NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Mouchayleh*, 2017 NSCA 51

Date: 20170621
Docket: CAC 457002
Registry: Halifax

Between:

Youhanna Mouchayleh

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	March 21, 2017, in Halifax, Nova Scotia
Subject:	Criminal law. Section 11(b) of the *Canadian Charter of Rights and Freedoms*. Right to be tried within a reasonable time.
Summary:	On April 10, 2012, Mr. Mouchayleh was charged with possession of cocaine for the purpose of trafficking. He elected Provincial Court on August 29, 2012 and pleaded not guilty on October 3, 2012. Trial was estimated at one day and was scheduled for October 3, 2013. A brief but late Crown disclosure was made the day before trial. Mr. Mouchayleh was granted an adjournment, although the Crown offered to split the case. Defence counsel now advised the case would only take half a day. But he was not available for a new proposed date of October 17, 2013. New date set for September 25, 2014. New counsel sought adjournment of that date and brought *Charter* motion for delay. Trial judge dismissed motion. Trial proceeded and Mr. Mouchayleh was convicted. He appealed.

Issues: Was Mr. Mouchayleh's right to be tried within a reasonable time violated?

Result: Appeal dismissed. Trial judge did not err in her application of the *Morin* criteria. The judge allocated much of the delay to the defence. Under the *Jordan* criteria, the net delay was 18 months. The defence argued it was 29½ months. Even so, under *Jordan*, transitional exceptional circumstances permitted a greater delay owing to judge's findings of defence conduct, lack of prejudice, and reliance on pre-*Jordan* law.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Mouchayleh*, 2017 NSCA 51

Date: 20170621
Docket: CAC 457992
Registry: Halifax

Between:

Youhanna Mouchayleh

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Saunders, and Bryson, JJ.A.
Appeal Heard:	March 21, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bryson, J.A.; MacDonald, C.J.N.S. and Saunders, J.A. concurring
Counsel:	Stanley W. MacDonald, Q.C., for the appellant Angela Nimmo and David Schermbrucker, for the respondent

Reasons for judgment:

[1] Youhanna Mouchayleh says the trial judge was wrong to deny him a stay under s. 24(1) of the *Canadian Charter of Rights and Freedoms* owing to delay of his trial, contrary to s. 11(b) of the *Charter*. His pre-trial motion was dismissed by the Honourable Provincial Court Judge Flora Buchan (*unreported*). Mr. Mouchayleh's trial proceeded and he was convicted of possession of cocaine for the purpose of trafficking.

[2] Mr. Mouchayleh was charged on March 7, 2012. He appeared that day in court with his counsel, Mr. Lyle Howe. On August 29, 2012, Mr. Mouchayleh elected trial in Provincial Court. He pleaded not guilty on October 3, 2012. Defence estimated a day for trial, which was set for October 3, 2013.

[3] Because there was a brief, but late, Crown disclosure of additional evidence on October 2, 2013, the October 3 trial was adjourned. Defence counsel was unavailable for the next proposed trial date of October 17, 2013, so he accepted a new trial date of September 25, 2014.

[4] In September of 2014, Mr. Mouchayleh retained new counsel, Ms. Laura McCarthy, who advised she could not accommodate the scheduled trial date and a new date was fixed for November 5, 2014. Ms. McCarthy then indicated that she would be bringing a motion for a stay owing to delay. Filing dates were set. Because Ms. McCarthy filed her motion materials late, the November 5 trial date was lost. Ultimately, the judge rendered her decision on the *Charter* motion for a stay in early December and the trial commenced on December 12, 2014. For her stay decision, the trial judge used the rescheduled trial date of November 5 as the "end date".

[5] In dismissing Mr. Mouchayleh's stay motion, the trial judge applied the then-prevailing law in *R. v. Morin*, [1992] 1 S.C.R. 771. The judge found that almost 32 months had passed between the charge and the expected commencement of trial. She ascribed at least 14 months of the delay to Mr. Mouchayleh. She found that he had waived some time and had not been seriously prejudiced by the delay. The judge's reasons for dismissing the motion will be elaborated on later in this decision.

[6] Eighteen months after the judge's *Charter* ruling on delay, the Supreme Court of Canada changed the law in *R. v. Jordan*, 2016 SCC 27. This Court is now

obliged to apply the criteria in *Jordan* (¶ 95), although unknown to the parties or the Court at the time of the stay motion. *Jordan* replaces the *Morin* analysis with fixed periods for delay, beyond which delays are presumed unreasonable. The presumptive period for proceedings in the provincial courts is 18 months, in superior courts, 30 months. *Jordan* requires:

1. First, calculate the total delay.
2. Deduct from the total delay any delay waived or caused by the defence.
3. Where the net total exceeds the presumptive ceiling, the onus shifts to the Crown to rebut the presumption of unreasonable delay by demonstrating that there are exceptional circumstances. If the Crown fails to do so, a stay must follow.
4. Where net delay is within the presumptive ceiling, the defence has the onus of showing that the delay is unreasonable. The defence can do this by showing that it took "meaningful steps that demonstrate a sustained effort to expedite proceedings; and the case took markedly longer than it should have".

[7] Where, like here, the charges pre-date the release of *Jordan*, there may be an exceptional transitional circumstance for cases exceeding the ceiling.

Delay

[8] The total delay in this case is 32 months less two days. The delay is calculated from the day the appellant was charged to the actual or anticipated end of trial, (*Jordan*, ¶ 47). The parties initially estimated a one day trial. The approximately 32 month delay exceeds the presumptive ceiling of 18 months for Provincial Court matters and so *Jordan* requires that "net delay" be calculated.

[9] Mr. Mouchayleh says that net delay was 29½ months. The Crown disagrees, calculating 18 months plus three or four days.

[10] The judge applied the *Morin* criteria which require consideration of:

1. The length of delay.
2. Waiver of time periods.
3. The reasons for the delay including:
    a. Inherent time requirements of the case.

b. Actions of the accused.

c. Actions of the Crown.

d. Limits on institution resources.

e. Other reasons for delay.

4. Prejudice to the accused.

[11] The Crown submits that the judge's findings under the *Morin* analysis are:

Time, Event, Dates	Actions of the Defence	Institutional Delay or Crown Action	Inherent Delay (neutral)
3 months, 11 days First appearances, Initial Disclosure. *March 7/12 – June 18/12*			X
2 months, 9 days Further Disclosure provided by Crown. *June 18/12 – Aug.27/12*		X Judge found there was a 'couple of months' delay due to the receipt of the ITO (Crown Action): AB, tab 1, page 18, lines 17-20	
2 days Defence adjourned to obtain designation of counsel. *Aug.27/12 – Aug.29/12*	X Defence delay: AB, tab 1, page 28, lines 17-22 & page 29, lines 1-4.		
1 month, 4 days Defence adjournment of pleas. *Aug. 29/12 – Oct. 3/12*	X Defence delay: See above		
12 months Trial date set *Oct. 3/12 – Oct. 3/13*		X Institutional delay: AB, tab 1, page 29, lines 5-17 and page 35, lines 7-13.	
14 days Trial adjourned at defence request due to new disclosure. Court offered Oct. 17, 2013, am or pm, for trial. *Oct. 3/13 – Oct.17/13*		X Crown delay: AB, tab 1, page 33, lines 22-24 & page 34, lines 1-3	
11 months, 8 days Trial times passed up by defence to second trial date. *Oct.17/13 – Sept. 25/14*	X Defence delay: AB, tab 1, page 33, lines 22-24 & page 34, lines 1-3.		

1 month, 11 days Defence adjournment of Sept. 25/14 trial date *Sept.25/14-Nov.5/14*	X Defence delay: see above		
TOTAL TIME **32 months less 2 days**	13 months, 25 days Applicant delay	14 months, 23 days Crown delay	3 months, 11 days (neutral)

August 27, 2012 – October 3, 2012

[12] The Court ascribed three periods of delay to defence conduct. The first was a period of a month and six days from August 27 to October 3, 2012. On August 27, Mr. Howe was not able to elect because he had not obtained a Designation of Counsel and Mr. Mouchayleh was not present. There was no outstanding disclosure. By August 29, Mr. Howe had a Designation of Counsel, but did not enter a plea. Provincial Court was elected and pleas were adjourned to October 3, 2012.

October 17, 2013 – September 25, 2014

[13] The second period of time ascribed to the defence was October 17, 2013 to September 25, 2014, a period of 11 months and 8 days. This was triggered by the Crown's late disclosure on October 2 that derailed the October 3 trial. Two brief witness statements—regarding Mr. Mouchayleh's possession of the relevant premises—were only obtained by police just before trial. The Court offered October 17, 2013 to the defence but Mr. Howe was not available. The Court and the Crown were prepared to split the trial and start evidence on October 3, but the defence objected. Mr. Howe did concede that the new disclosure was limited, but, in his words, "could change the waters". He then suggested the trial would only take half a day. He made this concession without having yet conferred with his client about the new disclosure.

[14] Mr. Howe had rejected the October 17, 2013 trial date because he had a trial scheduled in the morning of that day and another "matter" in Halifax in the afternoon.

[15] A new trial date of September 25, 2014 was set.

September 25, 2014 – November 5, 2014

[16] The third period the judge allocated to defence conduct was the change of counsel sometime prior to September 10, 2014. Mr. Howe had been suspended by the Bar Society pending an appeal on a personal matter (ultimately overturned). But in the meantime, he could not act for Mr. Mouchayleh at the scheduled trial on September 25, 2014. Ms. McCarthy appeared in court for Mr. Mouchayleh on September 10, 2014, looking for an adjournment. She was not available for trial on September 25, 2014. She then gave notice of an intended *Charter* application for delay. She had not filed a Designation of Counsel, and Mr. Mouchayleh was not present.

[17] The judge attributed the delay between September 25, 2014 and November 5, 2014 to the defence.

[18] The Crown submits that had the circumstances for the change in counsel been fully disclosed to the trial judge, delay may have been classified as "inherent" and not counted against the defence. The Crown cites *R. v. Cater*, 2011 NSPC 80, at ¶ 100-101; aff'd 2014 NSCA 74. The Crown further submits that since *Jordan* this would be characterized as a discrete event over which the Crown had no control and would therefore be an "exceptional circumstance" which would be subtracted from net delay, citing *Jordan* at ¶ 75.

[19] The Crown concludes that under the *Morin* framework, 14 months and 25 days' delay would be attributed to the Crown. Under *Jordan*, the net delay would be 18 months and three or four days, calculated as follows:

<table>
<tr><th>Forms of Delay</th><th colspan="3">Morin Framework</th><th>Jordan Framework</th></tr>
<tr><td>Delay caused by defence conduct (not including waiver)</td><td colspan="3">13 months, 25 days</td><td>13 months, 25 days</td></tr>
<tr><td>Institutional Delay</td><td>12 months</td><td rowspan="2">Delay Against Crown: 14 months, 23 days</td><td rowspan="3">Net Delay: 18 months & 3 or 4 days</td></tr>
<tr><td>Delay caused by Crown conduct</td><td>2 months, 23 days</td></tr>
<tr><td>Inherent Time Requirements</td><td colspan="2">3 months, 11 days (neutral under Morin)</td></tr>
</table>

Waiver

[20] While waiver must be clear and unequivocal, with full knowledge of the right waived and its consequences, counsel may be taken to have waived on behalf

of an accused. In *R. v. Askov*, [1990] 2 S.C.R. 1199 at p. 1229, the Court quoted Sopinka J. in *R. v. Smith*, [1989] 2 S.C.R. 1120:

> Agreement by an accused to a future date will in most circumstances give rise to an inference that the accused waives his right to subsequently allege that an unreasonable delay has occurred. While silence cannot constitute waiver, agreeing to a future date for a trial or a preliminary inquiry would generally be characterized as more than silence. Therefore, absent other factors, waiver of the appellant's s. 11(b) rights might be inferred based on the foregoing circumstances.

[21] The judge found that Mr. Mouchayleh waived the initial scheduling period of October 3, 2012 to October 3, 2013 and its rescheduling from the offered October 17, 2013 date to September 25, 2014 because counsel agreed to the new trial dates. The Crown adds, "…finding of the delay waiver from plea to the first trial date is significant since that time was also deemed institutional delay."

[22] Mr. Mouchayleh objects, saying that acquiescence in the inevitable cannot be delay. He challenges these findings of the trial judge. Certainly, that argument has some merit with respect to the scheduling of the initial trial date. No alternative date was offered. The *Jordan* presumptions were four years in the future. Nevertheless, the judge observed in her decision that if Mr. Howe had earlier conceded that only a half day would be necessary, a trial date would likely have been available earlier than October of 2013.

[23] Even if it is conceded that the judge's finding of initial waiver was wrong, the time lost after October 17, 2013 is a different matter. The trial date of October 3, 2013 was literally a wasted day. Nothing was done with that time, and Mr. Howe was not prepared to change his schedule for the proposed trial date of October 17, 2013. While it would be unreasonable to expect Mr. Howe to commit to the morning of October 17 because he was already scheduled to be in court, that would not necessarily apply to the afternoon when he was on "another matter". That is especially significant in view of Mr. Howe's sudden concession that only a half-day would now be necessary.

[24] The trial judge's finding here was informed by her experience of numerous appearances of Mr. Howe, occasionally with Mr. Mouchayleh in attendance. Her conclusion on waiver clearly incorporated what she inferred from all these dealings.

[25] The judge inferred waivers because Mr. Mouchayleh's counsel agreed to the initial scheduling of the trial on October 3, 2013 and to its rescheduling to September 25, 2014. The period from October 3 to October 17, 2013 was ascribed to the Crown. The Crown submits that even if the judge erred with respect to waiver regarding the setting of the first trial date, under *Morin* that period would be deemed institutional delay. The Crown points out that the second period was also attributed to the defence because Mr. Mouchayleh's counsel was not prepared to use October 3 for any of the witnesses and did not accept the proposed new trial date of October 17.

[26] Certainly in a post-*Jordan* world, the priority of barristers should be to attend court promptly for those clients they have undertaken to represent. Defence counsel unavailability when Crown and Court are ready will be attributed to the defence (*Jordan*, ¶ 64). Non-trial obligations should be rescheduled. This may not be what the Supreme Court of Canada contemplated in *R. v. Godin*, 2009 SCC 26 (¶ 23). But in a post-*Jordan* world, there is no assessment of the reasonableness of delay on *Morin* factors to contextualize the analysis of counsel's availability as in *Godin*. "Reasonableness" is largely subsumed by the presumptions. Outside transitional cases, "exceptional circumstances" are the only excuse for Crown delay beyond the presumption (*Jordan*, ¶ 81). In this case, had she known of any presumption, the trial judge could have pressed Mr. Howe about his obligation on the afternoon of October 17.

[27] The judge was also clearly concerned about Mr. Howe's sudden concession on October 3, 2013 that the trial would only take half a day. As earlier described, the Court observed that had counsel so advised the Court before, a half day could have been obtained much earlier. Although Mr. Mouchayleh's counsel challenges this finding because of the year's delay in obtaining the original trial date, nevertheless one must accept the trial judge's finding in this respect, not least because she would be familiar with her own docket.

[28] The trial judge formed the impression that Mr. Mouchayleh was not anxious to proceed to trial on the merits. She came to this conclusion both because of his actions and inactions. This is connected with her findings on waiver:

> Following the first trial date of October 3rd, 2013 which was adjourned at the request of the Defence as a result of late disclosure by the Crown, a new date was offered by the Court two weeks later. The Crown was ready to proceed on that date but due to other commitments the Defence was not. Delay was a live issue as I noted at the October 3rd, 2012 appearance, but rather than make himself

> available on the date offered of October 17th, 2013, Mr. Howe was not prepared to alter his schedule. The much later date of September 24th, 2014 was accepted by Mr. Howe with no concern raised about delay at that time by him. The Charter motion was raised by Mr. Mouchayleh's new counsel, Ms. McCarthy, a short time prior to the new trial date ... new trial date seeking an adjournment of that September 24th, 2014 date. She was not available on the trial date and did not have the time to perfect her motion for the delay until the 1st of October and she was then several weeks late in doing so causing a further delay in the then-scheduled trial date of November the 5th, 2014. Therefore, I find that the delay from the first trial date of October the 3rd, 2013 to the trial date of November the 5th, 2014, a period of some 13 months less the two weeks to the proffered date of October 17th, 2013 is attributable to the Defence including the change of counsel and counsel's unavailability, both old and new, on the dates offered by the Court.
>
> As far as waiver is concerned, I find that waiver or concurrence can be inferred as a result of the consent by counsel for the accused to the various dates fixed for trial. On all occasions the dates were accepted as fine on the record by the Defence.
>
> As noted in *Askov*, the Section 11(b) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused. The purpose of Section 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits. The actions, or in this case the inactions by the accused, are inconsistent with the desire for a timely trial. While there is no legal obligation on the accused to assert their right, inaction may be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay.

[29] These are findings that the trial judge was entitled to make and are supported on the record. First, the judge noted that there was a lengthy delay by Mr. Howe in filing a Designation of Counsel. When he first appeared, the day Mr. Mouchayleh was charged, the Court set April 10 for election and plea. Mr. Howe appeared in court on April 10, two hours late, without his client and without a Designation of Counsel. A Warrant was issued but held since Mr. Howe then indicated that he wanted to review the ITO. There were several further court appearances before August 29. In every instance, Mr. Mouchayleh did not appear nor did Mr. Howe have a Designation. While none of this affected election and plea – because Crown disclosure was not in Mr. Howe's hands until some time in August – it hardly shows Mr. Mouchayleh proceeding with alacrity.

[30] The failure of Mr. Howe to make any use of October 3, 2013 is also curious. The additional disclosure was very brief and dealt with the question of possession of the premises where the cocaine was located by police. At the very least, Mr. Howe could have met with his client on the morning of October 3 and then advised

the Court that a further delay would be necessary (or not). In principle, the new disclosure could affect whether Mr. Mouchayleh would testify, how Mr. Howe might examine the Crown's witnesses, or whether to tender any other evidence on behalf of Mr. Mouchayleh. Neither facts nor law were complex and surely that decision could have been quickly made. In fact, there was never any evidence that this new disclosure would have any impact on the defence.

[31] Similarly, the Court was disappointed at Mr. Howe's unwillingness to make himself available on the afternoon of October 17. Although Mr. Howe offered that the case could now take only half a day, this concession was not made until the originally scheduled trial date had been lost. As well, although Mr. Howe suggested that there may be some agreements—even an Agreed Statement of Facts—nothing came of any of this.

[32] Again, during the periods of October 2013 to September 2014, Mr. Mouchayleh's bail conditions were relaxed when he requested it, although on at least three occasions he either abandoned motions or failed to show up.

[33] The assumption of conduct of the case by Laura McCarthy was late in the day. Mr. Howe was suspended in June. Ms. McCarthy did not appear until September—and then to ask for a delay. She notified the court of a proposed *Charter* motion, but then missed the filing dates. Another adjourned trial date was lost.

[34] None of this suggests a litigant keen to have an early trial date or eager to reduce any alleged prejudice owing to bail conditions, or erosion of evidence.

[35] All of these events are indicative of a casual attitude, even indifference, that obviously gave the judge the impression that Mr. Mouchayleh was in no hurry to proceed (*Jordan*, ¶ 63). In all of these assessments, deference should be shown to the trial judge. Trial judges are uniquely positioned to gauge the legitimacy of defence actions, (*Jordan*, ¶65). Ordinarily deference should be accorded to the trial judge in these types of assessments (*R. v. Evans*, 2014 MBCA 44, ¶ 3).

[36] The judge did not err in her finding of waiver for the period October 17, 2013 to September 25, 2014. That meant the net delay was a few days over 18 months. These additional few days are not material. Under *Jordan*, the onus would shift to the defence to show that the delay was unreasonable. For reasons already described, the defence did not discharge that obligation. Alternatively, if

the delay of a few days over 18 months matters, it would fall under the transitional exceptional circumstance analysis.

Transitional exceptional circumstances

[37] Even if Mr. Mouchayleh is correct that the net delay was 29½ months, thereby exceeding the *Jordan* presumption, the transitional exceptional circumstances render the delay reasonable.

[38] *Jordan* recognized the ill-effects on the integrity of the administration of justice triggered by *Askov*, [1990] 2 S.C.R. 1199. Tens of thousands of cases were stayed in Ontario alone resulting from an abrupt change in the law. Keeping *Askov* in mind, the Supreme Court in *Jordan* conceded that some flexibility would be required to avoid the chaotic results of *Askov*:

> [95] The new framework, including the presumptive ceiling, applies to cases currently in the system, subject to two qualifications.
>
> [96] First, for cases in which the delay exceeds the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. ***This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed.*** This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account.
>
> [Emphasis added]

[39] In *Jordan's* companion case of *R. v. Williamson*, 2016 SCC 78, the Supreme Court elaborated on the contextual manner of applying *Jordan* in transitional cases.

[40] In his submissions, Mr. Mouchayleh cites *R. v. Manasseri*, 2016 ONCA 703, summarizing potential transitional exceptional circumstances at ¶ 321:

> [321] *R. v. Williamson*, 2016 SCC 28 (CanLII), provides an example of a contextual assessment of the circumstances that inform the decision about whether a transitional exceptional circumstance would justify a delay above the presumptive ceiling. Relevant circumstances included:
>
> i. the complexity of the case;

ii. the period of delay in excess of the *Morin* guidelines;

iii. the Crown's response, if any, to any institutional delay;

iv. the defence efforts, if any, to move the case along; and

v. prejudice to the accused.

[41] The parties' diligence in moving matters forward can be an important transitional consideration, (*R. v. Cody*, 2017 SCC 31, ¶ 70).

[42] In *Williamson*, the appellant was charged with historical sexual offences against a minor. The trial judge calculated a total of 35 months delay in that case. The Supreme Court ultimately fixed 35½ months. Only six weeks of that delay was allotted to the defence. Importantly however, the Supreme Court emphasized that the Crown had done nothing to try and mitigate any institutional delay of 25 months, exceeding the *Morin* guidelines by seven months. The Court noted Mr. Williamson's repeated efforts "to expedite proceedings". The Court was critical of the Crown's apparent indifference to Mr. Williamson's attempts to have the matter dealt with properly. As is evident from the discussion under "waiver", this is in striking contrast to the conduct of Mr. Mouchayleh and his counsel.

[43] In this case, applying *Jordan* contextually must begin with recognition that the *Charter* motion for delay and the trial itself were concluded before *Jordan* was released. There is literally nothing that anyone could have done to accommodate the Supreme Court's direction in *Jordan*, (*Cody*, ¶ 69).

[44] Turning to the *Williamson*/*Manasseri* criteria:

Seriousness of the offence

[45] Mr. Mouchayleh concedes that possession of cocaine for the purpose of trafficking is a serious offence. But he argues that *Williamson* also involved serious crimes which did not deter the Court from a finding of excessive delay.

Institutional delay

[46] There is nothing in the record that indicates the Dartmouth Provincial Court was experiencing significant institutional delay problems. However, steps could have been taken to mitigate this delay, as discussed further under "Crown Response to Institutional Delay".

Complexity of the case

[47] The Crown concedes that this case was not complex. That works both ways.

Delay in excess of the *Morin* guidelines

[48] *Morin* fixed the guidelines for cases in the Provincial Court at 8-10 months. Of course, that was 25 years ago. The extent of disclosure today and the number and complexity of extra trial motions has increased, (*Jordan*, ¶ 42). Indeed, the Supreme Court in *Jordan* implicitly recognized this by increasing the presumptive delays beyond the *Morin* guidelines.

[49] As *Jordan* acknowledges, prejudice was a significant factor in assessing the reasonableness under a *Morin* analysis, resulting in generous application of the guidelines (*Jordan*, ¶ 34-35). In transitional cases, prejudice and seriousness of the offence remain important, (*Cody*, ¶ 70-71). Plainly, conduct of the defence and absence of serious prejudice were determinative for the trial judge here.

The Crown response to institutional delay

[50] With respect to the initial 12 month delay in securing the trial date of October 3, 2013, the Crown submits in its factum:

> 46. The second point with respect to this transitional case is that the decisions made by the parties were influenced by the law as it stood at the time. Those decisions would have changed if all parties knew then what they know now. There are at least two points in the proceedings where the decisions made by the parties were influenced by the law as it stood at the time, both of which contributed to the overall delay:
>
> (a) The first of these occasions was October 3, 2012 when the trial date offered was a year away. The Crown did not appreciate the urgency of finding an earlier trial date, as it did not know that an eighteen-month presumptive ceiling would be imposed. In the post-*Jordan* world, the Crown would seek earlier dates by splitting a full-day trial into two half days, or by attempting to switch trial dates with matters expected to resolve or those involving less serious offences.
>
> At the pre-trial conference the Crown made an effort to narrow the issues (without success), as is customarily one of the purposes of the pre-trial conference. In a post-*Jordan* world, this pre-trial conference would have been used as another opportunity to canvass the court for earlier trial dates.

[51] Mr. Mouchayleh acknowledges the Crown tried to obtain an earlier date than September 25, 2014 at the October 3, 2013 court appearance but points out that the adjournment was caused by late police/Crown disclosure. That's true. But the Crown did more. It offered to split the case. It was prepared to be available on short notice, including the October 17 dates offered by the Court. The Crown continues in its factum:

> 46(b) The second occasion arose October 3, 2013 when the defence requested an adjournment to review the new, limited disclosure. At that point, over eighteen months had elapsed since the charges were laid. The Crown was concerned with delay and asked that the trial be split. In a post-*Jordan* era, the Crown would make further attempts to split the trial, find other available trial times (as above), defence would be pressed to try to make other arrangements for his non-trial appearance on October 17, 2013, or the Court could be asked to find 'a couple of Fridays'. Had all of those efforts been unsuccessful, the Crown could have chosen not to rely on the new disclosure and the associated witnesses in order to avoid the need for an adjournment at all.

[52] As *Jordan* explains it would be unfair to the Court and the parties to apply the new criteria without regard to the law as it was. The test must be applied contextually in light of the new criteria, (*Jordan*, ¶ 100). Had the Court and parties been aware of the presumptive ceilings, they could have acted differently. What the Crown describes are the kinds of steps that *Jordan* contemplates (¶ 70).

Defence efforts to move the case along

[53] Mr. Mouchayleh did nothing to move his case along. At no point did he object to proposed dates for trial. At no time did he make any agreements that might have shortened the trial dates although these were suggested by his counsel. It was not until October 3, 2013 – when the trial date was then lost and no trial was then pending—that Mr. Mouchayleh's lawyer suddenly suggested the trial could be done in half a day. As previously described, the trial judge found as a fact that an earlier trial date could have been allocated if this acknowledgment had been made sooner. And as previously discussed, the defence's action and inaction loomed large in the trial judge's findings of waiver.

Prejudice to the accused

[54] Under the new *Jordan* analysis, prejudice disappears into the presumptive periods, (*Jordan*, ¶ 54, 109). But it enjoys a brief lease on life, in transitional cases, where appropriate, (*Williamson*, ¶ 30; *Manasseri*, ¶ 321).

[55] The two interests which prejudice captures are Mr. Mouchayleh's liberty/security interest and trial fairness. The Crown agreed to increasingly relaxed bail conditions for Mr. Mouchayleh, even though some of those were not pressed by him. Mr. Mouchayleh adjourned a bail application and two variation applications. He abandoned another. The judge summarized:

> . . . During this time he's made several applications for variations on this Recognizance, some of which he advanced, some of which he abandoned. Ultimately, substantial variations were made including extended hours for working purposes, daily visits to the gym and then a replacement of the house arrest condition down to a curfew condition. While he nevertheless had to abide by conditions throughout this period of time, these conditions were progressively cut back thus reducing the restrictions on his liberty which he was experiencing.
>
> However, I do not find that the prejudice he has suffered as a result of the delays in getting this matter to trial have been of such hardship that is deserving of a stay of the proceedings. I find that while there is some systemic institutional delay which ultimately lies at the feet of the Crown, I also have found that in large measure the delay is attributable to both the action and inaction of the accused and that waiver of his Section 11(b) rights is readily inferred by the ... by those same action and ... actions and inactions.

[56] Nothing in the record suggests that the evidence was compromised by the 32 months it took to get to trial. The judge also found that no prejudice could be inferred.

[57] In a pre-*Jordan* world, this Court would give a trial judge's decision substantial deference. In *R. v. R.E.W.*, 2011 NSCA 18, Justice Beveridge put it this way:

> [33] In addition, in my view, where a trial judge is required to balance competing interests, some deference is appropriate (see *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353). In carrying out the final analysis in determining whether a delay has caused a denial of an accused's right to be tried within a reasonable period of time, a trial judge is required to balance the prejudice suffered by the accused with the public interest in seeing a trial on the merits. On this aspect of the

> analysis, assuming the trial judge has correctly identified the appropriate approach and considered the relevant factors, considerable deference is owed.

Cody (¶ 33) appears to endorse this deference in transitional cases.

Conclusion

[58] The trial judge did not err in her identification of the relevant principles nor their application. The net delay was only 18 months, and there is nothing in the record indicating that the defence did anything to expedite the trial date, raise delay (until just before the trial) or do anything to reduce trial time by entering into agreements with the Crown that would expedite matters – despite suggestions to that effect. Under the *Jordan* framework and assuming a delay in excess of 18 months, the Crown is entitled to rely on "transitional exceptional circumstances" and satisfactorily explained the additional delay, relying on the law at the time.

[59] I would dismiss the appeal.

Bryson, J.A.

Concurred in:

MacDonald, C.J.N.S.

Saunders, J.A.