PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v MacLean*, 2023 NSPC 36

Date: 20230623
Docket: 8501884, 8501885, 8501886
Registry: Dartmouth

Between:

His Majesty the King

v

Robin Francis MacLean

DECISION REGARDING APPLICATION FOR STAY OF PROCEEDINGS

Judge:	The Honourable Judge Del W Atwood
Heard:	June 23, 2023, in Dartmouth, Nova Scotia
Written reasons released	July 5, 2023
Charge:	Sections 129 and 320.14 of the *Criminal Code of Canada*
Counsel:	Stacey Gerrard for the Nova Scotia Public Prosecution Service Terrance Sheppard KC for Robin Francis MacLean

By the Court:

Synopsis

[1] This is a decision dealing with an application for a stay of proceedings because of a delayed trial. Following a hearing on 23 June 2023, I granted with the stay application, with reasons to follow.

[2] Robin Francis MacLean is scheduled for trial on 1 August 2023 on charges set out in information 820385:

- impaired operation of a conveyance, s 320.14(1)(a) of the *Criminal Code* (case 8501884);
- operation of a conveyance with an excessive blood-alcohol concentration, s 320.14(1)(b) (case 8501885); and,
- resisting a peace officer, s 129(a) (case 8501886).

[3] There have been a number of delays; as a result, Mr MacLean has applied for a judicial stay of proceedings, arguing that his right to a speedy trial has been violated.

[4] For the reasons that follow, I grant that application, and record a judicial stay of proceedings.

Case chronology

[5] Unlike some delayed-trial cases, Mr MacLean has had only a few appearances before the court.

Date of event	Presiding judge	Outcome	Relevant facts
12 April 2021	N/A	Information laid by police.	Process returnable for 29 June 2021.
29 June 2021	Brinton	Arraignment in Dartmouth Courtroom 3.	Mr MacLean pleads not guilty. Counsel estimate a 1-day-trial-time requirement. Defence counsel accepts first date offered by the court: 31 March 2022. The presiding judge schedules a pretrial conference for 7 December 2021.
7 December 2021	Digby	Pretrial conference convened in Courtroom 3.	Counsel confirm readiness for 31 March 2022 trial date.
30 March 2022	Tax	Case called of the court's own motion.	The presiding judge advises counsel that there would be no judge available for the trial date. Adjourned to 1

			April 2022 to allow counsel to determine openings in the docket arising from the settlement of other matter. Defence counsel was ill with COVID.
1 April 2022	Tufts	Counsel appear for trial rescheduling.	Defence counsel accepts the first date offered by the court: 20 January 2023. The prosecutor informs the Court of the possibility of a date opening up in September 2022.
17 January 2023	Sherar	Case called of the court's own motion following an email notification to counsel from court staff sent 12 January 2023.	The presiding judge advises counsel that no judge will be available on the trial date. Because of prior court commitments, defence counsel declines the first trial date offered by the court (9 February 2023) and accepts the second: 23 June 2023, with a pretrial conference for 25 April 2023.
25 April 2023	Sherar	Counsel appear for pretrial conference. Defence counsel	The court preserves the 23 June 2023 trial date, and

		advises court that he will be filing an 11(b) *Charter* application.	schedules the matter to be called 9 May 2023, apparently to schedule a date for an 11(b) hearing and to allow the prosecution to ascertain whether any dates might be opening up to allow the 11(b) hearing to be heard in advance of the trial date.
9 May 2023	Duffy	Counsel appear for 11(b) *Charter* hearing scheduling.	The presiding judge canvasses the availability of hearing dates that would precede the 23 June 2023 trial date. On the suggestion of the prosecution, the court sets the 11(b) hearing date for 23 June 2023, and reschedules the trial to 16 August 2023.

Procedural issues relating to 11(b) Charter applications

[6] There has been a significant increase in the numbers of delay-of-trial applications coming before the courts; I wish to raise two procedural points which present challenges to the efficient adjudication of them.

[7] First, applications should be brought as soon as possible after a constitutional vulnerability has arisen. An application is one that is compliant with the Nova Scotia Provincial Court Rules [Rules]; a verbal and inchoate pronouncement by counsel that an application might be sent in at some unspecified time in the future is neither an application nor a notice of one, and will have no legal effect. Requiring timely and rules-compliant applications will not operate as an onerous procedural obligation, as the intervals between trial-scheduling dates and eventual trial dates are almost always quite lengthy. Significantly, constitutional challenges are justiciable as soon as a trial date is set, if that date falls beyond a presumptive threshold. It has been argued that timely and rules-compliant trial-delay applications are perfect-world, utopian aspirations that are not achievable in actual practise. I consider this proposition mostly unsupportable. Further, applications that are held back until trial dates are looming create scheduling chaos: some applications have had to be deferred until after trials have been heard; even when able to be heard prior to trial, untimely applications that end up being successful will result in short-notice trial dates being opened up on the docket that no party will be willing to accept. Counsel must be mindful that the Rules permit a court to dismiss untimely applications without a hearing on the merits: *R v MacDonald*, 2023 NSPC 9 at paras. 12-13.

[8] The second point is that the merit of an application will be clearer when counsel identify clearly the date after which a case is claimed to have exceeded a presumptive threshold. This provides opposing counsel and the court with a reference point to better assess issues of defence delay, waiver, and exceptional circumstances.

Law governing unreasonable delay—general principles

[9] The governing constitutional authority is the *Canadian Charter of Rights and Freedoms*, s 11(b), Part 1 of *the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11:

> 11 Any person charged with an offence has the right
> . . .
> (b) to be tried within a reasonable time;
> . . . .

[10] As reemphasised in *R v MacNeil*, 2023 NSPC 32 at s 27, the rights of an accused person under s 11(b) run from the time a charge is laid until its conclusion (citing *R v MacDougall*, [1998] 3 SCR 45 at s 19).

[11] *R v Jordan*, 2016 SCC 27 at ss. 5, 46, 49, 105 [*Jordan*] describes what should be an uncomplicated unreasonable-delay-assessment algorithm. It enforces the right of a person charged with an offence to be tried within a reasonable time.

[12] There is a presumptive case-origin-to-outcome ceiling of 18 months for matters adjudicated in provincial court; the decisive interval is measured as running from the time of the laying of a charge and continuing, not to the date of any eventual s 11(b) *Charter* hearing, but to the anticipated-end-of-trial date—*Jordan* at paras. 5, 46, 49, 105.

[13] From that interval must be deducted delay waived or caused solely by defence counsel, as defence delay does not count toward the presumptive ceiling; however, defence actions taken legitimately to respond to charges do not constitute defence delay—*Jordan* at paras. 65, 66, 105.

[14] Further, when a person charged with an offence consents to a date for trial offered by the court, or to an adjournment sought by the prosecution or directed by the court, that consent does not amount, without more, to a waiver. Rather, the prosecution must demonstrate that, in agreeing to a trial date, the defence was engaging in something more than an acquiescence in the inevitable. Proof of waiver of delay is a high bar, and there must be evidence of clear, unequivocal, and informed acceptance—*Jordan* at para. 61; *R v Morin*, [1992] 1 SCR 771 at 790. In *Jordan* at para. 4, a 4-month delay was allocated to defence waiver when there was a last-minute change of counsel prior to trial.

[15] Delay (minus defence delay) that exceeds the 18-month-provincial-court ceiling is presumptively unreasonable—*Jordan* at paras. 47, 49, 56, 68, 105.

[16] Once the presumptive ceiling is exceeded, the burden shifts to the prosecution to present persuasive evidence of exceptional circumstances sufficient to rebut the presumption of unreasonableness—*Jordan* at paras. 47, 58, 68, 105.

[17] An exceptional circumstance may be:

- a discrete, unavoidable, exceptional, or unforeseeable event; or,
- a complex case requiring exceptional time allocation—*Jordan* at paras. 71, 73, 75, 81, 82, 105.

[18] There is no complex-case issue raised in this matter.

[19] When no exceptional circumstances exist, or when the exceptional-circumstance adjustment leaves a case in excess of the presumptive ceiling, a stay is the appropriate § 24(1) *Charter* remedy; it is the only remedial tool—*Jordan* at para. 35.

[20] In a case when delay, after adjustment for an exceptional circumstance, does not exceed the presumptive ceiling, a person being tried may have proceedings

stayed by proving that meaningful and sustained steps were taken to expedite proceedings and that the case took markedly longer than it should have to bring to trial—*Jordan* at paras. 48, 82, 84-86, 105, 111, 113. Stays of cases beneath the ceiling are to be rare, granted only in the clearest of cases—*Jordan* at para. 48.

[21] *Jordan* encourages preventive problem solving; it requires the prosecution to act proactively throughout proceedings to justify delays that exceed the presumptive ceiling—*Jordan* at paras. 112-113. Defence counsel are to be part of the solution.

[22] However, it must be emphasized that charged persons are before the court at the instance of the prosecution; while the prosecution does not decide outcomes that are subject to judicial determination, it holds substantial decision-making authority over whether to proceed with a charge, how to proceed, pre-trial detention, trial length, and so on. It is in the best position to know the strength of its case, and whether there exists a realistic prospect of an accused person being convicted. Assuming policing services have fulfilled their duty to hand over full disclosure at the earliest reasonable point, the prosecution should be able to make these assessments very early on in proceedings.

Defence delay elaborated

[23] Defence delay must be unequivocal; it does not include defence actions taken legitimately to respond to charges: *Jordan* at para 65; *R v Roy*, 2023 NSPC 23 at paras 8; *R v Atwell*, 2023 NSPC 14 at paras. 12-15; *R v CB*, 2023 NSPC 48 at paras. 34-35. Further, in *R v Hanan*, 2023 SCC 101 at para. 9 [*Hanan*], the Court rejected the application of a bright-line rule which would allocate to defence any delay arising from an offered trial date being rejected.

Pandemic-related delay as a discrete-event exceptional circumstance

[24] The COVID-19 pandemic has been treated by courts, subject to certain conditions, as a discrete-event exceptional circumstance; delays that are attributable to the pandemic may be allocated to exceptional circumstances and subtracted from total delay in determining whether a case has exceeded a presumptive ceiling. The conditions that apply to that pandemic-related delay forgiveness are that it must be clear that the pandemic was the cause of the delay, and the prosecution must be prepared to show steps it took to mitigate it: *R v Burkhardt*, 2023 NSCC 4 at para. 60, citing *R v Sandhu*, 2022 ONSC 3910 at paras. 38-41; *R v Langford*, 2022 ONSC 4542 at para. 23, *R v Simmons*, 2020 ONSC 7209 at paras. 59-77 and *R v Hinterberger*, 2022 ONSC 4860 at paras. 48-50, 54-59.

[25] This sort of evidence-based approach was precisely the method in *R v LL*, 2023 ONCA 52 at paras. 20-23. In the later decision in *R v Ivarone*, 2023 ONCJ 69 at paras. 5 and 16 [*Ivarone*], the Court found that it would be reasonable to take judicial notice of the delay-inducing effect of the pandemic and allocate three months as an exceptional circumstance; anything beyond that would require the prosecution to produce some statistical evidence "to show with some precision how much delay to a particular case was caused by COVID 19". *R v Edwards*, 2023 ONCJ 221 at para. 82 says pretty much the same thing: the pandemic can be a discrete exceptional circumstance; the question of whether, and how much, must be decided based on the evidence.

[26] In *R v Taheem*, 2023 QCCS 2017 at para. 27 [*Taheem*], the Court underscored the importance of the prosecution quantifying pandemic-related delay when advancing a discrete-event-exceptional-circumstance argument. The Court referred to the impact the pandemic had had on all cases, and described it as a "backlog effect"—at para. 6; it found that supposed backlog delays could not constitute exceptional circumstances if, rather than being temporary, they had become permanent—at para. 24.

[27] In contrast to the evidence-based approach, the expansive approach to allocating pandemic-related delay—exemplified in *R v Loiacono*, 2023 ABCA 157

at para. 19 and *R v Agpoon*, 2023 ONCA 449 at para. 33—would seem to offer a "pass" for most *Jordan*-vulnerable cases that have had some temporal connection to the pandemic, and would see courts treating almost every pandemic-infected case as exceptional. This would seem to offer a redefinition of what is constitutionally exceptional.

Judicial-resources delay as an exceptional circumstance

[28] Two of the trial dates set for this case—31 March 2022 and 20 January 2023—were scrubbed as there was no judge available to hear the case.

[29] There is no evidence on the record before me that explains the lack of judicial resources on those dates.

[30] I have read the decision rendered in *R v Prosper*, 2023 NSPC 27 [*Prosper*]; it appears to describe a situation that was somewhat analogous to this one, which also arose in Dartmouth Courtroom 3. However, findings of fact in one case cannot be grafted onto another: *R v Daley*, 2007 SCC 53 at para. 86; *R v Fead*, 2017 ABCA 222 at paras. 15, 24.

[31] While factual findings in *Prosper* cannot be transplanted into this case, I can state unreservedly that I adopt the legal analysis in *Prosper*, which is well aligned

with s 11(b) *Charter* values and lays out the law with accuracy. First, the characterization of a judicial-resources issue as a discrete-event exceptional circumstance will not be automatic and will require an examination of the record: para. 39; this is consistent with the evidence-based approach. Second, the court cannot be expected to parse delays to oblivion: para. 59—nor, I would add, may it parse from oblivion: it may not find as a fact something not proven on the record, or draw inferences from unsupported premises.

[32] Finally, I would observe on this point that the Court is not dealing in this instance with a case of a judge seized of a matter becoming ill, or of a seized judge taking a prolonged time to deliberate on a case. While these, too, might implicate the adequacy of judicial resources, they carry the complicating factor of a judge being tied to the case. Not so, here: any judge of the Provincial Court could have heard Mr MacLean's trial; for reasons that are not evident on the record, none was available.

Application of the law to the facts of this case

Total interval

[33] The total interval from the laying of information 820385 to the scheduled trial date of 16 August 2023 is 28 months and 5 days.

Defence delay

[34] The prosecution seeks to allocate the interval of 9 February 2023 (the trial date declined by defence counsel on 17 January 2023) to 23 June 2023 (the third trial date) as defence delay. I decline to do so. Instead, I adopt the approach in *Hanan* and examine all the relevant circumstances: Mr MacLean put in his plea on the day of his very first appearance in court; prior to 17 January 2023, defence counsel had accepted each trial date offered by the Court; when the trial date of 9 February 2023 was offered on 17 January, defence counsel was faced with conflicting, prior commitments; finally, defence was not implicated in any way in the need to reschedule Mr MacLean's trial. Defence was doing its part in moving this case forward expeditiously; the delays originated with the Court. On the basis of all of the relevant circumstances, I decline to allocate any delay to the defence.

[35] As a result, the net delay for this case remains 28 months and five days.

[36] This exceeds the presumptive ceiling of 18 months for matters in Provincial Court.

[37] The burden now rests with the to establish the existence of an exceptional circumstance.

Exceptional circumstances—complex case

[38] As observed previously, the prosecution does not assert that this was a complex case.

Exceptional circumstances—discrete, unavoidable, exceptional, or unforeseeable event

[39] The prosecution advocates that the entirety of the interval from the arraignment date (29 June 2021) to the first trial date (30 March 2022) be characterized as a pandemic-related discrete-event exceptional circumstance. I decline to make this finding: there is no evidence on the record to support it. On the day of arraignment, when the first trial date was set, no one raised on the record anything about the pandemic as having a bearing on scheduling; this is not surprising, as COVID-19 had been present and pervasive in Canada for almost a year and a half at that point. In addition to the absence of evidence on the record, I do not have sufficient knowledge of local conditions at the Dartmouth Provincial Court to reckon a value for pandemic-related delay, so that the judicial-notice approach (as in *Iverone*, and *R v Korovchenko*, 2022 ONCJ 388 at paras. 89-106) is inaccessible in this case. Specifically, prior to the pandemic, what was the typical interval between scheduling dates and trial dates for one-day matters being heard in Dartmouth? The court requires evidence on that point to determine whether the interval in this case was authentically exceptional.

[40] The prosecution proposes that the period from the first trial date (30 March 2022) to 20 January 2023 (the second trial date) be allocated as judge-illness-exceptional-circumstance delay. I decline to do so. While the judge ordinarily assigned to Dartmouth Courtroom 3 might not have been able to hear the trial on 30 March 2022, there is no explanation on the record why alternative arrangements could not have been made to assign the trial to another court room, or to find another judge for Dartmouth Courtroom 3. Further, I do not know whether this was, truly, an exceptional circumstance: was this the only trial at the Dartmouth Provincial Court that got cancelled due to insufficient judicial resources, or were there others similarly impacted? I might suppose that the unavailability of a judge to hear Mr MacLean's trial was an unavoidable problem, but what I suppose is not a proof.

[41] Furthermore, the fact that defence counsel was ill with COVID on 30 March 2022 does not transform the delay to defence delay: the trial would not have proceeded had Mr Sheppard available for trial on 31 March 2022, as there was no judge to hear it. As held in *Hanan* at para. 9:

> [P]eriods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable.

[42] I find that there is no evidence before the Court supporting the finding of exceptional circumstances.

Conclusion

[43] The interval between the date the charges against Mr MacLean were laid and the date of the currently schedule trial is 28 months, 5 days.

[44] There is no defence-allocatable delay.

[45] There is no exceptional-circumstance delay.

[46] As the interval exceeds the presumptive ceiling, the charges against Mr MacLean are judicially stayed.

[47] The Court is indebted to counsel for their skilled submissions which were of substantial assistance.

Atwood J.