

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Arbique*, 2017 NSPC 11

Date: 20170120

Docket: 2595537, 2595538, 2595539, 2595540, 2595541, 2595542

Registry: Halifax

Between:

Her Majesty the Queen

v.

Amber Arbique and Jarrod Wellmann

Decision

Judge: The Honourable Judge Timothy D. Landry, J.P.C.

Heard: November 25, 2016, in Bridgewater, Nova Scotia

Decision: January 20, 2017

Charge: 5(2) CDSA, 4(1) CDSA, 4(1) CDSA

Counsel: Derek Schnare, for the Plaintiff
Nick Fitch, for the Defendant, Amber Arbique
Murray Judge for the Defendant, Jarrod Wellmann

By the Court:

COMMENCED, January 20, 2017

(TIME: 10:38)

[1] The matter is set today for decision with respect to an 11(b) application by the defence. I have prepared a decision. I'm prepared to read the decision at this time. It will probably be about half an hour.

[2] I'd like to begin by thanking counsel, particularly Mr. Fitch and Mr. Schnare for the thorough briefs that were filed. They were certainly very, very helpful to the court.

[3] This was an extremely difficult decision overall and I found the briefs extremely helpful. The law surrounding Jordan is likely going to be discussed in courts for many, many years I would assume but it is still fairly new, only having been delivered in July of this year.

[4] Mr. Wellmann and Ms. Arbique are facing charges from May 4, 2013. I'm very familiar with these accounts having heard the voir dire and given a decision with respect to the voir dire on this matter back in November.

[5] The charges were sworn to May 10, 2013. The defence has filed a Charter motion under s. 11(b) of the Charter alleging unreasonable delay. As I stated, the

Supreme Court of Canada has recently provided the courts with new jurisprudence on the issue of delay in the form of R. v. Jordan 2016 SCC 27. The judgement was released on July 8, 2016, and amends the previous test outlined in Ascoff and Morin which are well known to the court and counsel.

[6] I am going to be quoting a number of paragraphs from the Jordan decision as I go through the decision.

[7] At paragraph five of the decision, the court essentially summarizes this new test.

“A change of direction is therefore required. Below, we set out a new framework for applying s. 11(b). At the centre of this new framework is a presumptive ceiling on the time it should take to bring an accused person to trial: 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. Of course, given the contextual nature of reasonableness, the framework accounts for case-specific factors both above and below the presumptive ceiling. This framework is intended to focus the s. 11(b) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(b)’s important objectives.”

[8] From the Jordan decision the first step for the court to undertake in this analysis is what is the total delay. The clock started ticking, in my view, in this

matter on May 10, 2013. The delay from that date to the anticipated end of trial will equal the total delay. From Jordan at paragraph 48:

“If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls below the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable.”

[9] In this case the end date for my analysis I have determined to be November 25, 2016. That was the date scheduled for trial where the case could have concluded. This in my view, is a legitimate application that the defence is making however, the anticipated end of the trial being extended to January 13th or now January 20th due to the court’s adjournment does not change the fact that but for the application, this application, the trial could have been heard on November 25, 2016. Therefore, in my view, total delay in this case 1294 days or 42.54 months based on a monthly average of 30.42 days.

[10] The Jordan case goes on to indicate the court then has to determine what portion of the delay should be put to defence to determine net delay. By my review of this file there is no time when the defence has waived it’s s. 11(b) rights. As outlined in paragraph 61 of the Jordan decision:

“Defence delay has two components. The first is delay waived by the defence (Askov, at pp. 1228-29; Morin, at pp. 790-91). Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the past, “[i]n considering the issue of ‘waiver’ in the context of s. 11(b), it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness.”

[11] Furthermore, Jordan outlined in paragraph 63:

“The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises “those situations where the accused’s acts either directly caused the delay . . . or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial” (Askov, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.”

[12] In calculating defence delay the court must examine all court appearances in this matter. I’ve concluded that defence delay in this case is 56 days divided in the following time period; a 16 day delay period and a further 19 day delay period was necessary due the accused’s re-election to Provincial court. The 16 day period is February 19, 2014, to March 7, 2014, and the 19 day period was from March 7, 2014, to March 26, 2014. Furthermore, the time from October 8th to 29th, 2014,

should be attributable to the defence. The court and crown were available for voir dire on October 8, 2014, when the defence counsel was not. The matter was then set to October 29, 2014, thus the 21 days attributable to the defence.

[13] In my view, the time from May 10th, 2013, to August 21st, 2013, should not be attributable to the defence. I've been advised the defence in it's brief that it was only on August 21, 2013, that disclosure was complete. The defence is entitled to that information before making election and plea. I agree with the defence that even though during the first court appearance, June 19, 2013, the accused were out of the country; it is really not relevant. Without proper disclosure, no election could have been made. Net delay in this case is therefore 1294 days less 56 days for 1238 divided by 30.42 days which results in 40.7 months.

[14] From paragraph 49 and 68 of Jordan the court noted:

49 “The most important feature of the new framework is that it sets a ceiling beyond which delay is presumptively unreasonable. For cases going to trial in the provincial court, the presumptive ceiling is 18 months from the charge to the actual or anticipated end of trial. For cases going to trial in the superior court, the presumptive ceiling is 30 months from the charge to the actual or anticipated end of trial.[2] We note the 30-month ceiling would also apply to cases going to trial in the provincial court after a preliminary inquiry.[3] As we will discuss, defence-waived or -caused delay does not count in calculating whether the presumptive ceiling has been reached — that is, such delay is to be discounted.”

68 “*Delay (minus defence delay) that exceeds the ceiling is presumptively unreasonable. The Crown may rebut this presumption by showing that the delay is reasonable because of the presence of exceptional circumstances.*”

[15] The delay in this case does exceed the ceiling of 30 months for cases that are proceeded to trial in Provincial court after having a preliminary inquiry in Provincial court. That, according to the Jordan decision, results in a presumptive, unreasonable delay. The burden now shifts to the crown to justify the delay was due to exceptional circumstances.

[16] I think it’s important to put on the record that the Supreme Court of Canada’s comments in Jordan from paragraph 69 to 72:

69 “*Exceptional circumstances lie outside the Crown’s control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.*”

70 “*It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable*

available steps to avoid and address the problem before the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful — rather, just that it took reasonable steps in an attempt to avoid the delay.”

71 “It is obviously impossible to identify in advance all circumstances that may qualify as “exceptional” for the purposes of adjudicating a s. 11(b) application. Ultimately, the determination of whether circumstances are “exceptional” will depend on the trial judge’s good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

72 “Commencing with the former, by way of illustration, it is to be expected that medical or family emergencies (whether on the part of the accused, important witnesses, counsel or the trial judge) would generally qualify. Cases with an international dimension, such as cases requiring the extradition of an accused from a foreign jurisdiction, may also meet the definition.”

[17] The crown in this case is asking the court to declare the time from April 7, 2015 to July 27, 2016 as a discrete event. It is important for the court to consider the circumstances that surrounded that period of time from the perspective of both the court and counsel.

[18] On February 12, 2015, a voir dire was conducted in this matter by Judge Prince. After hearing the evidence in the voir dire Judge Prince reserved decision. A return date for decision was scheduled for April 8, 2015. The crown has conceded that the time from February 12, 2015, to April 8, 2015, is institutional delay.

[19] In March of 2015, Judge Prince suffered a significant medical event, a stroke. The matter was brought forward at the request of the court before Judge Burrill on April 7, 2015, to adjourn the April 8, 2015, court date due to Judge Prince's unavailability.

[20] During the April 7, 2015, court appearance the parties agreed to adjourn the matter for several months to June 1, 2015. On June 1, 2015, Judge Prince was still on medical leave. The court suggested adjourning the matters to October of 2015. Counsel consented to that adjournment. Hugh Robichaud was there on behalf of the federal crown, Mr. Judge was there on behalf of Mr. Wellmann and was appearing for Mr. Fitch who represented Ms. Arbique; the matter was adjourned to October 27, 2015.

[21] On October 27, 2015, Judge Prince was still on medical leave; the parties presented to the court, an agreed upon adjourned date to January 5, 2016. On

January 5, 2016, the court had received written request from the crown seeking a mistrial or an order that the court order proceedings to be recommenced by another judge. The defence consented to the application. Judge Burrill granted the order and stated on the record that Judge Prince's return date to the bench was still uncertain. Given that Judge Burrill had heard the preliminary inquiry, the matter was set to January 27, 2016, to set a date for the recommencement of the trial. On January 27, 2016, the matter was set to May 4, 2016, for recommencement of the trial and on May 4, 2016, voir dire was held. Dates were set for counsel to file further briefs and I set the matter for decision to July 27, 2016. The total time which elapsed from Judge Prince hearing the voir dire to July 27, 2016, is a period of 477 days.

[22] The court must analyse the conduct of the court and the crown to determine how to categorize all that elapsed time. There is no question that an illness, as was suffered by Judge Prince, as contemplated by the court in Jordan as a possible discrete event; it was obviously, a medical emergency. The nature of the illness suffered by Judge Prince was one in which it is sometimes difficult to accurately predict how long it will take for someone to return to work. As noted by Judge Burrill during the January 5, 2016, court appearance, Judge Prince's return date to the bench was still unknown.

[23] The crown notes in paragraph 52 of its brief on the application essentially what the crown did to try to move the matter forward. The crown was, in my view, in a difficult situation in this case. On the one hand, the judge was seized with an issue, in this case, a voir dire, does return to work in a reasonable time period, it is prudent to wait. A mistrial will automatically send the parties back to the beginning of the process. On the other hand, crown must bring accused to trial in a timely manner. The situation cannot go on forever.

[24] There are factors which the crown needs to consider. The crown's position in such a situation was discussed by the Supreme Court of Canada in *R. vs. MacDougall*, and while that case was decided prior to the *Jordan* decision, I believe the words of J. McLaughlin in that decision are still apropos and they are noted in paragraph 53 of that decision; I will not read into the record.

[25] Essentially, were the crown's actions reasonable in the circumstances? I've concluded, based on my review of the transcript and the comments of the crown, as to what steps that it took. That the actions that the crown did take from April 8, 2015 to May 4, 2016, the time period that the crown actions, in my view, were reasonable and I have determined that that entire time period will be treated as a discrete event.

[26] The illness of Judge Prince was an obviously unexpected event and in my view an exceptional circumstance handled reasonably by the crown. The crown monitored the situation as best as it could in consultation with the court staff. Upon being satisfied that as of January 16th, the date for Judge Prince's return to work was still unknown, the court decided the time to request a recommencement of the trial had arrived. In my view, once the court determines that the time period of April 8, 2015, to May 4, 2016, is a discrete event, the time period of May 4, 2016, to July 27, 2016, must also be a discrete event. That particular time period is necessitated by the first time period declared a discrete event. If the illness of Judge Prince had not occurred, the time I set aside to come to a decision on the voir dire would not have been necessary. The total delay found by the court in this case was 1294 days. When I subtract a delay of 56 days in the discrete event of 477 days, I am left with 761 days. Dividing that figure by 30.42 days equals 25.01 months which is under the 30 month presumptive ceiling.

[27] As outlined in paragraph 48 of the Jordan decision, if the total delay from charge to the actual or anticipated date of trial is less than the presumptive ceiling, after subtracting defence delay and exceptional circumstances, the onus does fall on the defence to demonstrate the delay is unreasonable. At paragraph 82 of the Jordan decision the court noted:

“A delay may be unreasonable even if it falls below the presumptive ceiling. If the total delay from the charge to the actual or anticipated end of trial (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) is less than 18 months for cases going to trial in the provincial court, or 30 months for cases going to trial in the superior court, then the defence bears the onus to show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(b) application must fail.”

[28] All but the final four and a half months of the total relevant time period these matters have been before the court were pre Jordan, the Jordan decision being delivered July 8, 2016. The parties operated under the previous state of the law for most of the relevant time; that would be the Morin principles. Morin is cited as [1992] 1 SCR 771 SCC.

[29] Jordan referred to this time period as a transitional exception. For cases that fall below the presumptive ceiling, the court in Jordan found that it was not appropriate to hold the defence to the two-pronged test in Jordan which must be established by the defence if most of that time took place prior to Jordan.

However, Jordan did indicate at paragraph 99:

“The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls below the ceiling. For these cases, the two criteria — defence initiative and whether the time the case has taken markedly exceeds what was reasonably required — must also be applied contextually, sensitive to the parties’ reliance on the previous state of the law. Specifically, the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the Morin framework, it would be unfair to require it for the period of time before the release of this decision. However, in close cases, any defence initiative during that time would assist the defence in showing that the delay markedly exceeds what was reasonably required. The trial judge must also still consider action or inaction by the accused that may be inconsistent with a desire for a timely trial (Morin, at p. 802).”

[30] In my view, the defence in this case, did not intentionally lengthen these proceedings. For example, the s. 8 and 9 Charter applications filed by the defence were certainly not frivolous, in fact the court asked counsel to file supplemental briefs. However, I cannot say when I examine the transcript of the court appearances, that the defence did anything to move the matter forward or express any concern about the delay. For example, the time period from the charge to the election was over four months and while in determining the presumptive ceiling, I did not attach that time to the defence, there is no indication that the defence was concerned about not receiving full disclosure until August of 2013. In addition, through all adjournments, the defence did not object or raise any concerns

regarding delay. Specifically, during the delay caused by Judge Prince's illness, the defence agreed to all adjournments, no mention of concern of delay. The defence could have brought their own application for a mistrial.

[31] Regarding the issue of whether the case took markedly longer to complete the cases that existed prior to Jordan, the court in Jordan noted at paragraph 100:

“Further, if the delay was occasioned by an institutional delay that was reasonably acceptable in the relevant jurisdiction under the Morin framework before this decision was released, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.”

[32] From Morin at pages 787 and 788 J. Sopinka indicated:

“The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in Smith, supra, “[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?” (p. 1131). While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:

1. *the length of the delay;*

2. *waiver of time periods;*
3. *the reasons for the delay, including*
 - (a) *inherent time requirements of the case,*
 - (b) *actions of the accused,*
 - (c) *actions of the Crown,*
 - (d) *limits on institutional resources, and*
 - (e) *other reasons for delay; and*
4. *prejudice to the accused.”*

[33] In trying to apply the Morin guidelines, I would note that the previous discussion in this decision is relevant for this analysis as well. The total delay I find was 25 months caused by crown and institutional delay. I've reviewed the transcript of all court appearances in this case. The institutional delay was approximately 19 months but I must say, each time the parties requested court dates, those court dates were available fairly quickly. The elections were made in September by Mr. Wellmann and by Ms. Arbique in October. The court was able to get a preliminary hearing date within five months of the September 18, 2013, court date. Re-election took place on April 2, 2014, the first date for voir dire was

October 29, 2014, some six months later. However the court could actually have heard the matter on October 8th but one of the defence counsel was unavailable; that delay was actually five months. Voir dire took place on February 12, 2015, and the court indicated it could return with a decision on March 6th which was three weeks later. The next institutional delay, as found by myself, is July 27, 2016, to November 25, 2016, the time I took to provide a decision in the voir dire. All of those time frames for institutional delay are well within the Morin guidelines. There were all crown delays of approximately six months. Overall, I must say that I am satisfied that the time requirement for this matter was not markedly longer than it would have been expected to take.

[34] This was not a straightforward case. While this is not the most complex case, the case did include a preliminary inquiry, re-election, charter application, time for the application and decision and the setting of another trial date. All those proceedings take time. In my view, the time required for this case would not have been deemed unreasonable under the Morin guidelines. The parties have filed affidavits, both Ms. Arbique and Mr. Wellmann. I've reviewed those and they certainly do outline the effects this case has had on both of them. However, the court still has to be mindful that overall a case such as this will take time and, in my view, the time elapsed in this case, if one does subtract the time caused by

Judge Prince's illness, is not unreasonable even applying the Morin guidelines.

The Jordan case indicates at paragraph 101:

“We note that given the level of institutional delay tolerated under the previous approach, a stay of proceedings below the ceiling will be even more difficult to obtain for cases currently in the system. We also emphasize that for cases in which the charge is brought shortly after the release of this decision, the reasonable time requirements of the case must reflect this high level of tolerance for institutional delay in particular localities.”

[35] In my view, this is not a case where the court should be finding that the accused s. 11(b) rights were violated and entering a stay of proceedings. I have found the net delay is to be under the presumptive ceiling of 30 months and furthermore, in my view, applying the framework in the Jordan case when dealing with cases below the presumptive ceiling which were already in the system for significant time, no stay of proceedings should be entered while we apply, in my view, the Morin guidelines.

[36] The application is dismissed.

Timothy D. Landry, JPC