11b Late Filing abrigment para 72. 142.

Def copy

Case Name:
R. v. Matteo

Between
Gliatta Matteo, and
Her Majesty the Queen

[2005] O.J. No. 5472

Ontario Court of Justice
Toronto, Ontario

I.A. MacDonnell J.

Oral judgment: July 11, 2005.

(158 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- Trial within a reasonable time -- Procedure -- Notice of constitutional question -- Appeal from dismissal of stay application allowed -- Justice of the Peace failed to consider the question of ***abridging*** *the notice period.*

Appeal from a dismissal of an application to stay criminal proceedings for undue delay -- Justice of the Peace dismissed stay application on the ground that notice to Attorney General was only seven days and not 15 days as required by statute -- HELD: Appeal allowed -- Justice of the Peace had discretion to abridge the notice period, but did not invite submissions or address his mind to the issue -- New trial ordered.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982 s. 7, s. 10(b), s. 11(b), s. 24(1), s. 24(2)

Courts of Justice Act s. 2.2, s. 109

Counsel:

I. Benjamin, Ms. Prosecutor

J. Cox, Mr. Agent for the Applicant

I.A. MacDONNELL J. (orally):--

MS. BENJAMIN: My friend is also here with respect to Matteo Gliatta at line two on the Appeals List.

MR. COX: I am, thank you. And again, it is Cox, initial J, appearing as agent on behalf of the applicant in this matter who is now before you and properly authorized to have this matter to proceed.

I believe you'll find the Information, Your Honour, there are amended grounds for an Appeal have been filed ...

THE COURT: Just one moment.

MR. COX: Thank you.

THE COURT; All right. Is s. 109 of the Courts of Justice Act included in any of the material here?

MR. COX: It is. It should be on page two of the amended grounds.

THE COURT: Oh, I have got it. Thank you.

MR. COX: Thank you.

THE COURT: Yes. Thank you.

I am not sure that section has anything to do with this application.

MS. BENJAMIN: With respect to the immediate application before you that s. 109 of the Courts of Justice Act does apply.

THE COURT: Does apply?

MS. BENJAMIN: It does apply. But, with respect to ...

THE COURT: Sorry. Well, the constitutional validity of an act of the Legislature is not being questioned.

MS. BENJAMIN: Yes, but there is a second ...

THE COURT: And there is no remedy being claimed in relation to an act or omission of the Government of Ontario.

MS. BENJAMIN: Yes, but ...

THE COURT: And accordingly then the notice of a constitutional question is not required to be served on the Attorney General.

MS. BENJAMIN: If I might refer to s. 109 of the Courts of Justice Act as I have it here, Your Honour, and that says at paragraph -- if I might read the entire section. "Notice of a constitutional. question shall be served on the Attorney General of Canada" ...

THE COURT: Now, I have got it here.

MS. BENJAMIN: You have it there.

THE COURT: Right. It has been reproduced by Mr. Cox.

MS. BENJAMIN: And paragraph two of that section.

THE COURT: Right.

MS. BENJAMIN: That section has two parts to it.

THE COURT: I know. I just read you the second part.

MS. BENJAMIN: The second part says, "This section is applicable where a remedy is claimed under s. 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 ...

THE COURT: Right.

MS. BENJAMIN: ... and it's under that limb that this case -- this matter, which is before you today falls.

THE COURT: No it is not. This is an application to stay for delay. It has nothing to do with an act of the Government of Ontario.

MS. BENJAMIN: An act or omission and ...

THE COURT: Well, it has nothing to do with an omission on the part of the Government of Ontario.

MS. BENJAMIN: My understanding, Your Honour, is that the application which the appellant sought to file on that day, to proceed with on that day with an 11(b) application arising ...

THE COURT: It ...

MS. BENJAMIN: ... under s. 21 -- 24(1) ...

THE COURT: No. The ...

MS. BENJAMIN: ... of the Charter.

THE COURT: ... remedy is claimed under 24(1), not for an act or omission of the Government of Ontario, but by reason of the failure, or to bring the accused on for trial within a reasonable period of time.

MS. BENJAMIN: Yes. And my understanding is that the allegation is that the failure of the administration, which falls to the City to have this matter put -- given a trial date, which was earlier, was such that it infringes his right to a fair hearing. That right has ...

THE COURT: No, no, no. It does not have to be. His fair trial interest is one of the interests protected by s. 11(b), but it is not the only one. There are ...

MS. BENJAMIN: Yes.

THE COURT: An accused has a liberty interest, has a security to person interest and has a fair trial interest. Does the Courts of Justice Act have a,provision, as most Acts of that nature do, in relation to extending or **abridging** time periods?

MR. COX: Not under s. 109. There is no abridgment part there, but with regards ...

THE COURT: No, no, not under that. But, do they have a general provision?

MR. COX: I believe there is a general provision with regards to it.

47 THE COURT: Which section is it?

48 MR. COX: I'm sorry. I don't have a copy of the section with me.

49 MS. BENJAMIN: I do have the section here.

50 THE COURT: Which section? Do you have the Courts of Justice Act with you?

51 MS. BENJAMIN: I do have it here.

52 THE COURT: What, the whole Act?

53 MS. BENJAMIN: The Act.

54 THE COURT: Okay. May I see it? Thank you very much. All right. Thank you. I will just hand that back.

55 The section itself answers the question. It is my fault, I should have realized that, but there is a provision for **abridging** the time. It is in 2.2, which gives the Court discretion to hear the application, assuming that this applies for an application to stay for delay, a question about which I am doubtful, but assuming that to be so, the Justice of the Peace had the authority to abridge the time. He could have heard the application if he thought it appropriate.

56 Yes, go ahead, Mr. Cox what do you have to say.

57 MR. COX: Thank you. Respectfully, Your Worship (sic), what we're seeking in this matter is a new trial on this matter, with regards to the Justice of the Peace was advised there's an 11(b) application before him, that he didn't take into consideration at the time was proper, therefore he did not want to proceed with the motion without taking into consideration whether the prosecution alleged any prejudice before them with regards to arguing this application.

58 I believe I included a case of R. v. Blom with the material as well. That is a case from the Ontario Court of Appeal that dealt with a 10(b) issue. And in the middle of the trial they realized, a s. 7 issue was brought up in that point in time.

59 Now, the prosecutor in this -- that position argued they faced some prejudice in arguing back. In this case there was no prejudice argued back with regards to them proceeding with it.

60 Respectfully, the matter should have proceeded by way of the 11(b) application -- on its merits. And respectfully what I'd be requesting is a new trial to allow that to happen.

61 THE COURT: Crown?

62 MS. BENJAMIN: Yes. Your Honour, before we proceed any further I would like to deal with this matter and perhaps if I can start with a synopsis of the facts in the case before I proceed with my arguments, as it pertains to -- as it surrounds the case law in this area.

63 The appellant was charged with failing to wear a complete seatbelt assembly. He applied for a trial and he was notified of his trial approximately around the end of 2002. That trial date was November 24, 2003, almost 11 months after he would have received the trial notice. During that time or it appears from the transcript that he did nothing to retain anyone to represent him until November 14th and this evidence becomes clear from page three of the transcripts and through the agent. The agent tells us that he was retained on November 14th. And as a result he subsequently filed a constitutional motion and also requested disclosure.

64 At trial the prosecutor brought it to the Court's attention that the constitutional motion had not been filed and this is for delay, a motion for delay, had not been filed within the prescribed period, pursuant to s. 109 of the Courts of Justice Act.

65 And based on the language in that Act, where it's specifically stated that service must be on the Attorney General of Canada and Ontario within at least 15 days. The Court rejected or denied the prosecution the defendant's motion and the Court proceeded with the trial in those circumstances.

66 My friend today is seeking to rely on the decision of R. v. Blom and the relief that he is seeking today is that the -- this Court finds that the Justice of the Peace erred in not allowing the 11(b) application to be argued on the basis that it had not been served within 15 days, as set out in the Courts of Justice Act.

67 Now, in this case which he's relying on, R. v. Blom, this is centred around an application which was filed for the exclusion of evidence and the provision of the Charter, which is invoked here is s. 24(2) of the Charter, not s. 24(1). Section 24(1) of the Charter would pertain to the matter, which was before the Justice of the Peace on the date in question. This matter here, in the matter of R. v. Blom, pertains to exclusion of evidence and it falls under s. 24(2).

68 And with respect to 24(2), Exclusion of Evidence Matters, it's clear that the Rules of the Ontario Court of Justice in Criminal Proceedings would apply. And those rules dictate the procedure which must be followed when an application has to be filed.

69 Rule 30 of those Criminal Rules, the Rules in Criminal Proceedings states, "This Rule applies to applications under sub-section 2 of the Charter for the exclusion of evidence."

70 This Rule further goes on to say, at paragraph 2.01, "A failure to comply with these rules is an irregularity and does not make any proceeding or step taken a nullity." The rules are very clear as to how the Court must treat with a failure of a party to comply with any step, which he's required to take in the proceedings.

71 In this case, the Rules go on to say further that, "A notice of application must state certain things." It also sets out the documents, which might accompany that application and the contents of any affidavit, which has to be filed.

72 In the case of Blom, there was no compliance. There were no documents filed. The whole application was deficient. And on the basis of the Rules, which are set out under the Ontario Court of Justice in Criminal Proceedings, the Court in that case made a determination at paragraph 22 of the -- that case.

> "That these provisions establish that where a procedural rule such as Rule 30 is invoked to foreclose consideration of a Charter issue, non-compliance with the Rule is not fatal to the Charter application. Rather the Judge is required to consider and weigh a variety of factors to determine what course of action is required by the purpose of the Rule."

73 And in this case, I'm suggesting that the Court properly made this determination. But ...

74 THE COURT: The Court decided in this case that because there was no compliance with the Rule that was the end of the matter.

75 MS. BENJAMIN: Yes.

76 THE COURT: Because there ...

77 MS. BENJAMIN: The Court decided ...

78 THE COURT: The Court never heard from the Crown as to the Crown's position. And, as I read it, never considered that the Rule was not an absolute Rule. I mean the position of the Justice of the Peace, as I read this transcript, is simply that if you do not comply with the Rule that is the end of it.

79 MS. BENJAMIN: But, Your Honour ...

80 THE COURT: With the section, that is the end of it. But, that is not correct.

81 MS. BENJAMIN: If I might refer the Court further to the matter, which is before you and the case law, which applies to this situation. I'm making a distinction here between the case, which my friend is purporting to rely on and the situation, which faces us at this time.

82 THE COURT: Yes.

83 MS. BENJAMIN: Now, the matter before us, at this time, deals with a remedy, which is sought under s. 24(1) of the Charter, not 24(2), 24(1) of the Charter deals with a remedy, which is being sought where someone feels that a right has been infringed. It ...

84 THE COURT: All of s. 24 ...

85 MS. BENJAMIN: ... does not deal with ...

86 THE COURT: All of s. 24 deals with that.

87 MS. BENJAMIN: But, it does not deal with exclusion of evidence.

88 THE COURT: No, I understand that. He wants ...

89 MS. BENJAMIN: And section ...

90 THE COURT: He is seeking a stay of proceedings.

91 MS. BENJAMIN: What I'm submitting is that s. 109 of the Courts of Justice Act particularly addresses this situation ...

92 THE COURT: All right. Well ...

93 MS. BENJAMIN: And if I might refer the Court to ...

94 THE COURT: I have said for the purposes of this argument I will accept that.

95 MS. BENJAMIN: Yes. And ...

96 THE COURT: I accept that.

97 MS. BENJAMIN: And if I might refer the Court to the decision of Eaton and Brant County Board of Education. If I might produce ...

98 THE COURT: What is the proposition that you take from that?

99 MS. BENJAMIN: The Court in that case and I'm looking at paragraph -- I'm looking at paragraph 14 -- 48.

100 THE COURT: Forty-eight?

101 MS. BENJAMIN: At paragraph 48 the Court specifically dealt with the purpose of s. 109. And it says that it is obvious -- the purpose is obvious, "In our constitutional democracy it is the elected representatives of the people who enact legislation" ...

102 THE COURT: No, I understand that. I'm sorry.

103 MS. BENJAMIN: Paragraph ...

104 THE COURT: Listen, you do not have to read that section to me. I accept that there is a valid purpose to s. 109. And ordinarily, the ordinary case, it is simply a matter of fairness. You are not going to sit there and challenge decisions of the Government, Laws of the Government, unless you give the Government notice. And there is good reason for that. And that is what Eaton and Brant County Board of Education was all about.

105 So, if you are saying to me it is important that the Government get notice of a constitutional challenge there is no doubt about that.

106 This case is not about whether or not you give notice, because notice was given. This case is about what should happen if the notice that you give is not 15 days, but as it turns out is seven days. I think it was somewhere around that in this case. And what happens in this case is that when you are out of luck, unless the Court orders otherwise, which is what the section says.

107 The issue with this comes down to, it seems to me, is not with respect to whether notice is important, but whether or not the Justice of the Peace should have, before he basically dismissed the application summarily, should have considered whether or not to extend or to shorten the notice requirement in this case, something which happens every day of the week. He had the authority to do it, but simply said because you did not comply with the 15 days you are out of court. And he did it without hearing from the parties on the issue of whether or not he should shorten the time. That is the problem. What do you say about that?

108 MS. BENJAMIN: I do hear your point that notice was actually served, it just wasn't served in time and that the Court should have considered ...

109 THE COURT. Well, I am suggesting that to you, I am suggesting that the problem here is that the Justice of the Peace, who is a very experienced Justice of the Peace and he is a very wise Justice of the Peace, there is no question about that, but surely he should have at least addressed his mind to the question of whether or not, a) there was any prejudice to the Government in proceeding with the application then and then deciding, and it was open to him to decide one way or the other. He did not have to grant an extension, he could have said no. But he has at least got to address the question.

110 MS. BENJAMIN: And perhaps if I can refer the Court to paragraph 53 in response to the point which ...

111 THE COURT: Paragraph 53 of what?

112 MS. BENJAMIN: Yes.

113 THE COURT: Of?

114 MS. BENJAMIN: Of this Eaton decision.

115 THE COURT: Yes.

116 MS. BENJAMIN: And I'm looking at lines -- line three of that paragraph where the Court says, "The provision is mandatory and failure to give the notice invalidates a decision made in its absence without a showing of prejudice." And the Court further goes on to say that ...

117 THE COURT: Yes, but that is if you do not give notice.

118 MS. BENJAMIN: Yes.

119 THE COURT: That is what that is. I mean that is a case where they are talking about -- we agree with that. It is a mandatory provision you have to give notice, but the Court has a discretion to dispense with it, in a sense. I mean that is what the section says.

120 MS. BENJAMIN: Yes.

121 THE COURT: I do not think Eaton and Brant County Board of Education is going to help us on this ...

122 MS. BENJAMIN: And I do have a further case, but based on what the position that the Court is taking, that there is a distinction to be made between no notice being provided and notice being provided late, it appears that that decision would fall in the same category as Eaton and Brant County.

123 The prosecution's position, however, is that the facts of this case do seem to suggest that the defendant is the least deserving of the Court's exercise of its discretion in this regard, given the facts which were outlined, after 11 months of being notified of the trial date he did nothing to retain counsel, to seek legal advice as to how to proceed with this matter until the 11th hour. And the ...

124 THE COURT: And how is that ...

125 MS. BENJAMIN: ... prosecutor's ...

126 THE COURT: Why is that a bad thing? I mean, you are saying that somehow this stands against him. Why?

127 MS. BENJAMIN: Because his -- his tardiness in acting is what brought him to a position of being unfavourably viewed by the Court. And further the prosecution's concern is that should ...

128 THE COURT: Well, all of those things may have been established if there had been some sort of hearing, in relation to whether to proceed on the 11(b) application. All of those things could have been fleshed out. He may have had an explanation for that.

129 All of these things would have come out, but we never got to that point. I mean I am going to suggest to you that what happened, it seems clear, is that the Justice treated the 15-day notice requirement as written in stone. And that if he did not comply with it that was the end of it.

130 I am going to suggest that that is not the end of it, and both as a matter of Statute Law and as a matter of General Principle.

131 Anything else, ma'am?

132 MS. BENJAMIN: I just feel that I should state for the record that it is the prosecution's position, that should the Court agree that the relief which the appellant is seeking should be granted, it does open a flood gate for these matters to be filed within a short period, not in compliance with the Courts of Justice Act and defendants simply ...

133 THE COURT: No it does not.

134 MS. BENJAMIN: ... coming and asking the Court to waive the time period, which is mandatorily set out under s. 109 or the Courts of Justice Act.

135 THE COURT: You are assuming that the applications will be granted, which is a different issue all together.

136 In any event, in the absence of prejudice I do not understand why the Crown is so concerned. I mean 11(b) applications, any prosecutor, worth her salt, could respond to it if they receive it the day before and they look at the record and they can respond.

137 So that, in terms of fairness here, I mean, this is basically relying on a 15-day period because it is there and not because it is necessary. If it is necessary and if the Crown can point to some sort of prejudice then they may well succeed. If there is no prejudice to the Crown, well, then why should anybody be concerned if everybody does them on short notice.

138 I can tell you in criminal matters the time periods are waived constantly. Constantly. The touchstone of the Crown's position on these things is prejudice. If the Crown has not been prejudiced then they do not oppose late filing. If they need time to prepare for the application and they have not been given enough time, then they have a right to complain and say you did not comply with the notice. I mean this application probably is not one of those. In any event, anything further, ma'am?

139 MS. BENJAMIN: No, Your Honour.

140 THE COURT; You have argued this very well and I want to thank you very much for your helpful submissions and you have obviously argued it thoroughly.

141 MS. BENJAMIN: Thank you, Your Honour.

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142 THE COURT: It is my view, I think clearly, you have detected that my reading of this transcript, is that the learned Justice of the Peace took the position that a failure to serve the notice within 15 days precluded an application to stay, or the hearing of the application to stay for delay.

143 And it seems to me clear, that the Justice of the Peace did not contemplate that he had a discretion to hear the application, notwithstanding the failure to comply with the 15-day notice provision. Had he considered that issue, he may or may not have been persuaded on the basis of the agent's submissions that he ought to extend or abridge the notice requirement.

144 I am not suggesting that he was required to in the circumstances of this case, but I am not in a position, it seems to me, where I can make a determination on the basis of the record, as to whether or not the application to abridge the notice period would have been inevitably refused.

145 In the circumstances, it seems to me that the learned Justice erred in law in the approach he took to the application and accordingly the matter should be remitted to the trial court for a new trial, at which time, I assume, the applicant will provide proper notice ...

146 MR. COX: Yes, Your Honour.

147 THE COURT: ... of any Charter applications that the applicant seeks to bring. Thank you.

148 MR. COX; Thank you very much, Your Honour and I thank my friend.

149 MS. BENJAMIN: Thank you, Your Honour. And at this point I might deal with ...

150 MR. COX: Do we get a new date on that? New trial date.

151 MS. BENJAMIN: New trial date. Sorry. Old City Hall?

152 MR. COX: No. I believe out of the 4682 -- or 2700 Eglinton Avenue location now.

153 MS. BENJAMIN: Okay.

154 MR. COX: Yes.

155 MS. BENJAMIN: If I might suggest a date of August 24th, 2005, at 9:00 a.m., in courtroom W-7.

156 MR. COX: That date is agreeable. And that concludes the matters. Thank you very much, Your Honour.

157 THE COURT: Thank you.

158 MR. COX: I thank my friend. Good day.

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