PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Aecon Construction Group Inc.*, 2017 NSPC 61

Date: 2017-11-14
Docket: 2854093-2854094
Registry: Halifax

Between:

Her Majesty the Queen

v.

Aecon Construction Group Inc.

DECISION – APPLICATION FOR STAY

Judge:	The Honourable Judge Gregory E. Lenehan
Heard:	November 14, 2017, in Provincial Court, Halifax, Nova Scotia
Decision:	November 14, 2017
Charge[s]	Section**[s]** 74(1)(a) OHSA
Counsel:	Alex Keaveny, for the Crown Norman Keith, for the Defence

By the Court:

Aecon – Unreasonable Delay Decision

[1] Aecon Construction Group Incorporated (Aecon) has brought forward arguments that, if successful, could lead to the matter before me being stayed due to a breach of the Defendant's Canadian Chart of Rights and Freedoms (the Charter). Aecon has amended its original pleadings to include and argument alleging a breach of its fair trial right under subsection 11(d) due to unreasonable pre-charge delay. The pleadings otherwise allege a breach of the right to be tried within a reasonable time as guaranteed under subsection 11(b) of the Charter. This decision shall address both arguments in the order in which I have set them out in this introduction.

[2] The original pleadings, also, allege a breach of subsection 11(d) of the Charter "as a result of lost and non-disclosed evidence as a result of unacceptable negligence." I have already ruled that the issue of lost evidence is to be addressed at the conclusion of receiving all trial evidence. It is only at that point in the

proceedings will I be able to assess the impact of the unavailability of evidence determined by me on a balance of probabilities to be lost.

Fair Trial Right

[3] Aecon asks that I find there was unacceptable pre-charge delay in this matter that has adversely affected its ability to receive a fair trial. The Defendant acknowledges that the Occupational Health and Safety Act (the Act) provides a limitation period of two years in which to lay charges under the Act. The original information in this matter was sworn five months shy of the limitation period.

[4] Nevertheless, Aecon argues that the investigation was not properly conducted and allowed for potential evidence to be lost. Also, evidence that should have been collected was not obtained by the investigators. Part of the criticism from Aecon is that the investigation was passed among four different investigators without any proper procedures in place to ensure materials were handed off to subsequent investigators. This led to an incomplete investigation being conducted by the investigating authority and to an inability to locate evidence that once existed.

[5] Specifically, Aecon points out that while a government agency has every right to assign persons to any particular task, there is a requirement that care be taken to preserve evidence and due respect for the administration of justice be exercised. The Defendant says in this matter such care and respect was not present. Aecon supports its argument by drawing attention to the lack of any memo from Mr. Chant to Mr. Chase when the investigation was handed off in October 2013. As well, there is the acknowledged loss of police statements obtained on September 9, 2013; such statements were not sought by Department of Labour and Advanced Education (Labour) investigators until defence counsel requested them as part of disclosure. Aecon argues further that Ms. Marshall, a Labour inspector, took more photographs of the scene on September 9, 2013 than the five disclosed in the Crown materials. Additionally, Aecon states that an audio statement made by its employee, Mr. Boudreau, taken by Labour investigator Mr. Chant on September 9, 2013 has gone missing. That statement would have provided Mr. Boudreau a better and more reliable source for his recollection of activities around September 7, 2013 (a time critical to both the Crown and Defence cases) than the statement taken several months later by Mr. Chase. Such missing evidence could have and should have been preserved if due care and respect had

been followed when passing matters for investigation along from one investigator to the other.

[6] The Defendant argues, as well, that without the undue delay in the investigation and with less sloppiness, Labour investigators should have identified as relevant and material evidence some notes of Mr. Eakin (of Eastin Properties) and the daily logs of Mr. McKinnon (of Flynn Canada). Neither of those sources of material was collected by Labour during its investigation.

[7] In essence, Aecon has asked me to examine for efficiency and completeness the conduct of the investigation that led to the charges now before me. With the greatest of respect, that is exactly what the Supreme Court of Canada has said I should not do. In *R. v. Hunt*, [2017] S.C.J. No. 25, the Supreme Court adopted the reasons of Hoegg J.A., in his dissent judgment in *R. v. Hunt*, [2016] N.J. No. 372 (NLCA) in which he decided that it was not part of the judicial role "to scrutinize an investigation for efficiency…", at paragraph 104. Hoegg J.A. followed the Supreme Court's ruling in *R. v. Rourke*, [1978] 1 S.C.R. 1021 and the Ontario Court of Appeal in *R. v. Young* (1984) 46 O.R. (2d) 520, decisions that held

"courts are not authorized to supervise the operation and efficiency of police investigation", *R. v. Hunt*, [2016] supra, at paragraph 71.

[8] While this matter is not a police investigation, the reasoning in *R. v. Hunt*, [2016] supra, in my view applies to any state supported investigation, including workplace incidents such as this case now before me investigated by Labour personnel.

[9] There is always, of course, the ability and authority of a court to stay proceedings if an investigation were motivated by a purpose that would amount to an abuse of process, *R. v. Keyowski*, [1988] 1 S.C.R. 657, but Aecon has not suggested that there have been any actions by the state during the investigation or prosecution of this matter that would or could amount to an abuse of process.

[10] The question I am required to address is whether there was undue delay by Labour before laying the first set of charges against Aecon. I am unable to conclude on a balance of probabilities that there was.

[11] From the materials filed as exhibits, the affidavits filed in support of this motion, and the testimony received thus far, I have been able to discern that the Labour investigation of this incident involved:

- taking of numerous statements from eyewitnesses to the actual injury incident,
- documenting the scene through photographs,
- obtaining statements from persons who had been at the project site in the workdays immediately preceding the injury incident,
- preparing and serving on numerous corporate entities orders for production of materials and compliance,
- permitting time for compliance with such orders,
- reviewing and collating all the documents received in response to those orders,
- determining whether to seek further statements or further documents following the initial material review,
- conducting such further interviews,
- considering the liability of individual corporate bodies and persons under the Act, and
- deciding to lay charges and preparing materials in an organized and cogent fashion for disclosure.

[12] I do note that Exhibits 1, 2, and 5 on this trial contain numerous documents in each and Exhibits 3 and 4 are Aecon's Red Book divided into two three-inch binders. The total number of pages for these five exhibits in my estimation would exceed 2500 (I have not counted each page). During the course of the trial, there have been several other exhibits tendered that apparently had been disclosed by the

Crown, but not included in the first three exhibits. This indicates to me that the volume of materials actually collected during the investigation and disclosed to the Defendant was in excess of 2500 pages. In an affidavit of Ms. Oliver, an Occupational Health and Safety Consultant with Aecon's counsel, sworn April 13, 2017, she estimates there are 2,729 pages in the trial exhibits. That does not make it an extremely complex matter, but it establishes that this is a matter that required an appropriate length of time for investigation, careful review and consideration. I cannot say 19 months to do so is unduly long.

[13] While it is not my role to scrutinize the Labour investigation, I shall comment on aspects of Aecon's argument for undue pre-charge delay.

[14] Aecon takes issue with Labour having four investigators for this matter and them fumbling the ball (so to speak) when handing the investigation from one to the other. The evidence at trial is that there were two inspectors, Ms. Marshall and Mr. Teal, who responded to the call of an injury accident on September 9, 2013. An investigator with Labour attended awhile later to take charge of the investigation. That investigator, Mr. Chant, was scheduled to retire, so in October

2013, the investigation was passed on to Mr. Chase, another investigator with Labour. Other than documenting the scene and assisting in obtaining statements, the two inspectors did not conduct the investigation. They supported the efforts of the investigators. This procedure was little different than the way in which serious criminal incidents are responded to and investigated by police. The first to respond do not necessarily conduct the investigation. I do not share Defence Counsel's view of the distribution of responsibilities among Labour personnel in this matter. I do not find there was a fumbling of the ball, so to speak.

[15] Aecon has suggested that the time taken by Labour to investigate and the manner in which the investigation took place resulted in evidence becoming lost and other potential evidence not being obtained. As I have already indicated, the subsection 11(d) argument as it pertains to the impact of lost evidence on Aecon's ability to make full answer and defence will only be addressed after all evidence has been received. It is only then that I shall be in a position to assess the impact of any such evidence on the Defendant's fair trial rights. However, I feel compelled to make some comments about the alleged lost evidence at this time, because Aecon has referred to it in its pre-charge delay arguments.

[16] The notes of Mr. Eakin of Eastin Properties and the log book of Mr. McKinnon with Flynn Canada would appear to be third party records. It is questionable whether Labour investigators would or should have had knowledge of their existence. Furthermore, it is uncertain whether the authority of Labour could compel the production of those, if they were personal materials. As well, at this stage of proceedings it is entirely speculative that the contents of such materials would or could assist either side in this trial.

[17] With regards to lost photographs said to have been taken by Ms. Marshall on September 9, 2013, I have heard from Mr. Teal who did not take the photos, but is adamant that he was beside Ms. Marshall when she did take them and I have heard from Ms. Marshall who is adamant that she took a total of five photographs only and those are the ones that have been disclosed to defence in this matter and to McCarthy's Roofing Ltd. in the companion prosecution. There was nothing in either person's testimony that would cause me to question his or her honesty about what they recall doing in response to this incident on September 9, 2013. That there were photos taken by Ms. Marshall that have gone missing must be established on a balance of probabilities, not a coin toss.

[18] There has, also, been an allegation that an audio statement given by Mr. Boudreau to Mr. Chant on September 9, 2013 in the Aecon site trailer has been lost. Mr. Boudreau recalls attending the site after learning about the injury incident on that date even though he was not scheduled to work that day. He recalls Mr. Chant speaking to him and an audio recorder being used. Mr. Chant denies that he took such a statement from Mr. Boudreau. On a balance of probabilities, I am inclined to accept as more reliable the testimony of Mr. Boudreau. This would have been an exceptional experience for him and he has a clear recollection of the interaction, but not the details of what he told Mr. Chant. It is more probable that Mr. Chant could fail to remember one of several interviews in the course of his duties than Mr. Boudreau would create a memory for something that never happened. However, it is yet to be determined how such lost evidence impacts on Aecon's ability to make full answer and defence.

[19] The lost statement of Mr. Boudreau might prove to be detrimental to the prosecution; it might not. The possibility or probability that potential evidence becomes lost during the course of an investigation does not lead to the inevitable

conclusion that an investigation was unduly long or improper. The mere possibility of prejudice to the defendant is not enough to establish undue delay.

[20] I can see nothing in the evidence or arguments presented thus far that could permit me to find that there was undue delay by Labour to investigate the injury incident from September 9, 2013, review information obtained, prepare materials, and determine who, if anybody, should be charged with offences under the Act. While it is possible to suggest in hindsight that the process might have been done in a more informed and efficient manner, that does not mean at the time and in the circumstances, there was undue delay that should lead this Court to stay charges. The defence motion under subsection 11(d) of the Charter is dismissed.

Unreasonable Delay

[21] I am required to determine the application in regard to the alleged Subsection 11(b) breach following the method prescribed by the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, *R. v. Williamson*, 2016 SCC 28, and *R. v. Cody*, 2017 SCC 31. Those cases established presumptive time limits for unreasonable delay; 18 months in provincial courts and 30 months in superior

courts. If a matter before a court is beyond such time limit, then it is necessary to examine why the case has taken so long to reach a prospective end date to determine whether the delay has been unreasonable in all the circumstances.

[22] The framework for analysis prior to the decision on July 8, 2016 *R. v. Jordan*, supra, was set out in *R. v. Morin*, [1992] 1 S.C.R. 771. Where the matter before me commenced under the Morin framework, I am required, if necessary, to consider the conduct of the case by the parties up to the release of the *Jordan* decision with a view to their compliance with the guidance offered in that *R. v. Morin*, supra. The matter before me is a transitional case.

[23] As summarized nicely by my former colleague Derrick, J. (as she was then) in *R. v. Mahar*, 2017 NSPC 9 and *R. v. Spears*, 2017 NSPC 51, the process I must follow is:

1. Calculate the total delay from the date the accused was first charged.
2. Deduct any delay attributable to the Defence through waiver, either explicit or implicit, or through solely Defence conduct.
3. Determine if this Net Delay exceeds the presumptive ceiling.
4. If the time is above the ceiling, I am to ask whether there are exceptional circumstances established by the Crown to explain the delay.

5. If exceptional circumstances outside the control of the Crown are shown to have caused delay, then I am to deduct that time from the net delay.
6. If the delay as now calculated is below the presumptive ceiling, then it is the responsibility of the Defence to establish that the delay is unreasonable.
7. If the resulting delay after deducting exceptional circumstances remains above the presumptive ceiling, a stay should be entered unless a consideration of transitional circumstances would dictate otherwise.

Total Delay

[24] The original charges were laid April 7, 2015. The anticipated last day of trial for the presentation of evidence is December 19, 2017. By calculation that means that this matter will have required 32 months and 12 days to be completed. The permissible delay as set out by the Supreme Court is now 18 months. The delay in this case exceeds that standard by 14 months and 12 days. That is presumptively unreasonable.

Defence Delay

[25] Any waiver of delay by the defence, whether it be explicit or implicit, must be informed, clear and unequivocal (*Jordan*, supra, at paragraph 61).

[26] Delay caused solely or directly by the defence can include:

- tactics viewed by the court as intended to cause delay,
- the unavailability of defence when the court and Crown are able to proceed, and
- any other illegitimate defence conduct or action the court determines has resulted in delay (*Cody*, supra, at paragraph 30).

[27] The legitimacy of defence conduct is to be examined within the culture change of cooperation and collaboration demanded by *Jordan*, supra, and reiterated in *Cody*, supra. Inaction, action, and omissions must all be considered when considering the issue of illegitimate defence conduct. There is a requirement that all justice system participants, including defence counsel, conduct matters in such a way as to avoid causing unreasonable delay. "…many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11(b) of the Charter", *Cody*, supra, at paragraph 35.

- Explicit Waiver

[28] The original trial set for this matter was for five days with defence agreement for the period September 26 -30, 2016. The trial was brought forward by the court to be heard from August 8 – 12, 2016. On August 5, 2016, in a pre-trial conference intended to address case management issues defence counsel informed the court for the first time that in his estimation the trial with the various

arguments defence intended to put forward would probably require 10 days to complete. The Crown did not seek to adjourn the trial scheduled to begin the following Monday.

[29] On August 8, 2016 at the beginning of proceedings defence counsel sought a recess to discuss matters with the Crown. When court resumed, Defence counsel informed the court that issues of ‘particulars’ and ‘delayed disclosure’ were no longer being pursued by defence. Both parties expressed a desire to receive the decision in a companion prosecution, R. v. McCarthy’s Roofing Ltd., which was expected to be delivered in September 2016. Crown and defence agreed some efficiency could be gained in the Aecon prosecution as many issues before me were common to the two matters. Defence and Crown sought to adjourn the Aecon trial and defence explicitly waived any delay between that trial date and the new trial date offered. The earliest dates available with the court was January 12 and 13, 2017 and January 19 and 20, 2017. This explicit waiver of five months and four days shall be deducted from the total delay of 32 months 12 days.

- Implicit Waiver

[30] This matter was before Judge Derrick (as she was at that time) on November 10, 2015 to set a trial date that would follow the trial in R. v. McCarthy's Roofing Ltd. The McCarthy's trial was scheduled for seven days in June of 2015. The Crown chose to prosecute McCarthy's first in time. Judge Derrick was hesitant to offer a trial date for Aecon in July or August, because the matter would be heard by another judge and she did not want to interfere with vacation plans for such other judge. Counsel for Aecon indicated that September 2016 was available. Crown counsel suggested five days to complete the Aecon trial. Defence counsel agreed with that estimation. The matter was set for September 26 to 30, 2016.

[31] After that trial time was set, Judge Derrick approached me to see if I was available to sit as the trial judge for this matter. I advised her I was and I offered trial dates earlier than what had been set by her. The dates I made available were August 8 – 12, 2016. That was conveyed to counsel by Judge Derrick and confirmed by me in an e-mail to counsel on December 21, 2015.

[32] Subsequent to those e-mails, there was further correspondence among counsel for both parties and the court to arrange dates for a hearing to address an

application by Aecon for particulars and to schedule a pre-hearing teleconference. The teleconference was held April 25, 2016 and the particulars application was conducted on June 20, 2016. My decision on that issue was adjourned for 10 days.

[33] On June 30, 2016, I gave my decision on the defence motion for particulars. I ordered the Crown to provide particulars on the first two counts but not on counts #3 and #4. Those particulars were to be provided to defence by July 6, 2016. Counsel for Aecon suggested a possible adjournment of the trial then scheduled to commence August 8, 2016. Counsel was advised that the earliest the court could accommodate five days for trial would be January 2017, a six-month delay. The trial was not adjourned.

[34] As mentioned previously, on August 5, 2016, counsel for Aecon for the first time suggested to the court that the trial would require 10 days to complete.

[35] On August 8, 2016 both counsel sought to adjourn this trial. The Crown and Aecon were of the jointly held opinion that Judge Derrick's decision in R. v. McCarthy's Roofing Ltd., expected to be provided in September 2016, would be

beneficial to consider before commencing this trial. Many of the issues on which Aecon had given notice it was intending to argue at trial had been fully canvassed by McCarthy's in the case before Judge Derrick. Crown asked about possible trial dates. I informed counsel that I could book January 12 and 13, 2017 of one week and January 19 and 20, 2017 of the following week. I suggested to counsel that I was interpreting the request for adjournment as an indication that there might be the possibility of counsel proceeding by way of an agreed statement of facts and argument. Counsel for Aecon acknowledged that was his preference and was something he would encourage the Crown to work toward. Counsel for Aecon said that if an agreed statement of facts could be achieved, the Crown would need a couple of days for argument and the defence likewise. Those January 2017 dates were tentatively set and a return date of September 20, 2016 was given for counsel to appear after they had the benefit of receiving the decision in the companion prosecution R. v. McCarthy's Roofing Ltd.

[36] On September 20, 2016 counsel appeared before me. The Crown indicated that after considering the decision in R. v. McCarthy's Roofing Ltd., it was offering no evidence on counts 3 and 4 on the information against Aecon. Those charges were dismissed for want of prosecution. Counsel confirmed they were

attempting to work toward filing an agreed statement of facts. The lost evidence motion would be argued at the end of the trial. The January 2017 trial dates were confirmed.

[37] No agreed statement of facts was ever presented to the court.

[38] The trial commenced on January 12, 2017 as scheduled with the four days assigned. At the commencement of the trial, Crown counsel conceded that statements obtained by Cst. Cole of Halifax Regional Police on September 9, 2013, had been lost due to unacceptable negligence by the Crown. The Crown made no other concessions of lost evidence. Crown, also, sought to amend the particulars with regard to count 2 on the information. I did not permit that to happen. Thereafter the Crown began to call its case with Cst. Cole as its first witness.

[39] On January 13, 2017, Crown counsel observed that the pace of testimony in the trial was not going to permit the completion of the Crown's evidence within the four days allotted. Both counsel were directed to determine the number of additional trial days required to complete the matter, to compare available

continuation dates, and to advise the court so I could arrange with my colleagues to switch courts to accommodate proposed continuation dates. On January 19, 2017, counsel for Aecon acknowledged that the Crown's availability was far more accommodating than his own. Counsel for Aecon asked that I set continuation dates for May 30 and 31, 2017. May is an intake month for my court, courtroom #1, thus those dates were not available for trial in my courtroom. I was able to secure those dates in courtroom #4 with the cooperation of my colleague Judge Digby who agreed to cover my intake days in Courtroom #1. No other continuation dates were sought at that time.

[40] Counsel for Aecon appears to be an experienced, knowledgeable lawyer well aware of the defendant's Charter protected rights. It can be assumed that Aecon would have been well aware from counsel of the rights available to it and the implications of agreeing to these trial dates.

[41] In my view the resulting delay from January 20, 2017 to May 30, 2017 was implicitly waived by defence. This four months and 10 days, also, will be deducted from the total delay of 32 months and 12 days.

- Caused solely or directly by the Defence

[42] *R. v. Jordan*, supra, released in July 2016, signaled to all parties in the criminal justice system a requirement to seek efficiencies wherever possible. As much as the Crown and the courts must respect an accused's right to be tried within a reasonable time, an accused must act to avoid creating or allowing delay. No longer may a defendant sit back and quietly watch the days go by. No longer may a defendant engage in motions and applications that have little merit. Defence counsel are expected to actively protect clients' rights, but to do so in a way that collaborates and cooperates with the Crown to seek and find trial efficiencies.

[43] In the matter before me, Counsel for Aecon has made motions for particulars, disclosure, directed verdict, and Charter relief for lost evidence, pre-charge delay and unreasonable delay. Counsel opposed a Crown motion for video-conference evidence from a witness, Ms. Marshall, residing in Great Britain. None of the motions could be viewed as wholly without merit or frivolous. With the exceptions of the motions for directed verdict and this one, the various applications did not add to trial time as most were accommodated by finding additional hearing dates to address the motions in advance of trial time.

[44] Aecon was successful in June 2016 with getting particulars ordered for two of the four charges it was facing at that time.

[45] On August 8, 2016, Aecon abandoned its motion for disclosure and any further clarification of particulars.

[46] Counsel for Aecon has acknowledged that the motion with regard to lost evidence should be argued at the conclusion of the trial evidence.

[47] I granted the Crown's request to have Ms. Marshall testify via video-conference despite the concern identified in Ms. Oliver's affidavit of April 13, 2017 about defence counsel being able to examine Ms. Marshall effectively on several of the 2,729 pages of documents exhibited at trial.

[48] Prior to the trial resuming on May 30, 2017, counsel advised the court that additional days were anticipated necessary to complete the trial and the various arguments to be addressed. I canvassed my colleagues and was able with the

cooperation of Judge Sherar to secure the days of September 11 and 12, 2017 in courtroom #2 for this matter to continue. Judge Sherar agreed to cover my court on those two days. As well, I was able to hold November 13 and 14, 2017 in my court for continuation, if necessary. As it turned out, November 13, 2017 was not available because of the functioning of our Remembrance Day Act. The dates provided by the court were the earliest dates provided by e-mail to the court on which counsel had mutual availability.

[49] I do note, however, that according to the affidavit of Carla Oliver of October 30, 2017, counsel for Aecon had advised Crown counsel on May 3, 2017, that the entire week of September 11 – 15, 2017 was available and that those dates would be held 'until the additional dates are confirmed with the Court.' On May 6, 2017, counsel for Aecon informed Crown counsel that September 14 and 15, 2017 were no longer available. September 15, 2017 would have been convenient for the court as a courtroom was available.

[50] On May 30, 2017, the trial continued first with testimony from Ms. Marshall. Her testimony was relatively brief. She was examined on only a few of

the documents contained in the 2,729 pages of exhibited material. Thereafter and on May 31, 2017, an additional seven witnesses testified. The last Crown witness was to be Mr. Merrick. He did not give evidence on May 31, 2017. It was anticipated that the Crown would require about 45 minutes in direct examination and then defence counsel would need time to cross-examine. It was approximately 3:10 p.m. when Mr. Merrick attended court. I had already informed counsel that court would not sit after 4:00 p.m. That was to accommodate defence counsel's travel arrangements for a flight home. I did not want to have Mr. Merrick bound by his oath until the trial was to resume September 11, 2017, so proceedings were adjourned with the agreement of counsel for Aecon until September 11.

[51] On September 11, 2017, Mr. Merrick testified. The Crown closed its case. Defence argued for directed verdicts on both counts and sought to argue the motion of unreasonable delay. Crown counsel argued against the directed verdict and sought time to respond to the unreasonable delay argument. I invited counsel to submit written materials on the subsection 11(b) Charter argument which I was prepared to hear on November 14, 2017, if necessary, after I rendered my decision on the motion for directed verdict. No further evidence was heard on September 11, 2017 and the matter was not in court on September 12, 2017.

[52] On November 14, 2017, I gave my decision on directed verdict. A dismissal was imposed on count #2 on the information. The motion by Aecon with respect to the first count failed. I, then, heard arguments on the subsection 11(d) (pre-charge delay) and subsection 11(b) (unreasonable delay) motions. No defence evidence was called on that date.

[53] In my view the delay from September 11, 2017 to November 14, 2017 must be attributed solely to the defence. It was trial time during which testimony could have been heard that was lost to argument and time for me to consider and prepare a decision. It was not time over which the Crown had any control or responsibility. The period of two months and 2 days will be deducted from the overall delay.

[54] I have declined to find defence counsel's unavailability has caused delay. Certainly, the Crown has been able to offer many earlier dates than Counsel for Aecon could for continuation of trial. For that to be considered delay caused by the defence, the court would have to have been available on those earlier dates as well. That was not the case. This court took the approach of accommodating mutually convenient times for counsel by canvassing all the courts in this building

to find space and time to hear this matter as efficiently as possible. Given my docket alone, it is doubtful a different approach would have permitted this trial to proceed in as timely a fashion as it has. The underestimation of time in my view is the appropriate issue to be examined. I will do so under the topic of exceptional circumstances.

Net Delay

[55] The total delay from April 7, 2015 to the anticipated end date of trial is 32 months and 12 days. Deducted from this is the explicit waiver of 5 months and 4 days and what I have decided was implicit waiver of 4 months and 10 days. I must, also, deduct 2 months and 2 days for delay caused by defence while I addressed the directed verdict motion. The net delay is calculated, therefore, to be 20 months and 24 days. That is a figure above the 18 -month ceiling imposed by the Supreme Court.

Exceptional Circumstances

[56] As has been previously mentioned, this trial was adjourned from August 2016 to January 2017 for the purpose of allowing Crown and defence the

opportunity to seek efficiencies in the proceedings, perhaps in the nature of an agreed statement of facts. Counsel for Aecon agreed that with such efficiencies in place the four days allotted in January 2017 would be sufficient for Crown and defence to present the case. Unfortunately, the type of efficiency suggested did not come to be. The trial began January 12, 2017 without counsel advising the court that four days for trial would not be enough. It was at noon on the second day of trial that Crown counsel raised the concern that additional time would be required.

[57] As I mentioned in my comments on implicit waiver, I instructed both counsel to determine how much additional time would be required to complete the trial. When the issue of setting continuation dates was addressed on January 19, 2017, I was asked for two additional dates, those being May 30 and 31, 2017. I understood from those representations that such was the estimation of additional time required to complete matters agreed upon by both counsel. It turns out that estimation was erroneous.

[58] On May 3, 2017, I heard the Crown's application to have Ms. Marshall testify via video- conference. During that court appearance, counsel raised concern

about having enough trial time to complete matters. Once again, counsel were instructed to share availability dates and advise the court so I could find an available courtroom. This led to an exchange of e-mails between counsel and an e-mail from Crown counsel to me on Saturday, May 6, 2017 with the list of mutually available dates for counsel.

[59] The underestimation of trial time at the initial stages of setting a trial down has significant repercussions when additional time is thereafter sought. As observed by Nelson, J. in *R. v. Live Nation Canada Inc*., 2017 ONCJ 590, at paragraph 64, "Trial underestimations almost always result in delay and disruption to the trial process."

[60] At the provincial court level in Halifax, the courts routinely double and triple book the dockets in an effort to reduce systemic delay. With such efforts, the courts are able in most cases to accommodate requests for full days of trial time within four or five months of the request. This, unfortunately, leads to the courts struggling to find early return dates for lengthy matters requiring additional dates for continuation because the trial has proceeded slower than anticipated. Delays of

four to five months for two or three additional trial days can be expected even with the matters for continuation being given priority.

[61] The estimation of trial time is not a responsibility borne solely by the Crown. "As *Jordan* stresses, all participants in the justice system bear the responsibility for the efficient management of justice resources." *R. v. Live Nation Canada Inc.*, supra, at paragraph 64. The Crown knows how much time it estimates to conduct direct examination of its witnesses. It has no control over how long or short defence anticipates requiring for cross-examination of each witness. That is entirely within the knowledge of defence counsel only. Thus, the need set out in *R. v. Jordan*, supra, and emphasized again in *R. v. Cody*, supra, for a culture of collaboration and cooperation in the justice system.

[62] It is recognized that there are times when the best efforts to estimate trial length will fail to anticipate factors that lead to greater time requirements. Often the circumstances are unforeseeable or unavoidable. Neither party will be at fault. Unfortunately, there often is nothing the Crown or the court can do to lessen the impact on further delay. I find that is what happened in this trial.

[63] I am satisfied that counsel took my directions seriously and conferred with each other after it was obvious that the four days assigned for trial in January would not be enough. When two additional days were suggested, a total of six days for trial was a reasonable estimation. By May 3, 2017, counsel realized more time was needed. After a canvass with my judicial colleagues for earliest available court time convenient to both Crown and defence, September 11 and 12, 2017 were added to the trial schedule to be held in courtroom #2 along with November 14, 2017 in courtroom #1. Although both counsel were available August 8 – 11, 2017, I was not available for personal reasons.

[64] As was decided in *R. v. Jordan*, supra, and followed in *R. v. Live Nation Canada Inc*., supra, I characterize the underestimation of time as discrete events that should result in a reduction of the unavoidable delay from the net delay as exceptional circumstances. In my view, the delay from May 31, 2017 to September 11, 2017, 3 months and 10 days should be deducted from 20 months and 24 days of net delay.

[65] Where the November 14, 2017 date was, also, set in May as the next earliest date I could accommodate a full day trial continuation due to the underestimation of time, I would have deducted that additional delay as part of these discrete events, but I have already characterized this delay otherwise as defence delay. It does not get deducted twice.

[66] I have not included the delay from November 14, 2017 to December 18, 2017 in this calculation as part of exceptional circumstances. In late October 2017 I was informed that two days of trial time scheduled in my court would not be needed for the case then set. I failed to contact counsel in this matter before me to canvass their availability to move the matter forward. I am unable in the circumstances to say this court at that time gave this the priority that should have been expected.

Resulting Delay

[67] When the exceptional circumstances delay is deducted from the net delay, the resulting delay is 17 months and 14 days anticipating December 19, 2017 as the

last trial day. This is below the 18-month ceiling set by the supreme court for non-complex matters in provincial court.

Further comments

[68] Aecon has not convinced me in its arguments that this time for trial below the 18-month presumptive ceiling for delay was otherwise unreasonable. Although the case does not meet the definition of a complex case, it does have some complexities that have led to various legitimate actions requiring time in which to identify, consider, and address those issues; including disclosure, lost or missing evidence, particulars, and trial length to name a few. The court and the Crown have been diligent in addressing these matters mindful of the defendant's right to trial within a reasonable time.

[69] If it had been necessary, I would have found that the actions of the parties and the court moving this matter from arraignment to the trial dates in August 2017 were well within the acceptable practices encouraged under the *R. v. Morin*, supra, guidelines. I see nothing in the record that would cause me to be concerned about a lack of consideration for the defendant's right to be tried in a reasonable time.

Defence counsel sought motions for disclosure and particulars. Crown counsel made efforts to respond to disclosure requests in a timely fashion. The Crown, also, encouraged the court to move the case forward as quickly as possible. The court accommodated all such motions and requests without adding any delay to the original scheduled trial in September 2017. In fact, the court was able to bring the trial forward by seven weeks to the dates in August 2017.

Conclusion

[70] The resulting delay in this case will have been 17 months and 14 days at the anticipated end of testimony. I find this delay is not unreasonable and it is under the presumptive ceiling established by the Supreme Court. I find the defendant's rights under subsection 11(b) of the Charter have not been violated. The case will not be stayed on this ground.

[71] I have found, as well, that there has not been undue pre-charge delay. The defendant's rights under subsection 11(d) of the Charter as addressed in this motion have not been violated. The case will not be stayed on this ground either.

The Honourable Gregory E. Lenehan, JPC.