

Court of Queen's Bench of Alberta

Citation: Kalashnikoff v Her Majesty the Queen, 2021 ABQB 327

Date: 20210426

Docket: 180324600Q2

Registry: Grande Prairie

Between:

**Alexander Dimitri Kalashnikoff, Tara Lee Cartwright
and Matthew James Roberti**

Applicants

- and -

Her Majesty the Queen

Respondent

**Oral Judgment
of the
Honourable Madam Justice N.F. Dilts**

This is a written version of the oral decision delivered April 23, 2021. I have edited this written version to add citations and headings, to ensure proper punctuation, spelling and use of language. I have not supplemented my oral reasons. This written decision is near verbatim from the oral decision delivered. My oral decision remains the official ruling of the Court.

[1] The Applicants, Mr. Roberti, Mr. Kalashnikoff and Ms. Cartwright, who I will refer to as “the Applicants”, apply for a stay of proceedings under s 11(b) of the *Charter*.

[2] They argue that their right to a trial within a reasonable time has been infringed as their trial was delayed from May 2020 to May 18, 2021 as a result of the Master Orders of the Chief Justice of the Court of Queen's Bench.

[3] While they concede that the COVID 19 pandemic is a discrete and unforeseeable event as contemplated by the Supreme Court of Canada in the *R v Jordan*, 2016 SCC 27 decision, and they

concede that some delay is appropriately deducted from the total delay as a result of the pandemic, they argue that the entire delay between the first scheduled trial to the second scheduled trial cannot be attributable to the pandemic. They argue that only the period of time that the court was not conducting any in-person trials should be deducted from the total delay. In effect, that means that only the time between May 5, 2020 either to the end of June 2020 or September 2020 when the court was able to hear in person trials should be deducted as delay attributable to the pandemic.

[4] The Applicants argue the remaining delay cannot be attributed to the pandemic. They say I need to look at the implications of the Court's actions on the Applicants. Those actions have resulted in there being now over 12 months of additional delay in getting these Applicants to trial. They say that when scrutinized, the Court's decisions exacerbated the delay experienced by the Applicants. They argue that the Court could have undertaken a case by case and region by region review and not simply ordered the adjournment of all trials by Master Order. The Court's actions failed to consider what the appropriate response was for Grande Prairie and what the appropriate response was for these Applicants. Whether or not you criticize the Court's response to the COVID 19 pandemic, the outcome is that these Applicants face a delay of 40 months to trial. The Applicants say that delay is unreasonable and cannot be excused.

[5] The Crown argues that the pandemic was a discreet exceptional event and that the entire delay from May 5, 2020 to the scheduled completion of trial on May 21, 2021 should be deducted. The Crown says that it's important to remember that the Supreme Court in *Jordan* was responding to a culture of complacency, where all participants in the justice system had to assume a proactive role in addressing delay. It says those same policy concerns are not in play here. In the same vein, the Crown says that it was appropriate for the Court to take time to respond to the pandemic, to build out solutions and to ensure all justice system participants were safe before resuming operations. The Crown argues that the system functions now because of the carefully considered decisions made.

[6] With respect to the backlog of cases created by the shutdown, the Crown argues the Court prioritized the vulnerable cases, and that had the Crown been aware of the Applicants' concerns of delay, they could have more proactively addressed delay.

Background

[7] The Applicants were arrested, charged and released on January 22, 2018. A replacement Information was sworn on March 21, 2018. The Applicants elected to proceed by Queen's Bench Judge alone and a preliminary inquiry was booked for March 11, 2019. When that date came, the Applicants waived the preliminary inquiry and consented to committal.

[8] Trial dates were booked on April 23, 2019; a pre-trial conference was held on September 16, 2019 and trial was scheduled to commence May 5 and to conclude May 8, 2020 (12 months from committal). Had it proceeded as scheduled, the trial would have concluded about 27 1/2 months after the Applicants were charged and therefore within the presumptive ceiling set by the Supreme Court in *Jordan*. Those initial trial dates were lost when the Court suspended in person matters in response to the COVID 19 pandemic.

[9] The trial was rescheduled in July, 2020 for 3 days commencing May 18, 2021.

[10] The issue raised by the Applicants is not whether the pandemic is an exceptional discrete event in the language of *Jordan*, but whether the entire delay between the first trial and the second trial is attributable to the pandemic and should be subtracted from the total period of delay. The issue is whether the Court took reasonable steps to mitigate the delay that resulted from the COVID 19 pandemic and to safeguard the Applicants' right to trial within a reasonable time under s. 11(b) of the *Charter*.

[11] For the purposes of this application where there is no allegation of defence delay, the main steps of the *Jordan* analysis are as follows:

- (1) calculate the total delay, from the date of the first Information;
- (2) compare the total delay to the "presumptive ceiling" of 30 months from the sworn date of the Information; and
- (3) determine whether any period of delay caused by a "discrete exceptional event" must be subtracted from the total period of delay.

[12] A discrete event is an unforeseeable or unavoidable development that interferes in the prosecution of charges against an accused person. In *R v Cody*, 2017 SCC 31 at para 41, the Supreme Court observed that a discreet event results in quantitative deductions of particular periods of time. In this exercise, the delay caused by the discrete exceptional event or by circumstances that are reasonably unforeseeable or unavoidable is deducted to the extent it could not be reasonably mitigated by the Crown and the justice system.

[13] As we all know, the world experienced a significant shift with the onset of the COVID 19 pandemic. This Court's first public announcement regarding the pandemic was issued on March 12, 2020 signaling the Court's need to prepare for the possibility of disruption to court operations. Internally, the Court created a pandemic response committee that began meeting daily to monitor the potential impact of the pandemic on court operations. By March 13, 2020 jury trials were suspended and by March 15, 2020 the Court limited hearings to emergency or urgent matters only. For criminal matters, emergency or urgent matters encompassed detention, bail review, and arraignments for in-custody accused. It otherwise resulted in the immediate suspension of in-person criminal trials.

[14] By various Master Orders, the suspension of sittings was extended through to June 26, 2020. Across the province, a total of 380 criminal trials were adjourned due to COVID 19 from March 15 to September 1, 2020. In Grande Prairie, 14 criminal trials were adjourned due to COVID 19.

[15] On May 22, 2020, the Court announced its intention to conduct short judge alone criminal trials via WebEx and in-person with COVID safe courtrooms. The Court's public notice reads:

Commencing June, July and August, 2020, the Court will be hearing some short, judge-alone Criminal trials in-person in COVID-safe courtrooms. The Court will also be hearing some short, judge-alone Criminal trials via WebEx video, where the accused is represented by Counsel and both Crown and Defence Counsel agree to proceed in this manner.

Priority will be given to trials that were scheduled to be heard between March 16 and June 26, 2020, and cancelled pursuant to the Court's Master Orders due to the

pandemic. Additional consideration will be given to *Jordan*-compromised trials and trials involving in-custody accused, as well as other particulars detailed in the Criminal Trial Triage Form.

To request a short Criminal trial slot between June and August, Counsel must complete the Criminal Trial Triage Form in full.

[16] From this announcement, it is clear that priority was given to trials that were scheduled to be heard between March 16 and June 26, 2020. The Applicants suggest this trial would not have qualified for a summer trial date but provide nothing other than this bare assertion.

[17] By experience, there was limited uptake on the Court's offer to conduct criminal trials over the summer, with the result that the Court made the time available for family matters, civil matters and judicial dispute resolution. In the meantime, the Court aggressively undertook pretrial conferences on criminal matters in an effort to get its arms around the backlog and its current bookings. In addition, the Court established priorities for the rescheduling of adjourned matters.

[18] The Court resumed criminal appearance court province wide on June 5, 2020. Its public announcement on June 4, 2020 was that "booking priority will be given on CAC lists in June to September 4, 2020 to in-custody matters, trials that were *Jordan*-threatened prior to the pandemic and trial adjournments from March 16, 2020 to June 26, 2020." In Grande Prairie, criminal appearance court resumed June 15, 2020. Given that trial bookings are made well in advance, at that point, the adjourned trials were being scheduled into an already populated calendar.

[19] New trial dates for this matter were secured on July 17, 2020 with trial set for May 18-21, 2021.

[20] To this point, my comments regarding the Court's response to the pandemic have focused on criminal matters. At the same time, there remained urgent need for emergency protection orders, to hear family and parenting matters, and to process surrogate matters. In essence, life carried on in an even more socially, emotionally, financially and physically challenging environment that itself raised new issues regarding family breakdown, family violence, and business and economic crisis. It has always been that the Court's resources must respond to every instance where life intersects with the law; however, as all of us can imagine, many of the issues before the Court became more acute.

[21] Within that broad context, the Court faced workforce impacts. When the Alberta Government declared a public health emergency on March 17th, the Court, like most organizations, was impacted by absenteeism due to self-isolation, child care issues and other circumstances, and by the restrictions on indoor public gatherings. Attendance at courthouses was almost immediately limited. Those who were working remotely and at the courthouse were asked not just to meet the daily needs, but to develop and implement new online / virtual processes.

[22] In addition, the Court had to ensure suitable physical facilities. Over the late spring and summer, plexiglass was installed in courtrooms across the province and public safety guidelines were established for social distancing, cleaning and sanitation requirements in the courthouses. In Grande Prairie, by June 17, 2020, three courtrooms had plexiglass installed. By September 9, 2020, all courthouses across the province had plexiglass installed in at least one courtroom. In

addition, the Court established off site locations throughout the province to allow for the resumption of jury trials starting in September.

[23] Finally, the Court's efforts had to be collaborative. The ability to operate criminal in-person trials depends not just on judicial resources, but clerk, sheriff, court reporting and court administration resources. It requires coordination with other agencies, including the Crown, police and courthouse security, to name just a few, all of which expect there to be reasonable measures in place to protect the health and safety of their members.

[24] The pandemic impacted each of these areas.

[25] The question of whether the justice system failed to reasonably mitigate the effects of the pandemic resulting in excessive delay was considered and rejected by Justice Renke in *R v Pettitt*, 2021 ABQB 84. In assessing all that was needed to be adapted and accommodated to resume operations, Justice Renke concluded that the Court made reasonable efforts to clear the delay. Following Fowler Byrne, J in *R v Walker* 2020 ONSC 8153, he concluded that the time needed to address the backlog created by the pandemic fell within the exceptional circumstances created by the pandemic and was not the consequence of insufficient response by the actors in the justice system. He attributed the entire delay from the date of the first trial to the date of the second trial to the pandemic.

[26] In *R v Harker*, 2020 ABQB 603 at para 18, Justice Kubik talked about the Court's response to the pandemic in this way:

The Pandemic has injected uncertainty into Court scheduling. ...In addition, the Court continues to have to balance priorities to address not only the backlog of cases resulting from the Pandemic, but also the availability of COVID-safe court facilities and virtual courtrooms. ...The Court's response to the Pandemic also reflects balancing the right of access to justice, amongst a wide variety of litigants, with public safety. As such, in considering all of those interests, the public safety considerations, as a part of public confidence are paramount in the time of a pandemic.

[27] In *R v Parent*, 2021 ABQB 66, Justice Neufeld addressed an argument from the accused that the government failed to properly prepare in advance for catastrophes such as the COVID 19 pandemic. Justice Neufeld said the following at paras 18-19:

...the Crown and the justice system are called on to take reasonable measures to prioritize cases that have faltered due to unforeseen circumstances of all kinds as and when they occur.

That is exactly what happened in this case. All of those involved, including defence counsel, the Crown and the Court took advantage of the steps available to reduce the delay caused by the first adjournment. The case was properly prioritized so that it could proceed as soon as reasonably possible while maintaining the health and safety of those involved and complying with public health directives. This was done in the context of a broad range of measures instituted by the Court to maintain services during the pandemic, including development of off site facilities for jury selection and trials that would allow for social distancing to be maintained, together with enhanced hygiene, and physical barriers within the courtroom itself.

[28] Justice Neufeld concluded that the entirety of the delay due to the adjournment must be deducted from the total period of delay for the purpose of determining whether the *Jordan* ceiling has been exceeded.

[29] In *R v Ofiaza*, 180360893Q1 (unreported: Calgary QB, November 4, 2020) at page 6 lines 13-16, Justice Ashcroft observed that “[t]he global pandemic and its effect on the Court system is unprecedented, resulting in this Court necessarily adjourning pursuant to the Master Orders, trials, and matters in all areas of law in order to protect the health of individuals and limit the spread of the virus in the community.” She concluded that the time from when trials resumed to when Mr. Ofiaza’s trial could be scheduled formed part of the pandemic related delay and that it was not reasonable to have refocused resources to respond to one matter over all others.

[30] Discreet exceptional events can be deducted from delay if the Crown and justice system cannot reasonably mitigate the delay. Paragraph 75 of *Jordan* states:

the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e. it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).

[31] As court operations resumed, the court had to ensure the necessary infrastructure and protocols were in place to support a safe return of the public and justice system participants to courthouses across the province. It is evident that reopening of courts was not a return to business as usual. We continue to face constraints and require further transition to continue to deliver justice while respecting public health protocols, minimizing in person attendance at our courthouses, minimizing travel, and maximizing remote proceedings where possible. However, since resuming operations, trials have been conducted safely for all participants no doubt in part because of the carefully thought out and operationalized measures put in place.

[32] Against these observations, I have not been presented with any evidence that suggest this Court should have mitigated the delay caused by the COVID 19 pandemic differently. Nor am I aware that any Canadian jurisdiction responded materially differently than here. In fact, the Court of Queen’s Bench response to the pandemic was consistent with that of other superior courts across Canada. See, for example, *R v Walker*, 2020 ONSC 8153. And nationally, an Action Committee on Court Operations in Response to COVID 19 co-chaired by the Attorney General Canada and the Chief Justice of Canada was established to provide national leadership to support the safe return of court operations, while ensuring the safety of court users and staff.

[33] This Court responded to the pandemic by setting priorities for when in-person matters could resume, allocating resources impacted by the pandemic in places to meet those priorities, allowing summer sittings, reconfiguring its courtrooms to allow for the resumption of in-person hearings and rolling out on line solutions. The challenges presented by the pandemic were unprecedented and complex. The magnitude of change in the context of this Court has been staggering.

[34] Keeping in mind that this Court had matters already scheduled for this winter to spring term and that dates require coordination of counsel, there should have been no reasonable

expectation that this matter could have been more aggressively scheduled than the earliest days offered by the court coordinator.

[35] I am satisfied that the entire delay occasioned by the COVID 19 pandemic from May 5, 2020 to the anticipated completion of trial on May 21, 2021 is properly considered an exceptional circumstance and should be deducted from the total delay.

Conclusion

[36] The delay in this matter from the date of the first Information to the conclusion of trial is 40 months (Jan 22, 2018 to May 21, 2021).

[37] The total delay attributable to the pandemic runs from May 8, 2020 to May 21, 2021. That amounts to 12 months, 13 days. When that amount is deducted from the total delay, the remaining delay is below the 30-month presumptive ceiling in *Jordan*.

[38] Given my finding that the remaining period of delay falls below the presumptive ceiling, the onus falls to the Applicants to show that the delay was nonetheless unreasonable: *Jordan*, at para. 48. In order to do so, the Applicants must show that they took meaningful steps that demonstrate a sustained effort to expedite the proceedings and that the time to conclusion of trial took markedly longer than it reasonably should have: *Jordan*, at para. 82.

[39] For the reasons already expressed, the Applicants have not met the onus of showing that this delay was unreasonable. The Applicants' section 11(b) application is dismissed.

Heard on the 21st day of April, 2021.

Dated at the City of Grande Prairie, Alberta this 26th day of April, 2021.

Given orally in Court on the 23rd day of April, 2021.

N.F. Dilts
J.C.Q.B.A.

Appearances:

C. Millsap Q.C.

For the Applicant- Alexander Kalashnikoff (Accused)

C. Millsap Q.C. (agent for Mr. Gubbins)

For the Applicant – Matthew Roberti (Accused)

P. Moreau

For the Applicant- Tara Cartwright (Accused)

S. Edwards

For the Respondent- Crown