PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Fulton*, 2022 NSPC 53

Date: 20220707
Docket: 8431357-60, 8460165, 8473751
Registry: Pictou

Between:

Her Majesty the Queen

v

Thomas James Fulton

DECISION REGARDING RECUSAL AND STAY OF PROCEEDINGS

Judge:	The Honourable Judge Del W Atwood
Heard:	2022: 7 July 2022 in Pictou, Nova Scotia
Charge:	Sections 348(1)(b), 334(b), 354(1)(a), 145(5) *Criminal Code of Canada*
Counsel:	T William Gorman for the Nova Scotia Public Prosecution Service Jennifer MacDonald for Thomas James Fulton

By the Court:

Summary

[1] Thomas James Fulton is charged with breaking into a shed, along with related counts of theft, possession of property obtained by crime (case nos 8431356-60), and two counts of violating a release order (case nos 8460165 and 8473751). The charges are proceeding summarily. A trial is scheduled for 13-14 July 2022.

[2] Defence counsel alleges that there has been a breach of Mr Fulton's right to be tried within a reasonable time, as guaranteed constitutionally in ¶ 11(b) of the *Charter*; the remedy sought is a stay of proceedings. Defence counsel reckons the delay in bringing Mr Fulton to trial, net of exceptional circumstances, as 26 months, well in excess of the 18-month threshold for matters heard in Provincial Court as determined in *R v Jordan*, 2016 SCC 27 at ¶ 5, 46, 49, 105 [*Jordan*].

[3] The prosecution has applied for recusal, so that another judge might hear the *Charter* application. Additionally, the prosecution asserts that the delay in bringing Mr Fulton to trial is 14 months, 18 days, well below the 18-month *Jordan* threshold.

[4] I ruled earlier that the application for recusal was not granted, and that the reasons of the court would be issued with the reasons pertaining to the delayed-trial *Charter* application.

[5] Counsel agreed that the court render judgment based on written submissions; no oral argument was required.

[6] For the reasons that follow, I decline to recuse myself from hearing the *Charter* application; the *Charter* application for a stay of proceedings is not granted.

Application for recusal

[7] Mr Fulton's charges are to be tried in Provincial Court under Part XXVII of the *Code* pertaining to summary-conviction matters. I am scheduled to hear the trial.

[8] This court, as the trial court, is presumptively a court of competent jurisdiction for the purposes of granting a § 11(b)/24(1) *Charter* remedy: *R v Mills*, [1986] 1 SCR 863 at ¶ 266 [*Mills*].

[9] In seeking recusal, the grounds stated by the prosecution in its legal brief of 30 May 2022 [prosecution recusal brief] are that:

- I would be required to rule on my interpretations of public-health directives and court-mandated protocols "in the context of in-person proceedings in the Provincial Court": prosecution recusal brief at ¶ 9;

- I would be required to evaluate "my own decisions and any interplay that those decisions may have with respect to [Mr Fulton's] section 11(b) rights": prosecution recusal brief at ¶ 9; and,

- given my ¶ 11(b) *Charter* ruling adverse to the prosecution in *R v Graham*, 2022 NSPC 10 [*Graham*], there exists "a reasonable apprehension of bias in this situation" because of the supposed need for me to "[evaluate my] own historical decisions": prosecution recusal brief at ¶ 11.

[10] A judge should not review on the merits a decision that the same judge made earlier on in a proceeding unless there have been (1) material changes in the circumstances upon which the decision was based, or (2) further jurisprudential developments on the same subject matter sufficient to warrant the reconsideration of an issue—*cf R v Evans*, 2019 ONCA 715 at ¶ 65; *R v Orr*, 2021 BCCA 42 at ¶ 47. The prosecution is entirely correct on this point.

[11] However, I do not believe that I am required to engage in that sort of an exercise here.

[12] There is no controversy that Mr Fulton's case was adjourned on a number of occasions; almost all of the adjournments were granted by me and the reasons for those adjournments are well described on the record. None of the adjournments was controversial when granted.

[13] Mr Fulton's application does not require the court to adjudicate on the correctness or reasonableness of the adjournments. An application for a judicial stay of proceedings for a putative breach of a charged person's speedy-trial rights is not a form of appellate review or judicial review of the decisions made by a court to adjourn a case earlier on in the process. It is, in my view, immaterial whether adjournments of Mr Fulton's charges were incorrectly or improvidently ordered; rather, what must be determine now is how the adjournments—whether properly or improperly granted—should be classified: as prosecution-attributed delay, defence delay, systemic delay, waived delay, exceptional-circumstance delay, or a combination of them. Accordingly, it will not be necessary for me—nor would it be required of a substitute judge—to decide whether any one or more adjournments should have been granted. What must be decided is the attribution of delay. No risk of bias arises in my being the adjudicator in that project.

[14] A second factor weighs against recusal.

[15] As decided in *Mills*, a trial judge presiding over a trial court is presumptively a court of competent jurisdiction for the purposes of granting most *Charter*-grounds remedies. This is reinforced in Rule 2.4(3) of the Nova Scotia Provincial Court Rules [Rule], which provides that an application for a stay of proceedings for unreasonable delay under ¶ 11(b) of the *Charter* shall be brought before the assigned trial judge. There is a practical advantage to this, particularly in sole-charge judicial centres such as Pictou, where the "assigned trial judge" will likely have presided every time a *Jordan*-vulnerable case was called and heard. That is so in this case. With the exception of arraignment (when Mr Fulton was brought before the court in custody before another judge) I have presided over all of Mr Fulton's appearances and have a good recollection of the procedural history of this case. This corporate memory is valuable, as it allows me to resolve, with the benefit of having been involved in this proceeding almost from the outset, any ambiguities that might exist on the printed record. Illustrative of this is the minute of proceedings for 16 March 2020. The endorsement on the information for that date records that Mr Fulton was not present in court, which would appear to have been contrary to the attend-court provisions of a release order; this is amplified in the brief for the prosecution, which asserts that Mr Fulton "fail[ed] to appear for plea." In fact,

no accused persons appeared in Pictou on 16 March 2020, as it was the first judicial day following the pandemic-related suspension of in-person proceedings. I recall this clearly, as I was the presiding arraignment judge in Pictou on that date.

[16] A third factor is this: that I might have rendered a decision adverse to the prosecution in the *Graham* delay case does not mean that I cannot approach this one impartially. This case will be decided on its own facts, and my rendering a judgment in *Graham* does not prevent me from approaching Mr Fulton's application governed by the imperative of judicial impartiality. A reasonably informed person, possessed of a contextualized understanding of the issues in this case, would be assured of that: *R v RDS*, [1997] 3 SCR 484 at ¶ 106; *Nova Scotia (Attorney General) v MacLean*, 2017 NSCA 24 at ¶ 38-42; *R v Lilly*, 2021 NSSC 292 at ¶ 20.

[17] Finally, there is the matter of efficiency and economy. A recusal would lead inevitably to further delay due to the need to assign a substitute judge to hear the matter and give that judge time to schedule and rule on Mr Fulton's trial-delay application. An action that engenders additional delay in a case involving the adjudication of delay is not in the interests of justice.

[18] The application for recusal is dismissed.

Application for stay of proceedings due to unreasonable delay

[19] *Jordan* applies describes what should be an uncomplicated unreasonable-delay-assessment algorithm. It enforces the right of a person charged with an offence to be tried within a reasonable time: *Canadian Charter of Rights and Freedoms*, ¶ 11(b), Part 1 of *the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[20] There is a presumptive case-origin-to-outcome ceiling of 18 months for matters adjudicated in provincial court; the decisive interval is measured as running from the time of the laying of a charge and continuing to, not the date of any eventual ¶ 11(b) *Charter* hearing, but to the anticipated-end-of-trial date—*Jordan* at ¶ 5, 46, 49, 105. This is a key point, which will be discussed later.

[21] From that interval must be deducted delay waived or caused solely by defence counsel, as defence delay does not count toward the presumptive ceiling; however, defence actions taken legitimately to respond to charges do not constitute defence delay—*Jordan* at ¶ 65, 66, 105.

[22] Further, when a person charged with an offence consents to a date for trial offered by the court, or to an adjournment sought by the prosecution or directed by the court, that consent does not amount, without more, to a waiver. Rather, the prosecution must demonstrate that, in agreeing to a trial date, the defence was engaging in something more than an acquiescence in the inevitable. Proof of waiver of delay is a high bar, and there must be evidence of clear, unequivocal, and informed acceptance—*Jordan* at ¶ 61; *R v Morin*, [1992] 1 SCR 771 at 790. In *Jordan* at ¶ 4, a 4-month delay was attributed to defence waiver when there was a last-minute change of counsel prior to trial.

[23] Delay (minus defence delay) that exceeds the 18-month-provincial-court ceiling is presumptively unreasonable—*Jordan* at ¶ 47, 49, 56, 68, 105.

[24] Once the presumptive ceiling is exceeded, the burden shifts to the prosecution to present persuasive evidence of exceptional circumstances sufficient to rebut the presumption of unreasonableness—*Jordan* at ¶ 47, 58, 68, 105.

[25] An exceptional circumstance may be:

- a discrete, unavoidable, exceptional, or unforeseeable event; or,

- a complex case requiring exceptional time allocation—*Jordan* at ¶ 71, 73, 75, 81, 82, 105.

[26] In a case when delay, after adjustment for an exceptional circumstance, does not exceed the presumptive ceiling, a person being tried may have proceedings stayed by proving that meaningful and sustained steps were taken to expedite proceedings and that the case took markedly longer than it should have to bring to trial—*Jordan* at ¶ 48, 82, 84-86, 105, 111, 113. Stays of cases beneath the ceiling are to be rare, granted only in the clearest of cases—*Jordan* at ¶ 48.

Case chronology

13 Feb 2020	Mr Fulton appears in custody before a presiding justice of the peace in relation to cases 8431359-60, and is remanded for a show-cause hearing to 14 Feb 2020.
14 Feb 2020	Mr Fulton appears in custody before Judge MacKinnon and is remanded to 18 Feb 2020 to allow Mr Fulton time to retain counsel.
18 Feb 2020	Mr Fulton is released on terms negotiated by counsel, ordered to return for plea on 16 Mar 2020.
16 Mar 2020	In-person proceedings suspended due to the pandemic—online: https://courts.ns.ca/News_of_Courts/documents/NSPC_Measures_03_16_20.pdf. Mr Fulton's case adjourned to 2 June 2020; a notice to this effect was mailed to Mr Fulton by the Court.
2 June 2020	Ms MacDonald appears for Mr Fulton under the authority of a designation of counsel and seeks an adjournment to obtain further disclosure. Case adjourned to 6 Aug 2020.
6 Aug 2020	Ms MacDonald appears for Mr Fulton and enters not-guilty pleas; matter to be called on 14 Oct 2020 for trial

	scheduling, as in-person proceedings for persons not in custody remained under suspension in Pictou, awaiting modifications to court room facilities.
14 Oct 2020	Trial scheduled for 18-19 May 2021; by this time, two additional release-order-breach charges are before the court, and are scheduled for plea on the trial date for the original charges.
26 Apr 2021	In-person proceedings suspended in Provincial Court, continuing to at least 11 June 2021—online: https://courts.ns.ca/News_of_Courts /documents/NSPC_All_In_Person_ Appearances_Suspended_04_26_21.pdf.
18 May 2021	Trial rescheduled to 13-14 July 2022.
29 April 2022	Defence counsel files application for stay of proceedings, pleading a ¶ 11(b) *Charter* violation. Hearing scheduled for 16 May 2022.
16 May 2022	Parties agree that court may decide ¶ 11(b) application based on briefs to be filed by counsel. Defence brief to be filed by 8 June 2022; prosecution brief, 15 June 2022. Prosecution provides informal notice of an application for recusal. Counsel agree to address recusal issue in their respective briefs; prosecution to file proper application by the end of the month.
30 May 2022	Prosecution files application for recusal

[27] In addition to the preceding chronology, I accept as accurate the additional relevant dates found at ¶ 8 of the prosecution delay brief, listing an array of directives issued by the court which suspended and limited in-person proceedings during the COVID-19 state of emergency—with this exception: the prosecution described a number of these directives as having been made by certain members of court staff. This is only partly accurate. None of the

directives referred to in the prosecution delay brief originated with court staff. Staff certainly circulated them to justice-system participants impacted by the directives; however, the directives originated with the court. They have been aggregated online at: https://www.courts.ns.ca/News_of_Courts/COVID19_Preventative_Measures.htm.

Calculation of delay

[28] I would observe that the stay application in this case was filed 29 April 2022, with a requested hearing date of 16 May 2022. As the first day for trial was 13 July 2022, an argument might have been sustainable that the application was not timely, as not being in compliance with Rule 2.4(1), which requires pre-trial applications to be heard at least 60 days before trial. Unreasonable-delay applications are classed as pre-trial applications in virtue of Rule 2.4(2)(e). However, no procedural objection was raised by the prosecution on this point, and it is not necessary for the court to address it. What I find of greater moment is the fact that the application was filed 347 days—almost one year—after the trial date was set.

Total delay

[29] The total delay in this case runs from the date Mr Fulton was arrested and charged (13 February 2020) to the anticipated end-of-trial date (14 July 2022). TOTAL DELAY: 29 months.

Defence delay

[30] The interval of 2 June 2020 to 6 August 2020 is notionally attributable to the defence; this delay was related to an unfulfilled disclosure request pertaining to video recordings. The prosecution is not obliged to disclose every last bit of evidence before a trial date is set: *R v Kovacks-Tatar*, [2004] OJ No 4756 at ¶ 47; *R v Allison*, 2022 ONCA 329 at ¶ 46. However, I am satisfied that there is a causal connection between the incomplete disclosure and the delay in setting a trial date; the disclosure sought by defence counsel was, in my view, essential to providing Mr Fulton effective legal advice regarding his plea. DEFENCE DELAY: 0 MONTHS.

[31] As the delay net of defence delay exceeds 18 months, the burden shifts to the prosecution to establish on a balance of probabilities the existence of a form of exceptional circumstance.

Exceptional circumstance—case complexity

[32] The prosecution does not advance a complexity-of case claim.

Exceptional circumstance—discrete event--pandemic

[33] The controversy in this case is whether the pandemic should be treated as a discrete-event exceptional circumstance.

[34] Counsel provided the court in their respective briefs with numerous decided authorities from across Canada that have sought to tackle this issue. In my view, those cases those cases turn on the pandemic situation the prevailed in the judicial centres where they were decided. The best guiding authority is *Jordan*; what the court must do is apply the binding principles in that case to the circumstances that have prevailed here since March 2020.

[35] In making the following observations, the court permissibly takes notice of the prevalence of matters on the local docket: *Nova Scotia (Minister of Community Services) v JP*, 2021 NSCA 45 at ¶ 47-49; *R v AJL*, 2019 NSPC 61 at ¶ 121, aff'd 2020 NSCA 5; *R v Nguyen*, 2013 ONCA 51 at ¶ 4; *R v Prasad*, 2006 BCCA 470 at ¶ 12; and *R v Gibbon*, 2006 BCCA 219 at ¶ 21 and 26.

[36] It is important for the court to take note the significant changes to court operations that have occurred since the start of pandemic.

[37] In February 2020, there were only five cases before the Provincial Court in Pictou that were assessed as being *Jordan* vulnerable; in fact, on closer

inspection, each of those cases was well below the presumptive ceiling as a result of defence-attributable delay.

[38] Prior to the pandemic, the average interval from arraignment to conclusion for cases in Provincial Court in Pictou was 108 days. The average number of appearances to bring a case to conclusion was four.

[39] The current situation is far different.

[40] At the present time, we are scheduling trial dates into the fall of 2023, and that is able to be accomplished only by setting multiple trials and hearings per day.

[41] Even with this, almost three hundred cases in Pictou are classified as *Jordan* vulnerable.

[42] By my rough calculation, the average number of appearances required now to bring a case to conclusion is eleven.

[43] There are myriad reasons for this.

[44] There is a significant increase in the numbers of persons coming before the court unrepresented by counsel. This inevitably prolongs and complicates proceedings: persons who are unrepresented will often wish to have counsel but

will require multiple adjournments to navigate what appears to be an increasingly complex process of applying for legal aid. Persons who are housing or income insecure may not have the means or ability to apply for legal aid, even though they might qualify for it.

[45] Those denied legal aid will be faced with the choice of applying to the court for state-funded counsel or forging ahead unrepresented—either way, adjournments are inevitable.

[46] Even cases defended by counsel take a great deal of time to bring to conclusion. Defence counsel are compelled to manage large numbers of pending matters. Clients will drop out of sight for weeks and months at a time. This is because very many persons with cases pending in Pictou are unsheltered and itinerant, a tragic situation that has been made far worse by the pandemic: persons living on the streets will not have the means to stay in touch with their counsel; some will relocate to other communities in search of work and shelter, and sometimes, unfortunately, end up with charges in multiple judicial centres (a complicating factor that almost always leads to further delays).

[47] There is increasing prevalence of defence counsel providing representation under the terms of appearance-by-appearance, limited-scope retainers. It might

be supposed that some legal assistance is better than none. I do not believe that the results bear this out. It takes an inordinately long time to tease out pleas or any other meaningful actions in these sorts of cases; even when pleas are entered and trial or sentencing dates are set, it will remain unknown whether the accused person will ultimately be assisted by counsel at the times that matter most.

[48] Prosecutors, too, face complex challenges. Particularly daunting are the large numbers of cases involving persons being arrested and brought to court in custody. Bail hearings are occupying an expanding portion of the docket and are dislodging cases for persons who are not in custody. This necessarily requires prosecutors to reallocate time and resources from trial preparation to bail-hearing preparation, and must be an enormous case-management burden. Bail-related trial-date displacement has a ripple effect: as cases take longer to get to trial, contact with witnesses will be lost, leading to further delay or the abandonment of proceedings.

[49] The increase in the numbers of persons being detained by police for show-cause hearings is attributable in part to the notable spike in firearms, serious-violence, and controlled-substance-trafficking offences coming before the court.

Additionally, allegations of serious bail violations are being encountered now with troubling frequency.

[50] Persons in custody facing reverse-onus proceedings typically require numerous appearances before being able to assemble bail plans for consideration by the court. Adjourning a bail hearing still consumes court time and erodes the docket space available to hear cases that are ready to proceed. There are two complicating factors at play in this. The first is the difficulty encountered by defence counsel in trying to make contact with clients who are on remand. The second is the phenomenon of trickle-in charges, which arises when policing services proceed to lay successive informations days or weeks after the charged person has been remanded; just as a release plan has been finalized, a new set of charges shows up on the bench, complicating the bail project.

[51] This is an abbreviated account of the significant disruption of court services that has occurred since the start of the pandemic. And recall: a state of emergency operated in the Province from 22 March 2020 to 21 March 2022. As recently as last week, Nova Scotia recorded a number of SARS-CoV-2 fatalities that matched the mortality weekly report from two years ago, so that this serious public-health situation has not ended—far from it. The virus

remains a vector for serious disease, which itself has had a significant impact on court operations. A large number of cases set for trial over the past two years have experienced significant delay due to essential justice system participants becoming infected and requiring prolonged convalescence.

[52] Without doubt, the pandemic operates as a discrete, unavoidable, unforeseeable, and exceptional circumstance. I would attribute the following intervals of time to its effects:

- 16 March 2020 (first suspension of in-person proceedings) to 2 June 2020: 2.5 MONTHS;
- 18 May 2021 (trial adjourned due to suspension of in-person proceedings) to 13 July 2022 (first day of trial): 13.8 months.
- TOTAL EXCEPTIONAL-CIRCUMSTANCE DELAY: 16.3 MONTHS.

[53] Subtracting the exceptional-circumstance delay of 16.3 months from the total delay of 29 months leaves an adjusted-delay difference of 12.7 months; this does not exceed the presumptive 18-month ceiling for provincial court matters.

Below presumptive ceiling—sustained steps

[54] Did the case take markedly longer to bring to trial, and did defence counsel take meaningful and sustained steps to expedite it?

[55] As to the markedly-longer criterion, the prosecutor asks rhetorically what more could the prosecution have done to speed up Mr Fulton's trial. In my view, a few fairly straightforward prosecution-operational steps could have helped.

[56] First, there would be considerable efficiency achieved in assigning a trial prosecutor to a case at an early stage; there seems every good reason to do so once the trial date for a case has been set. That does not appear to have happened here.

[57] I share the concerns raised by Ms MacDonald that attempts to have resolution discussions are frustrated when defence counsel are informed that a prosecutor has not been assigned to a case that has been set for trial.

[58] I confront that same problem when, in conducting pre-trial conferences, I am advised that the conference prosecutor is not the one handling the trial, and so is not familiar with the case. (A counterpoint to this is that cases are similarly

prolonged when defence counsel attend pre-trial or resolution conferences without instructions on issues that are integral to the agenda of the conference.)

[59] Additionally, the prosecution may proactively seek to have a matter brought forward for a resolution conference. Again, this might be done more easily when a trial prosecutor is assigned at an early stage.

[60] The responsibility to move cases along rests also, albeit to a lesser degree, with the person being tried. As observed earlier in this decision, the presumptive ceiling after which a case becomes *Jordan* vulnerable is calculated with the estimated completion date of the trial as the end date— *Jordan* at ¶ 5, 46, 49, 105. Accordingly, a person to be tried need not—indeed, should not—wait until a trial date is looming to bring a *Jordan* application for a stay of proceedings. If the date set for trial is believed by defence to either take a case beyond either the presumptive ceiling or the markedly-longer threshold, then a *Jordan* application is credibly justiciable from the moment the trial date is set; when an application is deferred for a lengthy period of time, and brought only when trial is imminent, it is more likely that a court will find, by necessary implication, delay to have been waived; I would note that waiver is not in issue in this case, as the presumptive ceiling has not been exceeded.

[61] Furthermore, when the advancing of a *Jordan* application is deferred for a substantial period of time, it will be challenging to prove that meaningful and sustained steps were taken to expedite proceedings—*Jordan* at ¶ 48, 82, 84-86, 105, 111, 113. That is the case here.

[62] I find that the presumptive ceiling was not exceeded in this case; while the case might have taken markedly longer than it should have, I am not satisfied that meaningful and sustained steps were taken to expedite proceedings.

[63] The application for a stay of proceedings is not granted.

JPC