ONTARIO COURT OF JUSTICE

DATE: November 10, 2016
CITATION: *Ontario (Ministry of Labour) v. Sterling Crane Division of Procrane Inc.*, 2016 ONCJ 692

B E T W E E N :

Her Majesty the Queen (Ontario Ministry of Labour)

— AND —

Sterling Crane Division of Procrane Inc.

Before Justice of the Peace S. E. Whelan
Heard on September 20 and 21, 2016
Reasons for Judgment released on November 10, 2016

Mr. T. Schneider and Mr. M. Nicol ..... Counsel for the Crown
Mr. R. Conlin and Mr. J. Schwartz…….Counsel for the Defendant Sterling Crane

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JUSTICE OF THE PEACE Whelan:

Sterling Crane Division of Procrane Inc., the Defendant, has brought a motion for a remedy under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter") for an Order granting a stay of the proceedings pursuant to section 11(b) of the Charter of Rights and Freedoms ("the Charter") alleging excessive, constitutionally unreasonable delay in the matter before the Court.

1: **MATERIAL FACTS**

Both the Defendant – Sterling Crane, and the Crown, acknowledge and agree:

Procrane Inc. is a corporation incorporated pursuant to the laws of Canada and which operates through its division, Sterling Crane, in Corunna, Ontario.

This matter arises out of a critical injury suffered by one of Sterling Crane's workers that occurred on a construction site on May 7, 2012.

The critical injury occurred following an annual maintenance inspection of a crane in Sterling Crane's shop on May 6, 2012.

The Ministry swore the Information on May 3, 2013, approximately one year later.

Twenty-four months passed between the laying of the Information and the first date of trial.

1.1: TIMELINE OF COURT PROCEEDINGS

At the first appearance on June 21, 2013, the record indicates that all parties are requesting the matter be adjourned for one month to discuss resolution.

On July 19, 2013, the matter was further adjourned to August 16th to allow time for the co-accused individual that was charged to also obtain disclosure. There were no objections to this adjournment.

On August 16th, 2013, the matter went to September 20th, 2013, to allow the co-accused individual time to review the disclosure. There were no objections by Sterling Crane.

On September 20th, the Crown and Sterling Crane were both prepared to set a pre-trial date – however, the co-accused individual had only recently retained counsel – and all parties consented to the adjournment to October 18th, 2013. On September 20th, Sterling Crane did not object to this extension – but did indicate that they were not waiving Charter rights ***after*** the Crown raised concern that Charter rights may apply to the individual that was co-accused. This is the only time, throughout the entire proceedings, on the record that Sterling Crane ever raised Charter rights.

On October 18th, 2013, the matter was set for pretrial on January 20, 2014. There was no objection raised to this date.

The Crown did not attend the pretrial on January 20, 2014 – apparently the Crown was double booked – and by the time a Crown called into the pretrial there was no time to hear the matter on January 20th, 2014. The matter was than scheduled for April 28, 2014 – earlier dates were canvassed however defence counsel was not available. That being said, a new date would not have been required if the Crown had been on time.

On April 28th, 2014, the pre-trial began and was adjourned to May 26th, 2014, to complete the pre-trial.

The matter was then set for trial. The dates of August 18th to 20th, 2014, were offered, but defence counsel was not available, so the matter was than scheduled for December 8th and 9th for trial, with a confirmation hearing on November 17, 2014.

The Crown did not attend the confirmation hearing on November 17, 2014, so the trial dates of December 8th and 9th were cancelled, and the matter went to December 15th, 2014, to set a new trial date.

Although both the Crown and Defence counsel originally requested 5 days for trial, the pre-trial justice was only willing to schedule two days, and extended that to three days. The matter was set for trial May 11, 12, and 13, 2015 – with a confirmation hearing on April 20th, 2015.

On the third day of trial, a three day continuation was scheduled for September 28, 29 and 30, 2015 – on consent of all parties. No objection was raised – in fact, it was this Court that raised the concern about the delay in the scheduling of a continuation – not the Defendant - and there was no request for a section 11(b) stay at that time.

At the conclusion of trial, the Court requested written submissions due to the length of the trial, the time between testimony, the complexity of the matters, and the severity of the injury.

Final submissions were received April 21st, 2016, and the Defendant was convicted on June 21st, 2016.

The Court was prepared to hear submissions on sentencing on June 21st, 2016, however, both the Defendant and the Crown asked for an adjournment to provide submissions on sentencing and to investigate a possible joint position.

It was proposed by the Crown that the matter return July 8th, 2016, however the Defendant was not available, and it returned August 12th, 2016, to set the application date and sentencing date of September 20th and 21st, 2016.

The Defendant acknowledges that they did not bring an application pursuant to section 24(1) alleging a section 11(b) Charter breach for delay prior to the Supreme Court decision in ***R. v. Jordan***, 2016 SCC 27 (S.C.C.) as they did not have instructions to do so from their client.

There was no evidence placed before this Court on the institutional resources available. However, this Court takes judicial notice of the fact that Sarnia is a smaller jurisdiction, with limited resources, and does not sit every day of the week.

The Defendant accepted the scheduling of events, and at no time requested a change in venue, to expedite matters, although that was within their rights.

2: ISSUES BEFORE THE COURT

[1] Does the Defendant have standing to bring this application?

The Defendant has argued that the Supreme Court made it clear that an Application for a stay of proceedings pursuant to section 11(b) of the Charter can be brought at any stage of a proceeding prior to sentence being imposed.

In ***R. v. MacDougall***, 1998 CarswellPEI 87(S.C.C.) pages 9 to 13, paras 9 to 26, the Supreme Court rejected the Crown's argument that section 11(b) was not applicable

to a proceeding after a conviction has been registered; and held that a section 11(b) application may be brought even after a conviction has been registered.

There is no dispute that the sentence had not yet been imposed in the current matter before this Court; however, in ***MacDougall*** the material facts are quite different. The issue was the delay from time of decision to actual sentencing. The Court found that the reasonableness of the delay must be assessed on a case by case basis, and ultimately determined that the delay was not unreasonable.

This Court was prepared to hear submissions on sentencing on June 21st, 2016, and this Court was also prepared to return on July 8th, 2016 for submissions, but the Defendant's counsel was not available.

However, this Court is bound by the decision in ***MacDougall***, and the precedent that Charter rights are to be given a generous and purposive interpretation. Therefore, this Court finds that the Defendant has standing to bring this motion before the Court.

[2] **Does the Charter apply to Corporations?**

Defence counsel has further argued, that the Supreme Court of Canada case, ***R. v. C.I.P. Inc.*** [1992] 1 S.C.R. 843, 1992 CarswellOnt 82 confirms that the Charter applies to Corporations, and with that this Court takes no issue. The Supreme Court clearly held in this decision, that the societal interest applies to corporate offenders as it does to individuals accused, and that the phrase, "Any person charged with an offence" in the context of s. 11(b) of the Charter includes corporations.

At the time of the ***C.I.P. Inc.*** decision, an individual could rely on the presumption of prejudice – however this presumption was linked to the liberty and security interests of an accused, not the fair trial interest. A corporate accused does not have the right to liberty and security of the person, therefore to succeed on a section 11(b) claim, prior to ***Jordan***, a Corporation had to persuade the court that its ability to make full answer and defence was impaired.

Defence counsel has argued that the presumptive ceiling in ***Jordan*** now removes the need to find this prejudice. This Court agrees that by establishing a presumptive ceiling ***Jordan*** may remove the necessity of prejudice in most cases, however ***Jordan*** clearly indicated that cases currently in the system were subject to the law as they were relying on it.

The Crown has argued that the Defendant has not provided any evidence that they were unable to make full answer. The only suggestion was that the co-accused individual had died before trial. However the co-accused was never a compellable witness; and therefore the Crown argues that his absence did not affect the Defendant's ability to make full answer.

This Court agrees with the Crown on this point, that the co-accused was not a compellable witness. Further, if the Defendant felt they could not make a full answer because of the death of the co-accused, than the Defendant should have raised this issue of prejudice prior to the trial commencing, or during the trial – and they did not.

[3] **What does the recent Supreme Court of Canada decision in R. v. Jordan, 2016 SCC27 (CanLII) say about the law governing section 11(b)?**

In the ***Jordan*** decision, the Supreme Court revised the legal test and developed a new framework for determining whether a matter should be stayed for unreasonable delay pursuant to section 11(b) of the Charter.

In the first four paragraphs of the decision, the Court stated the reasons for this fundamental change:

> Timely justice is one of the hallmarks of a free and democratic society. In the criminal justice system, section 11(b) of the Charter guarantees the right of accused persons "to be tried within a reasonable time".
>
> Canadians expect the criminal justice system to bring accused persons to trial expeditiously.
>
> An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself.
>
> The current system has come to tolerate excessive delays and fostered a culture of complacency within the system.

In addition, the Supreme Court made it clear that the prior legal regime governing section 11(b), under ***R. v. Morin***, [1992] 1 S.C.R. 771, resulted in a sometimes confusing system of assessing fault for delay, and making potentially arbitrary assessments about prejudice to specific defendants.

In the ***Jordan*** decision, the Supreme Court set out the new test, at paragraph 46 and 47:

> "At the heart of the new framework is a ceiling beyond which delay is presumptively unreasonable. The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry).
>
> If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling, then the delay is presumptively

> unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow."

The determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. And although the list is not exclusive, they will generally fall under two categories – discrete events and particularly complex cases.

[4] **Does Jordan apply to the regulatory matter before the Court**

One of the challenges before this court was to determine if the ***Jordan*** decision, based on an individual in a criminal matter, and the companion decision of ***R. v. Williamson***, 2016 SCC 28, also based on an individual in a criminal matter; now apply to the current matter before this court – a regulatory matter in which a corporation is charged.

The Defendant has argued that yes, indeed, the new framework does apply and that the application of the ***Jordan*** test is relatively straight forward and simple – did the prosecution exceed the presumptive18 month ceiling now imposed by the Supreme Court from the time charges were laid to the conclusion of the trial, and if so whether any delay can be attributed to the Defendant.

The Defendant has also argued there is no doubt that this matter is beyond the 18 month ceiling imposed by the Supreme Court in Jordan. Further the Defendant has argued that they are not responsible for any of the delay, and that have not waived delay at all during the proceedings. The Defendant does however concede that they only referred to their rights under section 11(b), once, during the early days of the proceedings.

Primarily the Crown has argued that ***Jordan*** does not apply to this case. ***Jordan*** is a criminal case about an individual – it does not address regulatory matters, nor does it address corporations. Throughout, ***Jordan*** refers to an individual as he or she, never to it.

However, without prejudice, and in the alternative, the Crown has argued that if ***Jordan*** does apply, than exceptional circumstances do apply – as well as, and perhaps more importantly, the special transitional circumstances will apply.

This Court agrees with the Crown, that ***Jordan*** is about criminal matters of an individual; and the companion decision of ***Williamson*** is as well. However, the Charter does apply to Corporations and since ***Jordan*** creates a new framework for the application of the Charter; although silent in the decision, this Court accepts that ***Jordan*** may also apply to charges stemming from regulatory offences, as the

previous Supreme Court decision of ***Morin*** did.

The decision in ***Jordan*** attempts to provide very clear guidance for cases currently within the system and outlines the need and application for transitional cases, carefully and in detail. Although focussed on criminal cases and their progress through the court system, this Court finds that one of the main principles identified in ***Jordan***, the right to timely justice, should apply to regulatory offences, and to all individuals, including corporations.

[5] **What does *Jordan* say about cases already in the system – the transitional provisions**

In ***Jordan*** the Supreme Court made direct reference to cases already in the system. Paragraphs 92 to 104 discuss the Supreme Court's proposed transitional provisions, and how they should be applied.

The Supreme Court specifically referred to ***R. v. Askov***, [1990] 2 S.C.R. 1199 (S.C.C.) and identified that they did not want the decision in ***Jordan*** to result in numerous charges being stayed or dismissed automatically, nor did they wish to create a similar situation to what occurred after the release of ***Askov***. At paragraph 94, the Supreme Court instructs the courts "to apply the framework contextually and flexibly for cases currently in the system." Although they refer explicitly to criminal matters, if ***Jordan*** is to apply to regulatory matters, it is this courts opinion that the same transitional provisions will apply.

Paragraph 94 also identifies the new incentive for both the Crown and the defence to expedite cases. In the matter before this Court, there was undoubtedly some delay to the start of trial due to a missed judicial pre-trial by the Crown – however there is no evidence before this Court that the Defendant did anything to expedite the proceedings prior to the commencement of the trial. In fact, the delay in written submissions being received in a timely fashion was partly due to the Defendant's failure to notify the Court of change of address.

And although this Court agrees with the Defendant that the delay may in fact exceed the new presumptive ceiling, this Court finds in accordance with paragraph 96, that a transitional exceptional circumstance applies.

Both parties relied on the law as it previously existed – where prejudice was required. As prejudice could not be proven by the defendant, there was no section 11(b) application prior to the start of trial, during trial, or prior to conviction. There were also no efforts to expedite proceedings as the Defendant agreed to all adjournments, and did not raise the issue of section 11(b) except early on in the process. It is only now, after conviction, and in the timeframe that this Court allowed the Defendant to secure a joint submission for sentencing, that ***Jordan*** was released and this application commenced.

There is no doubt that the case before the Court was proceeding on a timeline and in a manner that both parties accepted as the "normal pace" – it was the state of the law as it previously existed. At the time of this application there had not been time since the release of ***Jordan*** to correct, or amend any behaviour in setting trial dates within the POA court structure; nor had the system had time to adapt.

In light of ***Jordan***, the "normal pace", previously acceptable for regulatory offences, will undoubtedly have to change – but that will also require additional resources and court time to accomplish this. The Supreme Court recognized in Paragraph 97 that change takes time.

The Supreme Court also acknowledged that the seriousness of the offence, and the complexity of the case, may contribute to delay that may exceed the ceiling under the previous system.

The defendant has argued that the Sterling Crane matter was straight forward and not particularly complex whereas the Crown has argued that it was complex.

Jordan identified at paragraph 77, that "Particularly complex cases are cases that because of the nature of the evidence or nature of the issues, require an inordinate amount of trial or preparation time such that the delay is justified."

The Crown has argued that the matter before this court was complex and did require more trial time. The case took six days of trial time – and in regulatory offence matters such as this – and in this Courts experience - the Court agrees that six days of trial is substantial. The Crown has also argued it was complex – the case also involved two competing experts on engineering matters; numerous technological terms and understanding of crane operation, maintenance and stowage of Jibs; and a societal interest in justice of the severely injured worker; hence this Court finds it was not a simple straight forward matter.

The Defendant has also argued that ***Williamson*** was a more heinous crime – and that societal interests were at their highest, and yet the matter was stayed due to section 11(b). The Crown has argued that ***Williamson*** was a straight forward, criminal case, with a limited number of witnesses, and that Williamson's defence counsel continued to press for earlier dates and action throughout.

There is no doubt that the criminal crime alleged in ***Williamson*** was a heinous crime, however, ***Jordan*** was also very specific about when and how transitional guidelines should and do apply. It is not just about the type of offence that determines how section 11(b) will apply. It is also about the complexity of the matter – and this court finds the matter was both serious and complex, for a regulatory offence.

Although paragraph 98 reminds us of the s. 11(b) rights of all accused persons and that they shall not be held in abeyance while the system responds – this Court is left with little doubt that the circumstances of the case before it would not qualify for a stay of proceedings. There were numerous opportunities throughout the process for the Defendant to raise section 11(b) Charter rights - and they failed to do so.

[6] **The law at the time of Trial**

Further at the time of the trial ***Morin*** was still applicable.

Specifically, and on the record as indicated in the transcripts in the matter before this Court, both parties were asked at the end of pre-trials if they wished to put anything additional on the record when future dates were being set – and neither party did – on more than one occasion.

In addition, when this trial started in May of 2015, no section 11(b) application was brought, and nor was delay ever raised as an issue by the Defendant, nor were any earlier dates sought. In May of 2015, when this court questioned the length of time to schedule the continuation into September of 2015, the Defendant advised those were the earliest dates proposed – but again did not raise an objection or urgent concern.

Further, when this Court asked for written submissions prior to decision, the Defendant did not object or raise a concern about delay. And in meeting the submission timeline this Court notes the Defendant's submission was late first, due to failure to provide change of address, and then simply due to failure to meet the actual submission date - without explanation.

The Defendant is now claiming that they are not responsible for any delay; and that they preserved their section 11(b) argument throughout.

There is no doubt that the Defendant was and is entitled to raise section 11(b) arguments – but as a shield – not a sword; and in this court's humble opinion, waiting until after a lengthy trial, on a relatively complex matter with serious injury outcomes; and only after conviction; the Defendant is now attempting to use section 11 (b) as a sword.

In this Court's opinion, this was never the intended use of section 11(b). And this Court finds that the Defendant did not take any initiative to move the case along at a faster pace, but in fact also contributed to the length it took.

If Sterling Crane wished to bring a Charter argument under the previous system – they could have done so – at numerous points along the way. They did not. And the reason they did not, this Court finds was because they were unable to show preju-

dice. Prejudice and the seriousness of the offence often played a role in whether delay was unreasonable under the previous legal framework.

Yes, the Defendant can establish that the Crown missed a judicial pretrial date, and a confirmation hearing, however, this only explains approximately five months of total delay. Aside from this apparent hiccup, the process was proceeding, with the consent of both parties, in setting dates and establishing timelines.

In weighing the competing interests – this Court recognizes that there is a societal value in regulatory offences being prosecuted.

3: **Conclusion**

This Court finds that the Defendant's application does not succeed under section 11(b) for the following reasons:

[1] The defendant did not request that things move along as proactively as ***Williamson*** did; nor did the defence articulate their concern with or for delay.

[2] Transitional cases involving corporations cannot have presumptive prejudice – hence the need to look at the law as it existed prior to ***Jordan*** – and therefore the need to be able to demonstrate lack of fair trial according to the case of ***C.I.P. Inc.***

[3] The release of the decision in ***Jordan*** does not allow the Defendant to use section 11(b) as a sword instead of a shield.

[4] Societal interests are high when a severe work injury is involved, as in this matter; and this application is brought after conviction, within days of sentencing.

[5] A trial that takes six days to complete with engineering evidence, a reconstruction of the accident scene, and competing expert evidence, is not a simple or routine trial – it is relatively complex.

[6] ***Jordan*** does not create a passive right to section 11(b); certainly accused persons are to be tried within a reasonable time, but they themselves cannot remain passive and must assist in moving things along.

[7] Failure by the Defendant to assert section 11(b) rights in a timely fashion during the proceedings, based on reliance of the law at the time, speaks volumes.

[8] Institutional delay even if significant will not create an automatic stay when both parties relied on the law as it existed prior to the release of ***Jordan.***
The current system for regulatory offences is not designed to accommodate lengthy trials within 18 months – change is required.

It is very clear from the record, and the submissions during this application, that the Defendant was content with the pace of the proceedings until ***Jordan*** was released. They did not bring a motion, or an application for an earlier date, or to stay proceedings at any point – until after conviction.

For all of the above reasons the application for delay under section 11 (b) is dismissed.

Written reasons released: November 10, 2016

Signed: “Justice of the Peace S. E. Whelan”