Court of Queen's Bench of Alberta

Citation: R v RML, 2018 ABQB 972

Date: 20181128
Docket: 161198106Q1
Registry: *Omitted from electronic judgment only.*

Between:

Her Majesty the Queen

Crown

- and -

RML and DP

Accused

Restriction on Publication

By Order of the Court made on November 1, 2018 the names of the accused persons, the names of counsel, and the hearing location must not be published in any document or broadcast or transmitted in any way until the trial has ended and the appeal period has expired.

Ruling on Voir Dire
of the
Honourable Madam Justice J.A. Antonio

The following is a written version of the oral judgment delivered on November 1, 2018. I reserved the ability to edit the transcript, to correct grammar and other technical errors, and to add citations and authorities. This written version replaces the oral judgment as the official judgment of the Court.

[1] The trial in this matter is scheduled to be heard from April 2 to 12, 2019. At a pre-trial conference, counsel advised that two pre-trial applications needed to be scheduled: one alleging pre-trial delay and one alleging a breach of section 8 of the *Charter*. Three days of court time was booked for these hearings and I was appointed case management justice for the purpose of deciding them. These are my reasons on the application to have the proceedings stayed because the trial will not be held within a reasonable time, allegedly in violation of section 11 of the *Charter*.

[2] All three accused filed written materials on the section 11(b) application, but Mr. S abandoned his application at the eleventh hour. The remaining accused, RML and DP, argued that by the time the trial concludes the 30-month ceiling established by the Supreme Court in ***R v Jordan***, 2016 SCC 27 for trial in a Superior Court will have been met or exceeded, and that the Crown cannot justify the delay. Therefore they seek a stay of proceedings. The Crown's position was that the elapsed time from the laying of the charge to the scheduled end of the trial is one day less than 30 months, and that the delay for ***Jordan*** purposes is still less if delay attributable to the defence is deducted.

[3] At the hearing, I asked counsel to begin with their submissions on the length of the elapsed time. It is common ground the accused were charged on October 13, 2016. The scheduled end date of the trial, as mentioned, is April 12, 2019.

[4] Counsel for RML submitted that if one begins the count on October 13, 2016, then April 12, 2019 represents the end of 30 months, in the same way that a year runs from January 1 to December 31, not to January 1 of the following year. Therefore, 30 months will have passed by the time the trial ends, and the delay is presumptively unreasonable.

[5] Counsel for DP submitted in writing that the time to trial was 30 months and 8 days. At the hearing he agreed that the additional 8 days were an erroneous addition and adopted the position of RML.

[6] Crown counsel offered two methods of calculating the number of months to trial. The first would be to multiply by the average number of days per month, which she submits is 29.87. Using this method, 30 months would be reached on April 14, 2019. The second method is found in the *Interpretation Act*, RSC 1985, c I-21. Section 28 sets out the following method for calculating a period of months after a specified day:

> Where there is a reference to a period of time consisting of a number of months after or before a specified day, the period is calculated by
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> (a) counting forward or backward from the specified day the number of months, without including the month in which that day falls;
> (b) excluding the specified day; and
> (c) including in the last month counted under paragraph (a) the day that has the same calendar number as the specified day or, if that month has no day with that number, the last day of that month.

[7] Under this method, the specified day is October 13, 2016, when the charges were laid. November 2016 is Month 1. Counting on, April 2019 is Month 30. The final day in the count is the same calendar day as the specified day, or April 13, 2019. The same result would obtain if I were to apply section 22(8) of Alberta's *Interpretation Act*, RSA 2000, c I-8.

[8] The federal *Interpretation Act* applies to federal legislation, not to common law matters. Nonetheless, it provides a defined and objective standard. I find that it is appropriate to use section 28 of the federal *Interpretation Act* in calculating time for section 11(b) purposes. Therefore, the scheduled end of the trial falls under the 30 month ceiling, even before defence delay is considered.

[9] This result has a significant impact on the ***Jordan*** analysis.

[10] Net delay is time elapsed since charges were laid minus any periods of defence delay or waiver.

[11] Net delay that exceeds the ceiling is presumptively unreasonable. The Crown bears the onus of rebutting the presumption of unreasonableness by establishing the existence of exceptional circumstances: ***Jordan*** at para 68.

[12] Net delay falling below the presumptive ceiling may be found unreasonable. In these circumstances, the defence bears the onus of establishing that:

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.

[13] Absent these two factors, the section 11(b) application must fail: ***Jordan*** at para 82.

[14] There is no suggestion of waiver here. I do not find it necessary to consider whether any periods of time should be characterized as defence delay within the meaning of ***Jordan*** and ***R v Cody***, 2017 SCC 31. Because the elapsed time already falls under 30 months the net delay falls under 30 months in any event, and the latter test applies.

[15] On the first branch of the "under-the-ceiling" test, the defence must demonstrate that it took (per ***Jordan*** at para 85):

> … meaningful and sustained steps to be tried quickly. While the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(b) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.

[16] This "requirement of defence initiative" is the corollary to the Crown's justificatory burden above the ceiling: ***Jordan*** at para 86. That is, the defence efforts must be truly proactive in some way beyond compliance with standard procedures, and they will be recognized even if they are unfruitful: ***Jordan*** at para 70. This requirement is intended to encourage the defence "to be part of the solution [with] positive ramifications not only for individual cases but for the entire justice system, thereby enhancing – rather than diminishing – timely justice": ***Jordan*** at para 86.

[17] In discussing the second branch of the "under-the-ceiling" test, I observe that defence counsel sometimes slipped into the language of whether the trial took markedly longer "than usual" or "than it could have". The true question is whether "the case took markedly longer than

it should have". "The case" means this case, with all its particular circumstances, including its complexity. I am entitled to apply my knowledge of "local considerations … including how long a case of [this] nature typically takes to get to trial in light of the relevant local and systemic circumstances": ***Jordan*** at paras 87, 89.

[18] My task in determining whether the time the case has taken markedly exceeds what was reasonably required is not to "parse each day or month, as has been the common practice since [***R v Morin***, [1992] 1 SCR 771], to determine whether each step was reasonably required." Rather, I am to "step back from the minutiae and adopt a bird's-eye view of the case": ***Jordan*** at para 91.

[19] At this point a brief overview of the timeline will be helpful. The following is taken from the materials submitted by the parties and from the court file.

- October 13, 2016: Charges were laid.

- October and November 2016: The accused made their first appearances. The Crown election was entered, and the accused engaged in the process of retaining counsel.

- December 2, 2016: The Crown filed a joinder application that was first spoken to on December 15th. At that time, it was adjourned for counsel to consider their positions

- January 25, 2017: Mr. S went to warrant. RML consented to joinder. DP's position was frankly unclear to me based on the transcript, but all counsel before me have interpreted it as consent to joinder on that date. Some disclosure had been made.

- February 16, 2017: Substantially all disclosure had been made. RML's counsel asked for two or four weeks to review the three binders and hours of video. Counsel for Mr. Q, an erstwhile co-accused whose charges have since been resolved, sought time to discuss resolution with the Crown. DP's counsel was ready to set dates, but was willing to "go along to whatever date" was chosen. Mr. S remained at warrant. The Crown wanted to set a date for preliminary inquiry.

- March 16, 2017: Counsel for RML said he was awaiting the Information to Obtain the search warrant (ITO) which had not yet been unsealed, but he had filed a Form A identifying witnesses RML wished to hear from at the preliminary inquiry. The Crown wished to set the preliminary inquiry down, but the Court declined to do so since Mr. Q could not be produced from custody and a warrant to hold had been issued for DP. The matter was adjourned peremptorily to set a preliminary inquiry date.

- April 6, 2017: New counsel came on for DP. Once again Mr. Q was not produced and apparently was in the midst of changing counsel. Crown counsel expressed some frustration at her inability to learn at which institution Mr. Q was a serving prisoner and at the non-responsiveness of his counsel to her inquiries. DP elected trial by Judge and Jury, trumping RML's earlier Judge alone election. Crown counsel again asked to set a preliminary inquiry date. The Court declined to do so, saying that scheduling would be moot in the absence of Mr. Q or his counsel. The matter was again adjourned peremptorily to set a preliminary inquiry date.

- April 20, 2017: A preliminary inquiry for RML and DP was set for November 1st and 2nd, 2017. Although there was some discussion in court, the actual date was chosen at the case management counter, so no transcript is available to show if any other dates were offered or rejected.

- Nov 1st and 2nd, 2017: The preliminary inquiry was held, with Mr. S having rejoined the process. Crown counsel advises that because there was little overlap in the witnesses selected by each accused on their Form A, most of the Crown's case was called. Decision was reserved.

- November 10, 2017: The three accused were ordered to stand trial.

- December 4, 2017: This matter made its first appearance in Court of Queen's Bench. A judge and jury trial was scheduled for April 2 through 12, 2019.

- May 9, 2018: The first pretrial conference was held.

- September 27, 2018: Counsel for RML filed his *Charter* notice on the section 11(b) application.

- October 5, 2018: Counsel for Mr. S filed his *Charter* notice and written argument on the section 11(b) application.

- October 9, 2018: The second pretrial conference was held

- October 16th and 17th, 2018: Counsel for RML and DP respectively filed their written arguments on the section 11(b) application.

- October 18, 2018: Counsel for Mr. S filed a *Charter* Notice alleging breaches of sections 7 and 8 and setting out his arguments in support.

- October 22nd and 26th, 2018: Crown counsel filed her written arguments on section 11(b) and section8 respectively.

- October 26, 2018: Counsel for Mr. S notified the Court registry that he was abandoning his section 11(b) application.

- October 29, 2018: Counsel for DP filed a written response to the Crown's argument, and section 11(b) arguments were heard.

- October 30, 2018: Section 8 arguments were heard.

[20] In arguing that RML and DP took meaningful and sustained steps to expedite the proceedings and that the matter has taken markedly longer than it should have, their respective counsel have made various submissions that can be summarized and analyzed as follows:

(a) *It took a long time for the police to provide complete disclosure to the Crown, and therefore for the accused to receive disclosure*.

Disclosure was substantially complete within four months of the laying of the charges. The only information I have about the disclosure, taken from the appearance on February 16, 2017, is that it consisted of three binders and hours of surveillance video. RML's counsel said he needed two to four weeks to review it. I do not have enough information to determine whether the time to produce this disclosure was inordinate. I can comment that it is not out of line with my observations and experience.

(b) *RML adds that it took months to have the ITO unsealed and disclosed, but she filed her Form A and set a preliminary inquiry date even without it.*

As the production of the ITO did not affect the timeline, I infer this submission is advanced as a step taken to expedite the proceedings. Of course a court hearing a preliminary inquiry has no *Charter* jurisdiction, and calling an affiant at a preliminary inquiry is far from automatic. Forgoing an opportunity to delay the proceedings is not a meaningful step to expedite the proceedings.

(c) *The Crown's joinder application was an unusual step.*

Be that as it may, defence counsel acknowledged that the time to deal with this application ran concurrently with the disclosure process. Therefore the timeline was not lengthened by this application.

(d) *Scheduling delays arose from the fact that there were co-accused*.

I will say more on this later in these reasons. For now I will merely observe that the accused consented to the joinder.

(e) *Counsel for DP submits that she did not attend some court dates because of confusion arising from having two counsel at the same time*.

I can find no support for this assertion in the record.

(f) *Institutional delay at both levels of court was markedly longer than the court should be comfortable with in a case of this kind*.

That is not the test.

(g) *Counsel for RML advises that he sought a special sitting for preliminary date, but made no similar requests at the Court of Queen's Bench even after it became possible to do so, because DP was in the midst of changing counsel then.*

None of this is apparent on the record. An attempt to arrange a special sitting would count as a meaningful step taken to expedite the proceedings. However, I cannot call

this one step a sustained effort, as required to satisfy the "under-the-ceiling" test: ***R v Taylor,*** 2017 ONSC 2263 at para 24.

(h) *Length of trial*.

Some arguments were made back and forth about the number of days booked for trial. I lack the evidence to reach any conclusions about whether the number of days booked is appropriate, though nothing on the record before me suggests any impropriety. Crown counsel has advised that to date defence counsel have made no admissions, meaning that the Crown will be put to the full proof of its case. From the Pre-Trial Conference Report or CC7 filed on behalf of RML, I see that she is prepared to make some admissions, such as identity, jurisdiction, and service of the certificates of analysis. To date DP has not filed a CC7. If she has not advised Crown counsel that she is making any admissions, then the Crown must run its entire case. Of course I am not in a position to comment on whether admissions are appropriate on the evidence in this case. But the lack of admissions, even on matters such as identity and jurisdiction, does not assist the defence in demonstrating meaningful and sustained efforts to expedite the proceedings.

[21] To some extent, the defence submissions amount to an assertion that the time to get to trial has been extended by the fact that more than one accused is being tried. I heard various claims about each accused being held back by the others, as well as some blame to the Crown for its inability to bring Mr. Q to court on two occasions, and about the durations of the preliminary inquiry and the trial being longer than for all three accused than they would be for any one of them.

[22] Cases involving multiple accused require a balancing of each accused's section 11(b) right with the Crown's obligation to pursue meritorious prosecutions and its discretion to do so in what it views as the most appropriate manner. As noted in ***R v Saikaley,*** 2017 ONCA 374 at para 41:

> While the Crown must act reasonably and according to a concrete plan in prosecuting a complex case, the Crown should not be forced to abdicate its responsibility to prosecute meritorious cases as a matter of expediency.

[23] There are many sound policy reasons for conducting joint trials. As Justice Fairburn held in ***R v Ny***, 2016 ONSC 8031 at paras 42 and 46 [citations omitted in oral reading],

> It is a well-recognized principle of law that the interests of justice are most often best served by having people who are alleged to have committed crimes together, tried together and their guilt or innocence determined together. As Laskin J.A. held in ***R v Whylie*** (2006), 207 CCC (3d) 97 (Ont CA), at para 24: "A single trial for two or more accuseds generally conserves judicial resources, avoids inconsistent verdicts, and avoids witnesses having to testify more than once." See also: ***R v LG,*** 2007 ONCA 654 at paras 62-62.
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> . . .
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> The implications of proceeding too quickly to sever accused, simply because the ceiling is approaching, are obvious and striking. This is particularly true in

> jurisdictions like Brampton, where judicial and courthouse resources are long stretched to beyond their limits. The implications of conducting virtually the same trial more than once would be profound and potentially add to delay in the system: ***R. v. Koruz,*** 1992 ABCA 144 at para 83, aff'd ***R v Schiewe***, [1992] SCCA No 299 *(sic)*.

[24] Some consideration has been given to role of a joint trial within the Jordan analysis, though not, to my knowledge, to whether or how the implications of a joint trial affect an assessment of the reasonableness of delay below the ceilings.

[25] In cases involving delay above the ceiling, a joint trial may contribute to a finding of an exceptional circumstance, either because proceedings against multiple accused may be of increased complexity, or because a step taken by one accused caused a delay that "was reasonably unforeseen and reasonably unavoidable": ***Jordan*** at para 77; ***R v Gordan,*** 2017 ONCA 436 at paras 12-13; ***R v Klassen,*** 2018 ABCA 258 at para 88; ***R v Gopie***, 2017 ONCA 728 at paras 169-170; ***Ny***, para 41. Such findings will be made only in appropriate circumstances.

[26] Here, because the delay falls under the ceiling, there is no need to inquire into exceptional circumstances. I am, however, required to consider the circumstances of this case in assessing whether it took markedly longer than it reasonably should have. This assessment includes the complexity of the case, and the apt observation that "delays caused when proceeding against multiple accused 'must be accepted as a fact of life', because '[t]he more calendars, the more complications'": ***Klassen*** at para 95, citing ***Ny*** at para 113.

[27] This is not a case where RML and DP did "everything possible to move the matter along, only to be held hostage by his or her co-accused and the inability of the system to provide earlier dates": ***R v Vassell***, 2016 SCC 26 at para 7. RML and DP complied with basic procedural requirements (for the most part). Arguably, each caused some delay and/or acquiesced in delay caused by others.

[28] There is no question that the Court's schedule of availability contributed many months to the timeline. That said, and for better or for worse, the elapsed time in this case is consistent with that typically seen in similar local cases.

[29] Further, I am satisfied that the Crown has done its part to ensure that the matter proceeds expeditiously by responding to defence concerns, attempting to streamline the issues and evidence, adapting to evolving circumstances, and seeking to set dates at early opportunities: ***Jordan*** at para 90.

[30] In sum, I am not satisfied that this particular case took markedly longer than it should have. Nor am I satisfied that RML and DP took meaningful steps demonstrating a sustained effort to expedite the proceedings. They have not established that they attempted to set the earliest possible hearing dates, nor that they put the Crown on timely notice when delay was becoming a problem. Subject to comments I will make at the end of these reasons, I accept that they were generally cooperative with and responsive to the Crown and the Court. They can claim general compliance with the Court's rules and adherence to normal practices, but they have not taken initiative to move the matter forward.

[31] It follows that RML and DP have not discharged their burden of establishing unreasonable delay and their application for a stay of proceedings must fail.

[32] I wish to address some of the remaining arguments made in the parties' written materials.

[33] Each counsel produced a timeline with an ***Askov***-style accounting of time. That is, days were counted and classified into the categories of delay established in ***R v Askov***, [1990] 2 SCR 1199 and affirmed in ***R v Morin***, [1992] 1 SCR 771.

[34] An ***Askov/Morin*** analysis remains relevant to some extent in transitional cases, or in other words, those where part of the timeline elapsed before the ***Jordan*** decision was released. The charges at bar were laid months after ***Jordan*** was released; therefore I apply the ***Jordan*** framework with no transitional modifications.

[35] Part of the Supreme Court's goal in imposing the ***Jordan*** framework was to replace the arcane and unpredictable process of scrutinizing docket appearances and micro-accounting for periods of delay with a more realistic assessment of the reasonableness of overall delay. In other words, I am instructed to focus on the forest, not the trees: ***Jordan*** at paras 37 and 38.

[36] I recognize that the whole is made up of the parts, so references to transcripts and particular periods of time are inevitable, especially in determining whether any periods of time arose from defence waiver or delay such that they should be subtracted from the timeline. But the ***Askov*** categories are not relevant to determining defence delay or to any other part of the ***Jordan*** analysis.

[37] Another concept that gave rise to contention and confusion under the ***Askov/Morin*** framework was prejudice. At paragraphs 109 and 110 of ***Jordan***, the Supreme Court removed prejudice from the analysis:

> …[T]he new framework resolves the difficulties surrounding the concept of prejudice. Instead of being an express analytical factor, the concept of prejudice underpins the entire framework. Prejudice is accounted for in the creation of the ceiling. It also has a strong relationship with defence initiative, in that we can expect accused persons who are truly prejudiced to be proactive in moving the matter along.
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> Prejudice has been one of the most fraught areas of section 11(b) jurisprudence for over two decades. Understanding prejudice as informing the setting of the ceiling, rather than treating prejudice as an express analytical factor, also better recognizes that, as we have said, prolonged delays cause prejudice to not just specific accused persons, but also victims, witnesses, and the system of justice as a whole.

[38] Thus prejudice is no longer an express analytical factor, over or under the ceiling. At most, it may be a motivating factor for the accused in moving the matter along. But the court's task under the ceiling is to determine whether the accused's actions amount to meaningful and sustained efforts to expedite, not to examine her motivations.

[39] RML filed an affidavit to support her written argument that she suffered and is suffering prejudice from the delay. There is no need for me to consider it, as prejudice is not an express factor before me. If it were, I would observe that some of the hardship described in the affidavit was remedied very early on when the defence asked for bail conditions to be altered and the Crown agreed. The remainder of the alleged prejudice was either insufficiently explained or attributable solely to the fact of facing charges. I acknowledge that the latter could, from the accused's perspective, be remedied by acquittal and therefore delay in reaching a trial verdict

could be relevant to prejudice. However, any prejudice arising from the fact of being charged is common to all persons charged with offences, and must have been accounted for in the setting of the ceilings.

[40] Whether considering defence-caused delay or defence initiative, it is appropriate for the court to evaluate the when and the how of the defence's conduct of file, even including the ***Jordan*** application itself: ***Cody***; ***Jordan*** at para 85. This is so because the Supreme Court's overarching purpose in establishing the ***Jordan*** framework was to effect a change in the culture of criminal litigation. The framework was intended to create incentives for both sides, and to "enhance accountability by fostering proactive, preventative problem solving": ***Jordan*** at para 112.

[41] In what follows, I do not wish to belabour the procedural facts of this case. I will simply state my observations that, though three days were set for argument on the two *Charter* applications, the Court sat for only two half-days; that the applicants' written arguments were based on somewhat flawed premises and, therefore, were largely not pursued in oral argument; and that, though she did not do so, Crown counsel would have been within her rights to demand time to respond to some of the new arguments presented for the first time at the oral hearing. In short, time was lost to counsel's lack of forethought, even though *Charter* notices were filed and two pretrial conferences were held. As Justice Hill wrote in ***In the Matter of Judicial Pre-Trial Conferences Scheduled for Tuesday October 11, 2016***, 2016 ONSC 6398 at para 12, a pre-trial conference "is an important procedural step — it cannot be perfunctory — all participants must be prepared, organized and committed to the objectives of such a hearing."

[42] In the time that was lost here, Counsel could have scheduled a hearing for their other clients to move their matters along. The Court could have used the time to hear the trial of another accused who may now be waiting longer than necessary.

[43] I do not accept attempts to explain away the lost time as arising from various changed circumstances. On the record before me, there was no material change in circumstances. Where circumstances do change in a way that affects Court time or a judge's preparation, the Court expects to be notified.

[44] Reliance on past practices and old habits will not change the culture of criminal litigation. Token participation at pretrial conferences and the filing of boilerplate *Charter* notices is inadequate. Alberta courts are implementing pre-trial procedures to determine the issues that must be decided, to narrow the focus of proceedings to ensure the most effective hearing of those issues, and to ensure the best possible use of the Court's time and counsel's as shared resources to be used in protecting the section 11(b) rights of all accused. We require counsel's preparation and thoughtful cooperation. This is not too much to ask of officers of the Court.

Delivered orally on November 1, 2018.

Dated at Calgary, Alberta this 28th day of November, 2018.

J.A. Antonio
J.C.Q.B.A.