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ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

\- v. -

FONE MANAGEMENT GROUP & FITNESS ONE BRAMPTON & FITNESS ONE DUFFERIN & FITNESS ONE LAWRENCE & FITNESS ONE MALVERN & FITNESS ONE MANAGEMENT & FITNESS ONE PETER INC. & FITNESS ONE SCARBOROUGH & FITNESS ONE WINDSOR & FITNESS ONE YONGE INC. & JOHN WHEELER & JOHN WHEELER

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R E A S O N S   F O R   R U L I N G

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BEFORE HER WORSHIP JUSTICE OF THE PEACE L. DEBARTOLO
on Thursday, January 12, 2017
at NEWMARKET, Ontario

****

APPEARANCES:

L. Forestier — Provincial Prosecutor
J. Schwartz — Co-Counsel for John Wheeler et al
A. Boyce — Co-Counsel for John Wheeler et al

Regional Municipality of York
Court Administration

ONTARIO COURT OF JUSTICE

T A B L E   O F   C O N T E N T S

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15 REASONS FOR RULING 1

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THURSDAY, JANUARY 12, 2017

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REASONS FOR RULING

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DEBARTOLO, J.P. (Orally):

John Wheeler and Fitness One et al was charged on or about August the 18th, 2012 to January the 8th, 2015 with charges under the *Employment Standards Act* and

10 that's the *Act* of 2000.

If at any time - I'm encouraging you to stop me if you're - if I'm not clear on what I'm saying. So you can definitely stop me and I'll explain because I

15 don't know if I'm coming across clear or not with this cold that I'm having.

MR. SCHWARTZ: And I'm just getting over that myself, Your Worship.

20 THE COURT: Oh my God. Horrible virus. Anyways....

These matters were set for a five-day trial with the first date being November the 25th, 2016, December the 1st, 2016, May the 1st, 2017, May the 8th, 2017 and May

25 the 30th, 2017.

On the first trial date - on the first trial date of November the 25th, 2016, the defence presented the court with three motions: a preliminary motion, a

30 disclosure (Stinchombe) motion that was heard on December the 1st, 2015 which was the second day marked for trial, returning on December the 14th, 2016 in

order that the court can render the decision on the disclosure motion, and returning again January the 12th for this 11(b) motion that was argued.

The defence is stating that the court stay these charges, pursuant to section 11(b) of the *Charter of Rights and Freedoms*, because of the excessive constitutionally unreasonable delay in this matter.

The defence grounds for the appeal are as follows:

a) The Government of Ontario and the Crown breached the defendants' right to trial within a reasonable time under subsection 11(b) of the *Charter* by not completing the trial with the time limits set out in R. v. Jordan;

b) None of the delay is attributable to the defendant and at no time did the defendant waive their 11(b) rights;

c) That there are no exceptional circumstances that would warrant or excuse unreasonable delay in this case;

d) In the light of this violation, the defendant asked this court to impose a stay of the proceeding pursuant to section 24(1) of the *Charter*, which is the only appropriate remedy in these circumstances.

Defence council is stating that 22 months will have passed between the laying of the information and the expected end of the trial had it been conducted as originally scheduled on an *ex parte* basis on November the 25th, 2016 and December the 1st, 2016. With the additional continuation dates, there would have been 27 months will have passed between the swearing of the information and the final date of trial.

And further, defence is stating that there was nothing particularly complex about the trial relative to other prosecutions under the *Employment Standards Act*. The 22 months delay is primarily attributed to the lack of availability on the part of the court for appearances and trial dates, and to the decision of the court of its own initiative to schedule three pre-trials with lengthy adjournments interspersing them.

The information was sworn on February the 12th, 2015, and all of the defendants were served with a long-form summons to appear on April the 24th, 2015, courtroom T2, at nine o'clock in the morning. That was - these summonses were issued on February the 12th, 2015; that would've been - that would be two months and ten days from February the 12th to April the 24th.

April the 24th, 2015, was the first appearance and the court, Crown Counsel Mr. Alvarez and Mr. Wheeler all acknowledged that there were 12 information and Mr. Wheeler was representing all accused corporation as the president and himself. All matters were adjourned

to June the 26th, 2015, for the purpose of - for the purpose that Mr. Wheeler would review the disclosure and seek legal advice. The matter was marked "to be spoken to"; that's an additional two months and three days.

I will go on into a little later as to who absorbs these delays.

On June the 26th, 2015, Mr. Wheeler again appeared. Crown Counsel suggested that a judicial pre-trial be scheduled and the first available date the Crown Counsel, Ms. Glaister, being the person having carriage of the matter be set for November the 13th, 2015, at 11:30 a.m. That would be four months and twenty days. Mr. Wheeler did tell the court that he would have counsel on that day, agreed to the day, and did not waive his rights under section 11(b) of the *Charter*.

On November the 13th, 2015, Mr. Wheeler appeared as self-represented parties for all. Although the transcript does not reflect what occurred during the judicial pre-trial, it does reflect that the matter was adjourned for a second judicial pre-trial scheduled for January the 22nd, 2016, and that's an additional two months and nine days.

On January the 22nd, 2016, being the second judicial pre-trial, Mr. Wheeler appeared as self-represented for all parties. Again the transcript does not

reflect what occurred during the judicial pre-trial; however, Mr. Wheeler in his affidavit is saying that, "There is nothing to read. Then let's go to trial."

This brings us to the first preliminary motion in respect as to what occurred on this day. We all heard the court recordings. I'm not sure that you were here. Mr. Dhar was here, Madam Counsel.

MS. FORESTIER: Yes.
THE COURT: But he heard it, okay?
MS. FORESTIER: Thank you.

We all heard the recordings where the Crown spoke to Mr. Wheeler on the record while the court was in recess where the record should have been off. During a unrepresented judicial pre-trial, the record should always be recording. The moment the court rises from the judicial pre-trial, the recording should come to an immediate stop. In this case, the recordings continued. The record of - continued to - and it was recording for about an additional one minute before Madam Clerk realized that she hadn't stopped the recording.

It is within this one minute that we heard the conversation between Crown Counsel and Mr. Wheeler, being Crown Counsel said, "The Crown's position on sentence is six months imprisonment." And Mr. Wheeler immediately responding with, "There's nothing to read then. Let's go to trial." The justice returned and

back on the record, there were further discussions where Mr. Wheeler expressed to the court the jail term.

They continued with their judicial pre-trial discussion which is not relevant to this motion. At the end of the judicial pre-trial, the court expressed concerns setting a trial date absent of defence counsel's availability and without - and without Crown Counsel's estimation of time for the trial.

The court then suggested and encouraged of its own accord and in the hopes that Crown Counsel and Mr. Wheeler continue their dialogue in resolving these matters and to adjourn them to a third judicial pre-trial and suggested a couple of months. The trial coordinator was brought into the court and the first available date to the court for a continuation of the judicial pre-trial was May 13th, 2016; that was three months and twenty-two days.

On May the 13th, being the third judicial pre-trial, on the date it was understood that the matter would come to either to resolve or to set a trial date. However, Mr. Wheeler failed to appear but had advised Crown Counsel via e-mail that he would not be attending but to notify him of any trial dates and Mr. Wheeler would make himself available.

Mr. Wheeler did believe that his attendance was not required as there had not been any further discussion

with Crown Counsel as to the resolution position. In the Crown Counsel's response to Mr. Wheeler was that he was expected to be there and, if not, he would obtain the trial dates of next appearance dates from Court Administration. It was the court's assumption in their frustration that just because Mr. Wheeler was absent on this day that he would be absent on any other trial dates.

Because of the volume of paperwork that needed to be admitted for the trial on an *ex parte* basis, Crown Counsel estimated two days would have been sufficient. The trial coordinator was called in court to find two days and the first and only available days were November the 25th and December the 1st. It was then discussed for the possibility of setting confirmation dates for the trial and October the 14th was selected; that was six months and sixteen days.

This calculation is to November the 25th, 2015; that was to be the first trial date - oh, sorry - 2016. I beg your pardon. I just realized my own error. So to November the 25th, 2016, that was to be the first day of trial. In the interim, October the 14th, 2016 and October 28th, 2016 were two dates scheduled for the matters to be spoken to where counsel, Mr. Schwartz, appeared with Mr. Wheeler; however, these two days do not interfere with the calculation of delay. They were merely there for confirmation of the said trial dates.

October the 28th, Mr. Schwartz advised the court of the defence intention to bring the various motions on November the 25th, 2016, being the first trial day. The total delay, regardless of whom caused the delay to this day, is twenty-two months and twenty-seven days and the trial has yet to commence because the first two days of trial, being November the 25th and December the 1st were used to argue three different motion. Today is the last of these motions and without any dates in sight to foresee the end of this trial. I'm saying the last motion of the three that were presented; not of anything else, just of the three that were presented back in - when we first started this.

We are today lead by the recent Supreme Court of Canada decision of the R. v. Jordan that delays beyond eighteen months for a provincial matter is presumptively unreasonable.

The defence is stating that the Jordan test for all matters tried in provincial courts that there is a presumptive ceiling of eighteen months from the date of the offence to the end of the trial. Any further delays from eighteen months would have been - would be an exceptional circumstances with....

MR. SCHWARTZ: Your Worship...
MS. FORESTIER: Sorry.
MR. SCHWARTZ: ...just for the clarification of the record, it's the date of the....

MS. FORESTIER: The date...

MR. SCHWARTZ: Sorry. Excuse me.

MS. FORESTIER: ...the charges were - were sworn.

5 MR. SCHWARTZ: The date of the information.

THE COURT: Yes.

MR. SCHWARTZ: The swearing of the information. You said the date of the offence, if it matters when you're reading it out.

10 MS. FORESTIER: So the Jordan proposition is that it's eighteen months as of the date of the - the charges are laid, I believe. Perhaps we misunderstood or you misspoke. You indicated as of eighteen months between the date of the...

15 THE COURT: Offence. That's...

MS. FORESTIER: ...offence.

THE COURT: ...what I have here.

MS. FORESTIER: Yes.

THE COURT: The date of...

20 MS. FORESTIER: It's not the date of...

THE COURT: ...the offence.

MS. FORESTIER: ...the offence. It's the - it's the date that the charges were, in fact, sworn. It's not the date of the offence.

25 THE COURT: Which is February.

MS. FORESTIER: Yes.

MR. SCHWARTZ: We're working...

THE COURT: Okay.

MR. SCHWARTZ: ...from the same math, just using a

30 different word...

MS. FORESTIER: Yes.

MR. SCHWARTZ: ...Your Worship.

THE COURT: Okay.

MR. SCHWARTZ: Okay. Sorry.

MS. FORESTIER: Just want to make sure.

THE COURT: Okay.

MS. FORESTIER: Thank you.

THE COURT: Thank you both.

MR. SCHWARTZ: Okay.

R E A S O N S   F O R   R U L I N G

DEBARTOLO, J.P. (Orally): (Continued)

In any - okay. Let me just go back to this - the end of this sentence. Any further delays from the eighteen months would have been an exceptional circumstances without - okay. I read that part - with - would lie outside of the Crown's control or a situation where it's unforeseen or unavoidable.

On paragraph 46 of the Jordan decision, it says:

> *"At the heart of any new framework is a ceiling beyond which delay is presumptively unreasonable. The presumptive ceiling is set for 18 months for cases going to trial in the Provincial Court, and at 30 months for cases going to trial in a Superior Court."*

And it further says on 47 - paragraph 47:

> *"If the total delay from the charge to the actual or anticipated end of trial (minus defence delay)*

> *exceeds that ceiling then the delay is presumptively unreasonable. The rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and the stay will follow."*

Crown Counsel, Mr. Dhar, is stating that his application pursuant to 11(b) of the *Charter* has no merits and therefore should be dismissed. He says that the Jordan case does not address a corporate defendant and the rule of the Jordan do not apply. The Askov and Morin cases did indeed give us the guide to corporate defendants in regards to any delays. Crown Counsel states that:

> *"Under that regime, the Applicant's agreement to every adjournment, failure to take any steps to communicate with a Crown's - with a Crown outside of court appearance, and failure to articulate any concerns about delays or prejudice were relevant in determining the reasonableness of any delays. The court and Crown reasonably and correctly assumed that the state of the law through the pre-trial timeframe did not raise concerns about unreasonable delays."*

In every court appearance, the transcripts are - it clearly shows that conversations in regards to adjournments were between the court and the Crown. The defendant did not partake in these conversations

nor was he asked if he wanted to make submissions in regards to the adjournments. Once the adjournment's date was selected between the trial coordinator, the court and the Crown, Mr. Wheeler was merely asked, "Is this day good for you?" Mr. Wheeler being unrepresented and appearing for all corporate defendant on 12 information with over 200 charges would be reasonable to assume that it may set a stage where Mr. Wheeler found himself of not knowing what to do and therefore agreed to the adjournment dates as they were posed to him.

In Jordan, it says, and this is paragraph 50:

> *"A presumptive ceiling is required in order to give meaningful direction to the state on its constitutional obligation and to those who play an important role in assuming that a trial concludes within a reasonable time."*

If the matters exceed the ceiling of eighteen months, the Crown must prove that there are exceptional circumstances to justify the delay. In this case, the Crown stated that these are simple charges, which leads the court to believe that there are no exceptional circumstances that would have caused any delay.

Without repeating but I do believe that paragraph 69 and 70 of the Jordan decision explains exactly what

exceptional circumstances are and we're all very familiar with that.

I have read the case of R. v. Live Nations Canada Inc. and this paragraph definitely addresses the corporate defendant and it's paragraph 12 and it says:

> *"For me, these goals are to be taken seriously and achieved in practice. It would make no sense to exempt a case such as this from the new framework. Injecting back into the analysis of corporate defendants would impair these objectives. This I find that those goals are therefore the Jordan framework apply equally to the prosecution and - to prosecutions and co-operations - corporations."*

What His Honor is saying is that - is that there is no difference between - in dealing with matters between a corporate accused and a person accused such as Mr. Wheeler representing himself and the various corporations that he was owner and president of.

It is perfectly reasonable to say that the court or Crown are never in a position to counsel an unrepresented defendant but Mr. Wheeler did not receive any guide or assistance as an unrepresented accused from the court or Crown Counsel. He was merely asked if he was able to return on the day already selected. The court does have a responsibility to an unrepresented accused to assist a person through the process and to ensure that Mr.

Wheeler understood and not merely agreed as if he had no other choice.

Paragraph 33 of the Jordan, it says that:

> *"As the parties and interveners point out, the treatment of prejudice has become one of the most fraught areas in the section 11(b) jurisprudence. It is confusing, hard to prove, and highly subjective. As to the confusion prejudice has caused, courts have struggled to distinguish between 'actual' and 'inferred' prejudice."*

In this case, these corporations were the means of income for Mr. Wheeler and therefore, it's reasonable to assume that prejudice is attached to this motion.

It would be difficult for the accused to provide for his family as these companies, it is my understanding, that they are closed and probably pending these charges. These charges would weigh heavily over his head and knowing that upon a conviction he could be facing considerable jail time, I find that facing jail time is actual prejudice, not inferred, based on what Crown Counsel said - stated to Mr. Wheeler in his second pre-trial date. And it is reasonable to understand the concerns through the quick response of Mr. Wheeler when he expressed, "Let's go to trial then" and not to accept any resolution position that the Crown Counsel would be offering. He was quite clear that he wanted to proceed by way of trial.

Trial dates should have been set on the day of the second judicial pre-trial and not waste any further delay for continuing discussion to resolve these matters.

It is correct that these charges began pre-Jordan and will conclude post-Jordan. The transition time must be considered. The transitional time go hand-in-hand with exceptional circumstances and if the case is overly complicated then it would warrant time to transition to the new framework, new rules, new ceilings. But if the case is a simple case such as this case as Crown Counsel stated, and that charges are only failing to comply with an order, then the transition time should not be posing any difficulties and therefore does not apply.

This court is mindful that Central East, York Region, has an overwhelming increase of matters, too many that at times we accept excessive delays as the new normal. Under R. v. Morin, the rule of thumb was ten months; ten months delay would be acceptable unless there are exceptional circumstances. The new framework is now eighteen months delay. We, in Ontario, have now gone beyond ten months and it's still not enough. It's still not enough time to deal with all cases that are before these courts.

The court will always recognize how important it is the right to a trial within a reasonable time. However, I do agree with my brother Justice in R. v.

Ramsay that, "Developments since the Morin demonstrates that the system has lost its way. The framework set out in Morin has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it."

The analysis to be applied to a motion, pursuant to section 11(b) under the new framework, is as follows:

- Calculating the total delay which is the period from the charge to the actual anticipated end of trial;
- Subtract defence delay from the total delay, which results in net delay;
- Compare the net delay to the presumptive ceiling;
- If the net delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of exceptional circumstances and, if it cannot rebut the presumption, a stay will follow. In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases;
- Subtract the delay caused by discrete events from the net delay (leaving the remaining

delay) for the purpose of determining whether the presumptive ceiling has been reached;

- If the remaining delay exceeds the presumptive ceiling then the court must consider whether the case was particularly complex such as the time the case has taken is justified and delay is reasonable;

- If the remaining delay falls below the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable;

- And lastly, the new framework includes the presumptive ceiling - applies to cases already in the system when Jordan was released.

The total delay of this case is twenty-two months and twenty-seven days minus defence delay of two months and three days from the defence appearance of April the 24th, 2015, and adjourned the matter to June the 26th, 2015, for the purpose of Mr. Wheeler would review the disclosure and seek legal counsel. I think that's 16 though.

MS. FORESTIER: I'm sorry?
THE COURT: And - nothing. It's okay. I beg your pardon.

The total net institutional delay is twenty months and seventeen days. The delay exceeds the presumptive ceiling. It is presumptively unreasonable. The Crown has not established the presence of exceptional circumstances. Mr. Wheeler, throughout the various court appearances, did not make any arguments to any court dates. He was merely brought to accept and confirm to any court appearance.

This court has considered all the book of authorities, all submissions made. I am satisfied that the delay in this case clearly exceeds the Jordan ceiling. In light of these delays of twenty months and seventeen days that will take - that will have taken to bring Mr. Wheeler and corporate defence into a trial in this straightforward and simple matter.

I am satisfied that there has been a breach of Mr. Wheeler's and corporate defendants' rights under section 11(b) of the *Charter* and I direct that the proceeding against him and corporate defendants be stayed, pursuant to section 24(1) of the *Charter of Rights and Freedoms.*

...

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Form 2

Certificate of Transcript (*Subsection 5(2)*)
Evidence Act

THIS IS TO CERTIFY THAT the foregoing is a true and accurate transcription from the digital recording in the Ontario Court of Justice, held at 465 Davis Drive, Newmarket, which is recording number: 4960_T2_20170112_084742, which has been certified in Form 1, was subject to judicial review and edit, and has been prepared to the best of my skill and ability.

....

Karen Desjardins

Certified Court Reporter

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