

In the Court of Appeal for the Northwest Territories

Citation: *R v Fabian et al*, 2021 NWTCA 9

Date: 2021 10 20

Docket: A-1-AP-2020-000012;
A-1-AP-2020-000013;
A-1-AP-2020-000014;
A-1-AP-2020-000015;
A-1-AP-2020-000016

Registry: Yellowknife

A-1-AP-2020-000012

Between:

Her Majesty the Queen

Appellant

- and -

Shayne Gene Fabian

Respondent

A-1-AP-2020-000013

And Between:

Her Majesty the Queen

Appellant

- and -

Shayne Gene Fabian

Respondent

A-1-AP-2020-000014

And Between:

Her Majesty the Queen

Appellant

- and -

Blake Anthony Nessel

Respondent

Between:

A-1-AP-2020-000015

Her Majesty the Queen

Appellant

- and -

Kevin Leroy Wheaton

Respondent

And Between:

A-1-AP-2020-000016

Her Majesty the Queen

Appellant

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Blake Anthony Nessel

Respondent

The Court:

**The Honourable Justice Jack Watson
The Honourable Justice Frans Slatter
The Honourable Justice Brian O’Ferrall**

Memorandum of Judgment

Appeal from the Orders by
The Honourable Judge D. Molloy
Dated the 9th day of November, 2020

(Dockets: T-1-CR-2020-001547; T-2-CR-2020-000447; T-2-CR-2020-001701; T-1-CR-2020-001703; T-2-CR-2020-000514)

Memorandum of Judgment

The Court:

[1] On November 9, 2020, the assigned Crown prosecutor arrived at the Yellowknife airport two minutes late and was not allowed to board the airplane to Hay River. The presiding docket court judge in Hay River invited defence counsel to apply for dismissal of all of the charges on the docket for want of prosecution. In the end, 50 charges against 12 accused persons were dismissed. The Crown appeals the dismissals of indictable offences respecting three accuseds. Crown appeals of some summary conviction matters were allowed: *R. v Norn*, 2021 NWTSC 35.

Facts

[2] The Crown prosecutor assigned to Hay River was scheduled to fly down from Yellowknife that morning, as was the usual practice. When the Crown prosecutor realized that she had missed the airplane, she called the Hay River Court Registry to ask for the dial-in information so that she could appear by telephone. This request was consistent with the Practice Direction regarding Covid 19, which confirmed that counsel could appear remotely. At least one defence counsel was also appearing by telephone. The clerk, however, advised the Crown prosecutor that the presiding judge had denied her application to appear by telephone.

[3] There were a number of matters on the docket for various reasons: for adjournment to set a sentencing date, for plea, for Crown election, to set a trial date, to schedule a sentencing date, for a first appearance, etc. When court opened, the presiding judge addressed the absence of Crown counsel:

Thank you. So for the record, the Crown attorney that was supposed to be here today called the court this morning to advise that she had missed the plane. I note that on October 5 Crown [#1] missed the plane for the October the 5th appearance here. And October the 19th Crown [#2] missed the plane for the October the 19th appearance. And on November 9th, today's date Crown [#3] missed the flight for today's circuit.

So while we are going to call the individual matters, it is up to defence counsel as to whether or not they are going to seek any dismissal for want of prosecution, and if they do, then I will have to exercise my discretion accordingly.

A number of defendants took up the invitation to apply for a dismissal for want of prosecution.

[4] The Tambour summary conviction matter was scheduled for plea on November 9th. The charges included pointing a firearm, careless use of a firearm, and uttering threats. Defence counsel

took up the invitation to apply for dismissal. The presiding judge repeated that two other Crown counsel had missed the flight to Hay River in October, and continued:

Of course, whether or not to grant a dismissal for want of prosecution requires the court to still exercise its discretion judicially. In the circumstances and I have considered the case of *R. v Carvey*, [(1992), 110 NSR (2d) 350 (CA)]. In that case the judge's decision to grant dismissal for want of prosecution was overturned because he did not exercise his discretion judicially.

However, in that circumstance it involved a situation where the Crown had witnesses under subpoena. . . .

This is a case here where the Crown is guilty of laches and negligence and failing now for the third time inside of a month to send a prosecutor or to have a prosecutor attend in Hay River for the circuit. So on that basis I am exercising my discretion to dismiss this matter for want of prosecution.

The presiding judge generally applied this reasoning to all of the matters he dismissed that day. Later in the morning, he did acknowledge Crown counsel's request to appear by telephone, and that she ". . . was not granted permission to do so".

[5] The fresh evidence tendered on appeal by the Crown discloses that on October 5 and 19th, the Crown prosecutor who missed the airplane had attended by telephone, and a second Crown prosecutor was in attendance in the courtroom. There is no indication that missing the flights had any impact on the administration of justice.

[6] Crown counsel arrived in Hay River that afternoon. The next morning, she apologized to the Court and the community. The Crown prosecutor's office has since issued a directive requiring Crown counsel to attend at the airport well in advance of the boarding deadline.

Dismissal for Want of Prosecution

[7] Trial judges undoubtedly have an inherent discretion to control the proceedings before them: *R. v Cunningham*, 2010 SCC 10 at para. 19, [2010] 1 SCR 331. They can deal with matters such as the absence of counsel, but they must exercise their discretion in accordance with normal procedural expectations and in a manner consistent with the due administration of justice: *R. v Gallant*, 2010 NBCA 37 at paras. 2, 7, 261 CCC (3d) 155.

[8] The only reason given for the trial judge's decisions to dismiss for want of prosecution was the repeated instances of Crown counsel missing the airplane to Hay River. Persistent non-attendance is obviously undesirable and unacceptable, but the trial judge's remedy was disproportionate to the problem.

[9] Ensuring the efficient flow of criminal prosecutions is admittedly important, especially having regard to the busy dockets faced by Canadian trial courts. However, the public has an interest in the due administration of justice, including the prosecution of criminal offences. The matters before the court that morning involved some serious charges, including weapons offences, assaults, death threats, breaches of release orders, impaired driving charges, and unlawfully being in a dwelling house. Some of those charged with impaired driving had prior convictions for that same offence. It was an error of principle to dismiss these serious charges merely to send a message to the Crown prosecutor's office: *R. v Young*, 2015 ONCA 926 at para. 6; *R. v Siciliano*, 2012 ONCA 168 at para. 9; *R. v Hendon Justices, ex parte Director of Public Prosecutions*, [1994] QB 167 at p. 174 (Div Ct).

[10] The *Criminal Code* contains some specific provisions about dismissal for want of prosecution: s. 485, 799, and 803(4). The failure of the Crown prosecutor to attend on indictable matters, or at pre-trial proceedings in summary conviction matters, is not included: compare *R. v Sauve*, 2016 SKCA 85, 340 CCC (3d) 377. It is not necessary to decide whether the court has a necessary incidental statutory jurisdiction to dismiss for want of prosecution in the circumstances, but it is clear that, even if so, this would be a remedy reserved for serious abuses of process related to the particular case.

[11] There were also procedural problems with the approach taken. The Crown prosecutor was never given an opportunity to explain why she was late. The record does not disclose whether she knew that some of her colleagues had recently run into the same problem. If she had been allowed to make submissions by telephone, she could have explained the circumstances, and the trial judge could have expressed his displeasure on the record, in open court.

[12] Further, no explanation was given for why the Crown prosecutor was denied the opportunity to appear by telephone. This was authorized by the practice direction, and the Crown prosecutor was under no obligation to fly down and appear in person. Nothing on the docket compelled the personal attendance of counsel. The Crown prosecutor was not given an opportunity to make submissions on the subject. The trial judge never gave reasons for withdrawing the permission, contained in the practice direction, to appear remotely.

[13] In addition, trial judges should not initiate steps in the proceedings, especially those that invite a particular outcome: *R. v Simpson*, 2017 NWTCA 6 at para. 24, [2017] 8 WWR 361. Generally speaking, the parties are the ones who should raise the issues, and the judge's invitation to apply for dismissal undermined the appearance of the court's impartiality.

[14] Finally, the Crown was not given a fair opportunity to present its case in response to the applications to dismiss for want of prosecution: *R. v Thomas*, 2012 ABCA 176 at para. 6. Specifically, the Crown was not able to point out that many of the scheduled appearances were procedural only, that some of the charges were serious, and that the public had a legitimate interest in the prosecution of the charges. No submissions were made on the proper test to be applied or on whether dismissal was a proportionate remedy.

Conclusion

[15] In conclusion, the trial judge's decisions to dismiss the various charges for want of prosecution were unreasonable in the circumstances. The applications to introduce fresh evidence are granted (apart from the criminal records), the appeals are allowed, and the orders dismissing the charges are set aside. The respondents are directed to reappear in the Territorial Court.

[16] We note that the appellant filed virtually identical appeal records, fresh evidence packages, factums, and authorities on these appeals. Where related appeals arise from a common record, or raise the same issues, counsel should seek a direction under Criminal Appeal Rule 36(3) to file a single, consolidated, set of materials.

Appeal heard on October 19, 2021

Memorandum filed at Yellowknife, NWT
this 20th day of October, 2021

Watson J.A.

Slatter J.A.

Authorized to sign for: O'Ferrall J.A.

Appearances:

B. MacPherson
for the Appellant

R. Parker
for the Respondents

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