ONTARIO COURT OF JUSTICE

CITATION: *R. v. Live Nation Canada Inc.*, 2017 ONCJ 590
DATE: 2017 09 05

2017 ONCJ 590 (CanLII)

B E T W E E N

HER MAJESTY THE QUEEN

— AND —

LIVE NATION CANADA INC., LIVE NATION ONTARIO CONCERTS GP INC., OPTEX STAGING & SERVICES INC., and DOMENIC CUGLIARI

Before Justice C.A. Nelson
Heard on August 21, 2017
Ruling on 11b released on September 5, 2017

D. McCaskill, S. Succi ..... counsel for the Crown
J. Siegel, A. Grossman ..... counsel for the defendant Live Nation
S. Thompson ..... counsel for the defendant Cugliari
Dale Martin ……..agent appearing for the defendant Optex

NELSON, J.:

PART 1: INTRODUCTION AND SUMMARY OF RULING ON THE APPLICATIONS

[1] On June 16, 2012, Radiohead, a British band, was scheduled to perform a concert in Toronto. A few hours prior to the scheduled start of that concert, the stage collapsed, killing Scott Johnson, a drum technician, and injuring others. On June 6, 2013, over 4 years ago, the defendants were charged with a series of offences under the Ontario *Occupational Health and Safety Act* all arising from the collapse of the stage. Live Nation[1] and Cugliari[2] now move for a stay of the charges based on a breach of s. 11(b) of the *Charter* as well as s. 7 and s. 11(d) based on

[1] Live Nation Canada Inc. and Live Nation Ontario Concerts GP Inc. will collectively be referred to as *Live Nation* throughout this ruling.
[2] Domenic Cugliari will be referred to as *Cugliari* throughout this ruling.

an alleged abuse of process. The abuse of process application was abandoned during argument.

[2] Optex[3] attended by way of agent, Dale Martin, the company's President. The Crown advised that in the event that Live Nation was successful in its 11b application and a stay of these proceedings granted, that a similar stay should be entered with respect to Optex.

[3] The first scheduled trial date in this prosecution is today, September 5, 2017; the last scheduled date is May 31, 2018. By that latter date, the case will have been before the Court for almost 5 years. Even after the evidence is completed, a few months will likely be needed to allow time for judgment.

[4] This case was initially tried in November 2015 before Justice Nakatsuru. After about 9 weeks of trial, scattered over 14 months, the evidence on the first trial concluded on December 20, 2016. Submissions were scheduled for June 19, 20 and 23, 2017. On April 12, 2017, Justice Nakatsuru was appointed to the Ontario Superior Court of Justice. On April 27, 2017, Justice Nakatsuru ruled that he had no jurisdiction pursuant to the *Provincial Offences Act* (*POA*) to continue the trial. On May 19, 2017, Regional Senior Justice Lipson declared a mistrial. New trial dates were then scheduled for the currently scheduled almost 7 week trial.

[5] It is of note that on October 14, 2016 Justice Nakatsuru heard an 11b motion in this case which he dismissed. Justice Nakatsuru's written reasons were released December 5, 2016[4].

Summary of my Ruling on the 11b application

[6] For the reasons that follow, I find that the s. 11b *Charter* rights of Live Nation and Cugliari have been breached. The only remedy for such a breach is a stay of proceedings on all charges before the Court. Given the Crown's concession, the proceedings will be stayed against Optex as well.

[7] The right to a trial within a reasonable time is enshrined in the *Canadian Charter of Rights and Freedoms*. In *Jordan*[5], Justice Moldaver of the Supreme Court of Canada reminded us that "[t]imely justice is one of the hallmarks of a free and democratic society" and that "[a]n efficient criminal justice system is …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 stakes are indisputably high".

[8] It is important to emphasize that timely justice is not just important to persons facing charges. It is also important to our society at large.

[3] Optex Staging & Services Inc. will be referred to as *Optex* throughout this ruling.
[4] *R. v. Live Nation Canada Inc. 2016* ONCJ 735
[5] *R. v. Jordan* 2016 SCC 27, paragraphs 1 & 3

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[9] A stay in the circumstances of an 11b violation signals a failure on the part of the administration of justice. Such a failure impairs the reputation of our justice system. In a case such as this one, that failure also has a significant negative impact on the parties, those injured as a result of the stage collapse and most notably on the family of Scott Johnson. No doubt this decision will be incomprehensible to Mr. Johnson's family who can justifiably complain that justice has not been done.

[10] In the reasons that follow, I explain how I reached my decision on this application and, in addition to other issues, address the following:

- Whether, and to what extent, I am bound by Justice Nakatsuru's 11(b) ruling.
- Whether, and to what extent, there was any defence caused delay or waiver; more specifically, whether or not Live Nation and Cugliari are bound by an 11(b) waiver made prior to Justice Nakatsuru's appointment to the Superior Court bench.
- Whether or not there are any discrete events which qualify as exceptional circumstances and which warrant a deduction in the delay calculation.
- Whether this case qualifies as a *complex case* which justifies more time than allotted under the presumptive ceiling.
- Even allowing for the complexity of this case, whether the time to the conclusion of the trial is justified.
- Whether the Crown has met the onus to establish that the delay in this case is justified on the basis of the transitional case exception.

PART 2: OVERVIEW OF THE *JORDAN* ANALYSIS

[11] In *Jordan*, a decision released on July 8, 2016, the Supreme Court of Canada changed the landscape of 11(b) applications. A new framework of analysis was proscribed replacing the previous *Morin* framework. Justice Moldaver, speaking for the majority of the Court, admonished all of the participants in the justice system for fostering a culture of complacency regarding an accused person's right to a trial within a reasonable time. To remedy this problem, presumptive ceilings were set in order to assist in assessing when a particular delay was too long. In the Ontario Court of Justice that presumptive ceiling is 18 months. Any delay over 18 months is presumptively unreasonable.

[12] In order to calculate the justifiable delay in any particular case, the Supreme Court mandated the following analysis:

i. **Calculate the total delay**: that is from the date the information was sworn until the date the trial is scheduled to conclude.

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ii. **Calculate the net delay:** deduct delay either waived or caused by the defence.

iii. **Exceptional circumstances**: If the net delay exceeds the presumptive ceiling, the delay is unreasonable unless the Crown establishes that exceptional circumstances exist. Exceptional circumstances may consist of any of the following:

a) *Discrete events*: Discrete events are events which the Crown could not reasonably foresee or remedy. The delay caused by discrete events is quantified and deducted from the net delay.

b) *Complex Cases:* Particularly complex cases may require more time than the presumptive ceiling permits. In order to determine whether a particular case is complex and if so, whether the time needed for the case is as result of that complexity, the Court must make a qualitative analysis. If, as a result, the Court determines that the delay is justified then the Crown will have successfully satisfied its onus to establish exceptional circumstances.

c) *Transitional cases:* Transitional cases are cases that were in the system at the time the *Jordan* decision was released in July 2016. The Court must determine if the delay involved in the case is justified based on the parties' reliance on the law as it stood before *Jordan* was decided.

PART 3: BRIEF OVERVIEW OF THE RELEVANT FACTS

[13] Unlike the *Morin* analysis the *Jordan* analysis does not require or recommend a detailed accounting of each and every court appearance starting from the first, and ending with the very last appearance in the case. Thus, the following overview reflects only the salient history.

[14] *The stage collapses – June 16, 2012*:

Radiohead was set to perform a concert at Downsview Park on June 16, 2012. Before the concert started, as musicians and technicians were making preparations, the stage collapsed. Scott Johnson was killed. Others were injured.

[15] *The investigation:*

Almost immediately after the stage collapse, the Ministry of Labour started an investigation into the causes of the collapse. That investigation took a lot of time. It involved extensive witness interviews as well as engineering and technical investigations.

[16] *The charges - June 6, 2013*:

On June 6, 2013 a 13 count information was sworn alleging offences under the *Occupational Health and Safety Act* against Live Nation, Optex and Cugliari. The

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Crown elected to have a Provincial Judge hear the case. All three defendants retained counsel almost immediately.

[17] *The period up to the first set date - May 30, 2014*

The Crown made the bulk of disclosure in September 2013. Not surprisingly, additional disclosure was requested. Several judicial pre-trials were held. On May 30, 2014, a 6 week trial was scheduled: 3 weeks were scheduled for July 2015 and 3 weeks for November 2015.

[18] *Optex loses its lawyer and late breaking disclosure - January to July 2015*:

In January 2015, Optex's lawyer was removed as counsel of record. Dale Martin, President of Optex, started appearing for the company as its agent. He continually advised that he intended to hire a lawyer to represent the company. As it happens, to this day, Optex has not retained counsel in this prosecution. In addition, the prosecution continued its investigation through the spring of 2015 and, as a result, significant additional disclosure was provided to the defendants in the spring of 2015. On June 17, 2015 it was agreed that the 3 weeks of trial scheduled for July 2015 should be vacated because of the need for the defendants to review the additional disclosure and in order to allow Optex time to retain counsel.

[19] *The trial starts, November 9-27, 2015 and replacement dates are obtained for the lost July 2015 dates*:

Three weeks of scheduled trial time took place from November 9 through 27, 2015 – one day is lost because of a Crown disclosure mishap. An additional 4 weeks is scheduled to make up for the three weeks lost in July 2015[6]. The additional dates include dates in March 2016; April 2016; May 2016 and conclude in June 2016.

[20] *The trial does not finish in June 2016 and more trial time is needed*:

It turns out that the trial time estimate was woefully inaccurate. A further 15 days of trial time is scheduled starting in December 2016 and finishing on January 27, 2017.

[21] *The 11b Application brought by Live Nation and Cugliari is dismissed - December 5, 2016*:

On October 14, 2016, Live Nation and Cugliari argued an 11b Application which was dismissed by Justice Nakatsuru with written reasons released on December 5, 2016[7].

[22] *The evidence concludes earlier than originally expected on December 20, 2016, and time is schedule*d *for submissions*:

[6] Some of these dates may have been case management attendances. The trial sheet is confusing.

[7] *Live Nation* 2016

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The evidence is completed on December 20, 2016. December 21, and 22, 2016 and the three January 2017 dates are vacated. The dates of June 19, 20 and 23, 2017 are set for submissions. Cugliari and Live Nation waive the delay from January 28, 2017 through June 23, 2017.

[23] *Justice Nakatsuru is appointed to the Superior Court and a mistrial is declared:*

On April 12, 2017, Justice Nakatsuru is appointed to the Superior Court of Justice. Just two weeks later, on April 27, 2017, he heard a jurisdictional motion and determined that he did not have jurisdiction under the *POA* to continue to preside over the trial. He released his written reasons on this issue on June 6, 2017[8]. In the meantime, on May 19, 2017, Regional Senior Justice Lipson declared a mistrial.

[24] *New Trial Dates are set on May 19, 2017:*

On May 19, 2017, 7 weeks and 4 days of trial time were scheduled as follows: September 5, 14, 15, 18, 20, 27 & 28, 2017; October 24, 30, & 31, 2017; February 5, 7, 8, 9, 12, 13, 14, 15, 16, 26, 27 & 28, 2018; April 3, 4, 5, & 6, 2017; May 1, 2, 3, 4, 7, 8, 9, 10, 11, 28, 29, 30 & 31. Subsequently October 24, 2017 and the April 2018 dates were vacated because of conflicts with my schedule.

PART 4: APPLICATION OF THE *JORDAN* ANALYSIS TO THIS CASE

Preliminary Issue: The Effect of Justice Nakatsuru's 11b ruling on my decision on this application

[25] Justice Nakatsuru provided written reasons on December 5, 2016 dismissing the first 11b application brought by Live Nation and Cugliari.[9] The issue arises as to what extent, if at all, I am bound by Justice Nakatsuru's 11b ruling.

[26] It will be recalled that a mistrial was ordered by Justice Lipson on May 19, 2017 after Justice Nakatsuru ruled that he had no jurisdiction to continue the trial under the *POA.* The result is a new trial before a different Judge.

[27] Section 653.1 of the *Criminal Code* addresses the consequences of a mistrial in criminal cases with respect to certain of the original trial judge's rulings:

> 653.1 In the case of a mistrial, unless the court is satisfied that it would not be in the interests of justice, rulings relating to the disclosure or admissibility of evidence or the *Canadian Charter of Rights and Freedoms* that were made during the trial are binding on the parties in any new trial if the rulings are made – or could have been made – before the stage at which the evidence or the merits is presented.

[8] *R. v. Live Nation Canada Inc.* 2017 ONCJ 356

[9] *Live Nation* 2016

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[28] This section provides a statutory amendment to the common law rule that prior rulings are not binding on the Judge at the second trial. There is no similar provision in the *POA*. The Crown submits that I should incorporate the provisions of *Code* s. 653.1 into the *POA*.

[29] The Crown submits that s.2(2) of the *POA*, which permits the Court to interpret provisions of the *POA* by reference to the *Criminal Code*, should result in this Court interpreting the *POA* so that it accords with *Code* s. 653.1. Specifically, the Crown submits s. 30(2) of the *POA* (which provides for a new trial in this case) should be interpreted with reference to a similar provision in s. 669.2(3) of the *Code* with the result that s. 653.1 of the *Code* is incorporated by reference. I disagree. Section 653.1 was added to the *Code* in 2011. No similar provision was enacted in the *POA* at that time or since.

[30] In my view, there is no need to resort to the *Criminal Code* as an aid to interpret s. 30(2) of the *POA*. The section is clear in its language. Section 2(2) is not an invitation to *amend* the *POA* by reference to the *Code*.

[31] I hold that s. 653.1 of the *Code* has no application to the *POA* or to this case. Thus, in accordance with the common law, on the re-trial, I am not bound by Justice Nakatsuru's rulings made on the first trial. Having said that, since there is an overlap in the periods of delay at issue and because I am dealing with some of the same issues that Justice Nakatsuru dealt with, it stands to reason that his 11b reasons carry persuasive weight.

[32] I will have more to say about Justice Nakatsuru's 11b decision as I discuss various issues in the application of the *Jordan* framework to this case.

Step One: Calculate the total delay

[33] The total delay is calculated from the date the information is sworn until the date the trial is expected to conclude. The information is dated June 6, 2013. The trial is scheduled to conclude May 31, 2018 - that is one week shy of 5 years or 60 months. I should indicate that after the evidence concludes on May 31, 2018, it is unrealistic to expect that I would be in a position to deliver a judgment immediately after conclusion of the trial.

[34] Live Nation submitted that the trial would not conclude until November 2018, 6 months after the last scheduled date for the trial. Counsel submitted that this extra time would be needed for the parties to obtain transcripts, prepare and exchange written submissions and to make oral submissions.

[35] I do not accept this submission. The trial dates that were scheduled in May 2017 were clearly intended to reflect the parties' best estimate of the trial time needed to *complete* this trial. If the parties anticipated that additional time was needed, it was incumbent on them to make that known and schedule that time accordingly. Indeed, at the first case management meeting that I conducted with the parties on June 13, 2017, I advised of my unavailability for 6 of the scheduled

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dates. In turn, I suggested that the parties seek out replacement dates. All parties assured me that notwithstanding the loss of 6 days, they expected the trial to complete in the remaining allotted time. In these circumstances, for the purposes of this application, I use May 31, 2018 as the end date for the delay calculation.

Step Two: Calculate the net delay

[36] Any waiver or delay caused solely by the defence must be deducted under this rubric. In this case, delay must be deducted for both waiver and defence caused delay.

Waiver

[37] Both Live Nation and Cugliari waived delay between January 28, 2017 and June 19, 2017 in order to obtain transcripts of all of the evidence and to prepare and exchange written submissions. As it turns out, Justice Nakatsuru's decision as to his lack of jurisdiction was made on April 27, 2017. As of that date, it was clear that there would be no need for the exchange of written or oral submissions. Thus, in my view the defence waiver effectively ended on April 27, 2017. Three months must be deducted from the total delay arising from defence waiver for both defendants.

[38] It was submitted on behalf of Cugliari and Live Nation that no deduction should be made for defence waiver because the appointment of Justice Nakatsuru negated the basis for that waiver. As will be noted above, I agree with this proposition in part. I disagree that the portion of the waiver that predated April 27, 2017 should be ignored.

[39] It will be recalled that the trial evidence concluded on December 20, 2016. While it is understandable that counsel needed time to prepare submissions and, therefore, could not make use of the balance of the December dates, it was conceivable that the three January 2017 dates (January 25, 26 & 27) could have been used for submissions. Indeed, it is evident from the transcript of the December 20, 2016 appearance that that was precisely what Justice Nakatsuru expected. He made clear his concern about delay if submissions were postponed until transcripts were obtained and written submissions exchanged. Counsel insisted, however, and the 11b waivers were proffered to facilitate the extra time requested. Had the case proceeded to argument in January 2017, there is every reason to expect that Justice Nakatsuru would have rendered his decision prior to his appointment, thus avoiding the necessity of the mistrial. In these circumstances, it is entirely appropriate to sustain the validity of the waiver until the date Justice Nakatsuru ruled on the jurisdiction issue.

[40] Live Nation also submitted that the waiver was not voluntary in that Justice Nakatsuru essentially gave the parties no real choice. Given his 11b concerns, Justice Nakatsuru wanted submissions to proceed in January 2017 whereas counsel for Live Nation was of the view that their client would be prejudiced if submissions were made in the absence of transcripts. Thus, the argument is that

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Live Nation was essentially forced to waive delay in return for time to make proper submissions. This is an untenable submission. Apart from the irony of an applicant on an 11b application complaining about a Judge giving priority to that same party's 11b *Charter* right, Live Nation had experienced counsel. A waiver was given. Presumably, in giving the waiver, counsel balanced Live Nation's right to a trial within a reasonable time against the time needed to make submissions after receipt of the transcripts. Live Nation cannot now complain about the choice it made.

Defence conduct

[41] In the event the Court and the Crown are ready to proceed but a defendant is not, any ensuing delay will count as defence delay. Both defendants are responsible for some delay in this regard.

Live Nation

[42] When the dates were selected for the trial before me, counsel for Live Nation was offered, but was not available on September 7 and 8 or and 11 days in November. Had Mr. Siegel been available for those 13 dates, the trial would have concluded on February 28, 2018. Thus the delay attributable to Live Nation for periods of time when the court was available and their counsel was not is 3 months. (February 28, 2018 to May 31, 2018)

The total defence waived or caused delay for Live Nation is 6 months.

Cugliari

[43] Justice Nakatsuru found that there was "little" defence caused delay at the time he determined the 11b application before him. In my view, the only defence caused delay up to that point was Cugliari's counsel's unavailability for 6 days offered by the court in November and December 2016. Six days may not be significant and, in isolation, would make little difference to the delay calculation. When, however, they are added to the dates that Cugliari's counsel was unavailable in 2017, the total resulting delay is significant enough that it should be calculated.

[44] When the December 2016 dates were selected, Cugliari's counsel, Mr. Thompson was unavailable for 4 dates offered in November and 2 dates in December. It will be recalled that the trial was scheduled to conclude on January 27, 2017 but that date and two others were vacated in January 2017 as well as December 21 and 22, 2016. The evidence was completed on December 20, 2017. Had Mr. Thompson been available for the 6 dates in November and December, the trial evidence would have been completed 6 trial days earlier than it otherwise concluded, namely December 12, 2016. The delay attributable to Mr. Thompson's unavailability in 2016 is 8 days.

[45] When the trial dates were set for the trial before me, Mr. Thompson was unavailable for two dates offered in September 2017 and one in November 2017.

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Had he been available for those 3 dates, the last date for the trial would have been May 28th, 2018; thus counsel's unavailability resulted in a 3 day delay.

The total defence waived or caused delay for Cugliari is 3 months and 11 days.

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Conclusion on net delay calculation

[46] **Live Nation net delay**: Total delay of 59 months and 25 days less 6 months results in net delay for Live Nation of **53 months and 25 days.**

[47] **Cugliari net delay:** Total delay of 59 months and 25 days less 3 months and 11 days results in net delay of **56 months and 14 days** for Cugliari.

[48] In each case, the net delay far exceeds the presumptive ceiling of 18 months. This 11b application must be allowed on this basis *unless* the Crown satisfies me on the balance of probabilities that the delay is nevertheless reasonable because of exceptional circumstances.

STEP 3: Exceptional circumstances

Discrete Events

[49] A discrete event is an event that causes delay which is reasonably unavoidable and unforeseen. In my view, there were three events in this case which qualify as discrete events within the meaning of *Jordan.*

1. The loss of three weeks of trial time in July 2015 as a result of the combined effect of late breaking disclosure together with counsel issues for Optex.
2. The underestimation of time needed by all counsel for the completion of the evidence
3. The appointment of Justice Nakatsuru to the Superior Court bench.

[50] I will discuss each of these events and explain why I find that the Crown has satisfied me that each qualifies as a discrete event. I will also calculate the appropriate amount of time to be deducted from the net delay.

1. *The loss of three weeks of trial time in July 2015 as a result of the combined effect of late breaking disclosure together with counsel issues for Optex.*

[51] Two events culminated in vacating three weeks of trial time in July 2015.

[52] First, Optex's counsel was removed from record on January 8, 2015. From that date on, despite assurances that the company planned to retain counsel, Optex was unrepresented by counsel. Given the assurances made by the president of the company, Dale Martin, and the serious jeopardy faced by the company, Justice Nakatsuru wanted to give the company every opportunity to retain counsel.

[53] I note that the Crown took proactive steps to try to mitigate delay arising from Optex's issue. The Crown brought the case forward to be case managed by the trial judge who, in turn, had Mr. Martin, as the company's representative summoned to court.

[54] Second, new information came to the Crown's attention which the prosecution needed to investigate; in turn, that led to further disclosure being made in the weeks prior to the scheduled July trial dates. Counsel for Live Nation sought an adjournment to address this disclosure and in order to properly prepare for trial.

[55] I am satisfied that the Crown had no control over the timing of this disclosure. Indeed, the information that led to the additional disclosure came from one of the defendants. On receipt of this information, the Crown acted diligently. I am satisfied that the disclosure issue was unforeseen and that the Crown took reasonable steps to address it. The resulting adjournment request by Live Nation, which was unopposed by all parties, was also a reasonable response to the late disclosure.

[56] In his 11b decision, Justice Nakatsuru was also satisfied that the loss of the July 2015 trial dates qualified as a discrete exceptional circumstance.

[57] In my view, the delay was unforeseeable and unavoidable. It qualifies as a discrete event as envisioned by *Jordan*.

[58] The next step is to calculate that part of the delay that relates to the lost three weeks of trial time in July 2015. It will be recalled that initially it was expected that the trial would take place during 6 weeks - with 3 weeks in July 2015 and 3 weeks in November 2015. The fact that three weeks were lost in July 2015 did not change the fact that the trial was expected to continue and conclude in November 2015. Thus, the calculation of the time lost as a result of the vacated July dates starts on November 27, 2015, the last November date.

[59] Replacement dates were obtained for March, April, and June 2016 concluding on June 22, 2016. Therefore, the delay attributable to replacement of the lost July dates (November 27, 2015 to June 22, 2016) is 6 months and 25 days.

[60] I pause to point out that just because an event qualifies as a discreet event, not *all* of the delay flowing from that event will *necessarily* be deducted from the delay calculation. The parties and the system must respond reasonably to the delay caused by such an event. If the response is not reasonable, only that part of the delay that reasonably flows from the discrete event is deducted. In this case a delay of almost 7 months to obtain replacement dates borders on unreasonable.

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Indeed, arguably it *is* unreasonable given the time this case had already been in the system. Keeping in mind, however, that more than three weeks of trial time was needed, which is a significant amount of trial time in the Ontario Court of Justice, and that Justice Nakatsuru was apparently of the view that the entire delay should be deducted[10], I am prepared to allocate all the time taken to replace the lost trial dates as attributable to the discrete event.

2. *The underestimation of time needed by all counsel for the completion of the evidence.*

[61] The total time initially estimated for this trial was 6 weeks; it turned out that it needed almost 9 weeks to complete the evidence, with a further 3 days for anticipated submissions. Despite frequent queries, from Justice Nakatsuru from time to time as the case proceeded, he was assured that adequate time had been allocated.

[62] Both Live Nation and Cugliari blame the Crown for the underestimation of time. Thus, they each submit any delays resulting from the underestimation of time lie at the feet of the Crown and do not qualify as a discrete event. The Crown points out that the delay largely arose as a result of lengthy cross-examinations undertaken by defence counsel.

[63] In my view, all parties bear responsibility for the underestimation of time.

[64] Live Nation points out that it was the prosecution who repeatedly assured Justice Nakatsuru that the time estimate was adequate. That may be so, but the defence was largely silent in the face of these assertions never suggesting that with the anticipated cross-examination of the prosecution's witnesses more time would be needed. As *Jordan* stresses, all participants in the justice system bear the responsibility for the efficient management of justice resources. Trial underestimations almost always result in delay and disruption to the trial process. All of the participants bear responsibility for ensuring that time estimates are accurate. Notwithstanding best efforts, trials sometimes take on a life of their own and end up taking much more time than estimated. There are all sorts of reasons for this. I am satisfied that that is exactly what happened in this case.

[65] In *Jordan,* the Court clarified that such an underestimation of time qualifies as a discrete event[11]. The court as an institution, however, must respond appropriately by ensuring that priority is given to a case in these circumstances.

[66] Justice Nakatsuru viewed the trial underestimation as a discrete event exceptional circumstance. [12] I share his view.

[10] In his 11b decision Justice Nakatsuru did not actually quantify the delay relating to this discrete event noting that even if he did so it would not bring the delay below the presumptive ceiling.
[11] *Jordan,* paragraph 73
[12] *Live Nation* 2016 at paragraphs 22-25

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[67] The calculation of the delay attributable to the underestimation of the trial time begins June 22, 2016 and finishes December 20, 2016[13] (the date the evidence was completed). That period is 5 months and 28 days.

[68] Once again, this length of time borders on, and arguably exceeds, what is a reasonable delay to schedule continuation dates. By this time, the case had been in the system for over 3 years. Granted three weeks of trial time is a precious commodity in this court, however, this case should have been accorded significant priority. Justice Nakatsuru did not quantify the delay attributable to this discrete event, simply holding that whatever it was, it would not bring the case below the presumptive ceiling. Implicitly, he allocated the whole of the delay between the set date and last continuation date as related to the trial underestimation. In these circumstances, I allocate the delay of 5 months and 28 days as attributable to the discrete event.[14]

3. The appointment of Justice Nakatsuru to the Superior Court bench.

[69] As mentioned several times, Justice Nakatsuru was appointed to the Superior Court of Justice on April 12, 2017 which in turn led to the declaration of a mistrial. In my view, this is a clear example of a discrete event which was reasonably unforeseen and unavoidable. Indeed, in the Supreme Court of Canada's decision in *R. v Cody*[15], Mr. Cody's counsel's appointment to the bench mid-trial was treated as a discrete event and the resultant delay deducted.

[70] Both Cugliari and Live Nation submit that Justice Nakatsuru's appointment should not be treated as a discrete event because although unforeseen by the Crown in this case, it was not unforeseen by the state. Further, the state failed to take reasonable steps to mitigate any delay that did ensue. Specifically, counsel point to the following:

- The Provincial government failed to pass legislation which would have permitted Justice Nakatsuru to complete the trial;
- Justice Nakatsuru would have known that he was presiding over this trial when he applied to the Superior Court bench thus risking the mistrial;
- Justice Nakatsuru could have deferred his appointment until after he completed this case;

[13] The scheduled completion date was actually January 27, 2017 but the parties did not require that date and instead vacated December 21 & 22, 2016 and January 25-27, 2017

[14] It should be noted that the final scheduled date for the trial was actually January 27, 2017 about 39 days later than the date on which the evidence concluded. Had I used January 27rd as the end date, the institutional delay would have been 7 months and 6 days. I would not have allowed the post December 22nd part of the delay caused by this discrete event. Given that this was the second set of continuation dates obtained for this trial, it was incumbent on the system to prioritize this case. Over 7 months to accommodate 3 weeks of trial in these circumstances would not have not demonstrated an appropriate level of priority.

[15] *R. v. Cody* 2017 SCC 31

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- The Federal government should have ensured that Justice Nakatsuru was not appointed until this trial was completed.

[71] As is clear from *Jordan,* extraordinary circumstances are those that are outside the control of the Crown, meaning the Crown charged with prosecuting the particular case before the Court. That is precisely what happened here. The prosecution could not have anticipated or mitigated the delay which resulted from the appointment of Justice Nakatsuru. The defence submits that it is not just the Crown in this case that must be considered but the Crown in the larger sense including the provincial and federal legislatures, judicial officers and Crown agencies. I do not accept this submission. Such a proposition casts the net far too wide and is unreasonable.

[72] I am satisfied that the Crown has met its onus to establish that the judicial appointment was a discrete exceptional event.

[73] Cugliari submits that even if the appointment of Justice Nakatsuru qualifies as a discrete exceptional circumstance, the resulting delay should not be deducted. Cugliari submitted that in *Cody* the delay resulting from the appointment of defence counsel to the bench was counted against the defence and thus, in the current case, such an appointment should be counted against the Crown. Cugliari misreads *Cody*. In *Cody* the judicial appointment was treated as a discrete event, not as defence caused delay. In other words, it was an exceptional circumstance and the resultant delay was *deducted* from the net delay. If it had been considered defence caused or waived delay, it would have been characterized as such and deducted from the total delay accordingly under that rubric. It was not.

[74] The more problematic issue is how to calculate the delay reasonably flowing from this event. There can be no question that this discrete event had nothing to do with the actions of the parties. It was essentially an institutional event. The Court, as an institution, is charged with the responsibility of setting trial dates which reflect 11b *Charter* imperatives. In this situation, the case required priority over others in the system given that:

- the parties had already completed some 9 weeks of trial evidence; they were now faced with redoing the entire trial;

- this trial involved serious charges relating to an incident where there was loss of life and there was a significant public interest in the determination of the case on its merits;

- an 11b application had already been heard;

- the second trial date was necessary *because* of the appointment of a presiding Judge and had nothing to do with the actions of any of the parties;

- the case was already 4 years old when trial dates were being set; and

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- the Supreme Court of Canada just less than a year before chastised all participants in the system for fostering a culture of delay and complacency.

[75] Notwithstanding the above realities, trial dates were scheduled in this matter starting on September 5, 2017 and ending on May 31, 2018 some 12 months and 12 days after the set date. To add insult to injury, the scheduled dates were scattered over this 12 ½ month period – with dates in September and October 2017 and February and May 2018. To expect the parties, counsel and the Judge to conduct a complex trial in this piecemeal fashion is inconsistent with the proper administration of justice. Challenging as it may for to schedule lengthy trials, these trials should be set on consecutive days, allowing for the odd day off here or there.

[76] The Crown emphasized that all parties have an obligation to minimize delay including the defence. Mr. McCaskill submitted that if the defence had agreed to his suggestion that the second trial be conducted based on the transcripts of the first trial, the trial would only require submissions. Indeed, it would only be necessary for Live Nation and the Crown to serve written submissions as Cugliari had already served his submissions prior to Justice Nakatsuru's appointment. Trial dates would only be necessary to facilitate oral argument. The defence resisted this suggestion although conceding that the second trial (currently scheduled for 6 weeks 3 days) would likely be shorter than the first trial (9 weeks 3 days) because of shortcuts available for the presentation of the evidence.

[77] In my view, the defence does not have an obligation to forgo a re-trial based on oral evidence in order to shorten the trial time. The defendants are statutorily entitled to a new trial. It is a fundamental principle of the judicial system that trials involve *vive voce* evidence. Credibility assessments are difficult, if not impossible to make, based on written transcripts. Technically complex issues benefit from *vive voce* explanations. The defence is not required to sacrifice its fair trial interests or right to make full answer and defence in order to shorten the length of a trial.

[78] I return to the issue about how much institutional delay was reasonably necessary as a result of the judicial appointment. In my view, trial dates that concluded more than 12 months after the set date did not give this case the priority it required. Granted, 7 weeks of trial time is a valuable commodity in the Ontario Court of Justice. The judicial and court resources devoted to such an endeavour almost certainly come at the expense of other cases in the system. But by this point, that is precisely the kind of priority that this case deserved. At the very least, and allowing for the fact that some 7 weeks of trial time was needed, dates should have been offered to the parties which would have resulted in the completion of the evidence by the end of November 2017. Had that been done, the delay from the set date to conclusion of the trial would have totaled 6 months and 11 days.

[79] I realize that the only reason earlier dates or consecutive dates were not offered to the parties was because there were no available dates to offer. This reality does not change the obligation on the system. Irrespective of the reason that the dates were not available, the fact that no earlier dates were available is

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systemic failure. Delay caused by systemic failure cannot be included as part of the delay related to a discrete event.

[80] I am prepared to deduct 6 months and 11 days as the justifiable delay related to Justice Nakatsuru's appointment.

Calculation of the adjusted delay after allowing for discrete exceptional circumstances

[81] It will be recalled that the delay attributed to the three discrete events was calculated as follows:

Lost July 2015 dates	6 months, 25 days
Trial time underestimate	5 months 28 days
Judicial appointment	6 months 11 days
Total deduction	**19 months 4 days**

Live Nation It will be recalled that for Live Nation the net delay was 53 months and 25 days. The adjusted net delay is *34 months and 21 days.*

Cugliari It will be recalled that for Cugliari the net delay was 56 months and 14 days. The adjusted net delay is *37 months and 9 days*

The Complex Case Exceptional Circumstance

[82] As I move on to address the complex case exceptional circumstance, I pause to point out the obvious - delay of almost 35 months in the case of Live Nation and 37 months in the case of Cugliari is close to or double the presumptive ceiling in the Ontario Court of Justice. Thus the delay is presumptively unreasonable unless the Crown convinces me that this delay is justified because of the complexity of this case.

[83] Complex cases, as defined in *Jordan*, are those cases which require "an inordinate amount of trial or preparation time" over and above the allotted time under the presumptive ceiling because "of the nature of the evidence or the nature of the issues".[16] In *Cody*, Justice Moldaver emphasized that the presumptive ceilings already incorporate an allowance for the increasing complexity of criminal cases and it is only particularly complex cases which require more time than allotted under the ceilings. Further, the determination as to whether a particular case qualifies as a complex case requires a qualitative assessment of the entire case. Even if a case is complex and requires more time than allotted under the ceiling, an assessment must be made as to how much additional time is justified in light of the case's complexity.

[16] *Jordan*, paragraph 77

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[84] In his 11b decision, Justice Nakatsuru held that this case qualified as a complex case. Indeed, the case bears most of the hallmarks of a complex case as described in *Jordan* - voluminous disclosure; numerous expert witnesses; numerous witnesses, some of whom reside outside the country; numerous exhibits and multiple parties.

[85] Cugliari submitted that this trial was not particularly complex and that any complexity arose because of "faulty expert evidence" led by the Crown. Such a submission is untenable on this application. The quality of the evidence on a previous trial is not an evidentiary issue that I am able to assess on this application, nor indeed should I assess it in circumstances when I am the scheduled trial judge for the second trial.

[86] Live Nation submitted that the Crown could not satisfy its onus that this was a complex case because the Crown did not develop or follow a plan to mitigate the consequences of any complexity. I disagree. The Crown has taken numerous steps in this regard, including:

- delivered voluminous disclosure at any early stage of the litigation;
- brought the case forward for Case Management shortly after Optex lost its counsel;
- was prepared to proceed with written submissions in January 2017 rather than wait for transcripts;
- sought a consent from all parties that Justice Nakatsuru's rulings in the first trial should govern the same issues on the second trial; and
- sought a consent from all parties that all or part of the second trial would be based on transcripts of evidence from the first trial rather than *vive voce* evidence.

[87] I have no difficulty qualifying this case as a particularly complex case. I reach this conclusion largely because this is a case that requires an inordinate amount of time compared to other cases in the Ontario Court of Justice. That extra time is required because of the badges of complexity mentioned previously. The more challenging issue is the determination as to how much extra time the case needs from the system as a result of its complexity.

[88] In this case, we actually have a benchmark within which to measure how much time this case justifiably requires. It will be recalled that the information was sworn on June 6, 2013; disclosure and intake was sufficiently completed so that trial dates were set on May 30, 2014, for a 6 week trial which was scheduled to conclude on November 27, 2015.

[89] Had events transpired as expected, the trial would have taken just under 30 months to complete. Of course, that did not happen - the first set of trial dates

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were postponed and the trial ended up taking longer than 6 weeks. The delays relating to those two events, however, were treated as discrete events and those delays were backed out of the presumptive ceiling calculation. Similarly the delay *reasonably* attributable to the third discrete event, the judicial appointment of the presiding Judge, was backed out.

[90] Thus, on its face, the case arguably needed the equivalent of 30 months from start to finish. I say *arguably* because that calculation includes an intake period of 11 ½ months and institutional delay of 18 months between the first set date and the last day of the first set of scheduled trial dates. Both periods of delay are significantly longer than what an ordinary case would take in the Ontario Court of Justice. While the extended intake period may appropriately reflect the voluminous disclosure and need for extensive judicial pre-trials, an institutional delay of 18 months to the end of trial even for a 6 week trial seems excessive.

[91] Nevertheless, on a qualitative basis, given the systemic challenges in scheduling such a lengthy trial, 30 months delay is justified *at the outside*. In other words, such a calculation is generous.

[92] It is of some importance to note, as well, that in the case of each new set of trial dates necessitated by each discrete event, the allowance for reasonable institutional delay was *increased because* of the amount of trial time that was being sought. In other words, when calculating the amount of delay attributable to discrete events, the fact that this was a complex case which required inordinate trial time, was taken into account to excuse delay than would not otherwise be justifiable for a less complex case.

[93] It is also of note that Justice Nakatsuru determined that this case was a complex case and that the time taken to the then scheduled end of trial (January 27, 2017) was justifiable on that basis. Although he did not quantify the time allocated to the two discrete events that he found constituted exceptional circumstances – the loss of the July 2015 trial dates and the trial time underestimate – had he deducted the entire delay attributed to those two events, the total delay that he found was justifiable based on the complex case exception would have been about 30 months.

[94] In other words, my determination that 30 months is a reasonable allowance for the complexities of this case accords with Justice Nakatsuru's 11b decision of December 5, 2016.

[95] One final note. In *Jordan*, Justice Moldaver emphasized that "the presence of exceptional circumstances is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling"[17] In particular, "chronic institutional delay"[18] cannot be a basis on which the Crown can discharge its burden.

[17] *Jordan, supra* paragraph 81
[18] *Jordan*, supra, paragraph 81

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The Transitional Case Exceptional Circumstance

[96] On a *Jordan* calculation, the delay in this case for both applicants exceeds 30 months, which is the amount of delay that I determined was justified based on the complex case exceptional circumstance. In circumstances such as this where the delay exceeds the justifiable delay, and part of that delay precedes the release of the *Jordan* decision, the Crown can seek to rely on the transitional case exceptional circumstance to justify the delay. To establish this exception, the Crown must satisfy the court that the delay is justified based on reliance by the parties on the law as it stood prior to *Jordan*. In so far as part of the delay occurs post-*Jordan*, the court must assess whether that delay can be explained by the fact that the system had not yet had time to adjust to the *Jordan* expectations.

[97] Although he did not have to address the issue of transitional exceptional circumstances given his decision that the then delay was all justified on an exclusive *Jordan* analysis, Justice Nakatsuru held that even on a *Morin* analysis, much of the delay would have been considered neutral having regard to the complexity of the case, the few complaints from the defence about the pace of the proceedings, and the need to deduct about 6 months as inherent delay to allow for counsel to prepare for the trial. Thus, he concluded that the 11b application would also have failed on the transitional exception to *Jordan*.

[98] At the time that Justice Nakatsuru decided the 11b application, about 6 months of the total delay of then delay of 44 months had taken place after *Jordan* was decided. At the present time, about 22 months of the total anticipated delay of 60 months postdates *Jordan.* In these circumstances, it is hard for the Crown to argue convincingly that the delay is justified based on the transitional exception.

[99] It is key that on May 19, 2017, when the current tranche of court dates were scheduled, the dates were set sporadically over 9 months concluding on May 31, 2018, a date more than 12 months from the set date. This delay occurred at a time when the parties and the system had had almost a year to adapt to the new *Jordan* regime. Indeed, an 11b motion based on *Jordan* had already been determined in this very case. It should be uncontroversial that by May 2017, some 10 ½ months post *Jordan*, the system had had sufficient time to adapt to the new delay realities.

[100] For the above reasons, I find that the Crown cannot rely on the transitional exceptional circumstance to justify the delay. In any event, I also satisfied that even under pre-*Jordan* law, the delay in this case would have been unreasonable.

[101] In calculating the institutional delay for *Morin* purposes, the delays that I attributed to discrete events would have likely been characterized as inherent. Similarly, the deductions for defence caused delay and waiver would have resulted

in similar reductions to the delay calculation. Accepting that the almost 12 month intake period would be treated as inherent because of the complexity of the case, the two remaining significant periods of institutional delay would have been the 18 month period between the first set date and the end of the first set of trial dates and the 6 month period from November 30, 2017 to May 31, 2018. That institutional delay totals 24 months.

[102] Justice Nakatsuru noted that the complexity of the case would have required significant preparation time for counsel; he would have allocated 6 months of the otherwise institutional delay to preparation time or to inherent delay. Six months strikes me as a reasonable deduction for notional preparation time. That results in a total of 18 months of institutional delay.

[103] It should be recalled that in the case of the delay caused by each of the three discrete events, extra time was allocated for the system to allocate trial time having regard to the complexity of the case. Further, the lengthy intake period is also reflective of the complexity. These accommodations for complexity need to be taken into account, when the Court takes a holistic look at assessing whether the remaining institutional delay is reasonable under the *Morin* analysis.

[104] It will also be recalled that Justice Nakatsuru opined that the delay calculated at the time of his 11b decision would have been reasonable under the *Morin* guidelines. Of course, that calculation did not take into account the institutional delay that postdated his decision. I estimate that the *Morin* calculated delay that Justice Nakatsuru was addressing was about 12 months.

[105] The *Morin* guidelines suggested that 8 to 10 months of institutional delay in the Provincial Court was reasonable subject to issues of prejudice. Obviously, 18 months is significantly more than the upper end of the *Morin* guideline, even allowing for the fact that the case required a significant amount of trial time. Further, the prejudice to the fair trial interests of both parties is substantial. In addition to expert evidence, there are numerous civilian witnesses and investigative witnesses. There can be no question that the quality of the testimony of witnesses to events which took place 5 to 6 years prior would be negatively impacted. Further the prejudice to Cugliari's security of the person interest is substantial. He will have lived under the shadow of this case for almost 5 years. His affidavit filed in these proceedings details the stress, uncertainly and professional consequences of these proceedings.

[106] Even on a *Morin* analysis, the delay in this case would not be justified.

PART 5: CONCLUSION

[107] If this trial finished in May 2018, it will have been in the system for almost 5 years – over 3 times the presumptive ceiling for delay in this Court of 18 months. This case was a complex case that required more time than other cases in the system. A series of unavoidable discrete events added to the challenges of this case. After allowing for all of the exceptional circumstances that were in play, this

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case still will have taken too long to complete. The 11b rights of both applicants have been breached. The remedy for this breach is a stay of proceedings pursuant to s. 24(1) of the *Charter*.

[108] Given the Crown's concession that Live Nation's success on this application should also result in a stay in favour of Optex, I stay all charges in the information against all defendants.

Released: September 5, 2017

Signed: **Justice C. A. Nelson**

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