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R. v. Hill, 2016 ONCJ 623 (CanLII)

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ONTARIO COURT OF JUSTICE

CITATION: *R. v. Hill*, 2016 ONCJ 623
DATE: 2016-09-22
COURT FILE No.: Brampton 14-11467

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

ROBERT HILL

Before Justice W.J. Blacklock
Heard on August 19, 2016
Reasons for Judgment released on September 22, 2016

T. Sferruzzi..... counsel for the Crown
B. Starkman..... counsel for the defendant Robert Hill

BLACKLOCK J.:

[1] I have before me Mr Robert Hill who is charged with the offences of impaired operation of a motor vehicle and over 80. He has brought an application for a stay on the basis that his right to be tried within a reasonable time, as guaranteed under section 11(b) of *The Charter of Rights and Freedoms*, has been denied.

[2] The accused was originally charged in August of 2014. The merits of this matter are now set for trial on November 16 and 17, 2016, over two years after the charge was laid

[3] Its history can be summarized as follows.

[4] The charge was laid August 14, 2014. The first appearance was August 27th. Disclosure was provided to counsel and the matter was adjourned to September 17th. On September 17th counsel was ready to set a trial date and did so for April 8th 2015. This was approximately a further 7 months off. At that time, the matter was not reached and as a result, a new trial date had to be set. It was set for June 22, 2015 which was now in excess of 9 months from the original set date. On that date, defence counsel was detained in another court making submissions on another matter and as a result, Mr Hill's case had to be adjourned. The

matter was put over to the next day, June 23, 2015, to set a date. A trial date was set then but it was soon realized that defence counsel's office had set another case for trial on the same date around the same time and the matter was then placed on the list for July 8th to set a new date. At that time the Crown package was not in court and the set date had to be adjourned to July 15th. Again the Crown package was not in court and the matter had to be again adjourned to July 22, 2015. On July 22nd, trial dates of March 8th and 9th, 2016 were set. It is agreed between the parties that this period should be treated as delay attributed solely to the defence except for the period for which the Crown package was not available, which delayed matters an additional two weeks. When the parties appeared for trial on March 8th, one of the essential police witness was not available and the matter was again adjourned to June 16th and 17th.

[5] The defence in this matter ordered the transcripts immediately following the March 8th adjournment appearance. There were some relatively minor delays in the system in producing those transcripts but they were available as of March 29th. Shortly thereafter, the defence began work on an 11(b) motion and the preparation of the necessary documentation and factum. On May 5th, the defence attempted to set a date for the 11(b) prior to the June trial date but were told that there was no date available to the court and counsel prior to the June trial date. The defence materials on the 11(b) motion were delivered to the Crown on May 16th, other than a copy of the accused's sworn affidavit. An unsworn copy of this affidavit was provided on May 31st with a sworn copy to follow. It eventually arrived June 13th but was, as I understand it, the same as the unsworn copy. A Crown complaint in some form appears to have been communicated to the defence, and as consequence, a further affidavit of Ms Bilodeau was filed on June 9th. The Crown filed no response of any sort.

[6] The parties appeared on June 16th. As it turned out, the assigned judge was ill.

[7] As a result, efforts were made to move the case to another court to be heard. The matter was traversed to two different courts to try to accommodate it. When the matter was spoken to in those other courts, discussions were had as to how the matter

should proceed and to what extent those courts could deal with it in light of the other judges' schedules. The first judge took the position that she could not, given her schedule that week, accommodate a two day matter. The case was traversed to a second court. In this court, there were discussions as to whether the 11(b) could be heard and the order of proceeding. The Crown took the position that the trial should proceed first, as the Court's rules had not been complied with in terms of arguing the 11(b) application 60 days in advance of the trial date and in failing to provide the Crown with timely notice to deal with the 11(b) motion. The defence wanted the 11(b) to proceed first but certainly indicated a willingness to proceed with the trial first. In the end, the presiding judge asked the parties to go to the trial coordinator to get a sense of whether it would be more reasonable to start the case and become seized or to simply put the whole matter over to fresh dates. In the end, he concluded that it made most sense to put the whole matter over to be scheduled with the 11(b) to be argued in August and trial date to be set in November 2016, as opposed to starting the matter, and perhaps being seized in a way that also required a lengthy adjournment.

[8] There was also an affidavit filed by the accused making reference to material which, under the law at the time, could support a finding of actual prejudice. Its content was not challenged in this proceeding, although it was suggested that some of the prejudice was not applicable to the Crown delays in this case. The affidavit shows that even prior to being charged, Mr Hill had been diagnosed with anxiety disorder and was on medication. As the matter proceeded from adjournment to adjournment, his disorder worsened and his medication had to be increased. He resigned from his job. He needed his licence to hold his job and he was concerned that if he did not seek other employment, he could suddenly be completely unemployed if convicted. As a result, he took employment that did not require him to drive but this resulted in him suffering in terms of the level of his salary. He has been unable to safely reapply for employment similar to his former position until his trial was complete. He deposes that he thinks of the case constantly and is distracted by it. He was recently suspended from work due to a work place accident that he caused which he says was due to his level of distraction relating to this matter. He has also, needless to say, incurred additional legal expenses arising out of the adjournments in this matter.

[9] On July 8th, after the defence had received instructions to

launch this application, had ordered all the transcripts, had prepared and filed its material including its factum and case book, and had prepared to argue this matter on the June 2016 dates, the Supreme Court of Canada released its decision in *R. v. Jordan* 2016 SCC 27 (CanLII).

[10] As I read this decision, the analysis for the majority authored by Justices Moldaver, Karakatsanis, and Brown signals a new approach to the section 11(b) analysis. It creates, for the first time, harder lines described as "ceilings", as opposed to what was earlier referred to as "guidelines", under what was the analysis advanced by the same court in *R. v. Morin* 1992 CanLII 89 (SCC), [1992] 1 SCR 771. These ceilings were also accompanied, for the first time, by presumption-like doctrines which controlled the burden. The seriousness of the offence does not appear, itself, a relevant concern any longer. At least, it can be said that weighing the societal interest in a result on the merits in the case before the court against other 11(b) factors no longer appears as an independent part of the test. The kind of role that prejudice to the accused plays in a *Jordan* analysis appears also to be different from one conducted under the former authorities.

[11] The majority makes it very clear that their approach rests on a real dissatisfaction with respect to the former analysis regarding section 11(b). It was said by the majority to have given rise to both "doctrinal and practical problems". It was said to be "too unpredictable too confusing and too complex". The majority said the former 11(b) analysis was itself a burden on the "already over-burdened" trial courts.

[12] The majority also observed that the former 11(b) analysis has contributed to practical problems. This includes promoting a certain culture of complacency. It is said that this approach involved a rear view analysis which did nothing to encourage the participants to take preventative measures to address inefficient practices and resourcing.

[13] It is said, in addition, as the complexity of pretrial matters increased, the former 11(b) analysis was too tolerant of delays arising out of the complexity of those matters.

[14] As a result, the majority in *Jordan* calls for the following type of analysis to occur.

[15] For matters in this court tried without there being a preliminary inquiry, they have established a “ceiling” of 18 months. It appears that the time necessary to complete pretrial steps not attributable solely to the defence will be seen as part of this 18 month ceiling. If the time the matter takes from charge to trial exceeds 18 months, having deducted any periods attributable solely to the defence, the onus will be on the Crown to show that the majority’s notion of exceptional circumstances applies. If there are exceptional circumstances bringing the otherwise objectionable delay under 18 months, then the defence still has a chance to discharge its onus to establish a breach of 11(b) as discussed below. If the Crown does not satisfy the court that there are exceptional circumstances bringing the case below the 18-month ceiling, a stay will automatically follow notwithstanding that there may be no actual prejudice demonstrated to the accused.

[16] If the time to trial is less than 18 months, the onus is on the defence to show two things. Firstly, they must show that the defence has taken “meaningful steps that demonstrate a sustained effort to expedite the case” and secondly, that the case took “markedly longer than it reasonably should have”.

[17] The meaning of this last phrase was fleshed out by the majority. The “reasonable time requirements of the case” is said to be derived from a “variety of factors”. These include the complexity of the case, local considerations and whether the Crown took reasonable steps to expedite the case. The more complex a case is, the longer its inherent time requirements will be. Local considerations will be determined by local judges in terms of them applying their knowledge as to how long a case of the nature before the court typically takes to get to trial. It is said judges should not parse each day or month but should step back and adopt a “birds eye” view of the case.

[18] Interestingly enough, the majority of the Supreme Court does not say anything about prejudice to the accused being a factor in the analysis as to whether or not the case took “marked longer than it reasonably should have”.

[19] The minority decision, authored by Justice Cromwell, also discusses, within the context of the differing framework they propose, the issue of determining how long a particular case should reasonably take to get to trial.

[20] The minority suggests this is an objective inquiry involving a combination of the amount of time it reasonably would take to complete the appropriate pretrial procedures, which would include processing the charge, making disclosure, dealing with bail, completing police and administrative paper work preparation, and the time necessary to litigate the case, which would include time to reschedule mistrials, to convene a judicial pre-trial, and the time necessary to try the issues in the case plus the time it is reasonable to allow to the institution of the court to make itself available to conduct that litigation. They too suggest that prejudice plays no role in the question of how long ought it reasonably take to try a particular case, except to the extent that an accused is in custody or bound by stringent bail terms.

[20] The majority recognize that the law they articulated was a departure from the past and they suggest some accommodation must be made for cases in the system to ensure firstly, that there are no Askov-like voluminous stays and secondly, to recognize that the parties may have relied on the previous state of the law.

[21] In light of this, for at least some cases that are in the system and that do not exceed the 18 month ceiling, there will be, in the interim, no requirement for the defence to show meaningful and sustained efforts to expedite the case, as this formed no part of their obligation prior to the decision in *Jordan*.

[22] In addition, it was said by the majority that the court should, for cases in the system, take a flexible and contextual approach that recognizes that the parties may have relied on the state of the former law.

[23] Let me now attempt to apply these principles to this case.

[24] The only time periods of delay that I see as “solely” the responsibility of the defence are the adjournment when counsel was held up in another court making submissions and some of the delay attendant on setting the new trial date. This would mean that the delay of 26 months between the charge and the anticipated trial would be reduced by about 8 months. This would mean that the over-all delay would be about 18 months.

[25] I am not however prepared to conclude that the last adjournment in June was solely the responsibility of the defence.

[26] The Crown suggests that the 11(b) was not set down to be argued 60 days in advance of the trial date as required by the rules, that they did not have sufficient notice to deal with the 11(b) issue and that on June 16th, the defence was in essence resisting proceeding with the trial first unreasonably and was wasting valuable court time doing so. They submit that this should be taken into account as reflecting upon the weight to be put upon the evidence of prejudice involved in the case. The Crown submits that had the trial started on the merits there may have been no need for the 11(b) and the matter may have finished. Alternatively, there may have been no need to schedule both the 11(b) and a two day trial, and as a result the matter may have been reached sooner.

[27] The defence perspective was that they behaved reasonably in trying to get their 11(b) perfected, Although not completely in compliance with the rules, and that the Crown still had had time to respond to its materials so as to keep the case on the rails. They take the position that they were prepared to start the trial first, but, little time if any, would have been saved by proceeding in part with the trial before the judge the matter was before last and then adjourning the matter for the 11 b and the rest of the trial.

[28] I accept that there was little the defence could have done to get the 11(b) prepared and argued 60 days before the trial date. While they made less than perfect efforts to get this matter perfected, their efforts in perfecting the application remain just passable given the relatively short time period they were dealing with between the March adjournment and the next trial date set in June. This case, in my view, had reached the stage where it called for greater cooperation between the parties, particularly given the two previous Crown adjournments of this matter.

[29] While the defence bear some responsibility for the difficulties that arose in June, I do not feel the adjournment of the June dates was fully their responsibility. It is true that they did take about 6 weeks after receipt of the transcripts to see if they could get a date for the 11 b in advance of the trial. I have no evidence however that had they moved more speedily they would have been able to do so. Moreover, this case presents a highly unusual circumstance in that I am satisfied that it is more likely than not that had the defence secured a date in advance of the trial date for the 11(b) it would have been stayed then then under *Morin*.

[30] Had the assigned judge on the 16th not been ill and the full

time allocated to the case been available, the matter could have started on its merits and, in my view, it would have been reasonable to expect the Crown, in the precise circumstances present here, to have been ready to address the 11(b) on day 2, with perhaps an opportunity to adjourn the matter briefly for supplementary oral or written submissions on the 11(b) if necessary.

[31] The law at the time as applied to this case regarding 11(b) was, in my view, relatively straight forward. The case had already been adjourned twice for reasons which tell against the Crown. The Crown had been in possession of the defence factum and transcripts for about a month in advance of the June trial dates. The civilian's evidence, I am advised by counsel, had been admitted by that point and it appears from the record that there were only two police witnesses. The Charter issue related to a straightforward issue regarding the time passing between the ASD's arrival at the scene and the demand. Had the case been started before the assigned judge for the full two days allocated, I believe it could have been, in essence, dealt with in a way that would have been fair to both parties and been completed, worst case scenario, very shortly after the June dates that had been set. In all those circumstances, the court may well have been willing to make the necessary orders abridging the rules to proceed this way.

[32] Certainly one of the real contributing causes triggering cause for the lengthy adjournment that occurred on the 16th appears to have arisen out of the judge's illness which created the difficulty of moving the case to different courts and trying to figure out how to best accommodate in light of all the circumstances and the other judges' schedules.

[33] My conclusion that the delay arising out of the last adjournment should not be seen as "solely" attributable to the defence means, as I understand it, under the approach of the majority in *Jordan*, that I should not deduct any part of this time from the overall delay. I would add that this conclusion may not have any meaningful impact on my conclusion here in light of my conclusion I reach latter on the question of "exceptional circumstance".

[34] In this case then, I am prepared then to proceed at this point in the analysis under *Jordan* on the basis that this case is one involving delay in excess of 18 months in duration, although it is very close to the line in this regard.

[35] A conclusion that the last adjournment should be seen as in reality attributable to the illness of a judge would render the delay neutral under the old law and under *Jordan* it would amount, in my view, to an "exceptional circumstance" under the new 11(b) framework. See *Jordan* para 72. Deducting the time arising out of this adjournment would leave the overall delay in this case at approximately 13 months, or 14 months if you include the entirety of the intake. Roughly 13 ½ if some of it is seen as solely attributable to the defence ie obtaining and reviewing disclosure. Under old *Morin* analysis, I would make the delay out at approximately 13 months of institutional and Crown delay after the parties were ready to set a date with evidence of actual prejudice.

[36] In this case, under the old law, as I adverted to above, it is clear to me that I would have stayed this charge. Even as of June, the overall delay clearly was sufficient to call for inquiry. There was delay attributable to the Crown and the institution of the court which significantly exceeded the old guideline of 8 to 10 months after the parties were ready to set a date in this matter. Some authorities can be found to suggest that the former *Morin* guideline for this jurisdiction should be 9 months. There was no waiver of any of these time periods. There was evidence of actual prejudice and some inferred prejudice given the overall length of the delay. While the defence is completely at fault for some of the delay, it is, in my view, a relatively modest portion of the delay that actually occurred. Defence counsel's conduct of the litigation would not have significantly undercut the weight I would put on the defence evidence of prejudice in the unique circumstances present here. Finally, when I weigh the societal interest in the prosecution against other factors in the case, I would have been satisfied in this case, under the former regime, that the defence had met their burden to establish an actual breach of 11(b) on the balance of probabilities and I would have stayed this charge.

[37] I agree with the Crown in this case that there are passages in the majority's analysis in *Jordan* that suggest that it will be very difficult for cases in the system with under 18 months of delay to secure a stay. The defence will have the burden to show, at least, that such a case has taken "markedly" longer than reasonable to come to trial. It seems that the question of whether or not delay is "markedly longer" than reasonable under a formal *Jordan* analysis is determined without reference to a prejudice analysis, at least prejudice in the broad *Morin* sense. The height of the hurdle for the applicant in such a circumstances comes into focus for me when I consider the following.

[38] Lets suppose, for example, that the court in this case was to completely ignore the prejudice component on the question of whether or not the matter had taken markedly longer than it reasonably should have to come to trial. One might still say intuitively 13-14 months of delay not attributable to the defence was a delay that was longer than reasonable for this type of matter to come to trial, but could one say that this was "markedly" longer than was reasonable?

[39] If one stops to think about it, there are a number of components to the question of what is the amount of time that it is reasonable to expect a basic impaired over 80 will take to come to trial. Cases do not automatically and instantly get to trial. Organizing has to get done. Disclosure has to be prepared, copied and gotten to the Crown and processed for distribution, Counsel has to be retained privately or through Legal Aid, disclosure needs to be reviewed by both the Crown and defence, at least a Crown pretrial needs to be held and that process needs to be completed. In some such cases, a judicial pretrial is required. Generally, to accomplish all these features, it would not be unreasonable to think that 30 to 120 days might generally be required and perhaps somewhat more for cases requiring a judicial pretrial.

[40] If one was to add that the former guideline of 8 to 10 months to that period of intake, which the minority appears to accept as legitimate, one might find that it is reasonable to take up to 14 months to try even this type of case (one that did not call for a judicial pre-trial). At what point short of 18 months could I then be satisfied that the delay in this case had become "markedly" longer than reasonable for a case of this type to take? Would exceeding the limit by 30 – 60 days be sufficient? Perhaps not. It can be thus be seen on this analysis that the window for a stay, even in this kind of a case under 18 months, becomes quite narrow.

[41] Moreover, in most cases now in the system, it is difficult for me to see how it can be said that the defence has truly "relied" on the former law regarding 11(b) other than perhaps by not taking initiative to move matters forward. That being the case, it seems to me difficult to say that there will ordinarily be a context which would call for an ameliorated approach to this question.

[42] This all suggests to me that Justices Moldaver Karaksanis and Brown in *Jordan,* and the Crown in its submission before me,

are clearly correct that in the vast majority of cases in this court, it will be a rare case in which delay under 18 months will lead to a finding of a breach. This will certainly be the case for new cases and will probably also be the case for matters in the system with one possible exception in my view.

[43] This is a case that is one of those rare exceptions, as I am satisfied that firstly, there was actual and meaningful reliance on the former state of the law by the defence, which opens the door to a more "flexible and contextual" approach and secondly, this case was one that clearly called for a stay under the former regime.

[44] In this case the defence actually incurred expense in ordering, preparing and filing their 11(b) materials, and in preparing and actually attending to potentially argue the issue on June 16th, prior to *Jordan* being released. Indeed, the fact that there was perhaps a very strong 11(b) argument under the old law, coupled with the Crown's position in refusing to accommodate proceeding on the 11 (b) application, may well have been one unspoken reason why the judge who last dealt with the case thought it best to put the whole matter over to the dates that have been currently set, rather than to start the trial on the merits himself.

[45] As I briefly adverted to earlier, at para 103 of *Jordan,* the majority does state:

> For cases already in the system the presumptive ceiling still applies, however, "the behaviour of the accused and the authorities" –which is an important consideration in the new framework "must be evaluated in proper context"(Mills at pg 948). The reasonableness of a period of time to prosecute a case takes its colour from the surrounding circumstances. Reliance on the law as it then stood is one such circumstance

[46] In addition, in the summary appearing at para 105, the majority states in part, "For cases currently in the system the framework must be applied "flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law."

[47] That combination of circumstances I have described above in paragraph 43 makes it appropriate, in my view, for me to look at how long this case should reasonably have taken to come to trial much more flexibly way than I normally would for new cases or for cases other cases in the system at the time Jordan was decided.

[48] In this case, counsel was retained from the very first appearance. There was a very brief adjournment to permit counsel to review disclosure that was provided on the first appearance to him and the trial date was then immediately set. There was Crown and institutional delay following that point amounting to at least 13 months even under the former 11(b) analysis, perhaps up to 14 months on a *Jordan* analysis. The 13 months is more than marginally beyond what was the guideline applicable to this jurisdiction, at that time, for this type of case under the *Morin* analysis. It could be argued that it was in fact verging on 50% beyond the applicable guideline. Moreover that delay was accompanied by a degree of actual prejudice. During that period, there were two adjournments that clearly fall to be considered against the Crown on this application and one of which was due simply to a lack of court resources. In addition, accepting that the last adjournment arose out of an exceptional circumstance, the system did little to prioritize the future hearing of the matter. The new trial dates were ultimately set almost 90 days after the new 11(b) date that was set and thus were a further five months form the June dates. It seems to me that, at a minimum, at that stage the Crown could have waived any need to have the 11(b) argued in advance of the new trial date which probably could have expedited matters to some degree. If I take all the unique circumstances of this case into account, I find I am satisfied that this matter has taken markedly longer that it reasonably should have to come to trial, and that being the case, there is a breach of 11(b) and there will be a stay.

[49] I recognize that I have not approached this matter applying all features of the new *Jordan* analysis. That is because this was a case that was in the system at the time *Jordan* was released and, more importantly, in this case there was clear reliance on the state of the former law by the defence in a context that under the old law clearly called for a stay even as of the last trial dates set in June.

[50] My conclusions in this case should not however be taken as amounting to a conclusion that 13-14 months is a period of delay that will, in any other case, necessarily be viewed as “per se” “markedly” longer than reasonable for a case like this to come to trial.

Released: September 22, 2016

Signed: Justice W.J. Blacklock

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