

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

BARNEY ALBERT NORN

MEMORANDUM OF JUDGMENT

Corrected judgment: A corrigendum was issued on October 18, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

I) INTRODUCTION

[1] On November 9, 2020, several matters that were on the Territorial Court docket in Hay River were dismissed for want of prosecution because no prosecutor was in attendance.

[2] The Crown has filed appeals challenging those dismissals. The appeals pertaining to the indictable matters are before the Court of Appeal for the Northwest Territories and have yet to be heard.

[3] The appeals in the summary conviction matters (*R v Barney Norn, R v Leona Fabian, R v Shane Fabian, R v Clayton Lennie, R v Richard Sonfrere, R v Henry Tambour, R v Jason Yee*) were heard at a joint hearing that proceeded in this Court on August 6, 2021.

[4] Mr. Tambour was represented on the appeal by Ms. Gunn Emery, who had also appeared on his behalf in Territorial Court on November 9th. Several of the other Respondents were represented by Mr. Evan McIntyre. Mr. Lennie and Mr.

Fabian were not represented. They had been served with the Crown materials and a Notice of Hearing. Neither of them filed any materials ahead of the hearing. Mr. Fabian did not appear at the hearing. Mr. Lennie appeared by phone, but once the purpose of the hearing was explained to him, he said he did not wish to make any submissions on the appeal.

[5] The Crown's submissions were the same on all the matters. Overall, Ms. Gunn Emery's and Mr. McIntyre's submissions were aligned. Given this, in these Reasons, I do not draw any distinctions amongst the different Respondents.

II) FRESH EVIDENCE APPLICATION

[6] The Crown has filed an Application to adduce fresh evidence, seeking to introduce the following materials:

- a) an Affidavit sworn by the prosecutor who was assigned to the Hay River circuit on November 9th;
- b) copies of emails exchanged between that prosecutor and the Hay River registry that morning;
- c) criminal records of some of the Respondents.

[7] The Respondents consent to the admission of the Affidavit and emails. They oppose the admission of the criminal records.

[8] The Crown concedes that the criminal records are only relevant if this Court accepts its position that the situation that arose on November 9th engaged the legal framework of abuse of process.

[9] For the reasons set out below, I disagree with the Crown's contention that the legal principles that govern abuse of process have any bearing on these appeals.

[10] Accordingly, Crown's fresh evidence Application is allowed with respect to the Affidavit and the emails, but dismissed inasmuch as it pertains to the criminal records.

III) THE NOVEMBER 9TH PROCEEDINGS

[11] The circumstances that led to the dismissal of the charges are relatively straightforward, and readily apparent from the transcript of the proceedings and the fresh evidence.

[12] On November 9th, the prosecutor who was assigned to the circuit missed the early morning flight from Yellowknife to Hay River. She communicated with the Hay River registry before court started to make arrangements to appear by telephone. She was provided the call-in information by the clerk. The prosecutor received another email a short time later, before the start of court, advising that the Territorial Court Judge had refused her request to appear by phone.

[13] When court opened, two defence counsel were in attendance. Michael Hansen was in the courtroom and Ms. Gunn Emery appeared by phone. A police officer was also present in the courtroom. The following exchange occurred:

THE COURT: Is there anyone appearing for Her Majesty the Queen today?

CST. GAGNON: No, Your Honour. I was advised I'm representing the Crown today.

THE COURT: Really?

CST. GAGNON: As they were not able to make it today on time.

THE COURT: Can I see your designation from the Attorney General?

CST. GAGNON: Sir, I do not - - I'm a constable here.

THE COURT: Well, step back then, sir.

CST. GAGNON: Okay. Thank you, Your Honour, for your time.

THE COURT: 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 the 5th, Emma Skowron missed the plane for the October 5th appearance here. And on October the 19th Simon Hodge missed the plane for the October 19th appearances here. And on November the 9th, today's date, Crown Nina Connelly 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.

Transcript of November 9th proceedings, p. 13 line 8 to p.14 line 8.

[14] The docket was called. Ms. Gunn Emery's matters were called first. On the first, she advised the Court that she was not applying for dismissal because the

prosecution on that matter was virtually concluded. A very narrow issue was left to be decided and there appeared to be some confusion as to which judge was seized. The matter was adjourned to be spoken to on another date.

[15] Henry Tambour was Ms. Emery's second client. She asked that his charges be dismissed for want of prosecution. The Territorial Court Judge granted the application and said the following:

THE COURT: All right. Well, then for the record, with respect to Mr. Tambour, I will go back to my comments earlier this morning that before the start of court this morning, Ms. Mina [sic] Connelly, Crown prosecutor, advised the Court that she had missed this morning's flight.

I note as well that on October the 5th Crown Emma Skowron missed the flight to Hay River for that day's circuit. On October the 19th Crown Simon Hodge missed the flight for that day's circuit, and again, as I just said, Ms. Connelly missed this morning's flight.

Of course, whether or not to grant a dismissal for want of prosecution requires the Court to still exercise its discretion judicially. In these circumstances, - - and I have considered the case of *R v Carvery*, which is - - the citation is 1992 Carswell Nova Scotia 25, Nova Scotia Court of Appeal. 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. They were late, and the judge did not give the Crown an opportunity to either advise that the witness was under subpoena; in fact, pursuant to *Darville*, The Court noted that the Crown ought to have been entitled to an adjournment in any event.

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.

Transcript of November 9th proceedings, p.18 line 27 to p. 20 line 5.

[16] The rest of the docket was called, including the matters that are the subject of this appeal. As each was called, Mr. Hansen applied for dismissals. The Territorial Court Judge granted the applications, adopting the reasons he had given when granting the application made on behalf of Mr. Tambour.

[17] When dealing with one of the matters, which is not part of these appeals but was dealt with that day, the Territorial Court Judge added the following comments:

THE COURT: All right. The - - for the record in terms of - - because it was not spoken to explicitly before, I note that for the same reasons as were given in the case of Mr. Tambour. In terms of - - but I think some additional clarification is needed.

After calling the clerk to advise - after Ms. Connelly calling the court to advise that she missed the flight, she did inquire about the possibility of appearing by phone and was not granted permission to do so. But other than that, that is the only additional fact and for the reasons as I gave in Mr. Tambour, I am exercising my discretion to grant your application to dismiss these charges for want of prosecution.

Transcript of November 9th proceedings, p.23, lines 13-25.

IV) ANALYSIS

[18] The Crown raises four alleged errors on the part of the Territorial Court Judge: having prevented the Crown from participating in the proceedings; having, in effect, “spearheaded” the applications for dismissal; having dismissed the matters without having the jurisdiction to do so; and having made decisions that were unreasonable.

[19] In my view, the issues that arise on these appeals boil down to two questions: whether the Territorial Court Judge had the power to make the decisions that he made on November 9th and if so, whether he exercised that power in a reasonable manner.

A) The powers of the Territorial Court Judge

[20] Issues that relate to a court’s jurisdiction and lawful authority to make decisions are questions of law and are reviewable on a standard of correctness.

1. Refusal to allow the prosecutor to appear by telephone

[21] The first impugned decision is the Territorial Court Judge’s refusal to allow the prosecutor to appear by telephone. This was an important decision in the context of these events, and it is inextricably linked to what followed: it was the reason that the Crown was entirely absent from the proceedings when the docket was called.

[22] In its Factum, the Crown asserts that:

The Crown prosecutor was available to attend court by telephone and she was permitted to do so pursuant to a COVID-19 Practice Directive.

Appellant’s Factum, para 41.

[23] The Directive in question is included in the Appeal Book. It is 7 pages long and covers a number of issues. With respect to appearances of counsel, it states the following:

APPEARANCES BY COUNSEL

Counsel may appear in person. However, counsel may also appear remotely. Arrangements to do so can be made by contacting the Territorial Court registry in Yellowknife

[24] During oral submissions, the Crown did not place great reliance on this Directive, and rightfully so. In my view, it is of little assistance to the Crown, at least not on the jurisdictional issue.

[25] A general Directive like this one does not trump an individual judge's authority to oversee the proceedings in the courtroom. There are a variety of reasons why, in certain circumstances, a judge may deem it necessary to have counsel appear in person.

[26] The Directive had last been updated on July 3, 2020. Reading it as a whole, it is clear that at that particular point in time, Territorial Court matters were not all proceeding in person as a matter of course. In fact, all sittings outside Yellowknife scheduled for dates before August 16th were cancelled.

[27] By the time the events leading to these appeals arose, several months later, it is apparent from the record that relative normalcy had returned. The Territorial Court had resumed its usual practice of having in-person circuits to the communities. On such circuits, the long-standing practice in that Court is that counsel usually appear in person. For this particular circuit, everyone expected the prosecutor to be there in person. The prosecutor herself, evidently, had planned on being there in person.

[28] The option of appearing by telephone on this circuit was not a given, let alone an entitlement. The Territorial Court Judge was under no obligation, under the July 3rd Directive or for any other reason, to grant the prosecutor's request to appear by telephone. The decision to do so or not was within his discretion.

2. Dismissal of charges for want of prosecution

[29] The Crown argues that the Territorial Court Judge did not have the jurisdiction to dismiss the charges for want of prosecution.

[30] This argument is based on the premise that the Territorial Court, as a court of statutory jurisdiction, only has the powers that are specifically conferred to it by statute. That authority, with respect to trying criminal offences, is set out in the *Criminal Code*. The *Code* gives those courts the power to dismiss a matter where the prosecutor fails to appear for trial or for the continuation of a trial. *Criminal Code*. Ss. 799 and 803.

[31] The Crown argues that, as none of the charges that were on the November 9th docket were scheduled for trial, the Territorial Court Judge did not have the jurisdiction to dismiss them. In support of that narrow interpretation of the power to dismiss for want of prosecution, the Crown relies on *R v Sauve*, 2016 Sask CA 85.

[32] The analysis in *Sauve* is based on jurisprudence dating back to the 1970's which favoured an extremely narrow interpretation of the powers of statutory courts. There have been significant developments in the jurisprudence on this issue since then.

[33] Many cases have recognized, in the last decade or so, that statutory courts have powers that are necessarily implied in the grant of power to function as a court of law. Implied powers are not limited to those that are absolutely necessary, but also include those that are practically necessary for the statutory court to effectively and efficiently carry out its purpose *R v Cunningham*, 2010 SCC 10; *Ontario v Criminal Lawyers Association of Ontario*, 2013 SCC 43. Moreover, the power of a statutory court to control its own process must be interpreted generously. *R v Felderhof*, (2003) 68 OR (3d) 481 (ONCA). *R v Fercan Developments Inc*, 2016 ONCA 269.

[34] A fairly broad range of implied powers have been recognized by the courts on the basis of these principles. This included, for example, the authority to oversee the conduct of counsel (*Cunningham*) and the power to order costs (*Fercan*). As noted by the Respondent, there have been others, such as the appointment of *amicus curiae*, denying audience to an agent, or preventing publication of information identifying a witness.

[35] In my view, the very narrow approach followed in *Sauve* cannot be reconciled with the recent developments of the jurisprudence in this area.

[36] I conclude that the power to dismiss a charge for want of prosecution is necessarily implied in the Territorial Court's functions, as part of its power to control its process. Considering that the *Criminal Code* already gives it that power at the trial stage, this is hardly a revolutionary leap: from a practical and functional point of view, it is difficult to see why a power that it has long had at the trial stage would not also exist at earlier procedural stages.

[37] Given my conclusion on this issue, I disagree with the Crown's assertion that the Territorial Court Judge should have engaged in an analysis under the abuse of process legal framework. I would add that it seems somewhat inconsistent for the Crown to argue, on one hand, that the Territorial Court Judge erred in raising the possibility of dismissal for want of prosecution on his own motion, and to then suggest that he could or should have initiated an abuse of process analysis in the absence of anyone having applied for that remedy.

[38] In summary, I conclude that the decisions that the Territorial Court Judge made were within the scope of his general authority and discretion. The more difficult issue is whether he exercised that discretion judicially and reasonably.

B) Reasonableness of the Territorial Court Judge's decisions

[39] As the Crown acknowledges, the standard of review on this issue is highly deferential. It is the same standard as the one that applies to a trial judge's findings of fact or findings of credibility. A difference of opinion as to what the outcome should have been is not a basis for appellate intervention. Decisions that involve the exercise of discretionary powers are not to be interfered with absent palpable and overriding error. *R v Gagnon*, 2006 SCC 17; *R v Lee*, 2010 ABCA 1, para 6.

[40] Judges exercise their discretionary powers in a variety of circumstances, and any review of how that power is exercised must be approached from a standard of deference, realism, and an appreciation for the dynamic and often unpredictable situations that judges face day in and day out in carrying out their duties. It is often easy, looking back with the benefit of hindsight, to think of how matters might have been handled differently.

[41] However, on occasion, judges exercise discretion in a manner that cannot be said to be reasonable and in those situations, appellate courts have a responsibility to intervene. I have concluded that this is one of those situations, when taking a global view of the decisions that were made on November 9th.

[42] The Territorial Court Judge's refusal to give the prosecutor any opportunity to be heard on November 9th is problematic. Appearing by telephone is not an absolute right of counsel but it is a common occurrence in this jurisdiction, even more so since the start of the COVID-19 pandemic.

[43] Even if he was not inclined to allow the prosecutor to speak to the matters that were on the docket over the telephone, the Territorial Court Judge ought to have given her an opportunity to be heard before making that decision. Counsel who find themselves in these situations should be given an opportunity to address the court.

[44] In this case, the prosecutor missed her flight because she made an error about the cut-off time for checking into the flight, and missed that cut-off by 2 minutes. While these are not the most compelling of extenuating circumstances, at minimum, she ought to have been given an opportunity to address the situation on the record, and explain herself. In addition, had there been more significant extenuating circumstances, she would not have had an opportunity to inform the Territorial Court Judge of them.

[45] In addition, although the Territorial Court Judge said on the record that the prosecutor had asked to appear by phone and that he had refused, he did not give any reasons for that decision. This too is problematic. Excluding a party from court proceedings is a significant step for a judge to take. Where a judge decides to do so, reasons should be provided. The absence of reasons contributes to creating an impression of arbitrariness. Moreover, as has been recognized for many years in other contexts, reasons serve many functions, including transparency, accountability, and the possibility of meaningful appellate review. *R v Sheppard* [2002] 1 S.C.R. 869.

[46] As for the dismissals for want of prosecution, which are at the core of these appeals, the Territorial Court Judge did give reasons. They were brief and unambiguous: this was the third time a prosecutor had missed a flight for the Hay River circuit. The Territorial Court Judge viewed this as negligence. He clearly wanted to send a strong message to the Crown's office.

[47] The Crown argued at the hearing of the appeal that the power to dismiss for want of prosecution is only engaged when the record indicates that Crown has become disinterested in the proceedings, and that it cannot be exercised for punitive reasons. I do not agree with such a strict interpretation. As I have explained, I view this power as one that territorial and provincial courts implicitly have to control their own process. One of the considerations in the exercise of this power may well be to

sanction conduct on the part of the prosecuting agency if it fails to act diligently in carrying out its functions.

[48] However, as the Territorial Court Judge himself acknowledged, it is a power that must be exercised judicially. This necessarily implies a careful weighing of all relevant considerations, as opposed to focusing on one factor at the exclusion of all others. Sentencing, for example, is also a highly discretionary fact-driven exercise. Still, the failure to consider a relevant factor, or the over-emphasis of a relevant factor, if it had an impact on the result, opens the door to appellate intervention.

[49] It is clear that the two earlier incidents when prosecutors had missed Hay River flights were at the forefront of the Territorial Court Judge's mind when he dealt with the applications to dismiss.

[50] The Territorial Court Judge was not the presiding judge on either of those circuits. He may have partly misapprehended the circumstances of these earlier incidents. He referred to the Crown's laches and negligence "failing now for the third time inside a month to send a prosecutor or to have a prosecutor attend Hay River for the circuit". This suggests that he may have been under the impression that there had been no prosecutor at all in Hay River on those two earlier occasions, as was the case on November 9th. That was not the case. The transcripts of the October 5th and October 19th proceedings, filed as part of the materials on these appeals, show that two prosecutors were assigned to each of these circuits. On both occasions, one of them missed the flight but the other was present in court.

[51] The fact that there were prosecutors in Hay River on the two earlier occasions changes nothing about the concerns that arise from two others missing their flights, obviously. However, the impact of the errors made on the earlier occasions may not have been as great as what the Territorial Court Judge thought. Indeed, from my review of the transcripts of the October 5th and 19th proceedings, very little was said about the prosecutors appearing by telephone. On both occasion, the prosecutor apologized for not being present and the presiding judges did not make any comments. The proceedings simply continued.

[52] As I hope I am making clear, irrespective of the impact that the prosecutors' absences had or did not have on the earlier circuits, the Territorial Court Judge's concerns about the pattern of prosecutors missing flights was completely understandable. Unfortunately, those concerns appear to have entirely overtaken the exercise of his discretion, at the exclusion of everything else.

[53] There were many different criminal charges on the November 9th docket. Some were more serious than others. The matters were also not all at the same procedural stage: some were scheduled for first appearance, some for plea, and some for Crown election. On others, guilty pleas had been entered and the matters were scheduled for sentencing.

[54] The Territorial Court Judge does not appear to have given any consideration to the differences in the types of charges or the stages they were at. His decision would, no doubt, send a strong message to the Crown, but did not address other considerations, such as the interests of the complainants, public safety, and the overall public interest in having matters heard on their merit. If he did give these factors any consideration, the reasons he gave for dismissing the charges do not reflect it.

[55] The Crown has referred to a number of cases where courts of appeal have overturned trial decisions that had the effect of terminating a prosecution as a result of prosecutors not being present when the matter was called. They are all distinguishable on their facts, but a common theme emerge from them.

[56] In *R v Lewis* (1996), 32 W.A.C. 227, a charge that was to be prosecuted by the federal Crown was added to a provincial court morning docket. For whatever reason, the prosecutor who was responsible for appearing on it was not made aware of it in time. It also appears that he expected the provincial prosecutor to step in and ask that the matter be stood down, which did not happen in that case. When he appeared in the afternoon, the court dismissed the matter for want of prosecution on the grounds that no one had been there to speak to the matter in the morning. In overturning that decision, the Court of Appeal said:

Judges minded to dismiss proceedings in circumstances such as these would do well to consider the comments of Mann L.J. in *R v Hendon Justices and Others, ex parte DPP*, (1993) All E.R. 411 at 415.

Lewis, para 9.

[57] The case referred to is an English case where two accused were charged with burglary and scheduled to have their trial on a certain date. There was some confusion about the dockets and possibly erroneous information provided by the registry to the prosecuting office, which resulted in no prosecutor being present at the time and place the trial was scheduled to commence. The presiding judge was made aware that an error had occurred and that a prosecutor was on his way. When

the prosecutor arrived, the charges had been already been dismissed for want of prosecution.

[58] Lord Mann, speaking for the Court, said the following:

We regret to say that in our judgment the decision of the respondent justices in the present case was so unreasonable that no reasonable bench in like circumstances could have come to it. We express our judgment with regret because we are sure that the lapse was uncharacteristic of justices who were doing their best and because we are fully appreciative of the pressures upon a busy court such as is Hendon. However, the duty of the court is to hear informations which are properly before it. The prosecution has a right to be heard and there is a public interest that save in exceptional circumstances, it should be heard. A court's irritation at the absence of a prosecutor at the appointed time is understandable. That said, it can seldom be reasonable to exercise the power [to dismiss for want of prosecution] where the justices know that a prosecutor is on the way to their court and the case is otherwise ready to be presented.

Hendon Justices and Others, p.4.

[59] Lord Mann went on to express the view that the power conferred under the applicable English legislation is not one conferred for punitive purposes. As I have already stated, I would not go that far, largely because of what I have concluded is the source of a territorial or provincial court's power to dismiss for want of prosecution. However, I do agree with his other observations.

[60] In *R v Siliciano*, 2012 ONCA 168, during the course of proceedings, the trial judge had adjourned court for 20 minutes. When court reconvened, the prosecutor was not there. The judge asked the clerk to notify the prosecutor that if he was not there in 1 minute the remaining of the docket would be dismissed for want of prosecution. A few minutes later, the prosecutor not having arrived, all matters were dismissed. The prosecutor returned a few minutes later, apologizing, explaining he was reading a Pre-Sentence Report that had just been filed. The trial judge reiterated that the matters were dismissed. The Court of Appeal described the trial judge's actions as "highhanded" and ones that "did a real disservice to the proper administration of justice". *Siliciano*, para 9.

[61] In *R v Gallant*, 2010 NBCA 37, a matter had been scheduled for sentencing. On the date and time scheduled, the prosecutor was not there. A police officer who was present in the courtroom informed the judge that the prosecutor had made an error in entering the sentencing date in his diary, that he was on his way and would

arrive shortly. The defence lawyer moved that the matter be dismissed. The trial judge struck the guilty plea and entered an acquittal.

[62] The Court of Appeal had harsh words for the trial judge, stating that the decision to set aside the guilty plea “fell in the category of capricious and arbitrary decisions that the rule of law prohibits” and that the decision to set aside the guilty plea and dismiss the charge constituted “a breach of the most basic standards of judicial conduct”. *Gallant*, para 7.

[63] In *R v Young*, 2015 ONCA 926, a prosecutor who was scheduled to continue a trial before one court sent a colleague to ask that the continuation be postponed for 30 minutes because she was dealing with a sentencing hearing in another court. The trial judge held the matter down, but only for 15 minutes. When court resumed, and no prosecutor was present, the judge stayed the proceedings. The Court of Appeal agreed with the trial judge that the prosecutor’s first obligation was to attend the trial continuation and that she should have arranged for someone else to deal with the sentencing. It nonetheless allowed the appeal, concluding that the test to warrant a stay of proceedings for abuse of process was not met.

[64] In *R v Carvery*, 1992 CanLII 2603 (N.S.C.A.), the case referred to by the Territorial Court Judge, the matter was scheduled for trial. At 10:00AM, the time scheduled for the start of the trial, the witnesses had not arrived. The prosecutor asked that the matter be dealt with a little later. The matter was called again at 10:15. The witnesses had still not arrived. The presiding judge said that if they were not there by 10:30 he would dismiss the matter for want of prosecution. When court reconvened shortly after 10:30, the prosecutor advised that a key witness was on his way. Defence counsel applied for dismissal, which was granted. In overturning this decision, the Nova Scotia Court of Appeal noted that the Crown would have been entitled to an adjournment under these circumstances:

(...) before the Crown could advise the Court the witnesses were under subpoena or move for an adjournment, defence counsel moved for dismissal which was immediately granted by the trial judge without the Crown being given an opportunity to make any representation on the defence motion. This could not have been anticipated by Crown counsel.

The transcript indicates that Judge Randall had more or less made up his mind before the recess that if the witness did not appear by 10:30 a.m. he would dismiss the charge. Had Judge Randall afforded the Crown an opportunity to make submissions on the defence motion he would no doubt have been apprised of the fact that the witnesses were under subpoena. He then would have been able to exercise his discretion with

knowledge of the relevant facts. His hurried behaviour foreclosed that possibility. He exercised his discretion in an arbitrary way in failing to give the Crown counsel an opportunity to speak to the defence motion and without giving consideration to proper legal principles.

Carvery, p.3

[65] Unlike the other cases I have referred to, *Carvery* involved missing witnesses, not a missing prosecutor. In that sense it is perhaps less helpful. Still, it is another illustration of how the exercise of discretion, to be reasonable and judicial, requires a careful consideration of all the relevant facts.

[66] I acknowledge that none of these cases involve a factual pattern that resembles what happened in this case. However, these cases underscore the necessity for judges to exercise some restraint when exercising their power to put an end to a criminal prosecution, even in the face of logistical or organizational shortcomings on the part of a prosecuting agency. They also underscore the importance of the public interest being taken into account before such a power is exercised.

[67] While the Territorial Court Judge's concerns about what transpired were understandable, in my respectful view, he became overly focused on the issue of prosecutors missing planes, at the exclusion of all other considerations. This caused him to exercise his discretion in a manner that was not reasonable.

V) CONCLUSION

[68] For these reasons, I have concluded that the Territorial Court Judge's decisions to dismiss these matters for want of prosecution cannot stand.

[69] My conclusions should not be taken as making light of the fact that several prosecutors missed flights in a short time span.

[70] Counsel for the Crown on the appeal began his submissions by acknowledging that the events that gave rise to these appeals raised serious concerns about the repute of the justice system, and that they were a blemish on the Crown's office. I can hardly disagree.

[71] In this jurisdiction, taking planes to work is an integral part of the day-to-day life of those who work within the criminal justice system. All court participants, and the public at large, are entitled to expect that those representing the Director of

the Public Prosecution Service of Canada will take all reasonable steps to appear before the courts when they are required to.

[72] The Affidavit introduced as fresh evidence indicates that a travel policy requiring prosecutors to arrive at the airport 75 minutes before departure has now been implemented. It is puzzling that it took 3 incidents of missed flights before this happened. It is also most unfortunate that the need for such a policy even arose.

[73] All that being said, as Chief Justice Drapeau said in his concluding remarks in *Gallant*:

To err is profoundly human. At the end of the day, the key to improvement lies in the lesson drawn from one's mistake.

Gallant, para 7.

[74] The appeals are allowed, the dismissals for want of prosecution are quashed and the matters are remitted to the Territorial Court.

“L.A. Charbonneau”

L. A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
15th day of October, 2021

Counsel for the Crown : Blair MacPherson
Counsel for the Accused : Evan V. McIntyre

Corrigendum of the Memorandum of Judgment
Of
The Honourable Justice L.A. Charbonneau

1. Paragraph 3 reads:

[3] (...) August 5, 2021.

Paragraph 3 has been amended to read:

[3] (...) August **6**, 2021.

2. Paragraph 70 reads:

[70] (...) and that it were a blemish on the Crown's office. (...).

Paragraph 70 has been amended to read:

[70] (...) and that **they** were a blemish on the Crown's office. (...).

3. The citation has been amended to read:

R v Norn, 2021 NWTSC 35.cor 1

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