PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Spears*, 2017 NSPC 17

Date: April 4, 2017
Docket: 2571965; 2571966;
2571967; 2571968; 2571969
Registry: Halifax

Between:

Her Majesty the Queen

v.

Darrell Spears, Spears Framing Limited,
Spears Concrete Formwork, Inc., and SCF Services Incorporated

Decision on Application to Hear a Mid-Trial "Jordan" Delay Application

Judge:	The Honourable Judge Anne S. Derrick
Heard:	March 22, 2017
Decision:	April 4, 2017
Charges:	Section 380(1)(a) of the *Criminal Code* (Darrell Spears); section 327(1)(c) x 3 of the *Excise Tax Act* (Spears Framing Limited and Darrell Spears as an officer, director or agent; Spears Concrete Formwork Inc. and Darrell Spears as an officer, director or agent; and SCF Services Incorporated and Darrell Spears, as an officer, director or agent); and section 239(1)(d) of the *Income Tax Act* (Darrell Spears)
Counsel:	Constantin Draghici-Vasilescu, for the Crown Brian Casey, Q.C. and Edward Sawa, for the Defendants

By the Court:

Introduction

[1] Darrell Spears and the defendant companies ("*Spears et al*") have given notice of an intention to make a section 11(b) delay application. I will be referring to this as a "*Jordan*" application after *R. v. Jordan*, 2016 SCC 27. The *Spears et al* trial is ongoing. The defendants want me to hear and decide the *Jordan* application now, mid-trial. The Crown objects to an interruption in the trial for this purpose.

[2] Context, and a number of factors are important to my assessment of the defendants' request.

The Context in Which the Defendants' Request is Being Made

[3] Darrell Spears is on trial for an alleged fraud of nearly $800,000 and income tax evasion. He and the defendant companies are also charged with wilfully evading the payment of HST. The offences are alleged to have occurred from 2006 to 2008. The charges were laid in March 2013.

[4] The defendants' original trial dates were January 29 to February 13, 2015 in Dartmouth Provincial Court. On February 3, 2015, new dates were set for a three-week trial in January and February 2016. It was subsequently agreed the trial would be heard on these dates in the Halifax Long-Trial Court.

[5] The trial began before me on January 12, 2016 and was heard as follows: January 12 to 15, 2016; January 25 to 29, 2016; and February 1 to 5, 2016. Additional dates were required and set - July 18 to 21, 2016 and August 22 to 26, 2016.

[6] The 23 days of trial in 2016 were insufficient to complete the trial. It is scheduled to continue April 18 and 19, April 24 to 28, May 15 to 17, and June 12 and 13. The plan is to finish the Crown's case on the April dates, hear Defence evidence on the May dates, and final submissions in June.

The Defendants' Argument for Hearing the Jordan Application Now

[7] The defendants want the *Jordan* application heard on April 18 and 19, 2017, dates scheduled for the continuation of the Crown's case. Mr. Casey submits that delay in relation to hearing the *Jordan* application should be avoided. It is his submission that hearing the application mid-trial is a more appropriate use of trial

time: if the application is successful the remedy is a stay bringing the proceedings to a conclusion, a saving of resources for the Crown and the defendants.

[8] Mr. Casey says hearing the application in April will still enable use to be made of the May and June dates if the application is unsuccessful. Indeed, he goes further and says the *Jordan* application should be heard on April 18 and 19 and the Crown's case continued on April 24 to 28, a loss of only two of the dates scheduled for the continuation of the trial. In Mr. Casey's submission, this takes care of any concerns that the proceedings will be fragmented by a mid-trial application.

[9] Mr. Casey is confident the application will fit neatly into the April 18 and 19 dates. He says the record required for the *Jordan* application will be ready in time. He advised that the recordings for the Dartmouth appearances have been prepared and the transcripts were expected to be ready by the end of March. He gave an estimate of April 10 for the transcripts from the Halifax appearances.

The Crown's Objections to a Mid-Trial Hearing of the Jordan Application

[10] Mr. Draghici-Vasilescu says the trial should be allowed to continue without the disruption of a mid-trial *Jordan* application. He doubts that the required record can be ready for April 18 and questions the likelihood of the hearing only taking a day or two. He notes that the Crown will need adequate time to prepare for the application if it proceeds in April, a diversion in the midst of Crown preparations for the continuation of its case.

[11] Mr. Draghici-Vasilescu raises concerns that hearing the *Jordan* application now will pitch the completion of this trial into 2018. He says this based on my indication to counsel that a significant loss of scheduled trial dates will have to be made up in November 2017 as there are currently no significant blocks of time available in the Long-Trial Court docket before then. He notes that the April, May and June dates were set some months ago, and with considerable difficulty. (Mr. Casey responded to the trial-extending-into-2018 argument by saying that postponing the *Jordan* application until the end of the trial could still drag the trial into 2018.)

[12] Several other arguments were made by Mr. Draghici-Vasilescu: *Charter* motions should proceed on the basis of a complete record which will not exist here until the trial evidence is complete; the policy reasons for hearing mid-trial applications are not present here; and there will be no benefit obtained in relation to the broader docket implications for the Court as any dates freed-up in May and June,

should the application be unsuccessful, are unlikely to be useable at such short notice.

[13] In Mr. Draghici-Vasilescu's submission the priority for the Court must be the completion of the trial, and not the accommodation of a mid-trial hearing of a *Jordan* application.

Determining Requests to Hear a Jordan Application Mid-Trial

[14] Mr. Casey and Mr. Draghici-Vasilescu agree that a trial court at any level has the jurisdiction to determine whether to hear a *Jordan* application mid-trial. This discretion is a feature of a trial judge's duty to ensure the orderly management of a trial. This duty has been noted by Coady, J. in *R. v. Colpitts*, 2017 NSSC 22 where at para. 17 he referred to comments made by Doyon, J.A. in *R. v. Auclair*, 2013 QCCA 671. Doyon, J.A. was quoting Casey Hill, J. who said,

> …it is today recognized that a trial judge has a duty to manage the trial process balancing fairness to the parties as well as efficient and orderly discharge of the court process. Judicial management of litigation recognizes that "there is more at stake than just the interests of the accused." Management involves control, direction and administration in the conduct of a trial…(*para. 8*)

[15] These principles, expressed in the context of supreme court trials, are equally applicable to trials conducted by provincial court judges. Decisions dealing with applications for mid-trial hearings on delay have noted the role of trial judges controlling the proceedings. (*Colpitts, paras. 4 – 7; R. v. Fast, 2016 ONSC 6426, para. 19*)

[16] A few weeks after his observations in *Colpitts* about judicial trial management, Coady, J. dealt with a request by the defendants in that trial – Mr. Colpitts and Mr. Potter – for a mid-trial hearing of a joint *Jordan* application. He denied the request citing the disruption to the progress of the trial and directing the application be heard after the trial evidence is completed.

[17] Coady, J.'s reasons for refusing to hear the delay application mid-trial were rooted in the need to keep a complicated, unwieldy proceeding on track. The *Colpitts/Potter* trial had started in November 2015 and was in its 128th day. There was no assurance that the *Jordan* application would be completed in a timely fashion. Coady, J. saw the application causing further delay in the trial. Previous

delay applications had significantly exceeded original time estimates. Coady, J. did not think it likely the applications would be ready for a hearing. He found that further delay would be caused by mid-trial decision-writing once the application had been argued and briefs filed. He identified the value to his determination of the *Jordan* application of having an "underlying record" that was "as complete as possible." (*para. 8*)

[18] Coady, J. also expressed concern that if the mid-trial application was successful but the stay that followed was overturned on appeal, there would be no outcome on the merits and a complete retrial would be required. He described this scenario as "very troublesome" given the complexity and time requirements of the case.

[19] Coady, J.'s decision in *Colpitts* references *R. v. Fast*, a decision of Leach, J. of the Ontario Superior Court of Justice. Leach, J. noted that,

> …discretionary decisions generally should be exercised by having regard to two policy decisions. The first is that criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own, (which is the basis of the rule against interlocutory appeals in criminal matters). The second discourages adjudication of constitutional issues without a factual foundation. Both policies favour disposition of applications at the end of the case, and in exercising his or her discretion, a trial judge generally should not depart from those policies unless there is strong reason for doing so – for example, where the court itself is implicated in a constitutional violation, where substantial ongoing constitutional violations require immediate attention, and/or where substantial time will be saved by deciding constitutional questions before proceeding to trial on the evidence. (*R. v. Fast, para. 19*)

[20] Leach, J. also refused to hear a mid-trial delay application citing in her reasons that: the application was not ready to be heard; Crown counsel would not have an reasonable opportunity to prepare while also being required to prepare for the trial; the application was likely to take more than a day; the "relatively short and compressed time frame suggested by defence counsel" did not allow for the preparation for "a proper decision"; this was not a case where the court was implicated in a constitutional violation nor were there ongoing constitutional

violations requiring immediate attention; there was no possibility of "entirely avoiding the time and expense of a trial" as the trial had already consumed 9 to 10 weeks of "effort and expense"; a complete re-trial might be required if an appeal court was confronted with the fact that there had been no outcome on the merits; and a complete underlying factual record best served the proper disposition of the delay application. (*para. 21*)

[21] In *Fast*, Leach, J. concluded that the trial process should be allowed to "run its carefully laid course…" and the delay application heard after the completion of the trial. (*paras. 21 and 22*)

Should the Defendants' Jordan Application be Heard Mid-Trial?

[22] The *Spears et al* trial is not the *Colpitts/Potter* trial, neither as protracted nor as complex. It is not projected to last as long as was expected in the case of the *Fast* trial. But it has been ongoing for 23 days and is well past its half-way mark. A path to completion was mapped out months ago and its continuation is in two weeks' time. Knocking it off course risks finishing it late in 2017 at best - subject to the availability of Crown and Defence - rather than June.

[23] I find that none of the policy considerations for hearing an application mid-trial apply here - such as the court being implicated in a constitutional violation or the presence of ongoing constitutional violations requiring immediate attention. I see no time savings to be gained: even if the defendants' *Jordan* application can be made ready in time and the Crown able to fairly prepare to respond, April 18 and 19 as trial dates will be lost and, potentially so will some of the week of April 24 to accommodate the preparation of a decision mid-trial. And what if the *Jordan* application takes longer than two days? That too will eat away at the available time for the continuation of the trial. Using up some or all of the April dates for the *Jordan* application will mean, in the event the application fails, a continuation of the trial more than a year after its adjournment last August.

[24] As for Mr. Casey's point that putting off the *Jordan* application will also protract the trial, there is a good reason to think that finding time for the application after the end of the trial will be a less fraught challenge than finding additional dates for the trial. In fact I can offer dates that are relatively soon.

Conclusion

[25] I have reached the conclusion that the trial dates should not be diverted to accommodate a mid-trial hearing of the defendants' *Jordan* application. This trial

has greatly exceeded original time estimates and now the end is in sight. Switching the focus to a *Jordan* application will jeopardize getting the trial finished in the timeframe contemplated since last August. It will compromise the ability of the Crown to complete its case and create the likelihood of the trial evidence not being completed until late in 2017 in the most optimistic scenario. There is nothing to indicate that Mr. Bright's busy calendar – a subject of discussion when the 2017 trial continuation dates were set – and the Court's docket will accommodate additional trial dates any sooner than late fall.

[26] Although as Mr. Casey has argued, the "fragmentation of the proceedings" concern is not as compelling in this case as it is in cases with contiguous trial dates, hearing the defendant's *Jordan* application mid-trial will be disruptive. Using April dates for the application will throw off the schedule for the continuation and completion of the Crown's case. This is inconsistent with effective and fair trial management.

[27] The existing trial continuation dates will be used for the continuation of the trial. In the weeks between April 18 – the date we are scheduled to resume the trial, and June 13 - the final day of submissions, the Court has the following dates available in its docket: May 29, 31 and June 1. I am prepared to hear the *Jordan* application on some or all of those dates although I will not be rendering a decision before the conclusion of the trial. The reasons for that are based in policy – the value of having an underlying factual record – and the practicalities of there being no time between the end of May and June 13 for me to produce a decision.

Derrick, P.C.J.