PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Bowers*, 2017 NSPC 21

Date: 2017-03-15
Docket: 2755198; 2755199
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Bridget Mary Bowers and Michael David Moore

Judge:	The Honourable Judge Theodore Tax,
Heard:	December 8, 2016, in Dartmouth, Nova Scotia
Decision	March 15, 2017
Charge:	369(1) of the Halifax Regional Municipality Charter
Counsel:	Joshua Judah, for the Municipal Crown Richard Norman, for Bridget Bowers and Michael Moore

By the Court:

INTRODUCTION:

[1] In March 2006, Mr. Moore and Ms. Bowers (the "applicants') built, and have continued to use a 750 ft.² accessory building on their residential property in Dartmouth, Nova Scotia. The applicable zoning and land-use bylaw of the Halifax Regional Municipality [hereafter referred to as the "HRM"] restrict the size of an accessory building in that community to no greater than 650 sq. ft. in area. In an information sworn on July 16, 2014, Mr. Moore and Ms. Bowers were charged that they did unlawfully allow an accessory building greater than 650 ft.² in area on their property between November 13, 2013 and July 10, 2014, contrary to the **Dartmouth Land Use Bylaw**, pursuant to Section 369(1) of the **HRM Charter**.

[2] The case proceeded to trial on September 16, 2015 and the parties returned to court on October 13, 2015 for their closing submissions. The Court reserved its judgment. Ultimately, the trial decision was delivered on February 11, 2016. The Court ruled that there was a limitation period, the charge was not a continuing offence and it was dismissed. The Crown filed an appeal which was heard and decided against Mr. Moore and Ms. Bowers on July 11, 2016. The matter was remitted back to the Provincial Court for retrial and to hear evidence relating to a

possible defence of “officially induced error” which was not considered by the Court during the initial trial.

[3] On August 11, 2016 the parties returned to the Provincial Court and a new trial date of one half day was set for December 8, 2016.

[4] On September 20, 2016, during a pretrial conference, Defence Counsel advised the Court and the Crown Attorney of their intention to file a Section 11(b) **Charter** application. Mr. Moore and Ms. Bowers filed an application under Section 11(b) of the **Charter** and dates for the filing of briefs were established by the Court. On December 8, 2016, this application was heard instead of proceeding with the substantive trial issues. Defence Counsel requested that the **Charter** application be determined before the trial proceeded and, as result of that request, the trial date was rescheduled for March 15, 2017. In making that request, Defence Counsel also confirmed that the time period between December 8, 2016 and March 15, 2017 would not be factored into the calculation of the total delay.

[5] The issue on this application is whether the applicants’ right to a trial within a reasonable time has been denied. They seek a stay of proceedings and rely upon the recent Supreme Court of Canada (the “SCC”) decision in **R. v. Jordan**, 2016 SCC 27. More precisely, the issue is whether their right to a trial within a

reasonable time has been denied by virtue of the fact that they were acquitted following a trial, the Crown successfully appealed the "original" trial decision, which resulted in a retrial being scheduled to be heard on December 8, 2016. Between July 16, 2014 [Information sworn] and December 8, 2016, this matter was before the Provincial Court and the Nova Scotia Supreme Court for approximately 29 months.

Positions of the Parties:

[6] It is the position of Mr. Moore and Ms. Bowers that the total time to be considered on their **Charter** application is all the time involved in the "original" trial, plus the period of time between July 11, 2016, when the appeal decision was rendered and December 8, 2016, which was the date when a new trial was scheduled in the Provincial Court. However, the applicants have not included in the "total delay," the time when the case was under appeal from mid-February, 2016 until it was ultimately decided in mid-July, 2016. In total, the applicants submit that the total delay in this case is 23 ½ months, none of which is attributable to them, and that the period of delay exceeds the presumptive limits set by the Supreme Court in **Jordan**. The applicants submit that the Crown has not established that any of the delay was caused by the Defence, nor have they established that the delay was due to exceptional circumstances or this being a

particularly complex case. Moreover, they submit that the Crown has not established reasonable reliance on the pre-**Jordan** law relating to Section 11(b) **Charter** applications nor have they established that there was significant institutional delay when this case was set for trial.

[7] It is the position of the Crown that the applicants' Section 11(b) **Charter** application relating to a breach of their right to be tried within a reasonable time cannot stand because they have been charged with a continuing offence. In the alternative, the Crown Attorney submits that the total delay was reasonable when the Court considers that this is a minor offence involving the prosecution of an alleged contravention of an **HRM by-law**, that the prejudice caused to the applicants is minimal and there was institutional delay in the Dartmouth Provincial Court at the time when this matter was set down for the first trial. In addition, the Crown Attorney submits that the Court must take into account that over the course of the 29 months that this matter has been before the courts, a trial was held, a decision rendered and the matter was taken on appeal, which ultimately resulted in its return to the Provincial Court for a new trial.

FACTUAL BACKGROUND:

[8] Mr. Moore and Ms. Bowers first appeared in the Dartmouth Provincial Court on August 7, 2014 and indicated that they wished to retain and consult with legal counsel. As a result of their request for time to retain and consult with counsel, their plea was adjourned to October 16, 2014. On October 16, 2014, their lawyer entered a not guilty plea and the trial date was set. The Crown and Defence Counsel advised the Court that they believed the trial would require one half day of court time. The court clerk indicated that the earliest dates for a half-day trial were in September, 2015 and the trial date was confirmed for September 16, 2015,

[9] A pretrial conference was held on June 9, 2015. During that meeting, both counsel advised the Court that there may be some agreements with respect to the facts to narrow the legal issues. Defence Counsel also indicated that his clients might seek a further opinion with respect to the trial issues.

[10] Shortly before the trial date, Mr. Moore and Ms. Bowers changed counsel. Their new counsel advised the Court on the trial date [September 16, 2015] that, even though he had recently been retained, he was prepared to proceed. On the trial date, the Crown Attorney and Defence Counsel advised the Court that they had shortened the required trial time by agreeing to an agreed statement of facts. The trial proceeded on September 16, 2015 and the rest of the evidence was heard in about 40 minutes, instead of requiring a half-day of trial time.

[11] The parties returned to court on October 13, 2015 to make their oral submissions. The defence position was that there was a two year limitation period in the **HRM Charter** which began to run from the time that the accessory building was built [March, 2006] and had long since expired. In the alternative, the Defence raised the issue of whether there was a defence of an officially induced error.

[12] It was the position of the Crown that the **HRM Charter** created continuing and separate offences for each day that the accessory building remained larger than permitted by the land-use by-law. Therefore, the Crown Attorney submitted that there was no limitation period to this prosecution. With respect to the alternative defence submission, the Crown Attorney submitted was that the facts did not support a defence of an officially induced error.

[13] The trial decision was originally scheduled to be delivered by the Court on December 14, 2015. On that date, the Court advised counsel that additional time would be required to consider the matters in issue. The Court established January 20, 2016 as the revised date for the delivery of the trial decision. On January 20, 2016 the Court advised the parties that the decision could be delivered the following week. However, Defence Counsel advised that he was not available until February 8, 2016. As a result, the Court confirmed that the decision would be delivered on February 11, 2016. On that date, the Court held that there was a

limitation period and that the case at bar was not a continuing offence. Having dealt with the first issue, the charge was dismissed. As a result, the Court did not address the issue of officially induced error.

[14] The Crown filed a notice of appeal and the appeal was heard by Justice Rosinski of the Nova Scotia Supreme Court on June 15, 2016. Rosinski J. rendered his decision on July 11, 2016 and concluded that the offence alleged by the Crown in the prosecution was a "continuing offence." For "continuing offences," Rosinski J. held that limitation periods begin to run when enforcement authorities discovered an offence [which was November 13, 2013 when a complaint was made to the HRM]. Rosinski J. held that since the information was laid against the applicants on July 16, 2014, the limitation period had not yet expired. As a result, the prosecution was entitled to proceed. However, since that the applicants had maintained that there was a defence an "officially induced error" which was not considered by the trial judge, the matter was remitted Provincial Court for retrial before a different judge.

[15] The Crown Attorney and Defence Counsel for Ms. Bowers and Mr. Moore returned to the Dartmouth Provincial Court on August 11, 2016 to set a date for the retrial. The Court confirmed December 8, 2016 as the trial date for the issues

remitted back to the Provincial Court. The Court also established September 20, 2016 as a date for a further pretrial conference.

[16] During the pretrial conference on September 20, 2016, Defence Counsel advised the Court and the Crown that he would be filing a Section 11(b) **Charter** application that the applicants had not been tried within a reasonable time and that the relief being requested was a stay of proceedings. Defence Counsel indicated that he would file his formal notice of the **Charter** application September 23, 2016. Based upon that notification, the Court established dates for the filing of all transcripts of previous court appearances. The Court also established that the defence brief be filed by November 7, 2016, with the Crown reply to be filed by November 21, 2016.

[17] On December 8, 2016, the Crown had witnesses present in court and was ready to proceed on the trial issues. It was also anticipated that counsel would make their oral submissions on the Section 11(b) **Charter** application. Since the Defence planned to call evidence on the issue of officially induced error and the Crown expected to call their witnesses in rebuttal, Defence Counsel stated that the applicants preferred to have the Section 11(b) **Charter** issue addressed by the Court before proceeding with further evidence. Under those circumstances, the Court established March 15, 2017 as the trial continuation date, if needed, and

indicated that, if possible, the decision on the **Charter** application would be released before that date. Defence Counsel agreed to waive any delay between December 8, 2016 and March 15, 2017.

ANALYSIS:

[18] On July 8, 2016, in **R. v. Jordan,** *supra***,** the SCC established a "new framework beyond which delay is presumptively unreasonable." This decision changed the framework analysis of the right to trial within a reasonable time which is enshrined in Section 11(b) of the **Charter.** The Court observed that the Section 11(b) litigation had become "too unpredictable, too confusing and too complex" and had become a burden on already overburdened trial courts [**Jordan**, supra at para. 38].

[19] The majority of the SCC in **Jordan** put forward this new framework as a means of creating "real change". The majority acknowledged that "real change" would require the efforts and coordination of all participants in the criminal justice system to take preventative measures to address inefficient practices and resourcing problems. The very clear expectations of the SCC with respect to the efforts and coordination of all participants in the criminal justice system, namely,

the Crown Attorneys, Defence Counsel, the Courts, Parliament and the Provincial Legislatures were summarized succinctly in **Jordan**, supra, at paragraphs 138-141.

[20] Some examples of the suggestions for "real change" made by the majority of the SCC were that Crown counsel make "reasonable and responsible decisions regarding who to prosecute and for what" and to use court time efficiently. For Defence Counsel, actively advancing their client's right to a trial within a reasonable time by collaborating with Crown Counsel to use court time efficiently. Both Crown and Defence Counsel should focus on making reasonable admissions, streamlining the evidence and anticipating issues that need to be addressed in advance.

[21] For the Courts, this "real change" requires implementing more efficient procedures, including scheduling practices, case management regimes and tools for the parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials, but all courts must be mindful of the impact of their decisions on the conduct of trials.

[22] For Provincial Legislatures and Parliament, "real change" requires taking a fresh look at rules and procedures to determine what is "truly necessary to a fair trial" and what is more conducive to timely justice. Parliament may wish to

consider the value of preliminary inquiries and Government "will also need to consider whether the criminal justice system (and any initiatives aimed at reducing delay) is adequately resourced." The SCC stated that these broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner.

[23] The core concepts of the new framework for Section 11(b) **Charter** analysis were described in **Jordan**, supra, at para 46 to 48. The new framework establishes a "presumptive ceiling" beyond which "delay is presumptively unreasonable". The "presumptive ceiling" is set at 18 months for cases going to trial in the provincial court and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry). However, the majority of the SCC also acknowledged in **Jordan**, supra at para. 51, that "obviously, reasonableness cannot be captured by a number alone, which is why the new framework is not solely a function of time" and that they had simply adopted "a different view of how reasonableness should be assessed."

[24] If the total delay from the date of the charge to the actual or anticipated last day of trial, excluding any defence delay, *exceeds* the presumptive ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must

establish the presence of “exceptional circumstances”. If the delay remains unreasonable and a stay will follow.

[25] If the total delay from the charge to the actual or anticipated end of the trial [minus defence delay or delay attributable to exceptional circumstances] falls *below* the presumptive ceiling, then the onus is on the Defence to show that the delay is unreasonable. To do so, the Defence must establish that, one, it took meaningful steps that demonstrate a sustained effort to expedite the proceedings and that, two, the case took markedly longer than it reasonably should have. The SCC observed that stays beneath this presumptive ceiling will probably be rare and limited to the clearest of cases.

[26] The **Jordan** framework for a Section 11(b) **Charter** analysis may be summarized and described by the following procedural steps:

1. Calculate the “Total Delay” which is the time from when the charge is laid to the actual or anticipated end of the trial;

2. Deduct Defence Delay from the Total Delay. The Court notes that Defence Delay may arise from two subcategories:

Defence Waived Delay:

- The waiver of an accused's Section 11(b) **Charter** right may be implicit or explicit, but the Defence must have full knowledge of the right and the effect of the waiver.

- The waiver must be clear and unequivocal.

- The waiver is for discrete periods of time and not the waiver of this right in its entirety.

- Finally, the Crown may seek a waiver as a *quid pro quo* to providing consent for a procedural step in the litigation, for example, re-election.

Defence Waived Delay:

- This delay directly results from defence conduct.

- Delay under this category can arise from deliberate and calculated tactics employed by the defence to delay the trial (for example, frivolous applications) or for time periods where the Crown and the court were available, but the defence was unavailable.

- It is left open to trial judges to determine when defence actions or conduct have caused delay, but the majority of the SCC added that "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay." **Jordan**, supra, at paras 60-65.

3. Determine the Total Delay which remains after deducting the Defence waived delay *and* Defence caused delay to arrive at the total net delay in the matter.

4. If the total net delay *exceeds* the "presumptive ceiling" of 18 months in the Provincial Court [or 30 months in the superior court, then the delay is "presumptively unreasonable" and the burden shifts to the Crown to justify the delay as having been due to "exceptional circumstances."

5. The Crown has the onus to demonstrate that there were "exceptional circumstances" present in the case which were reasonably unforeseen or reasonably unavoidable, but they need not be rare or entirely uncommon [**Jordan**, supra, at para. 69]. The Court also notes that there can be two broad categories of "exceptional circumstances":

   (i) "(D)iscrete and exceptional events" such as medical or family emergencies involving someone in the case. This catergory also includes exceptional events that may arise at trial, such as a trial goinglonger than reasonably expected, even where the parties have made a good-faith effort to establish realistic time estimates. Where such events occur, the delay was likely unavoidable and may

amount to an exceptional circumstance [**Jordan**, supra, at paras 71 to 73].

(ii) Particularly complex cases which involved voluminous disclosure, a large number of witnesses, significant expert evidence, charges covering a long period of time, large number of charges, pretrial applications, novel or complicated issues or a large number of issues in dispute [**Jordan**, supra, at para. 77].

6. If the Crown has established that there were "exceptional circumstances" which the Crown could not reasonably mitigate or prevent, which caused delay, then that delay is to be deducted from the total net delay.

7. If the total net delay remains below the "presumptive ceiling," the burden shifts to the Defence to show that the delay is unreasonable in those clear cases and, if so, a stay of proceedings "must be entered" [**Jordan**, supra, at para. 76]. In addition, where the onus is on the Defence, it must establish that:

(i) It took "meaningful and sustained steps to be tried quickly",

(ii) It was cooperative with and responsive to the Crown and the court and put them on notice when delay had become a problem, and

(iii) It conducted all applications reasonably and expeditiously [**Jordan**, supra, at paras. 84 and 85].

8. If the total net delay remains above the "presumptive ceiling," because the Crown has not established "exceptional circumstances" justifying the delay, then the delay remains "presumptively unreasonable", the application must be granted and a stay must be entered.

Transitional Exceptional Circumstances for Cases Already in the System:

[27] The SCC points out in **Jordan**, supra, at para. 94 that there are a variety of reasons for applying the new framework "contextually and flexibly for cases currently in the system." The SCC acknowledged, in paras. 92-94, that they recognized this new framework was a departure from the law that was previously applied to Section 11(b) applications and that they did not want to create "swift and drastic consequences" which might risk undermining the integrity of the administration of justice. For those reasons, the majority of the SCC held that the

new framework, including the presumptive ceiling, applies to cases currently in the criminal justice system, subject to two transitional exceptional circumstance:

1. Reliance on the Pre-**Jordan** Law:

2. Significant Institutional Delay

Reliance on the Pre-Jordan Law:

[28] In those cases, where the Crown proves that the time which the case has taken is justified, based upon the parties reasonable reliance on the pre-**Jordan** law, this reliance will constitute a "transitional exceptional circumstance" justifying delay over the presumptive ceiling.

[29] As the Court pointed out in **Jordan**, supra, at para. 96, the analysis by a Court requires a contextual assessment, sensitive to the manner in which the previous framework was applied. For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework and the fact that the parties' behavior cannot be judged strictly against a standard of which they had no notice. For cases, currently in the system, these considerations can therefore inform whether the parties reliance on the previous state of the law was reasonable. The trial judge should consider whether enough time has passed for the parties to "correct their behavior and the system has

had some time to adapt" before determining whether the transitional exceptional circumstance exists" [**Jordan**, supra, at para. 96].

Jurisdictions with Significant Institutional Delay:

[30] The second "transitional exceptional circumstance" is the existence of "significant institutional delay problems" in the jurisdiction in question. The SCC notes that trial judges in jurisdictions plagued by "lengthy, persistent and notorious institutional delays" should account for this reality, as the Crown's behavior is constrained by systemic delay issues. Parliament, the legislatures and Crown counsel need time to respond to the **Jordan** decision and "stays of proceedings cannot be granted *en masse* as they were after the **Askov** decision, simply because problems with institutional delay currently exist". The SCC recognized that with this "transitional exceptional circumstance," change takes time and institutional delay – even if it is significant – will not automatically result in a stay of proceedings. [**Jordan**, supra, at para. 97]

Stays Entered When Delay Vastly Exceeds the Presumptive Ceiling*:*

[31] In **Jordan**, supra, at para. 98, the majority of the SCC stated that for cases currently in the system, if the delay in a simple case "vastly exceeds the ceiling" *and* the Crown caused the delay, Section 11(b) breaches may still be found if the

delays were due to the "repeated mistakes or missteps by the Crown or the delay was unreasonable even though the parties were operating under the previous framework. Once again, the analysis conducted by a Court must always be contextual and the SCC stated that they relied on the "good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case." [**Jordan**, supra, at para. 98]

Impact of an Appeal – "Rewinding the Constitutional Clock":

[32] In this case, applying the analytical framework put forward by the majority of the SCC in **Jordan** also requires the consideration of the impact of the "original" trial decision based upon a jurisdictional issue, which was subsequently overturned on appeal. As a result of the successful appeal by the Crown, the matter has been returned to the Provincial Court for retrial on the substantive issues and whether there is defence of an "officially induced error."

[33] Clearly, this specific scenario was not addressed in the **Jordan** decision, and therefore, it should not come as a surprise that the SCC did not express any opinion on the relevance of appellate delay in the ascertainment of the total delay in a trial. In **Jordan**, the specific facts of the case did not include any prerogative remedies or appellate proceedings between the date of the charge and the verdict. Although

the majority of the SCC in **Jordan** stated, at supra, para. 51, that "reasonableness cannot be captured by a number alone, which is why the new framework is not solely a function of time," the fact is that the first step in the **Jordan** analysis is a mathematical calculation of the time, which has elapsed between two fixed events, the charge and the end or anticipated end of the trial. On this point, Watt JA noted in **R. v. Manasseri**, 2016 ONCA 703 (Canlii) at para. 337 that the underlying time period contemplated by the court in **Jordan** was based on the assumption that during the time between those two fixed events, the accused would be a "person charged with an offence" under Section 11(b) of the **Charter**.

[34] In this case, the applicants and the Crown Attorney both accept that there is settled jurisprudence that excludes the delay associated with the hearing of an appeal from being counted as part of the Section 11(b) delay analysis. The leading case in this line of jurisprudence is **R. v. Potvin**, 1993 Canlii 113 (SCC); [1993] 2 SCR 880, which involved an accused who had been tried and acquitted and the acquittal was subject to a Crown appeal. The accused had asserted that there had been an unreasonable delay in the appellate process and sought a remedy under Section 11(b). The question was whether he was a "person charged with an offence" during the appeal period.

[35] The majority decision in **Potvin**, supra, was written by Justice Sopinka who held, at para. 30, that during the period after an acquittal and the service of a notice of appeal, the person acquitted is not a "person charged". Sopinka J. added that no proceeding is "on foot" which seeks to charge the person acquitted. Upon filing an appeal there is a possibility, the strength of which will vary with each case, that the acquittal will be set aside and the charge "revived". In those circumstances, the former accused is like the suspect against whom an investigation has been completed and charges are contemplated, awaiting the decision by the prosecutor. Sopinka J. concluded that, in fact, the acquitted accused is somewhat more removed from the prospect of being charged than a suspect as no charge can be revived until a Court sets aside the acquittal because it has determined, with a reasonable degree of certainty, that an error of law has affected the decision at trial.

[36] In the final analysis, Sopinka J. concludes in **Potvin**, supra, at para. 33, that appellate delay does not attract Section 11(b) protection, but he added that, "this does not mean that when there is an adjudication relating to a charge which is appealed, Section 11(b) is spent. If, on appeal, the judgment is set aside and the matter is remitted for trial, the accused reverts to the status of a person charged."

[37] In support of his conclusions in **Potvin**, supra, at para. 33, Mr. Justice Sopinka cites, with approval, an excerpt from a paper presented by D.H. Doherty

(now a Justice of the Ontario Court of Appeal) at a CBA Continuing Legal Education session which was held in 1984:

> "Section 11(b) does not appear to operate at the appellate stage. Section 11(b) guarantees a trial within a reasonable time, not a final determination of the matter at the appellate level within that time. If, however, a new trial is ordered on appeal, or some other orders made directing the continuation of the trial proceedings, the constitutional clock should be rewound at the time of the order by the appellate court."

[38] The concept of "rewinding" the constitutional clock, as mentioned by Sopinka J. in **Potvin,** has since become the subject of debate as to when exactly, clocks should be "rewound" for the purposes of the Section 11(b) analysis. There have been two methods employed by courts since the **Potvin** decision:

> **Method (A):** A cumulative method calculated by adding together the delay from when the charge was laid until the first trial was completed, deducting any appellate delay. But if the Court of Appeal orders a new trial, then the total time from when the charge is "revived" until the actual or anticipated end of the trial is added to the total delay; or
>
> **Method (B):** In this alternative method, if there is a successful appeal, the constitutional clock is rewound to zero rather than doing a cumulative assessment of all the previous delay. With this method of assessing total delay, the Court's calculation of the total delay begins when the appellate

> decision is rendered and the accused reverts back to the status of a "person charged" with the "revived" offence(s) in the trial court.

[39] It would appear that the Nova Scotia Court of Appeal has not considered the issue of which method to employ in the of "rewinding the constitutional clock."

[40] In **R. v. Barros**, 2014 ABCA 367, at para. 50, the Alberta Court of Appeal stated that, in their view, **Potvin** stands for the proposition that all appellate delay, including appeals to the SCC, is excluded from the Section 11(b) analysis. Furthermore, In **Barro**s, supra, at para. 53, the Alberta Court of Appeal adopted Method (A) with respect to the meaning of "rewinding the constitutional clock" as expressed in **Potvin**:

> [53] The use of the term "rewound" by the majority suggests that the clock stopped ticking, that is it is being "rewound" to start it ticking again. In other words, the section 11(b) clock stops when an accused has been acquitted, but if a new trial is ordered after an appeal, the clock is "rewound" in order to start ticking again. Hence, section 11(b) will require consideration of the pretrial delay and any delay following the period after the ordering of a new trial. It follows that a further appeal will stop the clock again, and that it will again restart if and when a new trial ordered by the Supreme Court, as it was in this case."

[41] In this case, the Crown Attorney and Defence Counsel have agreed, in my opinion quite correctly, that appellate delay must be excluded from the Section 11(b) delay analysis. It is fair to say that most trial courts and courts of appeal agree on that point as well.

[42] However, I find that resolving the different methods utilized by courts with respect to the interpretation of the concept of “rewinding the constitutional clock” now takes on even a greater importance in light of the new **Jordan** analytical framework for Section 11(b) **Charter** applications. It must be remembered that when the concept of “rewinding the constitutional clock” was approved by the SCC in **Potvin** and then applied in cases like **Barros** [Alberta Court of Appeal], it was applied in the context of the pre-existing framework for the analysis of unreasonable delay which had been established by the SCC decisions, in **Askov [1990]** and **Morin [1992]**.

[43] In my opinion, there can be no doubt that the new analytical framework established in **Jordan** which creates a “presumptive ceiling,” reduces the trial judge’s flexibility since it does not require the trial judge to specifically consider such factors as the inherent needs of the case, the seriousness of the offence, the prejudice to the accused or the public interest in fair trials, all factors which were relevant in the previous analytical framework. Clearly, the majority of SCC in **Jordan**, supra, considered that those factors, which were relevant in the previous framework, provided the trial judge with “endless flexibility” [at para. 32] in determining Section 11(b) **Charter** applications. This “flexibility” made Section

11(b) applications "too unpredictable, too confusing and too complex" [**Jordan** at para. 38] as well as, too time-consuming for the courts.

[44] Given the fundamental shift in the Section 11(b) framework by the majority in **Jordan,** I find that the issue of the impact of an appeal period on the "rewinding of the constitutional clock" must be reconsidered.

[45] In the recent Ontario Court of Appeal decision of **R. v. Manasseri**, 2016 ONCA 703, Justice Watt stated at para. 337:

> "Quite understandably, **Jordan** is silent on the relevance of appellate delay to ascertainment of the total length of time between charge and the actual or anticipated end of the trial. After all, the time between charge and verdict in **Jordan** did not include any prerogative remedies or appellate proceedings. What seems envisaged at the first step of **Jordan** is a simple mathematical calculation of the time lapse between two fixed events: charge and the end of trial. What seems to be required is an answer to a question: How long did it take from the charge to verdict to complete the case? Implicit is the assumption that during this entire period the accused would be a "person charged with an offence" under section 11(b)."

[46] Justice Watt went on to say, in **Manasseri**, supra, at paras. 338-339, that he would be "leaving a final decision about the relevance of appellate delay to the **Jordan** framework to another day." However, Watt JA did offer an observation that, unlike the **Manasseri** case, **Potvin** did not involve an extraordinary remedy proceeding to review of a discharge at the conclusion of a preliminary inquiry and an appeal thereafter. Therefore, Watt JA observed that it would seem incongruous to treat the time taken in pursuit of extraordinary remedies differently than the time

taken in appeals from convictions, acquittals or stays of proceedings as **Potvin** mandates.

[47] Although the majority of the SCC in **Jordan** did not express any opinion on the impact of appellate delay**,** I find that they sent a clear signal that their opinions were based upon the specific facts present in that case**.** In this regard, it is important to note that the Court specifically added footnote [2] in **Jordan**, supra, at para. 49, where they described the "presumptive ceiling" of 18 months for trial in the Provincial Court and 30 months in the Superior Court as the "most important feature of the new framework." In footnote [2] the SCC referred to **R. v. MacDougall**, [1990] 3 SCR 45, which held that Section 11(b) of the **Charter** applies to sentencing proceedings. Then, the SCC specifically added the following in that footnote:

> "Some sentencing proceedings require significant time, for example, dangerous offender applications or situations in which expert reports are required, or extensive evidence is tendered. The issue of delay, in sentencing, is not before us, and we make no comment about how these ceilings should apply to section 11(b) applications brought after a conviction is entered, or whether additional time should be added to the ceilings in such cases."

[48] As Justice Watt pointed out in **Manasseri**, the issue of prerogative writs and appeals was not before the SCC in the **Jordan** case. I conclude that trial courts cannot look solely to the **Jordan** decision to resolve the specific issue which is

before me, that is, what is the appropriate method to determine the timeframe under Section 11(b) when a second trial is necessitated by a successful appeal.

[49] In addition, I find that the **Potvin** decision, which was made under a different analytical framework in relation to Section 11(b) **Charter** applications, did not specifically address how the "constitutional clock" should be rewound when an accused person, who has been acquitted, resumes being a "person charged" due to a successful Crown appeal. As I indicated previously, in the context of **Askov**, **Morin**, and later the **Godin** case, there have been many courts which rewound the constitutional clock to the time when the applicants *originally became* a "person charged" [in this case, July 16, 2014] and other courts which held that the clock should only be reset to the time when the applicants *returned to being* a "person charged" [in this case, July 11, 2016].

[50] In view of the new **Jordan** analytical framework and the fact that **Jordan** is silent on of the impact of an appeal on the "constitutional clock," I find that the majority decision in **Potvin** must also be re-evaluated in a "contextual manner" to consider this new reality. At several places in their decision, the majority in **Jordan**, supra, have observed, that "we rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case" [see **Jordan**, supra, for example, at para. 98]. Therefore, in a case such as this, where a

retrial is ordered following a successful appeal by the Crown, I find that the trial judge is required to conduct a reasonable and contextual re-evaluation of the concept of “rewinding the constitutional clock” considering the new analytical framework.

[51] Given the fact that the majority in **Jordan** did not wish to express any comments about matters which were not before them, it is not surprising that they did not discuss the impact of a successful appeal by the Crown, or a retrial on the issue of the Total Delay. Therefore, it follows logically that there was no reason for the SCC in **Jordan** to provide an opinion relating to the method by which a Court should rewind the constitutional clock or how much the constitutional clock should be rewound when a retrial is ordered by a Court of Appeal.

[52] Having said that, the majority in **Jordan**, supra, at para. 108, did clearly articulate a prospective approach and added that the new framework represents a significant shift from past practice towards making “real change” by eliminating a “culture of complacency” towards delay in order to expedite cases. However, the SCC also clearly expressed, in **Jordan**, supra, at para. 97, that they did not necessarily want to see stays of proceedings being issued *en masse*, simply because problems with institutional delay currently exist. The Court added that “the administration of justice cannot countenance a recurrence of **Askov**.”

[53] In the final analysis, the SCC recognized that real change will take time and therefore, they created the transitional exceptional circumstances which recognized that institutional delay even if it is significant will not automatically result in a stay of proceedings. Looking at the impact of all the foregoing comments, I find that it is reasonable to conclude that the thrust of the **Jordan** decision was to encourage all participants in the justice system to work in concert to achieve speedier trials. Furthermore, if those remarks were to be extrapolated to a situation where there was a retrial, I find that it would be equally reasonable to conclude that retrials should be conducted as expeditiously as is reasonably possible.

[54] In those circumstances, I find that a retrial should not necessarily be subject to a *cumulative* "presumptive ceiling" of either 18 months or 30 months, since the method of "rewinding the constitutional clock" that was considered in **Potvin**, supra, was in the context of a quite different Section 11(b) analytical framework. In my opinion, it would be completely illogical to interpret the majority decision in **Jordan** in a manner which could possibly make retrials, after a successful appeal by the Crown, a futile effort. If delay was to be calculated in a cumulative manner, it might be either impossible or highly unlikely to conduct a retrial within the original trial's "presumptive ceiling".

[55] In coming to the above conclusion, I find that it does not take much imagination to create hypothetical situations where such a cumulative interpretation of “rewinding the constitutional clock” would have a significant impact on the administration of justice in Canada. One can easily foresee a situation where the “original” trial had taken up the large majority of, or may have even exceeded the “presumptive ceiling” and then the Crown is successful on appeal or in obtaining a prerogative writ. In those circumstances, the successful appeal or prerogative writ would almost immediately be met by a Section 11(b) application before or during the retrial, which of course, would have the impact of further delaying the retrial on the merits of the substantive issues.

[56] In order to ensure that a party’s successful appeal of a trial decision which resulted in a new trial being ordered, was not rendered nugatory and futile by the creation of the “presumptive ceiling” in **Jordan**, I find that there has to be a re-evaluation of the majority decision in **Potvin** where their interpretation of “rewinding the constitutional clock” was based upon a completely different Section 11(b) analytical framework.

[57] In my opinion, the concept of “rewinding the constitutional clock” as described in **Potvin** should be re-evaluated, based upon a contextual and flexible analysis of the new **Jordan** analytical framework with its “presumptive ceilings”. I

find that it would be reasonable to utilize a third approach, or Method (C), which would accord rewind the constitutional clock to zero to allow a reasonable amount of time to complete the retrial process, with or without "presumptive ceilings." In other words, I find it would be reasonable to conclude that the "total delay" involved in a retrial, should be considered in a contextual and flexible manner, with the same general thrust as expressed by the SCC in **Jordan**, that is, with the expectation that the Court, the Crown and Defence Counsel would take all reasonable steps to expedite the retrial. However, given the new framework, following a successful appeal or a prerogative writ, for the purpose of the retrial, I find that the constitutional clock should only be "rewound" to the date of the "revived" charge and that if there are any "presumptive ceilings," they should only be "on foot" from that date and not go back to when the accused person was first charged with an offence.

[58] In my opinion, this contextual and flexible approach must be applied in order to preserve the right to be tried within a reasonable time, while at the same time ensuring that the public remains confident in the administration of justice. Put simply, if a successful appeal or application for a prerogative writ has been brought before a court of appeal within a reasonable time, a successful appeal or the issuance of a prerogative writ ought not to be rendered futile and nugatory because

it was impossible or highly unlikely to complete the retrial within the "presumptive ceiling," if the Court was to utilize a cumulative calculation for total delay to "rewind the constitutional clock."

[59] As the SCC noted in **Jordan**, supra, at para. 55, the new framework is designed to expedite trials and the clarity and assurance of the "presumptive ceiling" will build "public confidence in the administration of justice." In my opinion, the SCC reference to this "important public interest component," must not be downplayed when trial courts apply a contextual and flexible interpretation of the **Jordan** analytical framework.

APPLYING THE FRAMEWORK TO CALCULATE TOTAL DELAY:

Calculating the "Total Delay:"

[60] Since the calculation of "total delay" is based upon the time between when the charge or charges were laid and the actual or anticipated end of the trial, we are looking at a start point of July 16, 2014, the date when the charge was laid contrary to section 27A of the Dartmouth Land Use By law, pursuant to Section 369(1) of the **HRM Charter**. The trial decision of the Court, which dismissed the charge against the applicants, was delivered on February 11, 2016. Therefore, I find that the "total delay" in the "original" trial was 19 months.

[61] The Crown filed an appeal in mid-February, 2016 and the appeal decision of the Nova Scotia Supreme Court [Rosinski J] was delivered on July 11, 2016. Based upon the **Potvin** decision, during this appeal period, the applicants were not "persons charged with an offence" under Section 11(b) of the **Charter**. In those circumstances, this 5-month period of time shall *not* be included in the calculation of the "total delay."

[62] Furthermore, following the appeal decision, the matter was not remitted back to the Provincial Court to set a date for retrial until August 11, 2016. On that date, the new trial date was established with a different judge being assigned to hear the retrial. The retrial was scheduled for December 8, 2016.

[63] In my opinion, the one month period of time between when the Nova Scotia Supreme Court rendered its appeal decision and the matter being referred back to the Provincial Court on August 11, 2016 should be included as part of the appeal period and therefore, should *not* be included in the "total delay." In addition, I find that this one month period of time is a reasonable inherent delay in the criminal justice system to allow time for the court files to be transferred back to the Provincial Court and then to be scheduled in the normal routine for the intake of matters before the Court. Moreover, I find that this one month period of time

cannot be attributed to any inaction or missteps by the Crown and should be considered as part of the appellate process.

[64] However, there is no doubt that when the applicants returned to the Provincial Court on August 11, 2016 to set a date for the retrial, they returned to the status of "persons charged with an offence." Therefore, the total delay involved in the retrial process, following the appeal to the actual or anticipated end of the trial, is from August 11, 2016 and December 8, 2016.

[65] On September 20, 2016 Defence counsel indicated during a pretrial conference that he would be filing an application for a stay of proceedings pursuant to Section 11(b) of the **Charter**. Defence counsel filed this formal notice of **Charter** application on September 23, 2016 and obtained transcripts of all previous appearances prior to the December 8, 2016 date for retrial. During the pretrial conference, the Court also established dates for the filing of written briefs by the parties for the Section 11(b) **Charter** application, in advance of the December 8, 2016 trial date.

[66] As a result of the applicants filing their Section 11(b) **Charter** application in late September, 2016, the 3.75-month period of time between August 11, 2016 and December 8, 2016 was altered from being the actual or anticipated end of the trial

to a date when the **Charter** application would be heard by the Court. In those circumstances, a further period of time was added for the retrial, to allow the Court a reasonable amount of time to determine the **Charter** application. Therefore, March 15, 2017 was scheduled as a possible trial continuation date if the Court dismissed the **Charter** application.

[67] On the December 8, 2016 trial date, Defence Counsel specifically waived the further period of 3.25 months between December 2016 and March 2017, as there was no doubt that the delay in proceeding with the retrial was occasioned by the Defence request to have the Section 11(b) **Charter** application determined before the retrial. As a result, the Court scheduled March 15, 2017 for the decision on the **Charter** application and the retrial of the substantive issues if the Section 11(b) **Charter** application was dismissed.

[68] In summary, I find that the total delay between the laying of the charge and the actual or anticipated end of the “original” trial was approximately 19 months. Shortly after the “original” trial ended in a dismissal of the charge, the Crown appealed the trial decision in February 2016. The appeal decision was rendered by Rosinski J of the Nova Scotia Supreme Court in mid-July 2016 and the applicants returned to the Provincial Court to, once again, face the charge on August 11,

2016. I find that this period of six months is part of the appellate process and that this period of time shall be deducted from the total delay.

[69] On August 11, 2016 the applicants appeared in the Provincial Court and the retrial was scheduled for December 8, 2016 and, therefore, this period of 3.75 months shall be considered as the total delay between the "revived" charge and the actual or anticipated end of the retrial. However, since the applicants filed their Section 11(b) **Charter** application in late September, 2016, Defence Counsel requested that the December 8, 2016 date be utilized for the hearing of the **Charter** application and, as a result, March 15, 2017 was scheduled for the Court's decision on the delay application as well as the date of the retrial, if the Court was to conclude that the Section 11(b) **Charter** application should be dismissed.

[70] The total delay on the "original" trial was 19 months, there was a six-month period between mid-February and mid-August, 2016, which I have determined to be part of the appellate process. During this six month period of time, I find that the applicants were not persons "charged" with an offence. Based upon the SCC decision in **Potvin** and numerous other cases which have applied it, I find that the six-month period of time is not considered part of the total delay for the purposes of a Section 11(b) **Charter** application.

[71] In mid-August 2016, the applicants re-appeared in the Provincial Court to set a date for the retrial of this prosecution and the Court set December 8, 2016 as the date for the actual or anticipated end of the trial. However, at the request of Defence Counsel, that trial date was adjourned and the date for the decision on the Section 11(b) **Charter** application, which is the actual or anticipated end of the trial, was set for March 15, 2017. There is no doubt that Defence Counsel has specifically waived 3.25 months of the total delay (December, 2016 to March, 2017), but for the purpose of calculating the total delay for the retrial, I find that this retrial of the offence has had a total delay of seven months.

[72] Therefore, in total, this case has been before the court for a grand total of 32 months. During this time, there was a decision of the Court following the "original" trial, a successful appeal by the Crown and the matter was returned to the Provincial Court for retrial. Prior to the date of the retrial, the applicants filed their Section 11(b) **Charter** application, and Defence Counsel requested that the court adjudicate this application before the retrial commenced.

Deduct Delay Explicitly or Implicitly Waived by the Defence:

[73] The applicants, Mr. Moore and Ms. Bowers, made their first appearance in court on August 7, 2014 and indicated that they wished to explore the possibility of

being represented by Legal Aid or, if not, to secure private counsel to represent them. In order to allow the applicants a reasonable amount of time to retain and consult with counsel, the Court adjourned their plea until October 16, 2014.

[74] Although the transcript does not contain an explicit waiver by the two applicants, I find that their waiver was clearly implicit in their request to seek legal advice from, and representation by, counsel. In addition, I also find that this 2.25 month adjournment provided the applicants with a reasonable amount of time to consult with counsel if they planned to represent themselves, or to retain legal counsel to represent them. In those circumstances, I find that this 2.25 month period between August 7, 2014 and October 16, 2014 was implicitly waived by the applicants and it should be deducted from the total overall delay.

[75] On October 16, 2014 the applicants appeared with counsel, entered a not guilty plea and this matter was set down for a one half-day trial. On that date, the court clerk indicated that the earliest trial date that was available for a half-day trial was September 9, 2015. Defence Counsel for the applicants indicated he was not available on that date, and the next date offered by the court was September 15, 2015, which was a date acceptable to the Crown and the Defence. While it is a minor amount of time, it should be noted that the Crown and the Court were available on the earlier date and, therefore, this one week (0.25 month) period of

time when the Defence was not available should be deducted from the overall total delay.

[76] The trial evidence was heard on September 16, 2015. Although the matter had been scheduled for a half-day, given the filing of the agreed statement of facts, the balance of the trial evidence was heard in about 40 minutes. I should note here, parenthetically, that counsel had indicated to the court during a pretrial conference on June 9, 2015 that it was likely that the parties would file an agreed statement of facts to narrow the factual and legal issues, but that agreement was only concluded shortly before the scheduled trial date.

[77] After the trial evidence was heard on September 16, 2015 the Crown Attorney observed that Defence Counsel had only provided the copies of the cases, upon which he intended to rely during his oral submissions, to the Crown Attorney the previous day. As a result, the Court requested that written briefs be filed and timelines were established. It was also agreed that the oral submissions would be made on October 13, 2015.

[78] Under the previous analytical framework, I find that this one month period of time could easily be characterized as inherent delay occasioned in the normal vicissitudes of a trial. However, in the context of the **Jordan** framework, one could

certainly regard this as Defence delay, albeit delay which was inadvertently caused by the Defence. However, given the fact that Defence Counsel assumed conduct of the file with little notice and did not request an adjournment, I find that it would not be fair to attribute this delay to the applicants. Moreover, I find that it would be an example of holding them to a standard of which they were not aware at the time. As the majority noted in **Jordan**, supra, at para. 85, the Defence is required to act reasonably, not perfectly.

[79] Following those oral submissions, the Court reserved its decision until December 14, 2015. Prior to that date, the Court advised counsel that the trial decision would not be available on December 14, 2015 and that some extra time would be required to render the decision, which was then scheduled for January 20, 2016. On that date, the Court advised the parties that a further period of about one week would be required to complete the trial decision and dates were offered. However, Defence Counsel indicated that he was not available during the next two weeks. As a result, the decision was scheduled to be delivered, and was actually delivered, on February 11, 2016.

[80] There is no doubt that the Court requested some additional time to prepare its detailed and comprehensive reasons for judgment, which the SCC expects trial judges to deliver to the parties. It would appear under the **Jordan** framework that

the time required by a judge to formulate those sufficiently detailed reasons is to be considered as part of the total overall delay, since those reasons represent the end or anticipated end of the trial. However, when the Court indicated that the decision would be delivered on another date when Crown was available, Defence Counsel stated that he was not available during the next two weeks. In those circumstances, I find that this two week period (0.5 month) during which the Court's decision was further delayed due to the unavailability of Defence Counsel should, in fairness, be deducted from the total delay.

[81] Therefore, with respect to the delay explicitly or implicitly waived by the Defence during the original trial, I find that the total amount of time which should be deducted from the total delay of 19 months is three (3) months, leaving a total net delay of 16 months for the conduct of the original trial from the date of the charge [July 16, 2014] to the decision of the Provincial Court on February 11, 2016.

[82] Finally, as I indicated in the overview of the factual background of this case and in my discussion of the total delay, the actual or anticipated end of the retrial of this charge was set on August 11, 2016 for December 8, 2016. Therefore, the total delay in setting the matter down for the retrial of the charge before the Court

was 3.75 months. There is no Defence delay which should be deducted from this period of time.

[83] However, on December 8, 2016 as I have indicated above, the parties had witnesses who were available to provide evidence to the Court with respect to the substantive issues which were involved in the retrial of the offence before the court. At the request of Defence Counsel, the parties proceeded with their oral submissions on the Section 11(b) **Charter** application instead. The Court established March 15, 2017 as the trial continuation date if the **Charter** application was dismissed, but also indicated that, if it was possible, the Court would render its **Charter** decision prior to that date.

[84] As indicated previously, Defence Counsel specifically waived the delay for the period between December 8, 2016 and March 15, 2017, which is about 3.25 months and that period of time should be deducted from the total delay. Therefore, there is a total net delay of 3.75 months between August 11, 2016 when the "revived" charge returned to the Provincial Court for retrial and the actual or anticipated end of the retrial.

Deduct Overall Delay Caused by the Defence:

[85] This is not a case in which the Defence can be said to have engaged in "deliberate and calculated defence tactics aimed at causing delay" such as "frivolous applications and requests" [**Jordan**, supra, at para. 63]. Indeed, Defence Counsel assumed conduct of this trial very shortly before the "original" trial date, on September 16, 2015, did not request an adjournment, and indicated that he would be ready to proceed on the previously scheduled trial date.

[86] In addition, the parties had indicated during the pre-trial conference before the "original" trial, at which the previous Defence Counsel attended on behalf of the applicants, that there may be a second opinion sought by the applicants and that there may be some agreement of facts to narrow the legal issues. In October, 2014 when the "original" trial date was set, the parties believed that it would require one half day of court time, but with the agreements made just before the September 16, 2015 "original" trial date, the actual trial time taken was about 40 minutes.

[87] Obviously, the negotiation of an agreed statement of facts prior to the trial was a significant development which demonstrated that both the Crown and Defence were attempting to expedite the trial, by narrowing the factual issues. However, the agreed statement of facts was only concluded in September 2015, shortly before the "original" trial date. In those circumstances, there was no realistic opportunity for the parties to advise the Court of that development or for

the Court to take the agreement into account and secure an earlier date given the much shorter amount of time that was actually required for the trial.

[88] Moreover, I have no doubt that if the Court had been advised on an early date that the parties only required less than one hour of court time, that the parties could have secured a much earlier date for trial. Clearly, the thrust of the **Jordan** decision is for the Crown Attorney and Defence Counsel to work on expediting the factual and legal issues, and providing the Court, as early as possible, with a revised and more realistic estimate of the trial time that would be required.

Total Net Delay Below the "Presumptive Ceiling":

[89] As I indicated above, I have found that that the total delay from the "original" trial, that is, July 16, 2014 to February 11, 2016 was 19 months. This total included several months of inherent and institutional delay, due to a significant backlog of cases in the Dartmouth Provincial Court. This total also includes some express or implied waiver of time periods to allow the applicants to seek legal advice and retain legal counsel, as well as other delays attributed to the Defence.

[90] When Defence delay of three months, which I have found to have been either explicitly or implicitly waived by the Defence, is deducted from the total

delay of 19 months, I find that the “original” trial had a total delay of 16 months. I find that the “original” trial was concluded below the “presumptive ceiling” of 18 months for a trial in the Provincial Court. While the Defence Counsel was prepared to assume conduct of the trial on short notice, looking at the total period of time between the date of the charge and the actual end of the trial, I do not find that the Defence demonstrated that it took meaningful and sustained steps to expedite the proceedings.

[91] Moreover, this trial did not markedly exceed the reasonable time requirements for the case, nor did its complexity result in the case taking much longer than anyone could have reasonably expected. In fact, given the filing of agreed statement of facts, the case actually took significantly less time than the originally estimated amount of time.

[92] Having said that, however, the case has certainly become one of significant complexity. The “original” trial focused on a jurisdictional issue, namely, whether the offence was a continuing one or whether it was subject to a limitation period which had expired. In addition, the “original” trial also dealt with the issue of whether the applicants had a defence of officially induced error when the nonconforming building was built. Since the trial decision focused on the jurisdictional issue, which was subsequently overturned on appeal, the “original”

trial decision did not address the possible defence of officially induced error. Finally, of course, following the successful appeal by the Crown and this matter being remitted back to the Provincial Court for retrial on the remaining issues, the applicants filed their Section 11(b) **Charter** application. In these circumstances, the complexity of the trial has increased, as has the time required to determine the constitutional issue and the remaining substantive trial issues if the **Charter** application is dismissed.

[93] On the other side, I find that the Crown has done its part to ensure that the matter proceeded expeditiously, including working with Defence Counsel to streamline the issues and the evidence. In addition, I have already found that the total delay in the "original" trial did not exceed the "presumptive ceiling" and I find that the delay in this case was reasonably acceptable in this jurisdiction under the **Morin** framework before the **Jordan** decision was released. In those circumstances, I find that it is a component of the reasonable time requirements for those cases which are currently in the criminal justice system [see **Jordan**, supra, at para. 100].

[94] As I indicated above, there is no doubt that the six months period of time while this case was involved in the appellate process is to be deducted from of the total delay. Moreover, the delay associated with the appeal and the return of

"revived" charge to the Provincial Court for retrial were done in a reasonable and expeditious manner. The "revived" charge came before the Court to set a date for the retrial in August 2016 and the Court set the retrial for December 8, 2016, slightly under four months down the road. Looking at that period of time, without the cumulative effect of the "original" trial's total delay, there is absolutely no way anyone could reasonably advance a Section 11(b) **Charter** application. Even if the Court was to apply the **Potvin** decision and "rewind the constitutional clock" to the earliest dates when the applicants were "persons charged with an offence," this would barely be above the "presumptive ceiling" and, given the transitional exceptional circumstances mentioned in **Jordan**, this is not one of those cases where I would have found that there was an unreasonable delay.

[95] In terms of the transitional exceptional circumstances noted by the Court in **Jordan**, supra, at para. 97**,** I have indicated in previous Section 11(b) **Charter** applications **R. v Bowser,** 2016 NSPC 34 at para. 72 [decided before **Jordan**] and **R. v. McCully**, 2016 NSPC 70 at paras. 124 and 129 [decided after **Jordan** based upon the transitional provisions], that the Dartmouth Provincial Court was then, and remains today, one of the busiest courts in the province. Indeed, at the time when this matter was originally set down for trial, a one half-day or one-day trial

for an accused person who was not in custody might have been set for 8 to 12 months later.

[96] Having said that, since the **Jordan** decision, the Judges of the Dartmouth Provincial Court have taken several steps to reduce delay in setting of trial dates and expediting the trials themselves through the regular use of pre-trial conferences. This case is an example of those initiatives as the “original” trial, estimated to require one-half day of trial time, was set eleven months down the road in October, 2014, while the retrial which was also estimated to require one half day of trial time, was scheduled less than four months later in August, 2016. However, these measures could not be achieved without the cooperation of, and several innovative initiatives being taken by, all participants in the criminal justice system.

[97] In my opinion, I find that the **Jordan** decision did not deal specifically with a situation where there was an appeal and a subsequent retrial or a prerogative writ and the subsequent retrial. As Justice David Watt said in **Manasseri**, *supra*, the SCC in **Jordan** was silent on the relevance of appellate delay in ascertaining of the total length of time between the charge and the actual or anticipated end of a trial. In addition, as I mentioned previously, I find that the **Potvin** decision, which was made in the context of the previous analytical framework, must be carefully

reevaluated in light of that Court's lack of specificity respecting the meaning of "rewinding the constitutional clock."

[98] For the reasons which I have outlined above, I find that it would not be appropriate to consider the **Potvin** decision and calculate the total delay in a cumulative manner, without considering the impact of the new framework in a contextual and flexible manner and reevaluating the concept of "rewinding the constitutional clock" in the context of the **Jordan** framework.

[99] It is also worth noting that the **Jordan** case involved a trial which was before the courts from December, 2008, when he was arrested on drug charges, until he was convicted in February 2013 on five drug-related charges. He had brought an application for stay of proceedings, alleging a breach of his Section 11(b) **Charter** rights at the start of the trial in September, 2012. The total delay from the time of Mr. Jordan's charges to the conclusion of this trial was 49 ½ months. Those facts and circumstances are a far cry from the situation before me.

[100] The applicants' "original" trial was conducted well within the "presumptive ceiling" and this retrial was set within four months which demonstrates the priority that it has been given, especially when compared to the fact that the "original" trial was set eleven months down the road. This also demonstrates the significant steps

that the court has taken to address issues of backlog in the Dartmouth Provincial Court which remains one of the busiest courts in the province.

[101] In my opinion, this is not one of those rare and clear cases where a stay of proceedings should be granted where the total net delay falls below the presumptive ceiling [**Jordan**, supra, at paras. 83 and 105].

[102] While I have found that Defence Counsel worked with the Crown Attorney to prepare an agreed statement of facts which narrowed the factual issues, the reality was then, and remains today, that there was no narrowing of the legal issues. In addition, while the applicants were cooperative with and responsive to the Crown and the Court, there was no issue of unreasonable delay during the "original" trial. In fact, the notice of the Section 11(b) **Charter** application that the applicants was only after the Crown's successful appeal of the original trial decision, during the pre-trial conference just over two months before the scheduled date for the retrial in Provincial Court.

[103] There is no doubt that Section 11(b) of the **Charter** provides an important right for a person "charged with an offence" to be tried within a reasonable time. However, in creating the new **Jordan** analytical framework for these applications, the SCC has determined that trial judges must interpret that right in a contextual

and flexible manner in order to ensure that the public, and victims of crime, remain confident in the administration of justice. This “public interest component” must not be downplayed when the trial court applies a contextual and flexible interpretation of the **Jordan** analytical framework.

[104] In this case, I have found that there was no unreasonable delay during the “original” trial of the applicants and that the applicants’ Section 11(b) **Charter** rights have not been breached by the successful Crown appeal of that “original” trial decision. In addition, I have found that there was no unreasonable delay once the charge before the court was “revived” by the appeal decision and the matter was remitted back to the Provincial Court for retrial. In my opinion, the **Jordan** analytical framework with its “presumptive ceilings” required a contextual and flexible reevaluation of the concept of “rewinding the constitutional clock” as expressed by the SCC in **Potvin**.

[105] Furthermore, I have found that the **Jordan** decision was silent on the impact of an appeal and subsequent retrial on the issue of how to calculate the total net delay and, obviously, there were no comments on how or how much to “rewind the constitutional clock.” In my opinion, a retrial should be given priority and a retrial should be conducted as expeditiously as is reasonably possible or, in the alternative, if there is a “presumptive ceiling” for a retrial, the constitutional clock

should be rewound to zero in order to allow the full amount of time to conduct the case. In that way, the public can remain confident in the administration of justice by ensuring that a successful appeal or the issuance of a prerogative writ was not rendered futile and nugatory, because the "original" trial either used most of the time or even exceeded the time allotted for a trial under the "presumptive ceiling."

[106] For all of the reasons which I have outlined above, I conclude that the applicants' Section 11(b) **Charter** rights have not been breached in this case. Therefore, their application for a stay of proceedings, is hereby dismissed.

Theodore Tax, JPC