocent until proven guilty according to the law….

Section 24:

(1) – Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Askov et al v. R

The Supreme Court of Canada, which ultimately interprets the *Charter*, has made several decisions with respect to the *Charter*. On October 18, 1990 a decision was released in a case called Askov et al versus Regina. In that case, there had been a two year pre-trial delay and when it finally proceeded to court, counsel for all of the accused involved, argued that their clients rights to be tried within a reasonable time, pursuant to section 11(b) which provides a right to be tried within a reasonable time, had been unreasonably delayed. The initial judge (Judge Bolan, the senior judge of the District Court of the judicial district of Peel) granted a "stay of proceedings" against all of the accused. Judge Bolan, presiding at the trial, found that a period of 34 months, to bring a case to trial, was prima facie excessive. Judge Bolan's decision was appealed. The Ontario Court of Appeal set aside the "stay" and directed that the trial proceed. All of the accused appealed the matter to the Supreme Court of Canada.

The Supreme Court Judges carefully reviewed this matter. They looked at, amongst other things, the Charter of Rights and Freedoms, specifically sections 1, 7, 10 (b), 11, 24 and the Sixth Amendment of the Constitution of the United States of America. The Sixth Amendment ensures that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". One case which was relied upon, when making the decision in *Askov* was *Barker v. Wingo,* 407 U.S. 514,33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972), which dealt with the Sixth Amendment, with no comparable provision to our section 1 (of our *Charter*). The United States Supreme Court considered the Sixth Amendment right of the accused, Barker, in a case called *Barker v. Wingo.* In that case, Barker had been charged with murder and did not have his trial until five (5) years after the murder had taken place. Barker (as the accused) only began invoke his Constitutional right under the Sixth Amendment 3 ½ years after the charges were laid. Judge J. Powell, who provided the reasons in the case, on behalf of the U.S. Supreme Court ruled that a "flexible approach should be taken to cases involving delay and that the multiple aims of the Sixth Amendment must be appreciated.

U.S. Supreme Court Judge Powell continues to write for the majority in *Barker*... Page 2 con't..

In his decision, he recognized the general concern that all persons accused with crimes should be treated according to fair and decent procedures. He particularly noted that there were three individual interests which the right was designed to protect:

(i) to prevent oppressive pre-trial incarceration;
(ii) to minimize the anxiety and concern of the accused; and
(iii) to limit the possibility that the defence will be impaired or prejudiced.

He went on to say that the right to a speedy trial involved the added dimension of a societal interest. He found that a delay could result in increased financial cost to society and, as well, could have a negative effect upon the credibility of the justice system. Judge Powell went on to speak to the Sixth Amendment. He stated that in order to balance the individual right and the communal aspect of the Sixth Amendment, the United States Supreme Court adopted an approach of ad hoc balancing "in which the conduct of both the prosecution and the defendant are weighed". The balancing is undertaken by reference to four factors as the test for infringement of the right to a "speedy trial". Those four factors are:

(i) the length of the delay;
(ii) the reason for the delay;
(iii) the accused's assertion of the right; and
(iv) prejudice to the accused.

The Supreme Court of Canada upheld the stay, given that the pre-trial delay was grossly excessive on its face.

In *Morin* (*Regina vs. Morin*) the Supreme Court of Canada rendered a decision ion March 25, 1992. In this case, there was a delay of 14 months between the date of arrest and the Provincial Court trial, on a charge of impaired driving (contrary to section *253* of the *Criminal Code*). At the trial, the accused applied for a stay of proceedings, on the basis that her right to a trial within a reasonable time as provided for in section 11 (*b*) of the *Charter*, had been violated. This motion under the Constitution failed and she was convicted. She appealed and won, when a stay was granted. The Crown appealed this decision to the Ontario Court of Appeal and the Court of appeal set aside the stay and reinstated the conviction. The accused appealed the decision to the Supreme Court of Canada, which decided that the appeal would be dismissed. The Court spoke to the factors that must be weighed when an individual is claiming that his/her rights, pursuant to section *11 (b)* of the *Charter*, have been infringed and are seeking relief under section *24 (1)* of the *Charter*.

The requires the court to examine the period from the charge to the end of the trial. Pre-charge delay may, in certain circumstances, have an influence on the over-all determination as to whether post-charge delay is unreasonable but of itself is not counted in determining the length of the delay. If the length of the delay is unexceptional, no inquiry is warranted and no explanation for the delay is called for, unless the accused is able to raise the issue of reasonableness of the period by reference to other factors such as *prejudice*.

Morin con't.../3

If the length of the delay warrants an inquiry into the reasons for the delay then the court will first consider whether the accused has waived in whole or in part, his/her right to complain of the delay. However, any waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights. If the application by the individual is not resolved by reason of the principles of waiver, the court will then have to consider other explanations for the delay. This includes consideration of the *inherent time requirements* which inevitably lead to delay. Thus the more complex the trial, the more time will be needed to prepare for trial and for the trial to be conducted once it begins. As well, there are inherent requirements which are common to almost all cases. This includes activities such as retention of counsel, bail hearings, police and administrative paperwork, disclosure and similar activities. The actions of the accused and of the crown must be investigated.

Another factor is the limits on institutional resources. If the accused is in custody, the period of acceptable institutional delay may be shortened to reflect the court's concern. The last factor is the prejudice to the accused.

There are four (4) principle factors that the Court must review in each specific case, to assess whether the individual's rights under section 11 (b) of the Charter were infringed; they are:

1. The Length of the Delay (from the date that the ticket was issued, up to and including the date of the scheduled trial date)
2. Waiver of any periods of Time;
3. The Reasons for the Delay
4. Prejudice to the Accused

With regard to the Reasons for the Delay, the Court must examine the following:

1. The inherent time requirements of the particular case;
2. The actions, or lack thereof, of the accused and of the Prosecutor
3. Limits on Institutional resources; and
4. Other reasons for the delay

The Supreme Court reiterated in the Askov decision that the onus is on the person invoking the Charter to establish a violation of his or her rights. They stated that an accused under section 11 (*b*) must establish that he or she has not been tried within a reasonable time. One of the elements by means of which he or she may try to prove the unreasonableness of the delay in bringing him or her to trial, is by showing that he or she has been prejudiced by the delay, not the prejudice of being charged, (that prejudice will be there even if the accused receives a speedy trial) but the prejudice that is directly attributable to the lapse of time.

The Supreme Court of Canada has provided a guideline of 8 to 10 months in a decision called *Morin* and the same court spoke to an administrative intake period, for each court in a case called *Askov*. Based on the guideline and the intake time, Courts are providing Stay of Proceedings for trials which have taken 11 to 14 months to proceed, after the initial charge (s) was laid. In Toronto, at the old city hall, Prosecutor's are allowing cases of 14 months or longer to be stayed (in lay persons terms – to have your charge(s) suspended or dismissed).

Application for Stay of Proceedings con't… /4

An Application for Stay of Proceedings is also known as a "notice of Constitutional question" or a "Constitutional challenge" and is known as a preliminary motion, which has to be dealt with by the Courts, prior to the actual trial of the facts or merits of the case.

In order to submit an "**Application for Stay of Proceedings**" the Courts expect you to provide this application in a specific format which has all the essential ingredients of an Application for Stay pursuant to *Section 11 (b)* of the *Charter of Rights and Freedoms*. This is also referred to as a Constitutional challenge. In the case where your trial takes 11 to 14 months to proceed, after the initial charge, through no fault of your own, under *section 24 (1)* (remedy section of the *Charter*)of the *Charter of Rights and Freedoms* a Justice of the Peace has the authority and jurisdiction, under the *Charter* (see court of competent jurisdiction under *section 24 (1)*) to order that your charge(s) be stayed. Section 24 (1) of the Charter provides the Justice of the Peace with the ability to provide a "remedy as the court considers appropriate and just in the circumstances". In the case where there has been an unreasonable delay between the time you received your ticket and the time that your trial was scheduled to deal with the ticket, the remedy is to have the matter (the charge contained within your ticket) stayed (the trial doesn't happen).

In order to seek this extraordinary remedy, there are a number of rules which must be strictly followed, in order to comply with the Courts of Justice Act, the Application for Stay of Proceedings must be constructed in a certain format and delivered (and served (or hand delivered by anyone) on the Attorney General of Canada (also known as the Department of Justice), the Attorney General of Ontario, the City Prosecutor at the Court where your trial is scheduled to be heard and the Justice of the Peace (normally at the Court of Justice, Provincial Offences, office where you first went to file your Notice of Intention to Appear – Form 7 (when you requested a trial).

This Application for Stay of Proceedings must be delivered, to all the parties above, at the latest, fifteen calendar days prior to the scheduled trial date (ie- if your trial was scheduled for June 17, file your application, with all four parties, by June 1 at the very latest). If you do not file in time, the Prosecutor will argue that it is untimely and that you did not comply with the mandatory provisions of the *Courts of Justice Act* and therefore the Court cannot consider your *Charter* application and unfortunately, the Justice of the Peace will have no choice but to rule your motion out of order and will not even consider it. See "*Notice of Constitutional Question* (failure to give notice, form of notice, time of notice, notice of appeal, right of attorney general to be heard and to appeal)– *Section 109* **below** (pages 4/5)

This is what the *Courts of Justice Act* states: **PART VII COURT PROCEEDINGS**:

Application to Provincial Offences – Section 95 (3) states:
Section 109, 126 (language of the proceedings), 132 (judge sitting on appeal), 136 (prohibition against photography at court hearings), 144 (arrest and committal warrants enforceable by police) and 146 (where procedures not provided) also apply to proceedings under the *Provincial Offences Act* and, for the purpose, a reference in one of those sections to a judge, includes a justice of the peace presiding in the Ontario Court of Justice.

Continued on page 5…

Notice of Constitutional question:
109. (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1) The constitutional validity or constitutional applicability of an Act or the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2) A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to give notice:

2) If a party fails to give notice in accordance with this section , the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

Form of notice:

(2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

Time of notice:

(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen (15) days before the day on which the question is to be argued, unless the court orders otherwise.

Notice of appeal:

(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

Right of the Attorneys General to be heard:

(4) Where the Attorney General of Canada and/or Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

Rights of the Attorneys General to appeal:

(5) Where the Attorney General of Canada or Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

continued on page 6…

The main points to remember are to:

1. Write your application for stay of proceeding and put it together as a document, which will serve as a motion for the constitutional question.
   Make six (6) copies and as you drop each one off (or have someone assist you in this regard) Ensure that you get **all** the applications stamped, and leave one with that person who stamped your application. The example I will use is in Toronto. I have prepared and signed off one application for stay of proceeding and I have made five (5) additional copies of it.

2. Serve it at the very latest, 15 days prior to the day that your trial is scheduled, to the Attorney General of Canada, Attorney General of Ontario, the Prosecutor at the Provincial Court where your trial is scheduled and to the Justice of the Peace, at the office where you applied for a court date to fight your ticket.

3. This is the method that you use while serving the application for stay document:

   Make six (6) copies
   In Toronto, as an example, you would bring all six (6) copies of the application to the following Places:

   1. Department of Justice (Canada) (Ontario Regional Office)
      To serve the Attorney General of Canada
      Exchange Tower – located on 130 King St (just east of York St-on north side of King)
      Suite 3400, P.O. Box 36, Toronto, Ontario M5X 1K6
      Go into elevator which travels to the 34th floor and get off with your six (6) copies and aks the receptionist to stamp all six (6) copies and leave him/her with one.The stamp will say "Service of a True Copy Admitted On – with the date" same as Ontario's Attorney General.
   2. Now you have five (5) stamped copies and next you go to the Attorney General of Ontario They are located at 720 Bay Street (west side of Bay, north of Gerrard St.) in a building called the McMurtry-Scott building (named after two former Attorneys General of Ontario) The Attorney General is located on the 11th floor, but you will never get there, it is on constant "lock-down". You have to go to the phone in the corner of the lobby and phone and ask for a clerk from the "Constitutional branch" to come down and stamp your "Constitutional challenge". Wait someone will come down, have them stamp the other 5 documents and provide the clerk with one. Now you have four.
   3. Next stop is the Ontario Court of Justice office, Provincial Offences Act – Toronto South Office located on the second floor of 137 Edward St (just east of University, 1 street north of Dundas St. W). You have 4 stamped copies of the application for stay. You drop one off here for the Justice of the Peace. Have the clerk stamp them all four, and take away three.
   4. Last but not least – Old City Hall – 60 Queen St. W at the Prosecutions Office in the basement – room E 12. Take you last three copies, have the clerk stamp them all and leave one and take away two copies. You may need both on the day of your trial and may end up sharing them with the Prosecutor and/or Justice of the Peace.

Actual Application begins on next page.

How to Create an Application for Stay of Proceedings Document

All of these documents, put together, constitute your Application or your Constitutional Motion.

1. The first document you will see is the front cover:
   NOTICE OF APPLICATION FOR STAY OF PROCEEDINGS
   This cover is normally a blue cardboard (very thin) and is the front of your motion.

2. The second document is the "TABLE OF CONTENTS" which tells the reader of all different documents that have been included with your constitutional motion and the order in which they appear. You should have a different TAB NUMBER for each of the documents you are going to rely upon in your Notice of Application for Stay of Proceedings.

TAB 1

3. The third document is your actual "NOTICE OF APPLICATION" which puts the Attorneys General of Canada (Department of Justice) and Ontario, as well as the Justice of the Peace and the Prosecutor "on notice" that you are bringing this application forward. This also tells them what your "grounds for bringing the application forward" are, what you are including that "supports" your application and the "relief sought" (what you want to see the Justice of the Peace do on your behalf).

TAB 2

4 Your "SWORN STATEMENT" which describes the events, as they occurred, which required you to make an application for a stay of proceedings with the court.

TAB 3

5. A copy of the ticket that brought you to this stage.

TAB 4

6. The "Notice of Trial" you received in the mail, in relation to the ticket in TAB 3.

TAB 5

7. A copy of the Supreme Court of Canada's decision in *Askov v. R.*

TAB 6

8. A copy of the Supreme Court of Canada's decision in *R. v. Morin*

It is a good idea to put all of these documents together in a book of documents and have them separated by Tabs and then bound them together with a black plastic spine, and some cardboard on the back, given that this is where you'll have all of the different offices stamp your documents.

ONTARIO COURT OF JUSTICE
(PROVINCIAL DIVISION)
(Toronto Region)

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

YOUR NAME

Applicant

NOTICE OF APPLICATION FOR

STAY OF PROCEEDINGS

Your First and Last Name
Your Residential Address
The City and Province You Live in

The Offence No. Listed on the Ticket you Received

TABLE OF CONTENTS

ONTARIO COURT OF JUSTICE
(PROVINCIAL DIVISION)
(Toronto Region)

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

INSERT YOUR NAME

Applicant

NOTICE OF APPLICATION FOR STAY OF PROCEEDINGS

TAKE NOTICE that an Application will be brought by counsel on behalf of the Applicant, (INSERT YOUR NAME), before the presiding Justice of the Ontario Court of Justice (Provincial Division), Courtroom #H 60 QUEEN STREET WEST, TORONTO, ONTARIO, COURT HOUSE on the (insert day) Day of (insert month), (insert year) at 1:30 p.m. or as soon thereafter as the Application may be heard, for an Order directing the prosecution of the charges herein (Speeding on (insert month, day and year of alleged offence), contrary to the *Highway Traffic Act – Section 128*) be stayed, pursuant to *section 24 (1)* of *the Canadian Charter of Rights and Freedoms* (hereinafter the "*Charter*").

THE GROUNDS OF THE APPLICATION ARE:

1. That the Applicant's right to a trial within a reasonable time, as guaranteed by *s.11(b)* of the *Charter*, has been infringed;

2. That a stay of the proceedings is appropriate and just in the circumstances, as defined by *s. 24 (1)* of the *Charter*;

continued on next page…

3. Such further and other grounds as the applicant may advise and this Honourable Court permit.

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON THE FOLLOWING:

1. The Sworn Statement of the Applicant, sworn the (insert date that you sign your "Sworn Statement" in the next tab(Tab 2))

2. Jurisprudence – Copies of the Supreme Court decisions – Askov & Morin.

3. Such further and other material as the applicant may advise and this Honourable Court permit.

THE RELIEF SOUGHT IS:

1. An Order allowing the Application and granting a stay of the proceedings.

SWORN STATEMENT OF (INSERT YOUR FULL NAME)

I, (Insert your full name), hereby attest to the following:

On or about (provide the date you were charged), in the City of Toronto (or the City you were charged in), I was charged with a single offence:

Speeding (55 km's. in a 40 km. zone), contrary
to the *Highway Traffic Act – Section 128.*

Shortly thereafter, I proceeded to the Ontario Court of Justice (Provincial Offences Office) Toronto South, located at 137 Edward Street, 2nd Floor in Toronto. I filed this ticket with the Court, for the offence described hereinabove. The clerk in attendance was advised that I wished to contest this ticket in court and as a result, a "Notice of Intention to Appear" was filled out. The clerk stated that I would receive a "Notice of Trial" in the mail.

Much to my surprise, a year later, I received a "Notice of Trial" in the mail. This notice advised me that my trial date would take place at # H court room at the Old City Hall, at 1:30 p.m. on (insert the date that the trial is scheduled to proceed on) which would mean, that for the first appearance, over 14 months would have elapsed, before I had the first opportunity to challenge the alleged offence, which I did not commit.

As a result of this delay, this would mean that I would have to wait approximately 14 months for my first appearance in court on this matter and it is for this reason that I am filing this motion, requesting that a stay be granted pursuant to sections *11 (b) & 24 (1) of* the *Canadian Charter of Rights and Freedoms*, due to the inordinate and unreasonable delay.

I swear this statement is true.

Dated this (insert date) day of (insert month), (insert year) in the City of Toronto.

_____ (your signature)_____
Your Name
Your Address
Your City and Province
Your Postal Code

(This is TAB 3 and it is where you place a copy of the ticket (s) that you received, preferably the front of the ticket and the back of the ticket)

(This is TAB 4 and it is where you place a copy of your "NOTICE OF TRIAL")

(This is TAB 5 and it is where you place a copy of the *ASKOV* decision)

(This is TAB 6 – it is where you place a copy of the *MORIN* decision)

This is the back cover and it should be blue cardboard like the front cover.

It is important that it is cardboard as you will have these applications "stamped" by all of the appropriate parties (Attorneys General of Canada and Ontario, the Court of Justice, Provincial Offences Office where you originally went to apply for a trial date (this copy is for the Justice of the Peace presiding over your trial) and the City Prosecutor's office in the Court at which your trial is scheduled to proceed.

Once you have all the copies stamped, you should bring two of them to the trial date, bearing the official stamps of everyone who received them, to prove that you complied with the requirements of the *Courts of Justice Act*.

Keep in mind you have to have them all stamped, at least 15 days prior to your scheduled trial date or the Justice of the Peace presiding in your trial will not allow you to bring this constitutional motion forward, before the actual trial begins.

These motions are always "preliminary matters" and must be dealt with prior to a trial about the merits of your charge.

If the clerk stands and reads out your charges and asks you to provide a guilty or not guilty response, you should say that you are not prepared, at this time, to enter a plea, before the Section 11 (b) matter is dealt with.

This will remind the Justice of the Peace that a constitutional question is on the table and that this is separate and aside from the actual charge and must be dealt with, before the merits of the charge are explored.

Good Luck!