ONTARIO COURT OF JUSTICE

DATE: 24-March-2022
COURT FILE No.: Central East - Newmarket – 4960-999-17-01360000-00

B E T W E E N :

TRISAN CONSTRUCTION (614128 ONTARIO LIMITED)

— AND —

TECHNICAL STANDARDS AND SAFETY AUTHORITY (TSSA)

Before Justice A. A. Ghosh
Heard on November 5, 2021, January 19, February 25, 2022
Reasons for Judgment
Released on March 24, 2022

K. McKenzie ..... counsel for the Appellant, Trisan Construction
K. Hart ..... counsel for the Respondent, TSSA

Ghosh J.:

Overview:

[1] Trisan Construction appeals its conviction and sentence for "Damaging a natural gas pipeline", contrary to s.10 of Regulation 210/01 of the *Technical Standards and Safety Act.* During an involved construction project for a municipality, a worker for the appellant accidentally punctured a gas service line with a hand shovel.

[2] The appellant submits several grounds of appeal. It is submitted that the presiding Justice of the Peace erred in her disposition of the delay application, pursuant to s.11(b) of the *Charter.* Further, it is submitted that the court erred in failing to find that the pre-charge delay and associated State conduct warranted a violation of the appellant's fair trial right and a consequent stay of proceedings.

[3] Regarding the conviction appeal, it was submitted there was no basis to find that the appellant violated industry standards by failing to procure renewed documentation outlining the location of underground utilities. This informed the submitted error that the defence of due diligence had not been established. Finally, the amount of the fine imposed was submitted to be unfit. These are my final reasons dismissing the appeal.

The Trial Proceedings

[4] The Technical Standards and Safety Authority (TSSA) investigated the appellant contracting and excavating company, Trisan Construction, for damaging a gas service pipeline during a project for the Town of Richmond Hill. A worker employed by Trisan had been attempting to expose a gas line using a hand shovel when he accidentally punctured it, causing gas to escape. The project was paused, and the authorities were called.

[5] The investigation was completed within weeks. Regulatory charges for “digging with mechanical equipment without ascertaining pipeline locations” and “damaging a pipeline” were laid approximately 22 months later. By the time charges were laid, at least two potential defence witnesses had left the employment of the appellant.

[6] It was not contested that a Trisan employee had caused the damage. The TSSA withdrew the “mechanical equipment” offence mid-trial. A key issue was whether Trisan had established the due diligence defence that it took reasonable care to avoid the damage. A contested and related issue was whether Trisan had complied with the law by failing to obtain documentation supporting a renewed “locate” before causing the damage.

[7] A “locate” is an inspection required for digging sites that identifies the location of underground utilities before excavation can start. It has two components. First, the inspector from a third-party locating entity must identify and then mark the ground where underground utilities are located. Second, the contractor must obtain from the inspector the documentation supporting where the same utilities are for the identified area. There is a legal obligation that the contractor then reconcile the ground markings with the document before digging.

[8] Enbridge Gas, the locating company, and the TSSA, all took the position that Trisan was not in compliance, as the locate had expired after 30 days. Trisan took the position it had complied with its legal obligations. They had properly applied for the renewed the existing locate in a timely way, but the locating company had been delayed. The 30-day expiry period was not legislated or codified at the time.

[9] The defendant noted that the locator had recently applied fresh ground markings before the damage occurred. Although Trisan had not received the updated documentation of the renewed locate, it submitted that the 30-day validity of the locate was not prescribed in law. It was submitted that the existing documentation coupled with the fresh ground markings satisfied its legal obligations and established due diligence.

[10] The presiding Justice of the Peace twice denied s.11(b) *Charter* applications for unreasonable delay to trial. She also denied an application for abuse of process where State misconduct related to pre-charge delay was alleged. The court found that Trisan was not in compliance with its duty to have a valid locate, as the 30-day renewal was an established industry standard. Further, she found Trisan had not established the defence of due diligence on the balance of probabilities and entered a conviction for “damaging a pipeline without authority”.

[11] The TSSA submitted that the sentence should be a fine in the amount of $30,000. Trisan submitted for a $5,000 fine. The court imposed a fine of $20,000.

Grounds of Appeal:

[12] The appellant raised several alleged errors and potential grounds of appeal. These can be distilled into four core grounds of appeal:

i. *Charter* ss.7 and 11(d), Pre-charge Delay and Abuse of Process: Did the trial court err in failing to find the pre-charge delay and related state misconduct was an abuse of process and violated the right to a fair trial?

ii. *Charter* s.11(b) and Unreasonable Delay to Trial: Did the trial court err in failing to find a violation of the right to be tried withing a reasonable time?

iii. Conviction Appeal: Did the trial justice err in failing to find the appellant established the defence of due diligence?

iv. Sentence appeal: Did the court err by imposing an unfit fine?

Standard of Review:

[13] Counsel for the appellant identified no less than two dozen alleged errors or grounds of appeal. A reviewing court must not descend into submissions that appear to be attempts to relitigate aspects of the trial that warrant appellate deference. Given the number of trial issues raised on appeal, it would be prudent to start at first principles.

[14] Section 120(1) of the *Provincial Offences Act* (POA), outlines the bases by which an appeal court may allow or dismiss an appeal against conviction. The appellant submits errors of fact and of law and some that are mixed.

[15] The standard of review for findings of fact is one of "palpable and overriding error". Considerable deference must be afforded findings of fact, particularly those involving assessment of credibility. Mistakes of law, and those mixed with facts and law, are reviewed on the standard of "correctness".[1]

[16] The ultimate decision as to whether there was unreasonable delay to trial, is subject to the standard of correctness on appeal. This includes the characterization of periods of delay. However, the "trial judge's findings of fact are entitled to deference where they are relevant to the analysis required by *Jordan.*"[2]

Pre-Charge Delay, Abuse of Process, and s. 11(d) of the *Charter*

[17] The pre-charge delay from incident to charge approached two years and was one of the submissions advanced in support of a stay of proceedings. The defendant at trial appeared to conflate submissions regarding distinct potential *Charter* violations for unreasonable delay for both before and after the charges were laid.

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[1] *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235, paras. 1-14

[2] *R. v. Bulhosen,* [2019] O.J. No. 3666 (C.A.), para. 73; *R. v. Albinowski,* [2018] O.J. No. 6892 (C.A.), para. 27

[18] Delays "occurring in the pre-charge period, including in the investigatory or pre-charge stage, are not subject to analysis under s.11(b)": *R. v. Milani*.[3] S.11(b) of the *Charter* protects against unreasonable delay from charge to trial, spanning the swearing of the information to the end of the anticipated trial. The trial justice correctly adverted to this distinction in her analysis.

[19] Pre-charge delay may result in violations of sections 7, and 11(d) of the *Charter*, where it contravenes the right to a fair trial as engaged by the doctrine of abuse of process: *R. v. Carter; R. v. Kalanj*.[4] Only in the clearest of cases will a stay of proceedings for an abuse of process be warranted. These cases involve state conduct that either compromises the fair trial right of a defendant or risks undermining the integrity of the judicial process: *R. v. Babos.*[5] The test to determine whether a stay of proceedings is necessary is the same for both categories, and consists of three requirements:

> (1) There must be prejudice to the right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated by the trial process;
>
> (2) There is no alternative remedy capable of redressing the prejudice; and
>
> (3) where uncertainty remains after steps (1) and (2), the court must balance the interests in favour of granting a stay over a trial on the merits, such as denouncing state misconduct or preserving the integrity of the justice system.

[20] It is the effect, not the length, of the pre-charge delay that matters to the fairness of a trial.[6] Three potential defence witnesses, including the employee who caused the damage, apparently left the employment of Trisan during the pre-charge period. In rejecting a finding of prejudice to Trisan's fair trial rights, the trial justice properly observed that no submission or evidence was led to support the potential impact of the absence of this evidence to any available defence.

[21] I would additionally observe that the mere fact that these potential witnesses had left the employment of the appellant did not demonstrate that this evidence was lost or unavailable. Trisan only attempted to locate the witnesses in November of 2018, months after the first day of trial. There was no diligence displayed to procure their attendance.

[22] The trial justice also properly found that none of the pre-charge state conduct undermined the integrity of the process or demonstrated bad faith or an improper motive.[7] I appreciate in the almost two years that passed between the end of the investigation and the swearing of the Information soon followed a settlement of related lawsuits between Enbridge and Trisan.

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[3] *R. v. Milani*, [2014] O.J. No. 3247, para. 26; Post-*Jordan,* see *R. v. Wookey*, 2021 ONCA 68, para. 55
[4] *R. v. Carter*, [1986] 1 S.C.R. 981; *R. v. Kalanj*, [1989] 1 S.C.R. 1594
[5] *R. v. Babos,* [2014] 1 S.C.R. 309, paras. 31-2
[6] *R. v. L.(W.K.),* [1991] 1 S.C.R. 1091; *R. v. Hunt,* [2017] S.C.J. No. 25; [2016] N.J. No. 372 (C.A.), paras. 65-70
[7] *R. v. National Steel Car Limited,* [2003] O.J. No. 856 (C.A.)

[23] The TSSA investigator called by the appellant on the abuse of process application testified that he was unaware of the lawsuits or the settlement when he swore the information. There was no evidence to the contrary or that any involved state actor had knowledge of the civil settlement when the decision to charge and prosecute was made.

[24] The TSSA investigator also confirmed there was no strategic or improper motivation informing the timing of the start of the prosecution. His evidence was uncontested that the delay was informed by workload, case prioritization and reliance of the two-year limitation period in the statute. This submission was correctly dismissed.

[25] Finally, the trial justice was correct to find that the prosecution did not abuse its prosecutorial discretion[8] by initially proceeding with the charge of "digging with mechanical equipment without pipeline locates". I accept there was no evidence that "mechanical equipment" was used here. The damage was caused by a hand shovel. There was some evidence supporting all other essential elements of the offence.

[26] The TSSA properly withdrew the charge mid-trial before the defence was called upon. A simple directed verdict application would have disposed of this charge, and no added evidence was required to defend it. The trial justice properly found that the prosecution acted properly and there was no ensuing violation of the fair trial right.

[27] There was no violation due to the pre-charge state conduct or delay. This was certainly not a clear case warranting a stay of proceedings. Her Worship correctly applied the law. Her related findings were reasonably grounded in evidence and are accordingly deferred to. This ground fails.

The Delay Application – S.11(b) of the *Charter*

[28] The appellant submits that the trial justice erred in her determination of the s.11(b) *Charter* application. It was submitted that the prosecution failed to properly estimate the time required for trial, causing a continuation date and further delay.

[29] The appellant also submitted that the delay from the first trial date to the end of trial was improperly deducted as defence delay, and that the court erred in finding the defence waived delay at any time. I will address each of these submissions.

S.11(b) of the Charter and the Right to be Tried within a Reasonable Time – the Law

[30] In *R. v. Jordan,*[9] the Supreme Court set out the contemporary framework for determining the reasonableness of delay to trial pursuant to s.11(b) of the *Charter.* As the Court summarized at paragraph 105:

> There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in the provincial court… Defence delay does not count towards the presumptive ceiling.

[8] *R. v. Anderson,* [2014] 2 S.C.R. 167
[9] *R. v. Jordan,* [2016] S.C.J. No. 27

> **Once the presumptive ceiling is exceeded**, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.
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> **Below the presumptive ceiling, in clear cases**, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.

[31] The 18-month ceiling applies to "cases tried in the provincial court", including matters prosecuted under the *Provincial Offences Act.*[10] Firstly, the "net delay" must be calculated by subtracting defence delay from total delay (charge to trial's end). If the net delay exceeds the ceiling, it is presumptively unreasonable unless the State establishes that exceptional circumstances (case-complexity or a discrete event) caused the delay to be under the ceiling. The time left after the deduction due to any exceptional circumstances is the "remaining delay" to be compared against the presumptive ceiling: *R. v. Coulter*.[11]

[32] The following events were especially relevant to the delay application:

Dates	Particulars	Time / Attribution
Jul. 10, '17	Information Sworn	Start of Proceedings
Dec.15, '17	Judicial Pre-trial; Trial set for Aug.15, '18	5 months (to ceiling)
Jun. 1, '18	Trial confirmation: 1-day estimate maintained; *Charter* not raised	
Aug.15, '18	Trial (1 day); Adjournment to bring delay motion denied; delay motion denied; 3/4 TSSA witnesses completed; Jan. 7, '19 set for 1-day continuation; no further defence motions raised or accounted for;	13 months total (to ceiling)

[10] *R. v. Nguyen*, [2020] O.J. No. 4165 (C.A.), paras 22-26; *R. v. K.J.M.*, 2019 SCC 55 (S.C.C.);
[11] *R. v. Coulter*, [2016] O.J. No. 5005

Nov. 5, ‘18	Notice filed to renew delay motion and new ss.7, 11(d) *Charter* motion for pre-charge delay;	
Jan. 7, ‘19	Trial continuation date; Defence case closed; Charter motions adjourned due to inclement weather;	18 months total (546 days)
Mar. 12, ‘19	Charter motions argued and denied; Convictions entered; written reasons to follow;	20 months total (610 days)

i. Delay Application Properly Dismissed on Trial Date (13 months)

[33] On the first day of trial, the appellant brought an unperfected application for a stay of proceedings, alleging a violation of the s.11(b) *Charter* right to trial within a reasonable time. The notice of application was served and filed mere days before trial. Transcripts of the prior proceedings had not been obtained.

[34] While pre-charge delay improperly informed the s.11(b) argument at the time, the delay from charge to trial was 13 months. The Court briefly and correctly adverted to *Charter* law regarding pre-charge delay as being distinct from the s.11(b) right, and summarily dismissed the related submission for a stay of proceedings. This was correct, notably given the absence of evidence supporting the impact of the pre-charge delay.

[35] With the consent of the TSSA, the Court then heard and dismissed the s.11(b) application. It was proper to do so. In her final reasons, the Justice of the Peace correctly observed that the application was without merit. I share this finding and it will inform the reasonableness of the delay that followed the first day of trial.

[36] The trial justice correctly articulated and applied the analysis required for a “below-ceiling” violation to be determined. The entire 13-month period was correctly attributed to the justice system. The absence of the transcripts only assisted the applicant. The court properly found that neither the “meaningful steps to expedite” nor the “markedly longer” criteria were satisfied.

[37] In determining that the applicant failed to take “meaningful steps to demonstrate a sustained effort to expedite the proceedings”, the court correctly observed that the delay application was brought on short notice on the trial date and had not been perfected. Given the delay was 13 months and the merits of the application were accordingly limited, it was proper to have denied the adjournment to perfect the application. In doing so, the court implicitly presumed the absence of defence delay or exceptional circumstances.

[38] While not directly referenced, two other factors reinforced the finding that the applicant had not shown meaningful steps to expedite the proceeding. Firstly, the application to adjourn was of limited merit and brought without notice on the trial date. It

was based on the desire to perfect the delay application (the need for which was promptly waived by the prosecutor), and to absorb a report received ten days prior.

[39] This "new" report was properly conceded to be identical in substance to the original damage investigation report. The report merely impacted a hearsay-based cross-examination "strategy", but Trisan had been provided early on with essentially the same final report identifying the authoring investigator. Ten days, in the circumstances, was ample time to review such a report in defending a regulatory prosecution.[12]

[40] A second unreferenced factor supporting a lack of defence diligence is found in the submission of Trisan's counsel that the trial date should be converted into a second judicial pre-trial. This submission in the circumstances is also inconsistent with a desire to expedite the proceedings.

[41] Ultimately, eight months passed between the set-date and trial, which provided ample time to file and perfect a delay application. The prospect of such an application was not raised at a confirmation hearing over two months before trial. The intention to bring the application should have been determined, minimally, within a few months of setting the trial date.

[42] Delay applications routinely require hours of court time and should either be accounted for in the trial estimate or, ideally, scheduled to be heard well before trial and filed in accordance with the *Rules of Procedure*. To demonstrate its intention to expedite the proceeding, Trisan needed to attend to the application in a timely way. The time spent determining the delay application took time that could have been spent on trial evidence. This loss informed the trial continuation. This aspect of the delay-related ground of appeal fails and brings me to the time estimated for trial.

ii. **Trial Continuation and Renewed Delay Application – Trial Estimate**

[43] The appellant submits that the court erred in failing to find that the prosecution caused delay by improperly estimating the trial time, resulting in a continuation date. I disagree. The trial justice correctly identified that the trial was not completed within the one-day estimate due to the conduct of the defence. Several facts support this finding.

[44] Firstly, there was a judicial pre-trial and all parties had agreed to a one-day trial estimate. The TSSA's contribution to the trial estimate was made in good faith and was demonstrated to be reasonably accurate. Despite losing trial time to the defence adjournment application and a meritless delay application, the TSSA had called three out of its four witnesses. Two defence witnesses would also be called at the trial continuation.

[45] Secondly, the record supports a finding that the defendant failed to meaningfully contribute to the trial estimate. In advocating for an adjournment on the trial date, the appellant's counsel stated that "pretty much nothing was discussed at the pre-trial". This apparent defence inaction was confirmed by the prosecutor's unopposed submission at the continuation that Trisan's counsel at the JPT "did not advise what defence she was calling, if any, or how many witnesses she was going to call".

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[12] *R. v. Stinchcombe,* [1991] 3 S.C.R. 32 at paras. 26

[46] Finally, one of the two defence witnesses called at the continuation was primarily in support of a new abuse of process application. The spectre of this application had not been raised when the first day of trial was completed and a one-day estimate for the continuation was approved and set.

[47] In sharing the obligation to mitigate delay, it was incumbent on the defence to convey at the pre-trial the prospects of any *Charter* applications and a defence case. The prosecutor's submission at the adjournment application that its case contemplated "only four possible witnesses" was not contested.

[48] The basis of the pre-charge delay and abuse of process applications crystallized the day the charges were laid. The basis for the s.11(b) *Charter* application regarding delay to trial crystallized on the date the trial was set. This provided Trisan with an eight-month window to file the *Charter* applications. The s.11(b) application, notably, should have been perfected and scheduled to be heard before the trial date. Again, a confirmation appearance was held over two months before trial. Even then, the appellant failed to raise the anticipated applications and their impact on the trial estimate.

[49] The exercise of estimating trial time, by its very nature, defies the pursuit of precision. It draws on experience and an appreciation of the nature and complexity of the evidence and the issues to be litigated. It requires the engagement of all pre-trial participants to mitigate delay. Sometimes even the most carefully refined estimates prove to be reasonably inadequate. As the Supreme Court observed in *Jordan*, "Trials are not well-oiled machines."[13]

[50] The most favourable characterization to the appellant regarding the delay that followed the first trial date was that it was caused by a deductible discrete event of a collective failure to properly estimate the trial time.[14] This would be generous and unfitting.

[51] Rather, the trial justice was correct to implicitly find that the TSSA complied with its obligations to contribute to a proper trial estimate. She was also correct to explicitly find that Trisan solely caused the delay that followed the first trial date by failing to account for the time required to argue and determine a meritless delay application.

iii. Defence Delay: Submitted Error in Finding Defence Waived Delay

[52] Delay caused by the defence must be subtracted from the total delay. "Defence delay" involves either a waiver of the s.11(b) right or delay solely caused by the conduct of the defence. The appellant submits that the trial justice erred in finding that Trisan waived delay at any time.

[53] As the Supreme Court confirmed in *Jordan*:

> Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the

[13] *Jordan,* para. ; *R. v. C.G.,* [2020] O.J. No. 2554 (C.A.), paras. 46-49
[14] *R. v. Pauls,* [2020] O.J. No. 1186 (C.A.), paras. 75-81

> past, "in considering the issue of "waiver" in the context of s.11(b), it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness".

[54] In denying the delay application, the Justice of the Peace repeatedly mentioned, and in qualitatively different ways, that the appellant's counsel had "waived" delay between the second and final trial date. She stated that the defence "essentially", and later "clearly", and finally "implicitly" waived delay between January 7th and March 12th. This is understandable, and conceivably reconcilable in favour of an implicit waiver. Such a finding can be supported upon a review of the transcript of the end of the court day on January 7th.

[55] It was approximately 4:00 p.m. and trial submissions were complete. Not only did Her Worship express an openness to providing a trial ruling that day, but she raised the prospect of hearing *Charter* submissions as well. The prosecutor pressed to argue the *Charter* applications, expressing a concern that the consequent delay would be raised in a renewed application.

[56] In this context, counsel for the appellant raised that she did not believe the *Charter* submissions could be made that day and expressed concern about the weather and her long commute. Then the following exchange occurred:

> Ms. McKenzie: I mean I think - I think for the 11(b) I mean, I can undertake to not bring if we're hearing the motion on another day, can undertake to not bring a further motion and just argue the motion as is, subject to if you're reserving on the trial decision and that takes a while. I'm not including that in my undertaking.
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> The Court: You mean from, between now and the date – sorry?
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> Ms. McKenzie: I'm not sure, 'cause I don't know procedure that well in this court, but what I'm suggesting is on the Charter motions themselves, if I undertake to not challenge that duration until we can get the date of the Charter motions.

[57] This exchange may have laid the foundation for an implicit, but nonetheless clear and unequivocal waiver, particularly given the proceedings neared the end and the delay application had already been renewed. The TSSA prosecutor again expressed concern about delay and her desire to complete *Charter* submissions that day. The following exchange ensued:

> Ms. McKenzie: Well, is Your Worship in a position to rule on the trial today?
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> The Court: Well, I'd like a bit of time to do that, but…
>
> Ms. McKenzie: Look at the weather and see.

[58] Clearly the appellant's counsel, regardless of any waiver, was advocating to adjourn for the day without arguing the *Charter.* This led the court to take a brief recess, only to return and relay that she would prefer to reserve on her trial ruling. She asked again if counsel would like to make *Charter* submissions before the end of the court day so that she could reserve for all matters. Again, the appellant's counsel advocated to adjourn *Charter* submissions due to the weather and then the added concern about written materials. I find that the defence applied to adjourn *Charter* submissions when the court and prosecutor were expressly willing to extend the day to complete them.

[59] Returning to the submission that the court should not have found a waiver of delay, I am content for discussion purposes to find the court erred in doing so. Delay was not explicitly waived, and caution should be taken to find any implicit waivers of *Charter* rights. I share the appellant's concern that any implicit waiver of delay was qualified and perhaps, in turn, equivocal. If the court erred, however, no substantial wrong occurred from such a finding.[15] The ensuing delay to the end of trial, again, was clearly and solely caused by the conduct of the defence.

iv. Defence Delay: Delay Caused Solely by the Conduct of the Defence

[60] The second deductible form of defence delay is delay caused solely by the conduct of the defence. Such conduct comprises situations where the actions of the defence either directly caused the delay or are shown to be a deliberate and calculated tactic employed to delay the trial. The latter includes frivolous applications and requests.

[61] Trisan's initial delay application and the request to convert the first trial date into a judicial pretrial were both frivolous. The frivolous delay application was not accounted for in the trial estimate and consumed meaningful trial time. Along with the defence failure to include the prospect of its case in the trial estimate, this defence conduct solely caused the first adjournment.

[62] The trial continued for a second day on January 7th, 2019. The trial evidence and submissions were completed that day. It was open to the court to find that this brought the total delay just beneath the 18-month ceiling. Had it not been for further defence applications that were, yet again, not contemplated in the continuation time estimate, the deliberation time for the merits would not have impacted the delay analysis here. Thus, even if the court declined to deduct any defence delay, the remaining delay would have been presumptively reasonable and not rebutted in the circumstances.

[63] Had the ensuing adjournment to a third trial date been merely reserved for the trial decision, the deliberation time would not have counted towards the presumptive ceiling. As the Supreme Court in *R. v. K.G.K.* recently confirmed, deliberation time may nonetheless contribute to unreasonable delay, but only where that time took "markedly longer than it reasonably should have".[16]

[64] The trial justice expressed a desire to have the matter return for her ruling within weeks. However, the trial coordinator only offered March dates given that the defence

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[15] *Provincial Offences Act,* section 120(1)(b)(iii)
[16] *R. v. K.G.K.,* [2020] S.C.J. No. 7, paras. 4, 50-56

had renewed its delay application and filed new applications for *Charter* relief alleging an abuse of process. The two months taken to provide a final trial ruling was certainly reasonable and would not have contributed to a s.11(b) violation. Of course, the court unexpectedly had to also contend with *Charter* submissions deferred by the appellant.

[65] The defence solely caused the delay from the second to the third continuation date by again failing to contribute to the proper estimate for the trial continuation. The abuse of process application required added evidence and submissions and was not contemplated when the continuation date was set.

[66] I am not persuaded by the submission that Trisan was relieved of its singular responsibility for that delay by filing the abuse of process application in mid-November. It was almost 3 months after the first trial date, and, again, the basis for the application had gelled by the time the information was sworn. The defence offer to have it scheduled before the trial date was relatively hollow, given a mere 7 weeks and the holiday season intervened. The trial court was correct to characterize both continuation dates as being solely caused by the conduct of the defence. The delay applications were properly denied.

Conviction Appeal – Defence of Due Diligence

[67] I agree with the Respondent TSSA that the core ground in the conviction appeal is whether the judicial officer erred in finding the appellant failed to establish the defence of due diligence. The conviction was entered for the "pipeline damage" offence, contrary to *Ontario Regulation 210/01*. This is s.10 of the "*Oil and Gas Pipelines Systems"* Regulation of the *Technical Standards and Safety Act,* which states:

> "No person shall interfere with or damage any pipeline without authority to do so."

[68] This is a strict liability regulatory offence. The prosecution does not need to prove mens rea for such offences. It only must establish the commission of the act beyond a reasonable doubt. Guilt will follow such a finding, unless the defence establishes it exercised due diligence on the balance of probabilities. The due diligence defence is established where "reasonable care" was taken to avoid the commission of the act.[17]

[69] It was not contested that a Trisan employee damaged a natural gas pipeline using a hand shovel. This was established in both the TSSA and defence cases. The damage investigation report was admitted into evidence and was confirmatory. The project manager from Trisan testified that a Trisan employee "unfortunately hit" the pipeline "with a shovel" and the damage investigator confirmed that "gas was blowing" from the damage at the Trisan job site. As the offending act is not in issue, I need not address the submitted errors that are only relevant to whether the act was committed.

[70] Trisan submitted that it was contested throughout the trial that it had the "authority to damage the pipeline". This submission can be summarily dismissed. I accept the issue of the validity of the "locate" was contested, but a valid locate would not provide the

[17] *R. v. Sault Ste. Marie,* [1978] 2 S.C.R. 1299; *Ontario v. Henry of Pelham,* [2018] O.J. No. 6434 (C.A.)

contractor with any authority to damage the pipeline. It only could have contributed to its authority to excavate while avoiding pipeline damage.

[71] Any "authority" to damage or interfere with a pipeline in the offence provision must be read in conjunction with the duties and prohibitions applicable to excavators outlined in s.7 of the *Underground Infrastructure Notification System Act.* Excavators, like Trisan, must obtain a valid locate, and even then, must not "excavate or dig in a manner that the excavator know or reasonably ought to know would damage or otherwise interfere with any underground infrastructure."[18]

[72] No involved statutory interpretation is required here. It is clear the "authority" to damage or interfere was reserved in this case for State authorities, Enbridge Gas Distribution or its designates to conduct authorized repairs or rearrangements to gas pipelines. The trial evidence laid bare that Trisan, the private excavation contractor, was not authorized to damage or interfere with gas pipelines for any purpose.

[73] Many of the grounds and errors submitted reflect an effective and improper reversal of the onus to establish the due diligence defence. For example, the TSSA was not required to call experts, or to establish industry standards supporting that the pipeline locate had expired. I will explore that shortly. As the act was clearly established beyond a reasonable doubt, the appellant bore the burden to establish the defence on the balance of probabilities.

[74] A telling illustration of the misapprehension of the due diligence onus is found in a question posed by Trisan's counsel to the damage investigator:

> "It's just a follow-up question that you're – you're saying – you're putting the onus on the contractor to do all of these things. But, if the locate company knows they're late and knows the contractor's chomping at the bit and then now there's going to be a further delay, shouldn't the locator say "let me print these out for you so that you can get on your way?" Why is that the contractor's onus? They've asked for the locate 10 days ago."

[75] The onus indeed was on the contractor to establish due diligence, having damaged the gas line. Even if Trisan had a valid and current locate, that on its own would not have necessarily established due diligence. The absence of a valid locate is cogent evidence that simply permits an inference supporting the absence of due diligence. The analysis returns to the onus on Trisan to establish reasonable care taken to avoid the damage. No such evidence was led or extracted. I reject the submission that nothing more could have been done.

[76] On the issue regarding whether the 30-day expiry of the gas line locate was required by industry standards, there was ample support for that finding and it warrants deference on appeal. Two damage prevention technicians (including the damage investigator) from the locator company, a damage prevention inspector from Enbridge Gas, a TSSA inspector, and even a Trisan project manager testified that gas line locates expire after 30 days. They collectively confirmed that the locate must be renewed in

[18] *Underground Infrastructure Notification System Act,* s.7(3), 2012, S.O. 2012, C.4

documentation to be reconciled by the contractor with the ground markings. Indeed, David Ransom, a Trisan project manager, testified that the project was shutdown awaiting the renewed locate after the thirty-day validity period had expired. It was open on the evidence for the trial justice to find Trisan then "took a chance" without the required documentation, given the fresh markings provided a limited update of gas line locations.

[77] The evidence supporting that the Trisan worker used a hand shovel to excavate the gas line did not establish due diligence on its own. Inspector Todorovski of the TSSA testified that no mechanical digging equipment can be used within one metre on either side of the gas line marking. Considering that evidence, the use of a hand shovel or some other less invasive means to excavate near the pipeline was necessary and presumptive.

[78] When asked about how the damage could have been avoided, he described examples of "prudent" use of a hand shovel or a "hydro vac". Mr. Ransom testified that Trisan had twelve hydro vacs at its disposal. However, they were not always available and "very costly, so sometimes you do have to hand excavate. It's part of the work."

[79] No evidence was led by Trisan supporting any training or education for pipeline excavation for the employee who damaged the pipeline, nor that he followed related training or procedures. The trial justice correctly applied the law of due diligence and properly found the appellant failed to meet its onus. The conviction appeal is denied.

Sentence Appeal

[80] The sentence appeal is only facially straightforward. The TSSA advocated for a $30,000 fine. Trisan submitted for a $5,000 fine. The sentencing justice imposed a $20,000 fine. The appellant submits that the court erred in doing so.

[81] Section 122(1) of the *POA* outlines the statutory basis for a sentence appeal:

> Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may, upon such evidence, if any, as it thinks fit to require or receive, by order,
>
> (a) dismiss the appeal; or
>
> (b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,
>
> and, in making any order under clause (b), the court may take into account any time spent in custody by the defendant as a result of the offence.

[82] I am guided by our Court of Appeal's recent exploration of the standard of review for regulatory sentence appeals: *Ontario (Ministry of Labour) v. New Mex Canada*.[19] In this decision, Justice Paciocco addressed the seminal regulatory sentencing authority in

[19] *Ontario (Ministry of Labour) v. New Mex Canada*, [2019] O.J. No. 227; paras. 58-113

R. v. Cotton Felts Ltd.[20] In that appeal, the Court of Appeal had essentially permitted an appeal court, even in the absence of any error in principle, to "form its own opinion on the fitness of sentence and to vary any sentence if it does not consider it to be fit".

[83] Justice Paciocco considered this dated line of authority with the contemporary appellate sentencing guidance from our Supreme Court in *Lacasse.* [21] In *Lacasse,* the Court confirmed a more deferential standard of review. An error in principle, the failure to consider a relevant factor, or an erroneous consideration of an aggravating or mitigating factor, will only permit appellate intervention where the error had an impact on the sentence. An appellate court may only otherwise intervene if the sentence was "demonstrably unfit".

[84] Justice Paciocco did not need to reconcile the competing lines of authority to determine the appeal in *New Mex Canada.* I share, however, the Court's observation that the deferential *Lacasse* standard may indeed have overtaken the broader scope of appellate intervention for regulatory sentences countenanced in *Cotton Felts.*

[85] I find that on the facts of this case, I also need not resolve this. Both Trisan and the TSSA agreed that a fine was the appropriate penalty. The submissions diverged by thousands of dollars. The maximum corporate fine under the *Act* is a million dollars.[22]

[86] They agreed that the appellant was a medium-sized construction company with approximately 200 employees. As a limited indicator of its ability to pay, counsel asked for a mere 6 months, as the court intimated that it would consider a longer period. There was no submission made at trial or on appeal that the fine imposed a financial hardship.

[87] While the sentencing justice imposed a fine closer to that advocated by the prosecution, she adverted to the appropriate sentencing principles and the aggravating and mitigating factors in play. The court acknowledged that deterrence is a central sentencing principle in such cases, while acknowledging the remedial nature of the legislation. The sentencing justice discussed the public safety imperative and the risk to lives and property that result from damaged gas lines. She also expressly adverted to the financial impact to Trisan resulting from the delayed locate.

[88] Sentencing parity with comparable cases does not need to be approached with any precision or nicety. There was no error of principle. The sentence here was fit and certainly not demonstrably unfit. In either case, I must defer to it. This ground fails.

[89] The appeal is denied. My thanks to counsel.

Released: March 24, 2022

Signed: Justice A. A. Ghosh

[20] *R. v. Cotton Felts Ltd,* [1982] O.J. No. 178 (C.A.)
[21] *R. v. Lacasse,* [2015] 3 S.C.R. 1089, paras. 16, 51-53
[22] *Technical Standards and Safety Act,* section 37(1)(a)