File Number: 37310

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)

BETWEEN:

JAMES CODY

Appellant (on appeal)
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

- and -

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Interveners

FACTUM OF THE INTERVENER ATTORNEY GENERAL OF ALBERTA

RULES 37 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

Overview

1. This Honourable Court in ***R v Jordan***,[1] has substantially revised the approach to accessing alleged violations of the s.11(b) *Charter* right to be tried within a reasonable time. In doing so, *Jordan* imposed presumptive ceilings, not as aspirational targets, but as the notional tipping point beyond which trial delay becomes unreasonable. At the same time, as this Court noted, "reasonableness cannot be captured by a number alone."[2]

2. The new framework encourages a shift in culture by creating incentives for both the Crown and defence to proactively address and prevent delay. Judges, too, have a part to play in managing resources, and case managing criminal trials in an attempt to eliminate time-consuming inefficient practises. [3] Experience demonstrates that early judicial intervention and the use of deadlines positively correlates with expedient justice.[4] The proactive and liberal use of Case Management Judges ("CMJ") should be encouraged to resolve what is resolvable; to try only the issues that must be tried; and, to do so in a focused and efficient manner. Section 551.2 of the *Criminal Code* directs CMJ's to assist in promoting a fair and efficient trial, by ensuring, to the extent possible, that evidence is presented without interruption. [5] Section 551.3 authorizes a CMJ's management powers, including the following: *mediative* to encourage agreements; [6] *legal*, to adjudicate legal issues, including *Charter* issues, before trial; [7] and *discretionary,* to establish schedules and deadlines. [8]

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[1] ***R v Jordan***, 2016 SCC 27
[2] ***R v Jordan***, 2016 SCC 27 at paras 49-59
[3] ***R v Jordan***, 2016 SCC 27 at paras 112-114
[4] Attorney General of Ontario, *Report of the Review of Large and Complex Criminal Case Procedures*, November 2008 (The Honourable Patrick J. LeSage, C.M, Q.C, Professor Michael Code) at p 43 (*Lesage-Code Report*) [Tab 1]
[5] *Criminal Code*, RSC 1985, c C-46, s 551.2
[6] *Criminal Code*, RSC 1985, c C-46, s 551.3(1)(b)
[7] *Criminal Code*, RSC 1985, c C-46, s 551.3(1)(g)
[8] *Criminal Code*, RSC 1985, c C-46, s 551.3(1)(d)

3. *Jordan* instructs trial judges as an important aspect of effective judicial case management to dismiss applications and requests deliberately calculated to cause delay, such as frivolous applications and requests, at the earliest opportunity.[9] This is because defence applications and requests that are not frivolous will *generally* not count against defence.[10] Alberta urges this Court to remind trial judges that they must summarily dismiss defence applications where an applicant is unable to articulate the basis upon which the relief sought could be granted. Trial judges should consider this gatekeeping function in every case to restrict unnecessary procedural steps, minimize ineffective advocacy, and to enable the justice system to deliver practical results in a reasonable time. While Alberta contemplates that a *Charter* motion will be the usual context for this gatekeeping function, trial judges must consider the timely dismissal of all meritless applications. At the same time, to avoid judicial timidity, the decision to summarily dismiss a defence *Charter* application by a trial judge should be reviewed deferentially, absent an error in principle.

Facts

4. Alberta takes no position on the facts as set forth by the parties in their facta.

PART II – ISSUES

5. This intervention responds to the suggestion that an immaterial error in an agreed statement of facts might serve to immunize and legitimize frivolous defence applications from the delay they cause. A simple oversight, accepted as an innocent mistake, should never be permitted to spawn a series of time-consuming court motions unless the party proposing the evidence could "show a reasonable likelihood that the hearing can assist in determining the issues before the court."[11] Trial Judges, in exercising this gatekeeping function, must summarily dismiss such applications before they consume valuable court resources and time.

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[9] ***R v Jordan***, 2016 SCC 27 at paras 42-45, 63
[10] ***R v Jordan***, 2016 SCC 27 at para 65
[11] ***R v Pires; R v Lising,*** 2005 SCC 66 at para 35; ***World Bank Group v Wallace,*** 2016 SCC 15 at paras 116-134

PART III – ARGUMENT

Thirty-five years later: Charter procedure remains uncertain

6. Parliament proclaimed the *Charter* in April of 1982 and its use in criminal proceedings has undoubtedly played a significant part in the length and complexity of proceedings.[12] A committee of the Ontario Superior Court has described *Charter* based applications as the most significant contributor to the lengthening of trials and the greatest reason that trials last longer than anticipated. [13] Arriving without a procedural code, the development of procedures and guidelines applicable to *Charter* applications has primarily been the responsibility of the judges hearing the motions.[14] Procedural inconsistency has caused some ongoing confusion in the conduct of the *Charter voir dire*. To cite one example, while the *Charter* claimant generally[15] has the initial burden of presenting evidence,[16] there is an inconsistent judicial approach as to whether or not judges should allow defence greater flexibility in examining police witnesses, including cross-examination.[17] Judges have described this confusion as a "procedural morass".[18]

7. It may be because of the procedural morass, in part, that prosecutors frequently assume the duty of calling the initial evidence in the *Charter voir dire*, and the accused cross-examines the witnesses they might otherwise call.[19] In some of these cases, the prosecution assumes initial conduct of the *Charter voir dire* evidence because the judge considers the alleged breach of the *Charter* simultaneously with the admissibility of other evidence the Crown seeks to introduce. A *voir dire* of this type is commonly known as "blended" *voir dire.*[20] A trial judge must, in the

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[12] *Lesage-Code Report* at p 17 –"These external forces – the *Charter*, the 'principled approach' to evidence law, and the flood of statutory amendments – have all conspired to inevitably create long and more complex trials." [Tab 1]
[13] *New Approaches to Criminal Trials: The Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice*, Ontario, May 2006, online: <http://www.ontariocourts.ca/scj/news/publications/ctr/>
[14] ***R v Mills,*** **[**1986] 1 SCR 863 at para 12
[15] At times the persuasive burden shifts, see for example, ***R v Caslake,*** [1998] 1 SCR 51 at para 11
[16] ***R v Brodersen,*** 2012 ABPC 231 at paras 61-66; ***R v Deveau,*** 2011 NSCA 85; ***R v Collins,*** [1987] 1 SCR 265 at para 32; ***R v Dwernychuk,*** 1992 ABCA 316 at para 28; ***R v Kutynec,*** 1992 CarswellOnt 79 (CA) at para 16
[17] ***R v Feldman,*** 1994 CarswellBC 941 (CA) at paras 34-35; aff'd [1994] 3 SCR 832; ***R v Heslop,*** 2005 CarswellOnt 2054 (SCJ) at para 3; ***R v Brodersen,*** 2012 ABPC 231 at paras 69-80; ***R v Ward,*** 2007 ABQB 344 at paras 43-67
[18] ***R v Ward,*** 2007 ABQB 344 at para 47
[19] ***R v Coles,*** 2005 ABPC 20; ***R v Brodersen,*** 2012 ABPC 231
[20] See, for example, ***R v Furlong,*** 2012 NLCA 29 at para 4; ***R v Rompre,*** 2015 ONCA 707

hearing of a blended *voir dire*¸ be cognizant not to confuse the defence onus of establishing a *Charter* breach on a balance of probabilities with the burden on the Crown to prove guilt beyond a reasonable doubt.[21]

8. The assumption of the conduct of a *voir dire* by the Crown, practically speaking, often forestalls the proper enquiry from the trial judge as to whether the *Charter* motion should proceed in the first place as trial judges understandably assume the calling of *voir dire* evidence by the prosecution signifies there is some merit in proceeding.[22]

Trial judges need not entertain every *Charter* application

9. An applicant seeking *Charter* relief must discharge two burdens: he must demonstrate a breach of a right, and he must demonstrate that a remedy is warranted. A judicial inquiry into the merits of a proposed defence application, before the length of trial is set, should be the norm and not the exception.

10. Before embarking on a *voir dire* of any kind, a trial judge may ask an applicant to summarize the evidence it intends to elicit. If that summary "reveals no basis" on which the relief sought could be granted, then the trial judge need not proceed with a *voir dire*.[23] This Court has held that a trial judge may decline to hear evidence if the party proposing the evidence "is unable to show a reasonable likelihood that the hearing can assist in determining the issues."[24]

11. This discretion exists for three reasons:

a. In general, he who alleges must prove, and in particular, the defence bears the burden on a *Charter* application.
b. Courts must be able to control their own processes.[25]
c. Court resources are finite

In deciding whether to open a *voir dire* on a *Charter* complaint, a trial judge must balance the accused's right to be heard; the likelihood, in context, that a remedy might flow; with

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[21] See, for example, ***R v Boston,*** 2013 ONCA 498
[22] A trial judge is not bound by an agreement to hold a *voir dire*, see ***R v Wilson,*** 2011 BCCA 252 at para 63
[23] ***R v Kutynec,*** 1992 CarswellOnt 79 (CA) at para 35; ***R v Durette,*** 1992 CarswellOnt 955 (CA) at para 33; rev'd on other grounds, ***R v Durette,*** [1994] 1 SCR 469
[24] ***R v Pires; R v Lising,*** 2005 SCC 66 at para 35
[25] ***R v Felderhof,*** 2003 CarswellOnt 4943 (CA) at paras 40-43, 57

"countervailing interests, including the need to ensure the criminal trial process is not plagued by lengthy proceedings that do not assist in the determination of the relevant issues."[26]

12. The judicial discretion to summarily dismiss *Charter* motions has a long pedigree,[27] although this discretion rarely, if at all, has been utilized in Alberta. In other provinces, the appellate courts of Ontario, B.C., Manitoba, Newfoundland and New Brunswick, and various trial courts, have recognized this important discretion.[28]

Summary dismissal – The B.C. approach

13. In B.C., judges routinely consider the merits threshold as to whether to permit a *Charter voir dire* in a *Vukelich* hearing (named after the case of that name). In *R v Vukelich*,[29] the accused sought to challenge the validity of a search warrant by alleging in an affidavit sworn by his legal counsel's associate that certain portions of the supporting affidavit to obtain the warrant was false and misleading with respect to financial and other matters. Defence counsel's affidavit did not challenge the evidence of the co-conspirators outlined in the affidavit supporting issuance of the warrant. The B.C. Court of Appeal upheld the decision of the trial judge to decline a *voir dire*, noting that even if defence's allegations were true and the offending portions of the affidavit were excised, there remained sufficient information in the affidavit to support the warrant. The prevalence of the *Vukelich* rule in B.C., as opposed to other Canadian provinces, has resulted in some commentators referring to the procedure as a "uniquely British Columbia rule." [30]

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[26] ***R v Pires; R v Lising,*** 2005 SCC 66 at paras 24, 34-35

[27] Early cases include: ***R v Kutynec,*** 1992 CarswellOnt 79 (CA) at para 35; ***R v Durette,*** 1992 CarswellOnt 955 (CA) at para 33; rev'd on other grounds, ***R v Durette,*** [1994] 1 SCR 469; ***R v Dwernychuk,*** 1992 ABCA 316 at para 28; ***R v Vukelich,*** 1996 CarswellBC 1611 (CA) at paras 17-26; ***R v Felderhof,*** 2003 CarswellOnt 4943 (CA) at paras 88, 93; ***R v Feldman,*** 1994 CarswellBC 941 (CA) at paras 17-36, aff'd [1994] 3 SCR 832

[28] ***R v Tingley,*** 2015 NBCA 51 at paras 2, 5-6; leave to appeal ref'd, 2016 CarswellNB 27 (SCC); ***A(J) v Winnipeg Child and Family Services***, 2003 MBCA 154 at paras 31-32; ***R v N(D),*** 2004 NLCA 44 at paras 18-29; ***R v Manitopyes,*** 2013 SKQB 112 at paras 17-19; ***R v Wagner,*** 2015 ONCJ 66 at paras 64-74; ***R v Hilchey,*** 2015 NSPC 46 at paras 13-17; ***R v Pangman,*** 2000 MBQB 96 at paras 6-7; ***R v Standingwater,*** 2008 SKQB 288 at paras 35-36; ***R v Guindon,*** 2016 ONSC 1140 at paras 20-26, 40; ***R c Tshiamala,*** 2013 QCCS 7071 at paras 51-53; ***Montréal (Ville) c Silva-Toro,*** 2007 QCCM 177 at paras 5-8; ***R v Gillespie,*** 2016 NBQB 258 at para 5; ***R v Hanano,*** 2006 MBQB 202 at paras 2-8, 13-20, 22-26

[29] ***R v Vukelich,*** 1996 CarswellBC 1611 (CA)

[30] *Police Powers Newsletter,* February 2017, (Justice Michelle Fuerst, Justice Michal Fairburn and Scott Fenton) [Tab 2]

14. The *Vukelich* rule, however, is unique to B.C. only in the prevalence of its use, and not as a unique or discrete legal position. This Honourable Court, in ***R v Nixon,*** has previously recognized the importance of mandating a preliminary determination on the "utility of a *Charter*-based inquiry." [31] This Court observed, in part, as follows:

> As the AGBC rightly points out, mandating a preliminary determination on the utility of a *Charter*-based inquiry is not new: *R v Lising,* (citation omitted). Similar thresholds are also imposed in other areas of the criminal law, they are not an anomaly. Threshold requirements may be imposed for pragmatic reasons alone. As this Court observed in *Pires* (at para 35; quotation omitted)

Summary dismissal, a couple of examples

15. In ***R v Hanano,*** the accused filed a *Charter* motion seeking a stay of proceedings. She alleged that her right to disclosure had been breached because Crime Stoppers failed to obtain certain information from a tipster. In essence, she submitted that without this information, she could not know if the call was faked. Ms. Hanano argued that if the information she sought was potentially relevant to her defence, she had a right to its disclosure regardless of whether the information existed. The Crown applied to have the motion summarily dismissed. The trial judge summarily dismissed the motion finding that Ms. Hanano had not provided legal support for her argument that Crime Stoppers, and by extension the Crown, had "a duty to obtain and record evidence", or to create evidence that would not otherwise exist.[32]

16. In ***R v Armstrong,***[33] the B.C. Court of Appeal, considered an appeal from some protest fisherman for their convictions for fishing during a closed time. The anglers had argued against their convictions claiming breaches of their equality rights and an abuse of process as they were prosecuted, and aboriginal food fishers were not, for fishing during the closed period. The Court of Appeal judgment is procedurally interesting as one of the two appeal grounds asked "whether the summary conviction appeal judge erred in upholding the trial judge's decision not to hold an evidentiary hearing." The Court of Appeal upheld the trial and summary conviction appeal court judgments declining an evidentiary hearing, holding "the appellants have provided no authority that would permit this court to stay their convictions for breaching laws the validity of which is

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[31] ***R v Nixon,*** 2011 SCC 34 at paras 60-66
[32] ***R v Hanano,*** 2006 MBQB 202 at paras 22-23, 26
[33] ***R v Armstrong,*** 2012 BCCA 242

not challenged, on the basis that other fishers were also breaking the law but were not charged."[34]

Determining the need for a *voir dire*

17. In ***Vukelich,*** the B.C. Court of Appeal indicated that the statements of counsel, possibly supported by an affidavit, were a useful first step in persuading a trial judge to hold a *voir dire*. If that is insufficient, a more formal approach, involving affidavits and possibly an undertaking to call the deponent as a witness might be required. A flexible approach is to be preferred.[35]

18. The flexible process will necessarily lend itself to other offers of preliminary proof that a trial or applications judge accepts as satisfactory. The entitlement can be established on the basis of information provided through disclosure, cross-examinations at other proceedings such as preliminary inquiries, or a summary of evidence that counsel for the accused intends upon calling.[36]

Evidentiary basis for pre-trial applications

19. If the trial judge decides to hold an evidentiary *voir dire*, he or she should decide how the evidence should be presented so as to avoid delay, abuse and prolixity. It is not in every case that a trial judge's ruling will require findings of credibility and *viva voce* evidence will be necessary. A trial judge may direct that the evidence, or portions, be presented by way of an agreed statement of facts, transcripts or "will say" statements.[37]

What legal test should a trial judge use in determining whether or not a *voir dire* should be held?

20. The discretion to decline to hold a *voir dire* is based upon the common law power of trial judges to control proceedings and ensure the trial is run effectively.[38] This Court, in the context of an application seeking leave to cross-examine an affiant according to the threshold of *Garofoli*, held the accused is required to show a reasonable likelihood that the requested *voir dire* **can assist** in determining the issues.[39] The B.C. Court of Appeal had held this test is applicable

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[34] ***R v Armstrong,*** 2012 BCCA 242 at para 30
[35] ***R v Vukelich,*** 1996 CarswellBC 1611 (CA) at para 23
[36] ***R v Kutynec,*** 1992 CarswellOnt 79 (CA) at para 37
[37] ***R v Snow,*** 2004 CarswellOnt 4287 (CA) at para 61
[38] ***R v Felderhof,*** 2003 CarswellOnt 4943 at paras 38, 43, 57
[39] ***R v Pires; R v Lising,*** 2005 SCC 66 at para 35

to *Charter* applications more broadly,[40] and has accepted this as the proper test for the trial judge's discretion to decline a *voir dire*.[41] The B.C. Court of Appeal has also indicated that "would assist" is an acceptable formulation of the test.[42] To the extent that there is a meaningful difference between the two words, Alberta proposes that the applicant must show a reasonable likelihood that a hearing can assist in determining the issues before the court.

Standard of Review

21. The B.C. Court of Appeal has expressed the standard of review applicable to the decision of a trial judge to decline holding a *voir dire* in slightly different wordings, but with consistent meaning. In *Bains,* the Court expressed that deference must be afforded absent an error in principle.[43] In *Mastronardi,* the Court expressed that the "standard of review of such decisions proscribes appellate intervention to cases in which the discretion has not been judicially exercised."[44] In *B(M),*[45] the Court of Appeal found support for this discretionary standard of review established by this Court in *R v Pires; R v Lising.* In particular, the caution provided by Charron J., that deference is important because if it is not adhered to, judges out of an abundance of caution will conduct hearings rather than risk the vitiation of an entire trial.[46]

Conclusion

22. It is trite to observe that criminal trials on every scale have become longer and more complex. Impaired driving trials that would once have taken hours now take days; murder trials that would have taken days now take months. Megatrials, involving large numbers of co-accused or extremely complicated fact situations, often run aground on procedural shoals.[47] Longer trial times contribute to backlogs, scheduling difficulties and delay.

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[40] ***United States v Ranga,*** 2012 BCCA 81 at para 15
[41] ***R v B(M),*** 2016 BCCA 476 at paras 45
[42] ***R v Mehan,*** 2017 BCCA 21 at para 46
[43] ***R v Bains,*** 2010 BCCA 178 at para 76
[44] ***R v Mastronardi,*** 2015 BCCA 338 at para 63
[45] ***R v B(M),*** 2016 BCCA 476 at paras 45-47
[46] ***R v Pires; R v Lising,*** 2005 SCC 66 at paras 46-47
[47] *Lesage-Code Report* at pp 2-4 [Tab 1]; *New Approaches to Criminal Trials: The Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice,* Ontario, May 2006, online: <http://www.ontariocourts.ca/scj/news/publications/ctr/> at p 5

23. Counsel and the courts share in the responsibility. Courts have contributed by not controlling their own process. Counsel contribute when they act unprofessionally or uncivilly, or when they take steps that are prolix or baseless.[48]

24. Some counsel "engage in a series of lengthy and complex motions focused on the conduct of police and/or the prosecution *hoping to find* that a right of the accused has been infringed" (emphasis in the original). Courts are obliged to apply thresholds, like summary dismissal, to prevent abusive processes. In a case of distressing prolixity, the New Brunswick Court of Appeal found that the application of strict thresholds "might have avoided weeks, if not months, of pre-trial hearings."[49]

25. This Court in *Jordan*¸ has recognized the need to address delay and its causes, noting that "unnecessary procedural steps and inefficient advocacy have the opposite effect, weighing down the entire system."[50] The direction to trial judges to generally dismiss applications and requests the moment it becomes apparent they are frivolous, although made in reference to delay tactics, reinforces the broader ability of trial judges to dismiss summarily any application that cannot lead to the claimed remedy.

26. The Attorney General of Alberta asks this Court to remind trial judges to examine each and every application brought before them, to determine if there is a reasonable likelihood that an evidentiary hearing can assist in the sense that a remedy is available, and to dismiss summarily any application that cannot lead to the claimed remedy. As importantly, trial judges who are in the better position to assess the material, the submissions of counsel and the evidence, in the context of the proposed *voir dire*, must feel confident that judicially exercised discretion will be afforded deference.

PART IV – COSTS

27. The Intervener makes no submissions regarding costs.

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[48] ***R v Jordan,*** 2016 SCC 27 at paras 40-42; *Lesage-Code Report* at pp 7-10, 14-17 [Tab 1]
[49] ***R v Tingley,*** 2015 NBCA 51 at paras 2, 5-6, leave to appeal ref'd 2016 CarswellNB 27 (SCC)
[50] ***R v Jordan,*** 2016 SCC 27 at paras 43-45

PART V – REQUEST TO PRESENT ORAL ARGUMENT

28. The Intervener requests permission to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 11th day of April, 2017.

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DAL/kel

PART VI – TABLE OF AUTHORITIES

INTERVENER'S AUTHORITIES – HYPERLINKED ONLY	Cited at Paragraph No.
A(J) v Winnipeg Child and Family Services, 2003 MBCA 154, 2003 CarswellMan 513	12
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R v Armstrong, 2011 BCCA 274, 2011 CarswellBC 3715	16
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2	*Police Powers Newsletter*, February 2017, (Justice Michelle Fuerst, Justice Michal Fairburn and Scott Fenton)	13
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