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ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

STEPHENSONS RENTAL SERVICES

Before Justice P.H. Wilkie
Application heard on January 17, 2017
Oral Judgment rendered on March 14, 2017
Written Reasons for Judgment released on March 17, 2017

D. McCaskill .... for the Ministry of Labour
N. Keith .... for the defendant, Stephensons Rental Services

REASONS FOR JUDGMENT

WILKIE J.:

INTRODUCTION

[1] On January 16th this year this court ruled, after hearing oral argument on the matter, that the charge under the OHSA, upon which the defendant Stephensons Rental was being tried, ought to be stayed due to a violation of section 11(b) of the *Charter*.

[2] The formal entry of a stay was deferred until delivery of these reasons.

[3] At the time of the court's decision, the proceedings were 4 years 7 months and 4 days old, the Info having been sworn on June 12, 2012. The trial is not yet complete and can fairly be said to still require at least 3 more days of court time which had yet to be scheduled.

[4] The charge faced by the defendant arose from a workplace fatality that occurred at the GM plant in St. Catharines on November 18, 2011. The deceased worker was an employee of Procon Niagara who had been contracted by GM to do work at their plant. At the time of the incident that caused his death he was operating an electric powered elevated work platform also known as an articulating boom lift which had been rented by Procon from the defendant, Stephensons. The allegation was that the equipment provided by the defendant was mechanically defective and not in proper working order.

[5] At the time the delay application was heard in January 2017, the case had been in the system for over 55 months and the trial itself was just over 2 years old. Still it is important to understand that this was not the first time there had been an assertion by the defendant that the proceedings breached their right to trial without unreasonable delay.

CHRONOLOGY OF THE CASE

[6] There was a 30-month delay from the laying of the charge in June of 2012 to the commencement of the trial in December of 2014, as a result of which the defence had brought an 11(b) application returnable on the trial date.

[7] The 2-1/2 years leading up to the trial included a 19-month period involving 13 appearances before the trial was set including one, where with no explanation, no one appeared for the Crown. The transcripts of these proceedings reveal that the issue at all these pre set date appearances was the status of disclosure and the repeated assertion by the defence that it was not complete. A review of the correspondence between the parties during this period would suggest that in many instances the Crown was not disputing the relevance of the material asked for but was providing it incrementally in response to each additional request.

[8] Apart from initial disclosure provided 2 months after the charge was laid, there were 10 further separate instances of items of disclosure being provided up to the setting of the trial date. During this period as well, the lack of full disclosure from the defence perspective was the subject of discussion during 3 JPT's. The trial dates were set on the understanding that the defence would continue to pursue further disclosure.

[9] At the time of the final JPT, the parties discussed the possibility of an agreed statement of fact. The defence prepared it and sent it to the Crown for review within a matter of days, but over the ensuing months never received a response.

[10] On January 14, 2015, the trial was set for 5 continuous days commencing December 15, 2014, with an interim confirmation hearing before the trial judge. On the date for confirmation in September 2015, apparently due to an oversight, no one appeared for the Crown. The hearing was rescheduled but on the next date the Crown again did not appear. This time they had advised the defence in advance that a student would be sent. No student appeared. On the third confirmation date both parties confirmed their readiness for trial although the defence reiterated that they considered disclosure was still outstanding and that a third party records application would be brought. The Crown asserted that the defence had full disclosure with respect to every witness they would be calling, which as matters turned out, proved not to be the case.

[11] The pending 11(b) application and its potential impact on the trial time that had been set was also discussed at the confirmation hearing. Both parties agreed that the best course would be to hear the motion at the end of the evidence so as not to further delay the trial and in addition, in order that the impact of any prejudice could be better assessed.

[12] As it developed however the beginning of the trial was delayed and did not commence until the fourth scheduled day. The first 3 days had to be vacated because on the morning the trial was to begin, substantial disclosure, 2 binders of material, long sought by the defence, was finally turned over by the Crown. This averted the need for a third party records application but given the importance of the material, the Crown conceded that the defence could not be expected to proceed without reviewing and having it assessed by their experts.

[13] The trial, with additional time now rescheduled over the ensuing months to account for those lost, then proceeded through several days of testimony and argument so that by the end of the fifth day on August 11, 2015 there remained but 2 further Crown witnesses to hear from. One was a mechanic who promised to be quite brief and the other, the proposed expert engineer, whose report the court was told formed the foundation of the prosecution's case. The defence was challenging his expertise and his impartiality and so a *voir dire* was to be held to determine the admissibility of his evidence and report.

[14] To this end, 3 further days were set aside just over a month later, in late September and early October. His evidence commenced on September 23, 2015, only to be immediately shut down by disclosure issues, not to resume for just over a year and indeed, not to be completed at the time this application was argued in early January 2017.

[15] What happened was that as the expert began his testimony he disclosed that he had a large file containing his work product in support of his report, including many pages of notes, photos, documents, and test results. He said he did not bring it with him as he had never been asked to that point to produce it. The Crown was surprised about

the existence of the material but readily agreed it needed to be disclosed to the defence. The matter was adjourned to the following day on the understanding that the witness would retrieve it.

[16] Upon his return it was discovered that the file was stored digitally on 2 flash drives which could not be readily accessed. It was conceded by the Crown that the trial would have to be adjourned again. Eventually it was determined that the access issue would require longer to resolve with the result that the 2 further proximate days of the trial were lost.

[17] Over the ensuing weeks both counsel and the witness worked to gain access to the material some of which was apparently provided directly to the defence by the witness. On October 30, 2015, 210 more pages of disclosure was turned over by the Crown.

[18] Three further dates in April 2016 had previously been set to continue with the *voir dire*. At a speak to date in December 2015 the defence asserted that they were still missing items of disclosure from the expert's file and advised that they would be renewing their 11(b) application.

[19] Accordingly, in March of 2016, in light of this further delay, the defence filed additional material by way of renewal of their original 11(b) application.

[20] The trial however did not proceed in April, again due to the actions, or more to the point, lack of action by the Crown. It came to light on March 31, 2016, only days before the trial was to resume, (ironically through contact the defence had made with him,) that the proposed witness, the expert who was to be recalled for the *voir dire,* was not available as he had booked elective eye surgery for April 4th, incapacitating him for the scheduled dates of April 5 and 6, 2016. He told the defence in writing that he had never been notified of the dates.

[21] A third day in April 2016 had originally been scheduled, but some weeks before the parties were notified, that due to scheduling pressures, the court could no longer offer that date.

[22] In the result the matter had to be rescheduled again, this time to continue for 2 days in September 2016.

[23] In the interim the Supreme Court of Canada decision in *Jordan*[1] was released.

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[1] *R. v. Jordan,* 2016 SCC 27 (CanLII), (2016), 335 C.C.C. (3d) 403 (S.C.C.)

[24] The *voir dire* resumed in September with 2 days of testimony to qualify the proposed expert. On the afternoon of the second day, after the testimony was complete and during submissions, the Crown acknowledged that through an oversight they had failed to lead evidence through the witness that was likely essential to their case and without which it would be difficult to meet the onus to have him qualified. They sought to reopen the *voir dire* and to recall the witness. The witness had been dismissed earlier in the day and given the hour, his recall would have required a further day to be scheduled. The defence objected and the request was denied and submissions on admissibility completed.

[25] The matter went over for a ruling on the admission of the expert's evidence. Upon the return date in late November, the court indicated that upon reflection, responsibility for the absence of the essential evidence on the *voir dire* in the circumstances at hand had to be shared by the defence and ruled that as a matter of fairness, delay considerations aside, the Crown should be permitted to reopen and recall the witness if they chose.

[26] At this point the parties agreed that the 11(b) application ought to be heard before any further trial time was arranged.

[27] The forgoing chronological summary illustrates, among other things, that while the 11(b) application was finally argued post *Jordan*, it was not an opportunistic invocation of the new framework established by that case. Rather this is a matter where issues of delay were front and centre from the outset.

APPLICATION OF *JORDAN*

[28] Before turning to an analysis of the timeframes involved I must first address an important preliminary issue raised by the Crown who asserts that because this matter involves a corporate accused, *Jordan* and its new approach to the assessment of delay issues, does not apply.

[29] The Crown says that *R. v. CIP*[2], the Supreme Court of Canada decision that confirmed that corporate defendants have 11(b) rights, was not overturned by *Jordan*. Thus they say the *Morin*[3] framework for assessing delay, including the requirement that prejudice to the fair trial rights of the corporate defendant be proven, is still good law.

[30] I disagree for the following reasons.

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[2] *R. v. C.I.P.*, [1992] S.C.J. No. 34 (S.C.C.)
[3] *R. v. Morin*, [1992] 1 S.C.R. 771 (S.C.C.)

[31] First, a plain reading of *Jordan* gives no support for the notion that it does not apply to all cases previously governed by the *Morin* framework. To the contrary the court speaks to fundamental issues common to all prosecutions and seeks to provide a mechanism to change the culture of the criminal justice system, a system which includes regulatory and provincial offences. *CIP* itself confirmed the principle that corporations were not to be afforded any less protection under section 11(b) than individuals.

[32] Secondly, *Jordan* directly overturned *Morin* which as a matter of logic must have the effect of overturning decisions like *CIP* which followed and applied *Morin*.

[33] Third, the one significant difference that *CIP* applied to corporations under the *Morin* test has been effectively removed as a consideration in assessing delay by *Jordan*. Prejudice, which can only be suffered by corporations in relation to their fair trial rights, has now been removed in all its forms as an express analytical factor in assessing the impact of delay in a particular case and is taken into account in setting the presumptive ceilings. The existence of actual prejudice of any type, including that which the corporate accused were required to establish, is now effectively irrelevant and its total absence has no impact on a case that otherwise breaches the ceiling.

[34] Finally, at the heart of *Jordan* is the objective to change the culture of delay in the justice system as a whole and to require all trials to function as efficiently as possible. In this sense they have signalled that when section 11(b) is breached it is not just the particular defendant who is prejudiced but the justice system and by extension the community as a whole. There is no basis for concluding that this objective applies only to trials of individuals.

CALCULATION OF NET DELAY

[35] I turn then to the application of the *Jordan* framework to the timelines and events that marked this case.

[36] As indicated above the total delay at the point when the court indicated its decision to grant the 11(b) remedy was 55 months and 4 days. It's difficult to imagine a scenario, had the matter continued to completion, whereby the case would have completed in less than 5 months, given the remaining evidence to be called, and *Charter* applications to be argued and ruled upon.

[37] I have examined the record and apart from 9 days when the defence was not available on a continuation date offered by the court, in August of 2015, I can find no portion of the delay attributable solely to the conduct of the defence. There was certainly no waiver and no tactic calculated to cause delay. There were several *Charter* applications but none that could remotely be called frivolous. Indeed there was no assertion of any defence delay in either the oral or written submissions of the Crown.

[38] There was an instance where the court found that the position taken by the defence in resisting the introduction of the expert's report on the *voir dire* into his qualifications in September 2016 resulted in shared responsibility with the Crown for the delay that ensued. It was not however caused solely by the conduct of the defence so it is my understanding that it is therefore not properly subtracted from total delay.

[39] Net delay remains therefore effectively at 55 months and 4 days projected to the end of the trial to be at least 60 months. This is 41 months above the presumptive ceiling.

EXCEPTIONAL CIRCUMSTANCES

[40] Under the *Jordan* framework a stay would then automatically follow unless the Crown can establish that there were exceptional circumstances. These are matters beyond the control of the Crown that are reasonably unforeseen or unavoidable and the delay resulting from which can not reasonably be remedied once they arise. They generally fall under two categories, discrete events and particularly complex cases.

[41] The Crown argued that both considerations are at work here. I can not agree.

[42] In my view looking at the evidence and the issues on this case and comparing it to the example in *Jordan* of the typical murder trial, this matter falls far short of being particularly complex as that term is defined by the Supreme Court. It is clearly not in the same league as the *Live Nation*[4] case being tried by my colleague Justice Nakatsuru.

[43] The present matter involved a single corporate accused charged with a single count relating to a single discrete event taking place on one day. There was one substantive issue namely the mechanical fitness of the machine that was leased by the defendant to the deceased worker's employer. The Crown's case involved six witnesses including one expert. The defence was proposing to call its own expert. There were no novel or complicated legal issues.

[44] It is true the defence advanced several *Charter* motions under sections 7, 8 and 11(d) and of course 11(b), but two of them related to the failure of the Crown to provide timely disclosure and to obtain relevant documents in advance from their own witnesses. The Crown can not benefit from complexity that was generated by their mismanagement of the disclosure issue.

[45] Finally, even if it could be said that the case was somewhat complex it must be remembered that it had exceeded the presumptive ceiling (and timelines set out in *Morin*) even before the trial began. There were no steps taken by the Crown either before or

[4] *R. v. Live Nation*, 2016 ONCJ 735 (CanLII)

after the delay exceeded the ceiling to proactively remedy the disclosure problems that were causing the delay.

[46] In their written submissions the Crown alluded to the existence of discrete events but did not specify. During oral submissions it was suggested that the disclosure issue that arose at the beginning of the expert's testimony and the trial adjournment due to his surgery, qualified as such.

[47] Discrete exceptional events as formulated by *Jordan*, are unforeseeable or unavoidable developments that lead to delay. Neither of these are in my view discrete events in the circumstances of this case.

[48] There is no question that the expert disclosure did take the Crown by surprise, but only because they had to that point, well into the trial, at least 2 years after he had been retained by the Ministry to provide critical expert testimony, inexplicably in my view, failed to turn their mind to it. The defence disclosure requests clearly included this material, although not specifically by referencing the witness by name. In this court's experience it is certainly not a novel or unusual concept that the records and work product that comprise an expert's investigation would be disclosable, especially in a case where it is clear that the credentials of the expert and the admissibility of his opinions are being challenged. Even the witness himself seemed surprised that he had never been asked to produce his work product beforehand or to bring supporting documentation with him to court. And of course when alerted to the issue, the Crown readily agreed that the defence was entitled to disclosure of the material and conceded the case would have to be adjourned to enable the defence to receive and review it.

[49] This unfortunate development in the midst of a case that had already experienced inordinate delay ought not to have been unforeseen and was totally avoidable through the application of even a modest amount of foresight and planning. It is not a discrete event that excuses delay but rather the opposite, a misstep by the Crown that aggravated it.

[50] The Crown also referenced as a discrete event the delay of the trial and loss of 2 days in early April 2016 because of the expert's surgery. Unlike many medical issues which might ordinarily qualify as an exceptional event this was not an emergency and could easily have been avoided.

[51] The April dates had been set aside for some time, arranged back in September as soon as the disclosure problems made it clear that more time would be needed. It is not known when the witness's surgery was arranged but in correspondence just days before the trial was to resume, the witness said he had no prior notice of these dates. During submissions Crown counsel suggested that may not have been correct, but neither at the time of his non-attendance or as part of their response to this application, did they

choose to provide supporting evidence challenging this assertion. At the end of the day it can not be characterized as anything but a failure of the Crown to manage their case. This delay was not the result of a discrete exceptional event.

THE TRANSITIONAL EXCEPTIONAL CIRCUMSTANCE

[52] It remains therefore to determine if transitional exceptional circumstances exist. The issue here is whether in the words of *Jordan* "the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed".[5]

[53] The first thing to be noted about this issue is that the Crown in submissions conceded that the transitional exceptional argument is blunted because of the fact that even under the *Morin* framework within which the parties were originally operating, unreasonable delay had been raised as an issue by the defence before the trial even began.

[54] While the prosecution had no notice of the impending *Jordan* framework they were on notice that the position of the defence was that the institutional and Crown delay was already considered unreasonable. In my view it is apparent from the court's summary of the chronology of the trial itself, that the Crown made no efforts to manage the case so as to improve the pace of the litigation but in fact through lack of focus and inaction further contributed to the delay.

[55] No doubt the Crown felt confident that any delay argument could be difficult for the defendant, given the need to prove irremediable prejudice to fair trial interests as determined by *CIP*. That may have been true, had the trial once started, proceeded crisply and efficiently to a swift conclusion. The position of the defence is that the fair trial interests were in fact prejudiced given the effect of the passage of time on witnesses' memories and the availability of documents. Whether true or not the previous requirement that the defence prove prejudice ought not to be treated as licence to the Crown to complacently conduct an endlessly protracted prosecution, one that would have likely seen its fifth anniversary before completion.

[56] It should also be noted here that this jurisdiction, the Region of Niagara has not been one where a culture of long delays is the norm.

[57] I have considered various time periods that would probably have been considered neutral under the *Morin* framework. Even with an extended intake period of 6 months and attributing another 6 months for the defence to prepare, the trial itself

[5] *Jordan, supra,* at para. 96.

would still have started with 18 months of delay, pushing past *Morin* guidelines even in a case more complex than this.

[58] I have also considered that the responsibility for the delay from September 2016 forward (4 months to the argument on the motion) when the position of the defence contributed to the failure of the Crown to lead sufficient evidence on the *voir dire*, ought to have been attributed to both parties so as to render it neutral delay.

[59] However deducting these periods of time under a *Morin* analysis would still leave almost 40 months of delay.

DECISION

[60] This is not a close case in my view. The defendant's trial has clearly been unreasonably delayed whether the analysis is under the *Jordan* framework or that of *Morin*. The Crown principally due to its ongoing failure to provide timely disclosure and its overall complacency about the pace of the litigation is responsible for the vast majority of the delay with the rest accounted for by institutional time constraints.

[61] This case fits the example referenced in paragraph 98 of *Jordan* where the court says, "For example, if the delay in a simple case vastly exceeds the ceiling because of repeated mistakes or missteps by the Crown, the delay might be unreasonable even though the parties were operating under the previous framework."

[62] The Crown has not proven the transitional exception.

[63] The right of the defendant to be tried within a reasonable time under section 11(b) of the *Charter* has been breached. The charge is stayed.

Released: March 17, 2017 Signed: "Justice P.H. Wilkie"
Justice P.H. Wilkie