File No: 29850-1
Registry: Prince Rupert

In the Provincial Court of British Columbia

REGINA

v.

DP WORLD PRINCE RUPERT INC.
PRINCE RUPERT PORT AUTHORITY
FRASER RIVER PILE & DREDGE (GP) INC.
BELPACIFIC EXCAVATING & SHORING LIMITED PARTNERSHIP
BEL CONTRACTING
FRPD-BEL GATEWAY JOINT VENTURE

REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE L. MROZINSKI
(appearing by videoconference)

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Crown Counsel appearing by teleconference:	**A.M. Switzer** **J.H.M. Patterson**
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Counsel for Accused BelPacific Excavating & Shoring Limited Partnership appearing by teleconference:	**D. Rossi** **J.K. Choi**
No other appearances	
Place of Hearing:	**Prince Rupert, B.C.**
Date of Judgment:	**December 6, 2019**

[1] THE COURT: These are my reasons with respect to the Crown's application to adjourn the trial in this matter, in which the defendants are charged with various offences under the *Fisheries Act*, R.S.C. 1985, c. F-14.

[2] The trial was set to commence December 2, 2019, in Prince Rupert. On November 27, 2019, Crown counsel advised it was not in a position to start the trial date due to the unavailability of its key witness. Crown counsel, and at least one of the defendants, was unable to speak to an adjournment application on November 27, and the matter was put over by agreement of all the parties for hearing on December 4, 2019. With respect to the December 2 trial date, Crown takes the position that if this application to adjourn is not granted, it will call no other witnesses. Crown acknowledges that the result will be either a stay of proceedings or an acquittal on all counts, the defendants being present and ready to proceed. As such, when considering this application, this court must bear in mind the effect of not granting the adjournment.

[3] The defendants all oppose the Crown's application to adjourn. Their reasons are the same. Each take the position the Crown has not made out a case, on balance, for an adjournment. All take the position they will be prejudiced in light of the evidence available in this application if the adjournment is granted.

[4] As I have briefly noted, the basis for the Crown's application is the sudden unavailability, due to illness, of its key witness, Ms. [omitted]. At the material time, at least, Ms. [omitted] was employed as a [omitted] with the Fisheries Protection Program of the Department of Fisheries and Oceans.

[5] To provide some brief context, the defendants are charged under the

Fisheries Act with various offences, including causing serious harm to fish, arising out of work performed on the expansion of the Fairview Terminal in Prince Rupert. The work at issue included marine dredging, the significant infilling of intertidal and subtidal habitat, as well as the construction of a bund wall. The work was done pursuant to approval from DFO in the form of an Authorization under s. 35(2)(b) of the *Fisheries Act*.

[6] Ms. [omitted] was one of two DFO [omitted] that attended at the worksite to carry out compliance and monitoring inspections of the expansion project. As a result of these inspections, and subsequent visits to the worksite by Ms. [omitted] and others, DFO formed the view the defendants had failed to comply with DFO's Authorization to carry out the work. In the result, the defendants find themselves charged with 10 counts of various offences under the *Fisheries Act*. Count 1 charges that in carrying out the work in the marine environment at or near Prince Rupert, between November 30, 2014, and November 1, 2015, the defendants caused serious harm to fish, contrary to s. 35(1) of the *Fisheries Act*; namely, the death of fish. Other charges include that while carrying out the work, the defendants failed to comply with various conditions of the Authorization regarding sediment and erosion control and fish salvage operations. Additionally, the Crown charges the defendants failed to comply with statutory requirements to notify DFO of an occurrence resulting in serious harm to fish.

[7] The charges all relate to events that occurred between November 30, 2014, to November 1, 2015. Following a lengthy investigation, the information was sworn on November 2, 2018. Trial dates in this matter were scheduled, with no small

difficulty given the number of counsel, in April 2019. The trial is expected to last 11 weeks, with the first and last weeks to take place in Prince Rupert, and the remainder for hearing in Vancouver.

[8] The defendants submit they have been proactive in moving this matter forward and there is some basis to support that submission. Various lengthy admissions have been drafted by the defendants. An application for third party documents was brought in May of this year, only to be adjourned at the request of counsel for the third party, the Attorney General of Canada on behalf of the Department of Fisheries and Oceans. The application for disclosure was heard this October 2019 and document production ordered.

[9] By letter dated December 2, 2019, counsel for the Attorney General advises it has identified some 2,055 documents that fit within the scope of this court's order for disclosure. Some or all of those may be disclosed to the defendants after review by this court. This is in addition to significant disclosure already having been made by the Crown.

[10] At the first week of trial, the parties expected to commence a *voir dire* to determine the validity of a warrantless search conducted at the premises operated by DP World under a lease with PRPA. Ms. [omitted] is the key witness in that *voir dire*. Another witness, Mr. Byron Nutton, was also scheduled to testify in the first *voir dire*. The Crown elected not to call Mr. Nutton in the first week of trial. During submissions, Crown counsel clarified that Mr. Nutton's evidence would be short. It is Ms. [omitted] that carries the burden for the Crown on this first voir dire. In addition, Ms. [omitted] is, as I understand it, the author of an expert report for the Crown in

which she has estimated or calculated the number of fish the Crown alleges were killed by the defendants in performing the work, or alternatively in allowing the work to be performed.

[11] A number of other expert witnesses are expected to testify in the main trial. The point being that the defendants have and will, if the adjournment is granted, continue to have to expend significant time and energy preparing to defend these charges.

[12] The Crown's case for an adjournment is that on or about November 22, 2019, counsel was advised that Ms. [omitted] was unable to attend to her interview scheduled with Crown counsel, and that she would be unable to travel to Prince Rupert for trial in December, and possibly for trial dates in January. On or about November 26, 2019, Crown counsel received a note from Ms. [omitted]'s doctor, Dr. [omitted]. In the November 26 notes, Dr. [omitted] certifies that he examined Ms. [omitted] that day and that she is "unable to attend work from 2 Dec 2019 to 13th Jan 2020 inclusive."

[13] Naturally, Crown counsel sought additional information and, for the purposes of this application, has entered a further document prepared by Dr. [omitted]. That document, dated December 2, 2019, states as follows, and I quote:

> This is to certify that I am [omitted]'s most responsible physician (MRP)
>
> [omitted] has been suffering from severe anxiety and acute on chronic stress for some time
>
> This situation is due to a family member who has been treated for severe PTSD and depression and unable to work
>
> [omitted] has been supporting her family through this.

> In my view given her currently psychological state, [omitted] is not fit to testify reasonably in court well until after she has been re-evaluated.
>
> She is scheduled for review by me on 13th Jan 2020.

[14] There is an earlier note from Dr. [omitted] dated November 28, 2019. It is attached and marked as Exhibit B to the affidavit of Ms. Lohrasb, a paralegal in Crown counsel's office. The note is difficult to read but refers, Crown submits, to Ms. [omitted]'s inability to testify in court. It appears to be either an update or clarification of Dr. [omitted]'s note of November 26, indicating that Ms. [omitted] is unable to work from December 2, 2019, through to January 13, 2020, the precise date she was intended to testify in this voir dire.

[15] Crown submits there may be some inconsistency or discrepancy between Dr. [omitted]'s note of November 26 and December 2, 2019. This court cannot clarify that discrepancy. It can, however, clearly read and interpret Dr. [omitted]'s note dated December 2, 2019, which is the most up-to-date information provided by Crown regarding the availability or the potential availability of its key witness.

[16] In determining whether to grant this application for an adjournment, the parties all agree that the test this court must apply is set out in *Darville v. The Queen* (1956) 116 C.C.C. 111 (S.C.C.). *Darville* sets out three factors the court must take into account to determine whether it will grant an adjournment on the basis of the unavailability of a witness. These are whether:

a) the witness is a material witness;

b) the party applying for an adjournment is guilty of no laches or neglect in omitting to endeavour to procure the attendance of the witness; and

c) there is a reasonable expectation that the witness can be procured at the future time to which the matter is sought to be adjourned.

[17] The defendants have cited additional authorities in support of the proposition that to support its application for an adjournment in this case, the Crown must adduce some evidence supporting the *Darville* factors: see, for example, *R. v. Pusey*, 2015 ONSC 7150 at paragraph 19.

[18] With respect to the *Darville* factors, there is, firstly, no doubt that Ms. [omitted] is a material witness for the Crown. She is, for the first few weeks of trial, at least, the Crown's only witness, though at least one other, Mr. Nutton, is scheduled. Nonetheless, the Crown's position is that it will not start without Ms. [omitted] and, if it cannot have the matter adjourned on the basis of her unavailability, it will call no one else this first week of trial.

[19] Some of the defendants herein take issue with the second *Darville* factor, the question of the delay or reasons for failing to procure Ms. [omitted]. Mr. Cameron, on behalf of DP World, argues strenuously that the evidence discloses a case of institutional *laches*, essentially a failure on the part of the investigative agency in this case to exercise due diligence, though DP World in no way impugns the conduct of Ms. Switzer for the Crown. There is no dispute that Ms. Switzer learned of Ms. [omitted]'s condition only this November 22, 2019.

[20] The evidence does demonstrate that Ms. [omitted], a long-time employee of DFO, has been suffering from severe anxiety and chronic stress for some time. That is the evidence of Dr. [omitted]. In addition, Dr. [omitted] refers to himself as Ms. [omitted]'s most responsible physician. In the absence of any evidence as to

what that phrase means, Mr. Cameron suggests it infers Ms. [omitted] has other physicians. The submission is that Ms. [omitted]'s employer, DFO, as the investigative arm of this prosecution, failed to exercise due care in notifying the Crown sometime ago of Ms. [omitted]'s condition; that, as her employer, DFO must have known of her condition.

[21] The issue in this adjournment application is concerned with the question of witness availability or the Crown's ability to procure its witness for this trial. Even assuming a failure on the part of DFO to notify its prosecutor of Ms. [omitted]'s condition can be inferred from the evidence, the fact alone does not speak to a failure to procure the witness, so much as a failure, if proven, to fairly give the defendants notice of a possible delay in the trial scheduling.

[22] Whether or not Ms. [omitted]'s employer knew of this chronic condition, as an employee of the party investigating and prosecuting this matter, and as a key witness expected to give expert evidence, it is both surprising and unfortunate that Ms. [omitted], at least, did not give someone notice of her condition before this November 21 or 22 of 2019.

[23] I find, however, that the critical issue in this application is the third factor in *Darville*; that is, whether this court can be satisfied, on the evidence, that there is a reasonable expectation Ms. [omitted] can be procured at a future time to which this matter is sought to be adjourned. As noted, this is an application to adjourn the first two weeks of this trial. As scheduled, the third week, the date on which the Crown expects to restart the trial, commences on January 13, 2020, in Vancouver. As the trial is scheduled, after the week of January 13, the trial will adjourn to February 24,

2020, and continue on for some six weeks until it adjourns again to be rescheduled for one last week in Prince Rupert.

[24] Dr. [omitted]'s letter indicates, in my view, clearly that Ms. [omitted] will not be available to testify at trial on January 13. As I understand his letter, Ms. [omitted] will be examined on that date, but she will not, in the opinion of Dr. [omitted], be available to testify "reasonably well in court" until well after that evaluation date.

[25] I find I agree with many of the points made by DP World at paragraphs 39 to 45 of its written submission in regard to the third *Darville* factor. I agree that Dr. [omitted]'s opinion gives no indication when Ms. [omitted] might be able to testify. It indicates that Ms. [omitted]'s prognosis is likely, at least in part, contingent on the health of a family member, which is also an unknown. The defendants also point to the absence of a treatment plan and Crown bristles at the notion one ought to have been provided. At this juncture, there is simply too little known about Ms. [omitted]'s condition to determine whether one would be useful or not. It may be as simple as remaining calm and avoiding stress. It may require something more significant.

[26] The granting of an adjournment is a discretionary matter. As the court in *R. v. Sittampalam*, [1996] O.J. No. 2710 writes at paragraph 4:

> 4. . . . When exercising this discretion, the Court must balance the equities and give appropriate weight to considerations including prejudice to the accused, interference with their freedom, the safety and protection of the public, and the public interest that matters before the courts be resolved on their merits, but also within a reasonable time.

[27] As the court writes further at paragraph 7:

> 7. Normally, adjournments are granted when a key witness is

ill . . .

[28] Still, as the case provides, the three-part *Darville* test applies, even in the case of illness.

[29] In light of Dr. [omitted]'s opinion evidence regarding Ms. [omitted]'s condition, its chronicity, and it being contingent in some regard on the health of a family member, there is a significant lack of evidence on which I could be satisfied Ms. [omitted] will be available, certainly by January 13, but even by February 24, 2020.

[30] Crown submits that what Dr. [omitted] describes as Ms. [omitted]'s condition of severe anxiety and acute chronic stress is not abnormal in our society, or at least that the condition of stress is common. We can, it is submitted, expect that the condition will resolve at some point in the future.

[31] I find I can have no such comfort on the evidence in this case. The lack of evidence around Ms. [omitted]'s prognosis, coupled with the timing and manner in which this condition has been revealed, raises, in my mind, a serious question as to whether Ms. [omitted] may ever be able to testify. As Ms. Cleary for FRPD points out, also relying on the *Sittampalam* case at paragraphs 14 to 16, the evidence expected to be elicited by the Crown from Ms. [omitted] will require considerable preparation. It will be stressful. Ms. [omitted] is no ordinary witness. She is integral to this prosecution. She can be expected to be cross-examined by no less than four counsel and possibly for some time. She will be giving testimony on the *voir dire*, as well as on her expert opinion. It is no small matter.

[32] To paraphrase again from the *Sittampalam* decision, the high expectations of Ms. [omitted]'s testimony will make the testimony itself stressful. It can reasonably, in my view, be expected to make the prospect of testifying stressful.

[33] In those circumstances, there should be some evidence on which the court could find that Ms. [omitted] will nonetheless be available to testify, if not by this January 13 or February 24, at least within a reasonable time after that. There is just no such evidence in this application.

[34] Still, again, as the court in *Sittampalam* writes at paragraph 4 and as the courts have held in *R. v. Pittner*, 2008 ONCJ 136, and *R. v. Amos*, 2014 YKTC 64, in deciding this kind of application, the court has to balance numerous factors, including the interest of the public in having cases determined on their merits. At paragraph 15 of *Pittner*, the court writes as follows:

> The more serious an allegation is, the more compelling the public interest in assuring that it is heard on its merits. By the same token, the more serious the allegation, the higher the expectation the court has in expecting that all branches of the Crown will ensure that the case can be heard on its merits.

[35] *Pittner* does not involve a case of illness on the part of a material or key witness, so these remarks, especially in the last part of the second sentence, are not entirely apt. This is not a case, in my view, of the Crown failing to take due care to procure a witness, but it is the case that while the seriousness of the offence must inform the court's decision on this application, it must also inform the court's view of prejudice. In *R. v. Amos*, the court quotes from the reasons in *R. v. Sabourin*, 2007 MBQB 153 at paragraph 25, where the court notes that the seriousness of a charge cuts both ways. There the court writes:

> I have already acknowledged that this is a serious charge. However, that factor in and of itself cannot be determinative of the issue, as it cuts both ways. There is obviously a strong societal interest in having such matters adjudicated, but there is also a commensurately greater potential jeopardy for the accused facing such a charge.

[36] The defendants all submit the charges in this case, while complex and important to their clients, is not the most serious of charges. They rely on cases such as *R. v. Amos* and *R. v. Pittner* as examples of instances where serious charges involving matters such as criminal harassment, threats, and assault have resulted in adjournments. By way of contrast, the defendants submit these regulatory offences are on the less serious side of the scale.

[37] The Crown submits the charges are serious and that the courts have long acknowledged the importance of laws and regulations protecting our environment and the fishery. The Crown emphasizes that, given the sentencing provisions of the *Fisheries Act*, the defendants are at risk of substantial fines if convicted. All could be fined an amount no less than 4.5 million and, of course, the maximum fines run well over 100 million.

[38] While I do not disagree the charges are serious, it is, at the same time, obvious that the defendants are in serious jeopardy, making the necessity of a timely trial all the more important.

[39] *R. v. Joyce*, 2011 N.J. No. 143 provides another example of the court granting an adjournment, despite the seriousness of the charge. At paragraph 40 of that decision, Judge Gorman acknowledges, as I must as well, the importance of cases being heard on their merits. Still, as Judge Gorman notes, the seriousness of a charge cannot be allowed to trump other considerations elsewise that would end

the judge's discretion.

[40] The seriousness of the charges in this case is one factor for consideration. The flip side is the jeopardy faced by the defendants and the prejudice of an adjournment. The Crown submits there is no prejudice arising here out of an adjournment of six weeks. Here I find that I agree with Mr. Cameron that, realistically, this is an adjournment to February 24, 2020, as Ms. [omitted] will manifestly not be ready to testify on January 13. Even then, her testimony will not finish that week.

[41] Crown submits if Ms. [omitted] is not available the week of January 13, it could put up Mr. Nutton and, with the agreement of the parties, litigate one of the other *voir dires*. Effectively, the Crown would endeavour to fill that week, with the hope that Ms. [omitted] would be ready to testify when the trial is scheduled to resume on February 24, 2020.

[42] As Mr. Cameron submits, the Crown cannot prosecute this case without Ms. [omitted]. The evidence before this court is that Ms. [omitted] is unable to testify at this trial this week, suffering as she is from severe anxiety and "acute on chronic stress", as Dr. [omitted] puts it, caused by a family member being treated for PTSD and depression. There is no evidence before this court as to when that condition will resolve and what prospects there are for Ms. [omitted]'s reasonably timely recovery. As I say, the evidence indicates at least a possibility Ms. [omitted] may never be able to testify.

[43] In the interim, as Mr. Cameron puts it, the costs potentially thrown away will be staggering. The defendants are at risk of fines in an amount no less than 4.5

million per defendant, and potentially more. In the circumstances, and even accepting the seriousness of the charge, the defendants are entitled to some reasonable comfort the case will proceed and Ms. [omitted] will testify within a reasonable period of time. Apart from counsel's submission that the condition of stress is generally capable of resolution, there is no such comfort.

[44] In these circumstances, the court must ask whether it is fair and in the interests of justice to adjourn this matter to January 13, 2020, absent any cogent evidence to indicate Ms. [omitted] will be able to testify at some reasonable time after that. The charges in this case are serious, in that they are alleged violations of laws respecting our fisheries and our marine environment. The case is complicated by the sheer number of defendants, the time period in which the offences are alleged to have occurred, the subject matter of many of the charges, the number of documents, and the number of expert witnesses that are expected to testify. All this is to say that the defendants are correct when they state that if the Crown’s application to adjourn granted, they must still expend significant time and resources in preparing a defence that may not be necessary.

[45] There being no real prospect, on the evidence before me, that Ms. [omitted] will be available to testify within any reasonable time, and certainly not this coming January 13, 2020, I deny the application to adjourn.

[46] As the Crown is calling no evidence, and the defendants are present and ready to proceed, I will enter an acquittal on all of the charges against all of the defendants in this matter.

(REASONS CONCLUDED)