PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Testroete*, 2017 NSPC 50

Date: 2017-08-17
Docket: 2868050, 2868051 & 2868052
Registry: Kentville

Between:

Her Majesty the Queen

v.

Thomas Lee Testroete

Decision on Section 11(b) Charter Unreasonable Delay Application

Judge:	The Honourable Judge Theodore Tax,
Heard:	May 17th, 2017, in Kentville, Nova Scotia
Decision	August 17th, 2017
Charge:	266, 264.1(1)(a) and 423.1(1)(b) of the Criminal Code
Counsel:	James Fyfe, for the Nova Scotia Public Prosecution Thomas Singleton, Defence Counsel for Thomas Testroete

By the Court:

INTRODUCTION:

[1] Mr. Testroete was charged with three offences in an Information sworn on May 28, 2015, which included an assault of Erika MacLeod on or about August 24, 2014 contrary to section 266 of the **Criminal Code**, uttering threats to cause death or bodily harm to Ms. MacLeod between May 1st, 2014 and August 24, 2014 contrary to section 264.1(1)(a) of the **Criminal Code** and finally, between those same dates, intimidation of a justice system participant by wrongfully and without lawful authority, using violence or threats of violence to Ms. Erica MacLeod for the purpose of compelling her to abstain from doing anything that she had the lawful right to do, contrary to section 423.1(1)(b) of the **Criminal Code**. All of the offences were alleged to have occurred at or near Canning, Nova Scotia.

[2] After a brief first appearance in the Kentville Provincial Court on June 8, 2015, at his next appearance on June 24, 2015, the Crown indicated that they were proceeding by indictment and Mr. Testroete elected to have his trial in the Provincial Court and entered a not guilty plea to all three charges. At the request of both counsel, a half-day trial was set for November 26, 2015.

[3] The trial commenced on November 26, 2015, but several trial continuation dates had to be scheduled in order to complete the evidence in this matter. Some of those dates were not able to be utilized for the hearing of evidence due to an impending blizzard and safety concerns for the participants in the trial, the illness of a witness as well as the absence of a witness. In addition, in some cases earlier dates for the trial continuation were offered by the Court, but were not utilized due to the unavailability of either the Crown Attorney, Defence Counsel or one of the witnesses in the trial.

[4] The trial evidence concluded with the direct examination and cross examination of Mr. Testroete on April 4, 2017. The Court had also scheduled a half-day day on April 5, 2017 to ensure that the trial evidence was completed on that date. However, the April 5, 2017 date was released when the trial evidence was concluded on April 4, 2017.

[5] Prior to scheduling dates for submitting written briefs on the substantive trial issues, Defence Counsel advised the Court, as he had earlier mentioned, that he would be making a section 11(b) **Charter** application that his client's right to be tried within a reasonable time had been infringed. Defence Counsel filed his formal notice of the section 11(b) **Charter** application on April 5, 2017, based upon the guidelines laid out in **R. v. Jordan,** 2016 SCC 27**.** The remedy sought pursuant to section 24(1) of the **Charter** is a stay of proceedings.

[6] Based upon Defence Counsel's oral notification of the **Charter** application and the fact that transcripts had been obtained for the days during which evidence was heard, Defence Counsel requested that the **Charter** issue be determined before making any submissions on the substantive trial issues. Since the Court had already scheduled May 17, 2017 as the anticipated end of the trial for the closing submissions, at the request of Defence Counsel, that date was repurposed for the oral submissions of counsel on the section 11(b) **Charter** application. In addition, dates were set for the filing of written **Charter** briefs.

[7] Defence Counsel filed his **Charter** brief for the Applicant on May 1, 2017. The Crown Attorney filed his **Charter** brief on May 14, 2017. The Court heard the oral submissions of the Crown Attorney on May 17, 2017, but due to Defence Counsel being seriously "under the weather" and having laryngitis, he requested the opportunity to make further written submissions in response to the Crown Attorney's position and the questions raised by the Court for both counsel. The further written submissions of Applicant were forwarded to the Court on May 26, 2017. The further reply by the Crown was filed on June 4, 2017.

[8] The Court had advised the parties that the decision on the **Charter** section 11(b) application would be delivered on June 27, 2017, unless the parties were notified that the Court required some additional time to consider the issues. However, with the release of the Supreme Court of Canada (hereafter "SCC") decision in **R. v. Cody**, 2017 SCC 31 (Canlii) on June 1, 2017, the Court contacted counsel and advised that it wanted to determine the impact, if any, of that decision on the **Jordan** decision. As a result, the Court advised the parties that additional time would be required for this **Charter** decision and confirmed that the **Charter** decision would be made on August 17, 2017.

[9] The issue on this application is whether the Applicant's right to a trial within a reasonable time has been denied or infringed. The Applicant relies upon the Supreme Court of Canada (the "SCC") decision in **R. v. Jordan**, 2016 SCC 27.

FACTUAL BACKGROUND:

[10] Mr. Thomas Testroete was arrested on April 13, 2015 and released the same day on an Undertaking and Promise to Appear at the Provincial Court in Kentville, Nova Scotia on June 8, 2015. The three charges against Mr. Testroete were laid in an Information which was sworn before a justice of the peace at the Kentville Provincial Court on May 28, 2015.

[11] On June 8, 2015 Mr. Testroete made his first appearance on these matters via his counsel at Kentville Provincial Court. During this appearance, the Crown elected to proceed by indictment on all three charges before the court. The Court adjourned Mr. Testroete's election and plea to June 24, 2015 for the Crown to provide further disclosure to the Defence.

[12] During his second appearance in court, on June 24, 2015, Mr. Testroete elected to have his trial in the Provincial Court and the half-day trial was set for November 26, 2015. Defence Counsel indicated that he had discussed the length of the trial with the Crown Attorney and advised the court that "we're looking at about a half day for the trial." Counsel had already canvassed some dates with the clerk and November 26, 2015 was confirmed as the trial date. The record did not indicate whether earlier dates had been offered or whether one of the parties was not available for the trial.

[13] Prior to the trial commencing on November 26, 2015, it became apparent to the Court that the judges who regularly sat in Kentville, would have a potential conflict of interest as Defence Counsel was planning to call two lawyers, who regularly appear in the Kentville Provincial Court, as witnesses in the trial. For that reason, a request was made to have one of the other judges of the Provincial Court scheduled to hear this trial.

[14] The trial commenced on November 26, 2015, however, prior to commencing the direct examination of Ms. MacLeod, who was the first witness called by the Crown, the parties advised the Court that the half-day, which had been scheduled, would not provide enough time to complete the trial. Therefore, before the first witness was called to testify, two potential Defence witnesses were excused and Defence Counsel asked the Court to schedule another half day for trial. The Court scheduled a further half-day of trial time for the Defence evidence, with the expectation that the Crown's case would conclude that afternoon [transcript of November 26, 2015 at pages 6-7].

[15] In determining a trial continuation date on November 26, 2015, the Court had canvassed whether December 10, 2015 or December 30, 2015 would be an available date for the parties for the trial continuation. Defence Counsel stated that, looking at his schedule, his earliest availability was January 20 or January 21, 2016, with other availability on February 3, 4, 9 and 10, 2016 [transcript of November 26, 2015 at page 8].

[16] In addition, the Court noted that securing a future date would have to be coordinated with the Court's schedule and the schedule of the local judges in Kentville, who already had their own trials and trial continuations scheduled well into the future. Therefore, one of the additional issues to be addressed would be the availability of a vacant courtroom in Kentville or some other location [transcript of November 26, 2015 at page 11]. Ultimately, the parties were available on February 9, 2016 and there was a vacant courtroom that could be assigned for the trial continuation.

[17] During the afternoon of November 26, 2015, the Crown Attorney substantially completed his direct examination of Ms. MacLeod. Given the earlier discussions with respect to the trial continuation date, the Court adjourned completion of the Ms. MacLeod's evidence to February 9, 2016

[18] On February 8, 2016, the Court scheduled a conference call with the Crown Attorney and Defence Counsel. During that conference call, the Court raised the issue of whether it was prudent to keep the trial continuation date scheduled for the next day, given the weather conditions and the forecast of an expected blizzard on February 9, 2016. Since most of the participants in the trial would have to travel to Kentville from Halifax, there was a concern for their safety in travel. As a result, the parties agreed that the trial would not continue on February 9, 2016, but instead, would continue on April 19, 2016. [Transcript of April 19, 2016 at page 5].

[19] At the outset of the proceedings on April 19, 2016, before calling Ms. MacLeod back to the witness stand, the parties advised the Court that an additional future date should be set for the trial, because it was unlikely that the evidence would be concluded that day. Defence Counsel stated that he had the "fairly lengthy cross examination of Ms. MacLeod and there was to be another Crown witness. Once again, the two lawyers who were anticipated to be called by the Defence were excused from waiting outside the courtroom, given the order

excluding witnesses, but instead, they were asked to be on call to attend court from their nearby law office.

[20] As a result, the clerk of the court offered May 30, 2016 for trial continuation in Kentville, but Defence Counsel said that he was not available due to other matters being scheduled in Halifax. [transcript of April 19, 2016 at page 7]

[21] The court clerk indicated that the next available dates when there was a courtroom available would be in September, 2016. The Court offered September 7 or 8, 2016, but the clerk advised there was no courtroom available. Next, the Court offered September 27, 2016 which was an acceptable date for trial continuation for the Crown Attorney, Defence Counsel and the two lawyers also indicated that they would be available on that date. However, a few moments later, Defence Counsel indicated that Mr. Testroete's mother who had been attending court with him on each date, had advised him that she could not attend court on September 27, 2016. Defence Counsel pointed out that she was not a witness in the trial and while the Court noted that "it's not ideal" to essentially release a date because the accused's mother was not available, the September 27, 2016 date was not confirmed for the trial continuation. [transcript of April 19, 2016 at pp.7-10]

[22] Immediately thereafter, the Court offered either October 5 and October 6, 2016 for the trial continuation, but Defence Counsel and one of witnesses said that he was not available on October 5, 2016 and the clerk confirmed that there was no courtroom available on that date. Everyone confirmed their availability for October 6, 2016 and that day was confirmed for the trial continuation. [Transcript of April 19, 2016 at pp. 10-12]

[23] On April 19, 2016, the full day of the trial time continuation was essentially utilized by Defence Counsel for his cross examination of Ms. MacLeod. Defence Counsel indicated, around 4:00 P.M. that day, that he was about to move into a new area of cross examination of Ms. MacLeod and he estimated that it would take about two hours to complete his cross examination of her. [Transcript of April 19, 2016 at p.162]

[24] In addition, on April 19, 2016, although a trial continuation date had already been scheduled for October 6, 2016, it became evident towards the end of the afternoon that the next day would largely be taken by further cross examination of Ms. MacLeod and the other Crown witness. Since there had already been an indication by Defence Counsel that there would be Defence evidence, the Court raised the issue of scheduling a further trial continuation date. As a result, an

additional trial continuation date was canvassed by the clerk with the parties and there was a courtroom available on October 13, 2016, so that further full day was confirmed for the trial continuation. [Transcript of April 19, 2016 at pp. 145-149]

[25] On October 6, 2016, Defence Counsel completed his cross examination of Miss Erika MacLeod. However, at the outset of the proceedings that day, the Crown Attorney had advised the Court that his second witness, Ms. Dawn Mason, who is Ms. MacLeod's mother, was ill and not able to attend court that day. Defence Counsel advised the Court that the two lawyer witnesses were present to testify, but could not be called by the Defence as the Crown had not yet completed all of its evidence. The trial was adjourned until October 13, 2016.

[26] In addition, on October 6, 2016, Defence Counsel advised the Court that it was likely that Mr. Testroete would be called as a witness and, in that case, it was probable that an extra half day for his evidence would be required beyond the previously scheduled full day for trial on October 13, 2016.

[27] The Court advised counsel that, as a result of recent request to adjourn a three-week trial in Dartmouth, the Court would probably have several dates available in November, which could be utilized for trial continuation. Since the request for the adjournment in the other matter was to be formally dealt with on October 7, 2016, the Court suggested that additional trial time could be secured with some certainty on October 13, 2016. The Court also advised counsel that if additional dates were not secured in November, the Court's next availability for trial continuation would be in January or February, 2017. [Transcript of October 6, 2016 at pp. 6-9]

[28] After the proceedings concluded on October 6, 2016, Defence Counsel identified a legal issue that needed to be addressed. In a letter dated October 11, 2016, Defence Counsel advised the Court about a recently discovered issue of possible non-disclosure, which arose towards the end of Ms. MacLeod's testimony on October 6, 2016. She had described a telephone conversation, which she initially thought to have been with a police officer, but later clarified that it was with a Crown Attorney. Defence Counsel believed that their conversation formed the basis for laying the intimidation charge against Mr. Testroete. After the trial was adjourned on October 6, 2016, the Crown Attorney advised Defence Counsel that Ms. MacLeod had phoned him, and not a police officer, about recanting her earlier statement to the police.

[29] In Defence Counsel's letter, dated October 11, 2016, he stated that, if he had been aware that the Crown Attorney had spoken with Ms. MacLeod in regard to her recanting her statement before the commencement of the trial, he probably would have called the Crown Attorney as a witness in this trial. In those circumstances, Defence Counsel indicated that he would be raising an objection to the Crown Attorney continuing in that role and that he intended to call the Crown Attorney as a witness in this proceeding. Defence Counsel advised the Court that he was also seeking additional disclosure and that he reserved his right to make an application to stay proceedings, until he received that disclosure.

[30] The Crown Attorney replied in a letter to the Court, dated October 12, 2016, that if Defence Counsel intended to call him as a witness in these proceedings, he would no longer be able to act as the Crown Attorney. However, the Crown Attorney added that, given the fact the trial continuation was scheduled for the next day, there was simply no time to retain another lawyer to act as the Crown Attorney and get that person "up to speed on what is becoming a fairly complicated matter." As a result, the Crown Attorney indicated that it did not make sense for him to call Ms. MacLeod's mother to testify on October 13, 2016 and he suggested holding a conference call to discuss the "logistics" of the case. Since the Court had mentioned the possibility of trial dates opening up in November, 2016, he concluded his letter by stating that he hoped "that the matter can continue expeditiously at that time."

[31] On October 13, 2016, the complainant's mother, Ms. Dawn Mason was present in the court to testify for the Crown. However, at the outset of the proceedings, the Court acknowledged receipt of Defence Counsel's letter as well as the Crown Attorney's reply and indicated there was simply not enough time to arrange a conference call once the Court received his letter. In addition, the Court asked the lawyers whether there were alternatives to the Crown Attorney becoming a witness in this matter and being unable to continue as the Crown Attorney. The Court questioned whether the parties could reach an agreed statement of facts which would allow the trial to continue with the present Crown Attorney.

[32] Defence Counsel advised the Court that his cross examination of Ms. MacLeod would have been "quite different" if he had been advised that the Crown Attorney had a conversation with her before earlier charges were dropped as a result of her signing a statutory declaration in the presence of two lawyers. The Crown Attorney confirmed that, based upon Ms. MacLeod's statutory declaration,

the “original charges” against Mr. Testroete were withdrawn by him on the accused’s first appearance date.

[33] During the balance of the hearing on October 13, 2016, the Court discussed the options for moving forward with the parties, which included the discussion of a possible agreed statement of facts, a possible motion for a mistrial based on nondisclosure, when the Crown Attorney could provide additional disclosure, whether a subpoena would be issued to the Crown Attorney for him to be a witness in the trial, whether the Crown would challenge the issuance of the subpoena, how long it would take to have another Crown Attorney assume conduct of the trial and the possibility that all of the issues raised by Defence Counsel could be clarified by simply recalling Ms. MacLeod.

[34] Since Defence Counsel had mentioned the **Jordan** decision and the fact that it had been 18 months since Mr. Testroete had been arrested, the Crown Attorney requested an early date for trial continuation. The Crown Attorney also undertook to give Defence Counsel additional disclosure and to decide whether he should voluntarily recuse himself as the Crown Attorney. The Court indicated that it was “highly likely” that trial continuation dates would be available in November, 2016, and suggested holding a conference call to assess the status of the issues, which had been raised on October 13, 2016 in court and in the correspondence of counsel. The conference call regarding the status of all issues previously raised and the scheduling of further trial dates was held on November 1, 2016 at 1:00 P.M.

[35] On November 1, 2016, the Court met with the Crown Attorney and Defence Counsel by a videoconference, on the record. The Court advised the counsel that several possible trial continuation dates had opened up in November and December, 2016, but whether they could be utilized depended on the parties being available and whether the issues raised by Defence Counsel on October 13, 2016 had been resolved.

[36] In terms of the series of dates discussed as possible trial continuation dates, Defence Counsel indicated that the only possibility was December 8, 2016 otherwise he had commitments on every other one of the possible dates in the HRM. Unfortunately, the Court also noted that with the recent appointment of Judge Gabriel to the Nova Scotia Supreme Court and the illness of another judge, meant that the availability of several judges of the Provincial Court had recently changed to ensure coverage of the previously scheduled matters in Judge Gabriel’s

court. Therefore, the Court would not be available to continue this trial on December 8, 2016, due to other previously scheduled court commitments.

[37] During the November 1, 2016 videoconference, the clerk in the Kentville Provincial Court also indicated that a courtroom was available there, for trial continuation on January 16, 17, 23 and 26, 2017. However, Defence Counsel advised that the only one of those dates available for him was January 16, 2017, but the clerk in Dartmouth Provincial Court confirmed that the Court was already seized with a different trial matter on that date. The clerk in Kentville Provincial Court then offered January 30 and 31, February 1 to 3, February 6 and 7 as well as February 9 and 10, 2017. The Crown Attorney stated that he was available or would arrange to make himself available on any one of those dates. Defence Counsel advised that he was not available on January 30 or 31, but would be available on February 3 and 6, 2017. The Court scheduled those two full days for trial continuation.

[38] In addition, during the November 1, 2016 video conference, the Crown Attorney advised the Court that he had forwarded the follow-up disclosure from the "previous file" and that there was nothing new in it, except that there was a brief reference to a conversation that he had with Ms. MacLeod after the statutory declaration in relation to the "original charges" had been prepared. Once again, the Court raised the possibility that the "most effective, efficient option" was to simply recall Ms. MacLeod for further cross examination instead of seeking to make the Crown Attorney a witness with respect to his conversation with Ms. MacLeod. Defence Counsel wished to keep his options open at that time, because he had not yet had the opportunity to review the additional disclosure provided by the Crown Attorney.

[39] At the outset of the proceedings on February 3, 2017, the Crown Attorney and Defence Counsel advised the Court that they would be filing Agreed Facts, which were signed by both counsel to address the issues of additional disclosure and the Crown Attorney continuing as the prosecutor in this case. The Court was advised that the Agreed Facts [Exhibit 5] clarified the Crown Attorney's role and actions taken by him leading up to and including the withdrawal of the "original charges" at Mr. Testroete's first appearance in court on August 11, 2014.

[40] Following the filing of the Agreed Facts, the court questioned whether there was a plan to recall Ms. MacLeod based upon the discussion during the November 1, 2016 videoconference. The Crown Attorney stated [transcript of February 3,

2017 at p. 8]that there was a “little bit of a misunderstanding” between himself and Defence Counsel. The Crown Attorney had believed that the Agreed Facts would clarify all of the issues and there would be no need to recall Ms. MacLeod. The Crown would simply continue with Ms. Mason and the Crown Attorney stated that he had forwarded an email to Defence Counsel to that effect. However, Defence Counsel expected that Ms. MacLeod would be recalled as he wished to ask some additional questions in cross examination. Since Ms. MacLeod had not been asked to come back to court on February 3, 2017, the Crown Attorney said that he would contact her to attend court on the other previously scheduled continuation date of Monday, February 6, 2017. The Crown Attorney added that he did not know if Ms. MacLeod would be available to attend court on February 6, 2017, as he had not contacted her in the interim, because he did not expect her to be recalled.

[41] Defence Counsel confirmed that he had a number of questions to ask Ms. MacLeod, but indicated that after Ms. Mason’s testimony was completed, “in the interests of keeping this case moving as expeditiously as we can,” he was prepared to start the Defence’s case by calling one of the two lawyers who was present in court. The other lawyer had planned to be out of the country on February 3, 2017, but had said that he would be available to testify on February 6, 2017. It was anticipated that his evidence would be completed on February 6, 2017.

[42] Following those preliminary discussions on February 3, 2016, the Crown Attorney called Ms. Dawn Mason, who is Ms. Erika MacLeod’s mother as its second witness. Ms. Mason’s evidence was concluded that day.

[43] After Ms. Mason was excused and before Mr. Sampson was called as a witness, Defence Counsel indicated that he may be an hour or so in his questions of the other lawyer, Mr. Conway, and then he planned to call Mr. Testroete. Since his direct examination would be extensive and there would likely be a significant number of questions on cross examination, Defence Counsel suggested that it would be necessary to schedule another day. In addition, the Court noted that, given the number of days in court and the number of issues addressed, it would probably be helpful for counsel to prepare written briefs for their closing submissions. As a result, the Court suggested that it schedule an additional couple of days for the completion of evidence, allow some time for the preparation of written briefs and schedule a short amount of time on a third day for oral submissions. [Transcript of February 3, 2017 at pages 97-100]

[44] During the afternoon of February 3, 2017, Mr. Sampson's evidence relating to his interaction with Ms. MacLeod at the law firm, was completed.

[45] Prior to adjourning for the day, the Court confirmed that, on February 6, 2017, Ms. MacLeod would be recalled and Defence Counsel would have the opportunity to conduct further cross examination with respect to anything that may have arisen as a result of the additional disclosure and the Agreed Facts. Then, Mr. Conway would be called and it was fully expected that his evidence would be concluded on February 6, 2017.

[46] After that, the Court offered the parties trial continuation dates on April 3 to 5, 2017 and Defence Counsel and the Crown Attorney were both available on April 4, 2017. Defence Counsel had a matter in the morning in Halifax on April 5, 2017, however, he advised the Court that he could attend to complete the evidence during the afternoon of April 5, 2017. As a result, that additional half-day was also secured to complete the trial evidence.

[47] Therefore, the Court moved on to secure a date for closing submissions. The Court offered May 3-5, 2017, which was about 4 weeks after the evidence would have been completed, however, Defence Counsel said he was not available because he would be out of the country on vacation until May 11, 2017. It appeared that the Court and the lawyers would be available on May 17, 2017, however, there was no courtroom available in Kentville at that time. The Crown Attorney questioned whether the court would be available in Windsor, Nova Scotia on that date and the clerk advised that a courtroom was available. However, Defence Counsel stated that Mr. Testroete had a graduation from college on that date, so it would not be acceptable to the Defence.

[48] The Court then offered hearing dates of June 5-7, 2017, but the only day that a courtroom was available was on June 5th in Windsor, however, Defence Counsel indicated he had a previous trial scheduled on that day and was not available. After the clerk offered June 15, 2017 as a possible date for closing submissions, Defence Counsel advised the Court that, back in October, 2016, the trial had already "hit the 18 month time" and he added that he could say with "almost certainty" that the Court would also have to rule on a stay application. [Transcript of February 3, 2017 at page 143]

[49] The Court stated that Defence Counsel would have to obtain transcripts of all of the previous court proceedings, including the videoconference of November 1, 2016 which was done on the record. Defence Counsel advised the Court that he

had obtained transcripts of all previous day's evidence and therefore, the transcripts of other appearances might not take very long to obtain. However, the Court advised Defence Counsel that since dates had been set for the conclusion of the evidence and it was unlikely that the **Charter** application would be ready before those dates, the previously scheduled dates would be utilized for the completion of the trial evidence, but the submissions on the trial proper would be held in abeyance, pending the **Charter** decision. [Transcript of February 3, 2017 at pages 146-148]

[50] Following the discussion of the proposed **Charter** application, Defence Counsel consulted with Mr. Testroete and then confirmed his availability for the morning of May 17, 2017 in Windsor, Nova Scotia. It was also confirmed that May 17, 2017 would be utilized the oral submissions on the **Charter** application.

[51] On the February 6, 2017 trial continuation date, the Crown Attorney advised that he had spoken with Ms. MacLeod after the February 3, 2017 hearing and he expected her to be in court that day. However, she had not arrived in Kentville on February 5, 2017 as they had discussed and she had not called to explain why she could not be in court. On this date, Defense Counsel agreed to call his second witness, Mr. Conway, who was the previous lawyer for Mr. Testroete, before the Crown closed its case. Mr. Conway had been the lawyer primarily involved in meetings with Ms. MacLeod and the preparation of her statutory declaration, which he forwarded to the Crown Attorney in July, 2014.

[52] Although a full day of trial time had been scheduled for February 6, 2017 for the completion of Ms. MacLeod's testimony and Defence evidence, the evidence of Mr. Conway was completed around 12 noon. Defence Counsel advised the Court that he would not call Mr. Testroete as a witness until the balance of the Crown's evidence had been presented. The Crown Attorney submitted that the Defence should proceed with Mr. Testroete's direct examination to fully utilize the scheduled trial time. While the Court did not want to lose a half day of trial time, the Court concluded that the accused was entitled to make a full answer and defence after hearing all the Crown's evidence. Given the absence of Ms. MacLeod, the trial was adjourned to the previously scheduled continuation date of April 4, 2017.

[53] On April 4, 2017, Ms. MacLeod attended court and Defence Counsel completed his brief cross examination in relation to the further disclosure provided by the Crown Attorney and the Agreed Facts [Exhibit 5]. Following her testimony,

Defence Counsel called his final witness, Mr. Testroete. The direct examination and cross examination of Mr. Testroete was completed by mid-afternoon. The Crown Attorney stated that there would be no rebuttal evidence and at that point, the trial evidence was complete.

[54] Prior to closing court for the day, Defence Counsel confirmed that he would be filing a section 11(b) **Charter** application pursuant to the **Jordan** decision. The notice of **Charter** application was, in fact, delivered on April 5, 2017. The Court discussed whether the previously scheduled date of May 17, 2017 would be a convenient date for the submissions on the **Charter** application. Ultimately, the Court set a status date for the **Charter** application on April 25, 2017 and at that time, it was confirmed that the **Charter** oral submissions would be made on May 17, 2017 in Windsor Provincial Court. In addition, dates were established for the filing of written briefs by Defence Counsel and the Crown Attorney.

[55] On May 17, 2017, the Court heard the oral submissions of the Crown Attorney. However, Defence Counsel advised the Court that he was quite ill and had laryngitis, and would not be able to make his oral submissions that day. In view of that development, the Court provided Defence Counsel with the opportunity to submit a further written brief in response to issues raised by the Court and the submissions made by the Crown Attorney. Defence Counsel's brief was received on May 26, 2017. Since the Crown Attorney was entitled to be able to respond to the submissions of Defence Counsel on May 17, 2017, the Court granted the Crown Attorney an opportunity to provide a brief reply to the further written submissions of Defence Counsel. The Crown's reply was received by the Court on June 4, 2017.

LEGAL FRAMEWORK:

[56] Section 11(b) of the **Charter** reads as follows:

> "Any person charged with an offence has the right…..(b) to be tried within a reasonable time."

[57] Section 24(1) of the **Charter** reads:

> "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

[58] 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 majority of the Court observed that the section 11(b) litigation based upon **R. v. Morin,** [1992] 1 SCR 771 had become "too unpredictable, too confusing and too complex" and had become a burden on already overburdened trial courts [**Jordan**, at para. 38].

[59] The majority of the SCC in **Jordan** put forward this new framework to generate "real change" which they acknowledged 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 - Crown Attorneys, Defence Counsel, the Courts, Parliament and the provincial legislatures - were summarized succinctly in **Jordan** at paragraphs 138-141.

[60] The core concepts for the new framework for section 11(b) **Charter** analysis were described in **Jordan**, supra, at paragraphs 46 to 48. The new framework establishes a "presumptive ceiling" beyond which "delay is presumptively unreasonable," however, the majority of the SCC also acknowledged in **Jordan**, 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." The majority noted that they have simply adopted "a different view of how reasonableness should be assessed."

[61] The new legal framework for a section 11(b) **Charter** analysis was summarized in **Jordan**, *supra*, at para. 105:

- There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry. Defence delay does not count towards the presumptive ceiling.

- **Once the presumptive ceiling is exceeded**, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional

circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the cases complexity, the delay is reasonable.

- **Below the presumptive ceiling,** in clear cases, the Defence may show that the delay is unreasonable. To do so, the Defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.

- **For cases currently in the system,** the framework must be applied flexibly and contextually, with due sensitivity to the parties reliance on the previous state of the law.

[62] 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 was laid to the actual or anticipated end of the trial;

2. Deduct Defence Delay from the Total Delay. The SCC notes that Defence Delay may arise from two subcategories: (a) where the Defence has waived an accused's section 11(b) **Charter** rights - this waiver 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 and that 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; and (b) where the Defence conduct directly results in the delay, which 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** 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** at para. 69]. The SCC notes that there can be two broad categories of "exceptional circumstances": (a) "discrete and exceptional events" such as medical or family emergencies involving someone in the case or exceptional events that may arise at trial or the trial goes longer than reasonably expected, even where the parties have made a good-faith effort to establish realistic time estimates, then, the delay was likely unavoidable and may amount to an exceptional circumstance [**Jordan** at paras 71 to 73] or (b) 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** 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** at para. 76]. In addition, where the onus is on the Defence, it must establish that it took "meaningful and sustained steps to be tried quickly", that it was cooperative with and responsive to the Crown and the Court and put them on notice when delay had become a problem and must conduct all applications reasonably and expeditiously [**Jordan** at paras. 84 to 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" and the application must be granted and a stay must be entered.

[63] During their submissions relating to "exceptional circumstances," neither the Crown Attorney nor Defence Counsel submitted that this was a particularly "complex case" as defined by the SCC in **Jordan** or as clarified in their **Cody** decision.

Transitional Exceptional Circumstances for Cases Already in the System:

[64] The SCC points out in **Jordan**, at para. 94, that there are a variety of reasons for applying the new framework "contextually and flexibly for cases currently in the system." They recognized, at paras. 92-94, that this new framework is a departure from the law that was applied to section 11(b) applications in the past, but they did not want to create such "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 ceilings, applies to cases currently in the criminal justice system, subject to two qualifications:

1. Transitional exceptional circumstances: Reliance on the Previous Law:

[65] 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 "transitional exceptional circumstance" justifying delay over the presumptive ceiling.

[66] As the SCC pointed out in **Jordan** at para. 96, this requires a contextual assessment, sensitive to the way 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. In addition, the SCC noted that the parties' behavior cannot be judged strictly against a standard of which they had no notice.

[67] 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 that the transitional exceptional circumstance exists" [**Jordan** at para. 96].

2. Jurisdictions with Significant Institutional Delay:

[68] A 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 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, with this "transitional exceptional circumstance that change takes time and institutional delay – even if it is significant – will not automatically result in a stay of proceedings." [**Jordan** at para. 97]

3. Stays Entered When Delay Vastly Exceeds the Presumptive Ceiling:

[69] In **Jordan**, at para. 98, the majority of the SCC stated that "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 and stays entered for cases currently in the system, 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." This analysis must 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** at para. 98]

[70] During his submissions, the Crown Attorney did not rely on any of the transitional exceptional circumstances in support of the Crown's position on this section 11(b) **Charter** application.

The Jordan Framework Reiterated in R. v. Cody:

[71] More recently, on June 16, 2017, the SCC released its unanimous decision in **R. v. Cody,** 2017 SCC 31, which dealt with another application under section 11(b) of the **Charter**. In that decision, the SCC reiterated all of its key comments from **Jordan** but did expand on their earlier comments in certain areas.

[72] In **Cody**, supra, at para. 21, the SCC reiterated what had been said in **Jordan** at para. 60, that is, that the first step in the new framework entails "calculating the total delay from the charge to the actual or anticipated end of the trial."

[73] In terms of deducting the Defence delay, the SCC confirmed in **Cody**, supra, at para. 28 that, in broad terms, this deduction of delay is concerned with Defence conduct and is intended to prevent the Defence from benefiting from "its own delay-causing action or inaction" (**Jordan** at para. 113). Therefore, the SCC reiterated, in **Cody** at para. 30 what they had said in **Jordan** at para. 66, that the only deductible Defence delay from the total delay is that delay "which (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate in so much as it is not taken to respond to the charges."

[74] Furthermore, in **Cody**, supra, at para. 30, the SCC reiterated their comments made in **Jordan** (at para. 63) that the most straightforward example is "deliberate and calculated Defence tactics aimed at causing delay, which include frivolous applications and requests." Similarly, where the Court and the Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted (**Jordan** at para. 64). The SCC made it clear that these were some of the possible examples of Defence delay, but this was not an exhaustive list and as they stated in **Jordan** at para. 64, it remains "open to trial judges to find that other defence actions or conduct have caused delay" warranting a deduction.

[75] In addition, in **Cody**, supra, at para. 31, the SCC said that the determination of whether Defence conduct is legitimate is not an "exact science" and is something that "first instance judges are uniquely positioned to gauge" (**Jordan** at para. 65). To determine whether Defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the **Jordan** ceilings, compliance with any notice or filing requirements and the timeliness of Defence applications may be relevant considerations. Irrespective of its merit, a Defence action may be deemed not legitimate in the context of a section 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference towards delay.

[76] The SCC also noted in **Cody**, at para. 33, that inaction may amount to Defence conduct that is not legitimate (**Jordan** at paras. 113 and 121). In addition, illegitimacy may extend to omissions as well as acts [referring to **R. v. Dickson**, 1998 Canlii 805 (SCC) which dealt with the Crown's duty to disclose relevant information and Defence Counsel's obligation to pursue disclosure with due diligence].

[77] As a result, the SCC stated, in **Cody** at para. 33, that the accused persons must bear in mind that a corollary of the section 11(b) right "to be tried within a reasonable time" is the responsibility to avoid causing unreasonable delay. Defence Counsel are therefore expected to "actively advance their clients right to a trial within a reasonable time, collaborate with crown counsel when appropriate and use court time efficiently (**Jordan** at para. 138).

[78] The SCC stressed in **Cody,** at para. 35, that with respect to a court's potential ruling of "illegitimate defence conduct" for the purpose of a section 11(b) application, "illegitimacy in this context does not necessarily amount to professional or ethical misconduct on the part of Defence counsel". Instead, legitimacy takes its meaning from the culture change demanded in **Jordan**. All justice system participants – Defence counsel included – must now accept that many practices which were formally commonplace or merely tolerated are no longer compatible with the right guaranteed by section 11(b) of the **Charter**.

[79] It is clear from the SCC's comments in **Cody**, at paras 36-39, that they expected a proactive approach to real change to address the root causes of delay in the criminal justice system. This is a shared responsibility and requires the trial judge to play an important role in curtailing unnecessary delay and "changing courtroom culture" (**Jordan**, at para. 114). Trial judges should use their case management powers to minimize delay by, for example, denying an adjournment request even if it was made by the Defence if it would result in an "unacceptably long delay."

[80] A further example of a trial judge's screening function would be in a situation where an application was permitted to proceed, but if applications and requests become apparent that they are frivolous, then they should also be summarily dismissed. In **Cody**, the SCC noted that the Defence request for the trial judge to recuse himself was a clear example of a frivolous and illegitimate Defence conduct that directly caused delay. It ought to have been summarily dismissed [**Cody** at paras. 41-42].

[81] With respect to the comments of the SCC in **Cody** regarding "exceptional circumstances" and "discrete events," the Supreme Court of Canada reiterated what they had previously stated in **Jordan** (at paras 68-71 and 94-98).

[82] In relation to "Discrete Events," the SCC stated, in **Cody** at para. 48, that this is where the exceptional circumstances analysis begins. Discrete events, like deductions for Defence delay, result in "quantitative deductions of particular

periods of time." The delay **caused** by discrete exceptional events or circumstances that are reasonably unforeseeable or unavoidable are deducted to the extent they could not reasonably mitigated by the Crown and the justice system (**Jordan** at paras. 73 and 75). An example of a "discrete event," which was appropriately conceded by Mr. Cody, was the delay caused by the appointment of his former counsel to the bench.

[83] In dealing with other specific examples of disputed periods of delay in **Cody**, at para. 51-61, the SCC noted that there was a dispute with respect to defence counsel's refusal to sign a disclosure undertaking, which took several months to resolve. The Supreme Court of Canada noted in **Cody** at para. 52 that, even if this event had been reasonably unforeseeable, it was incumbent upon the Crown to take immediate steps to resolve the dispute. Instead, it took 3 further court appearances and three and half months of accrued delay which the trial judge had attributed to the Crown. The Supreme Court of Canada deferred to the trial judge's finding and the conclusion that the Crown had not met the second prong in establishing an exceptional circumstance, since they did not remedy the delays emanating from those circumstances, once they arose.

[84] In terms of a new McNeil disclosure obligation which arose on the eve of the defence **Charter** application to exclude evidence, the SCC in **Cody**, at para. 54, agreed with the Crown that the emergence of the new disclosure obligation qualified as a discrete event and that they would deduct a portion of the delay that followed. It was reasonably unavoidable and unforeseeable and the Crown acted responsibly in making prompt disclosure, following up as the matter proceeded and seeking the next earliest available dates. While the SCC stated that the Crown may have been able to take additional steps rather than relying on the officer's evidence or tendering it through an agreed statement of facts, the requirement is that of reasonableness, not that the Crown exhaust every conceivable option of addressing the event in question to satisfy the reasonable diligence requirement.

[85] However, the SCC concluded that they would not deduct the entire five months for the event, since it took two months for the Crown and Defence to determine how to proceed, but the court was unable to accommodate them until three months later. Therefore, that portion of delay was a product of systemic limitations in the court system and not of the discrete event (**Cody** at para. 55 and **Jordan** at para. 81). However, one month of delay was caused by defence counsel's unavailability (**Jordan** at para. 64) and not by the preparation time necessary to respond to the charges, and therefore that delay should also be

deducted (**Jordan** at para. 65). It is clear from these comments that the trial judge may exercise discretion to apportion the delay which was caused by discrete events from the total net delay.

[86] Finally, in **Cody** there was a dispute with respect to an error in the Agreed Statement of Facts which essentially resulted in a delay of slightly over 8 months. The SCC stated in **Cody**, at para. 58 that, in principle, an inadvertent oversight may well qualify as a discrete event. “The first prong of the test for exceptional circumstances requires only that event at issue be **reasonably** unforeseeable or **reasonably** unavoidable” [emphasis in original text]. It does not impose a standard of perfection upon the Crown. As the SCC noted in **Jordan**, at para. 73, “trials are not well oiled machines” and mistakes happen. They are “an inevitable reality” of a human criminal justice system and can lead to exceptional and reasonably unavoidable delay that should be deducted for the purpose of section 11(b).

[87] The question then focused on the second prong of the test of exceptional circumstances, that is, whether the Crown took reasonable steps to remediate the error and minimize delay. The Crown “is not required to show that the steps it took were ultimately successful – just that it took reasonable steps in an attempt to avoid the delay” (**Jordan** at para. 70). In **Cody**, the Crown acted promptly after the error was discovered, notified Defence Counsel and the Court and argued that the error was immaterial. The SCC expected that an issue of this nature should have been resolved in short order and if necessary brought to the attention of the trial judge on an application for summary dismissal. Based upon the record, the SCC, was unable to conclude that the exceptional circumstances criteria were met in this case.

[88] In **Cody**, supra, at para. 63 to 66, the SCC provided some further comments to clarify what might be considered to be a “particularly complex case.” They note that case complexity requires a qualitative, not quantitative assessment and that complexity is an exceptional circumstance only where the case as a whole is particularly complex. Complexity cannot be used to deduct specific periods of delay, however, if the net delay still exceeds the presumptive ceiling, the case’s complexity as a whole may be relied upon to justify the time that the case has taken and rebut the presumption that the delay was unreasonable. A particularly complex case is one that because of the nature of the evidence or the nature of the issues requires an inordinate amount of trial or preparation time. This is a determination that falls within the expertise of a trial judge (**Cody** at para. 64 and **Jordan** at paras. 79-80).

[89] Finally, with respect to the "Transitional Exceptional Circumstance" for cases that were already in the system when the **Jordan** decision was released, the SCC reiterated that this exceptional circumstance involves a "qualitative" analysis. In terms of the "reasonable reliance on the law as it previously existed" as mentioned in **Jordan** at para. 96, the SCC stated that the Crown may show that it cannot be faulted for failing to take further steps, because it would have understood the delay to be reasonable given its exceptions prior to **Jordan** and the way delay and other factors such as the seriousness of the offence and prejudice would have been assessed under **Morin** (**Cody** at para. 68).

[90] The SCC stated that "it is presumed" that the Crown and Defence relied on the previous law until **Jordan** was released and that the evaluation must be undertaken contextually with a sensitivity to the manner in which the previous framework was applied – prejudice and seriousness of the offence often played a decisive role in whether delay was unreasonable and that some jurisdictions were plagued with significant and notorious institutional delays (**Cody** at para. 69 and **Jordan** at paras. 96 and 98).

[91] When considering the transitional exceptional circumstance, trial judges should be mindful of what portion of the proceedings took place before or after **Jordan** was released. For aspects of a case that pre-dated **Jordan**, the focus should be on reliance on factors that were relevant under the **Morin** framework. For delay that accrues after **Jordan** was released, the focus should instead be on the extent to which the parties and the courts had sufficient time to adapt (**Cody** at para. 71 and **Jordan** at para. 96).

ANALYSIS

[92] The first step in the **Jordan** framework for a section 11(b) **Charter** analysis is to establish the total delay. In the **Jordan** decision, supra, at paragraph 47, the majority of the SCC stated that "if the total delay from the charge to the actual or anticipated end of the trial (minus Defence delay) *exceeds* the ceiling then the delay is presumptively unreasonable."

[93] The Crown Attorney submits that the comments of the majority in **Jordan**, supra, at para. 47 and again at para. 60, clearly mean that the calculation of total delay starts from the date that information was sworn [May 28, 2015].

[94] Although the majority in **Jordan** clearly stated that the total delay starts "from the charge," it is the position of the Defence that Mr. Testroete was arrested

on April 13, 2015 and restrictions were placed on his liberty pursuant to an Undertaking and obligation to appear in court. Defence Counsel submits that an Information must be filed in court as soon as practicable and in this case, the Information was not sworn before a justice of the peace until May 28, 2015. In those circumstances, Defence Counsel submitts that the swearing of an Information "should not be left to the whims of police officers" as to when they will file an Information in court.

[95] I find that the case of **R. v. Kalanj,** [1989] 1 SCR 1594 stands for the proposition that, for the purposes of section 11(b) of the **Charter**, a person is only charged with an offence when an information is sworn against him or her alleging an offence or where a direct indictment is laid, when no information is sworn. Accordingly, the reckoning of time in considering whether a person has been accorded a trial within a reasonable time must take into consideration the opening words of section 11 of the **Charter** which states: "any person **charged** with an offence has the right… (b) to be tried within a reasonable time."

[96] In many cases, perhaps the majority of cases, the arrest of a person and that person being charged with an offence are either the same day or within a day or two, so, from a constitutional perspective, the difference in time is of minimal concern. However, in this case, Mr. Testroete was arrested on April 13, 2015, but he was not charged with the offences before the court until May 28, 2015. In the context of the **Jordan** decision, that difference of 1 ½ months is significant in terms of when the "constitutional clock" would start for the purposes of a section 11(b) **Charter** application.

[97] Given the fundamental shift in the section 11(b) framework analysis which was adopted by the majority in **Jordan,** I find that the issue of when the "constitutional clock" starts is one of critical importance. Recently, the Ontario Court of Appeal decision of **R. v. Manasseri**, 2016 ONCA 703 dealt with the issue of when the section 11 right starts in the context of appellate delay, but I find that the remarks of Justice Watt are equally applicable in the context of this case. In **Manasseri**, supra, Watt J.A. states at para. 337:

> [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).

[98] More recently, the Nova Scotia Court of Appeal has also confirmed that the delay is calculated from the date that the accused person was charged to the actual or anticipated end of the trial: see **R. v. Mouchayleh**, 2017 NSCA 51 at para. 8.

Calculation of the "Total Delay"

[99] Based upon my review of the relevant authorities and interpretation of the opening words of section 11 of the **Charter**, I find that for the purposes of calculating the total delay involved in this case, the starting point is the day upon which the Information was sworn and Mr. Testroete was formally "charged" with the 3 offenses that are now before the court [May 28, 2015].

[100] As indicated previously in the factual background, with the completion of trial evidence on April 4, 2017, the Court had scheduled May 17, 2017 for the closing submissions on the substantive trial issues. If the section 11(b) **Charter** application had not been filed, I find that May 17, 2017 would have been the end or anticipated end of the trial.

[101] In those circumstances, I find that the "total delay" from the date of the charge [May 28, 2015] to the end or anticipated end of the trial [May 17, 2017] is approximately 23 ½ months.

Deduction of Defence Delay from the Total Delay:

May 28, 2015 to November 26, 2015:

[102] As I indicated previously, the charges were laid on May 28, 2015 and Mr. Testroete made his first appearance in court on June 8, 2015. On that date, Defence Counsel appeared in court on behalf of his client and asked for a short adjournment to obtain further disclosure. On June 24, 2015, Mr. Testroete elected trial in the Provincial Court and both counsel advised the presiding judge that they required a half-day for the trial. The half-day trial was scheduled for November 26, 2015. I find that there was no Defence delay during this 6-month period of time, as the election and plea was entered at a very early opportunity and the half-day trial was scheduled based upon the estimated time for trial of a person who was not in

pretrial custody. There is no indication on the record if any earlier dates were offered to the parties for a half-day trial , since the trial date was established approximately one-year before the **Jordan** decision.

November 26, 2015 to February 9, 2016:

[103] Prior to the commencement of the trial proceedings on November 26, 2015, both counsel advised the Court that the half-day originally scheduled for trial would not provide enough time to complete the trial. This was based upon the anticipated length of the direct and cross examination of Ms. Erika MacLeod and the fact that there would be Defence evidence, including two local lawyers who regularly appeared in front of the presiding judges in the Kentville Provincial Court. At that time, the Court noted that the judges who regularly presided in the Provincial Court in Kentville would have had a conflict and therefore, a trial continuation date would require a date when a vacant courtroom would be available in Kentville which coincided with the Court's availability as well as the availability of counsel and the witnesses.

[104] Taking into account the various parameters for scheduling the additional one half day of trial time requested by counsel, the Court offered December 10, 2015 as a trial continuation date, however, neither the Crown Attorney nor Defence Counsel were available on that date. Next, the Court offered December 30, 2015 and Defence Counsel indicated that he was not available on that date and would not be available until January 20, 2016 at the earliest, with other available dates in early February, 2016. Ultimately, the Court determined that February 9, 2016 was a date upon which the Court, both counsel and witnesses were available, as well as a vacant courtroom in Kentville, Nova Scotia and that date was confirmed as the one-half day required for the trial continuation.

[105] Looking at this period of time, I find that there was no defence delay between November 26 and December 30, 2015, as the Court's availability was limited on short notice, no courtroom was available and on the earlier date offered, neither the Crown Attorney nor Defence Counsel was available. However, Defence Counsel indicated that he was not available on the December 30, 2015 date which was offered and he would not be available until the third week of January, 2016, at the earliest.

[106] In those circumstances, I find that the confirmed unavailability of Defence Counsel on December 30, 2015 trial date which resulted in the Court seeking trial

dates starting in the 3rd week of January, and ultimately securing February 9, 2016 as the trial continuation date. Therefore, I find that the delay in scheduling between December 30, 2015 and February 9, 2016, resulted from the Defence not being available to proceed when the Court and the Crown Attorney were available. For this period of time, I find that this period of delay of approximately five weeks or one and a quarter (1 ¼) months, shall be deducted from the overall or total delay in this matter.

[107] On this date, the Crown Attorney completed the large majority of his direct examination of Ms. MacLeod, but given the time of the day, the Crown Attorney wished to review his notes to determine whether there were additional questions for the witness. The Court noted that it did not make any sense to start the cross examination at that time, but it was anticipated that the direct examination and Ms. MacLeod's cross examination would be completed on February 9, 2015, when the additional half-day was scheduled for the trial continuation.

February 9, 2016 to April 19, 2016:

[108] On February 8, 2016, the Court scheduled a conference call with the Crown Attorney and Defence Counsel to raise the issue of whether it was prudent to keep the trial continuation date scheduled for the next day, given the weather conditions of that day and the forecast of an expected blizzard on the trial continuation date. It was also noted during that conference call that most of the participants in the trial would have to travel from Halifax to Kentville and back to Halifax that day, and as a result, the Court raised the issue of everyone's safety in travel. Following a brief discussion, the parties agreed with the Court's concerns and the February 9, 2016 date was canceled. During the same conference call, the date for the trial continuation, when the Court, the counsel, the witnesses and a vacant courtroom were available, was scheduled for April 19, 2016.

[109] There is no Defence delay during this two and quarter month (2 ¼) period of time, as the issue of adjourning the trial due to the present and impending weather conditions was raised by the Court itself.

April 19, 2016 to October 13, 2016:

[110] Prior to hearing trial evidence on April 19, 2016, the Court confirmed that it "was agreed as a group," during the February 8, 2016 conference call, that the February 9, 2016 trial date continuation had been adjourned due to the weather

conditions and the dangerous driving conditions and that the trial continuation had been rescheduled for April 19, 2016. When the Court asked if there were any "housekeeping issues" to address before evidence was heard on April 19, 2016, the parties advised the Court that an additional day should be scheduled. Defence Counsel advised the Court that he expected that he would have a "fairly lengthy" cross examination of Ms. MacLeod, a second Crown witness was to be called and he planned to call Defence evidence, including the two lawyers, who had previously been in court.

[111] The Court offered May 30, 2016 as an available date, however, Defence Counsel advised the Court that he was not available, due to other matters in Halifax. Next, the Court offered September 27, 2016 which was initially confirmed as an available date by the Crown Attorney, Defence Counsel and the two lawyers who were witnesses. However, very shortly after Defence Counsel confirmed his availability for that date, he also advised the Court that Mr. Testroete's mother, who had been attending court on each appearance with him, was not able to attend on September 27, 2016. While Defence Counsel added that "she is not a witness in the proceedings." While the Defence did not specifically waive any delay which might be occasioned if the court acted on what was their clear preference by raising the point in the first place, the Court did not confirm September 27, 2016 as a trial continuation date.

[112] Next, the Court offered trial continuation dates on October 5 and 6, 2016, but Defence Counsel was not available on October 5, 2016. However, both the Crown and the Defence were available on October 6, 2016, and the Court confirmed October 6, 2016 as an additional full day for the trial continuation.

[113] Prior to concluding the proceedings on April 19, 2016, given the progress of the cross examination of Ms. MacLeod and Defence Counsel's estimate of the time required to complete his cross examination, the Court also scheduled an additional full day for the trial continuation on October 13, 2016.

[114] In terms of the delay between April 19, 2016 and October 13, 2016, Defence Counsel advised the Court that he was not available on the earliest date offered for the trial continuation [May 30, 2016] when the Court and a vacant courtroom were available. In addition, although the Court, the Crown Attorney, Defence Counsel and scheduled witnesses for the trial were available on September 27, 2016 and that date was initially indicated as being "good" for the defence, Defence Counsel advised the Court that the September 27, 2016 trial date was not a date upon which

Mr. Testroete's mother, who had been attending court with her son, would be able to do so. The Court acted on Defence Counsel's statement and did not confirm September 27, 2016 as a trial continuation date. However, the Court then offered October 6, 2016 as a trial continuation date and the Crown Attorney, Defence Counsel and their witnesses confirmed their availability for that date. In addition, the Court also confirmed that a courtroom, both counsel and the witnesses were available and scheduled an additional full day for trial continuation on October 13, 2016.

[115] In assessing the delay during this period which was either explicitly or implicitly waived by the Defence or delay in scheduling which was caused by the Defence not being available, I find that the four-month period of time between May 30, 2016 and September 27, 2016 was delay caused by the Defence not being available and should be deducted from the total delay. In addition, I find that the additional nine days or about quarter (¼) month between September 27, 2016 and October 6, 2016 was an implicit waiver of the Mr. Testroete's right to a trial within a reasonable time, since the only reason the earlier date had not been confirmed was based upon the Defence preference to find an alternate date, due to the fact that Mr. Testroete's mother who was not a witness in the trial, was not available. As I indicated above, Defence Counsel did not specifically waive any delay occasioned, nor was he asked whether he was waiving any delay, if the court acted on what could only be regarded as a clearly stated preference to accept court dates when Mr. Testroete's mother would be available to attend court with her son.

[116] It is worth noting here, parenthetically, that this discussion took place on April 19, 2016, approximately three months before the **Jordan** decision was released by the Supreme Court of Canada. In addition, at this point, Mr. Testroete had been before the Court for approximately eleven months [since May 28, 2015] and at that point, it was clear to everybody that the original scheduling of a half day for the trial, was seriously underestimated by the counsel. Clearly, the **Jordan** decision was designed to generate "real change" and since that decision, Defence Counsel have been routinely asked if they specifically waived any delay as a result of a request made by them on behalf of their clients, but that was not necessarily the case prior to the **Jordan** decision.

[117] Therefore, during the period of time between April 19, 2016 and October 13, 2016, I find that four and a quarter (4 ¼) months should be deducted from the total overall delay as being either delay that was caused by the Defence not being available or for the short delay which I find to have been implicitly waived by the

Defence, when the Court did not confirm the trial continuation date of September 27, 2016, after Defence Counsel advised the Court that Mr. Testroete's mother would not be able to attend the trial with her son on that date.

[118] Defence Counsel conducted his cross examination of Ms. MacLeod on April 19, 2016, but at the end of the proceedings that day, he advised the Court that he still anticipated "a couple of hours" of cross examination and would be moving into a new area.

[119] On October 6, 2016, Defence Counsel completed his cross examination of Ms. MacLeod. Thereafter, there was a short re-examination by the Crown Attorney and a few questions posed by the Court. Following those questions by the Court, the Court provided the Crown Attorney with the opportunity to conduct any further re-examination arising out of the questions posed by the Court and also provided Defence Counsel with the same opportunity to pose any further questions on cross examination which arose out of the questions posed by the Court. Then, Ms. MacLeod was excused as a witness.

[120] In addition, on October 6, 2016, the Crown Attorney had advised the Court that his second and last Crown witness, Ms. Dawn Mason was not in court due to illness. In those circumstances, the Court stated that Defence Counsel would probably want to hear the balance of the Crown's case before calling any Defence evidence. Since the Court had previously scheduled a full day for the trial continuation for October 13, 2016 and since the Crown Attorney was confident that Ms. Mason would be available at that time, the proceedings concluded at 12:40 PM on October 6, 2016.

October 13, 2016 to February 3, 2017:

[121] On October 13, 2016, the complainant's mother, Ms. Mason was present in court to testify as a Crown witness. However, prior to her being called as a witness, Defence Counsel identified a legal issue which had been outlined in a letter to the Court dated October 11, 2016. The legal issue raised by Defence Counsel related to a possible issue of nondisclosure, which arose towards the end of Ms. MacLeod's testimony on October 6, 2016. Defence Counsel regarded this issue as being critical to the basis for the laying of the intimidation charge against Mr. Testroete and also that the disclosure of information might result in a Defence request to subpoena the Crown Attorney as a witness in the trial. The Crown Attorney replied in a letter to the Court dated October 12, 2016 to indicate that there was not enough

time to evaluate the Defence request, nor to arrange for another Crown Attorney to assume conduct of the trial the next day.

[122] Given the serious implications of the legal issues raised by Defence Counsel, the Crown Attorney stated that it did not make any sense for him to conduct the direct examination of Ms. Mason on October 13, 2016. The balance of the proceedings on October 13, 2016 related to the Court discussing the options for moving forward with the parties, which included the possibility of an agreed statement of facts to address the issues raised by the Defence, a possible motion for mistrial based on nondisclosure, whether a subpoena would be issued to the Crown Attorney and if so whether Crown would challenge that subpoena, as well as the possibility of simply recalling Ms. MacLeod for further cross examination on any conversations that she had with the Crown Attorney before the "original charge" was withdrawn by the Crown.

[123] The matter was adjourned to November 1, 2016 when the Crown Attorney and Defence Counsel participated in a conference call with the Court to address the issues raised on October 13, 2016. During the conference call, the Crown Attorney advised the Court that he had forwarded additional disclosure to the Defence, but Defence Counsel advised the Court that he had not yet received that information. Once again, the options for moving forward were discussed including the possibility of filing an agreed statement of facts and/or recalling Ms. MacLeod to be subject to further cross examination.

[124] Given the fact that it appeared that progress had been made with respect to resolving the outstanding disclosure issue and the issue of whether the Crown Attorney would be called as a witness, the Court offered several dates in January, 2017 and early February 2017 for the trial continuation. As it turned out, the Court was not available on January 16, 2017 which was the only date prior to the dates in early February when Defence Counsel was available. The Crown Attorney stated that he would make himself available on any of the dates offered by the Court which were acceptable to the Defence. As a result, the Court confirmed that 2 full days would be scheduled for the trial continuation on February 3 and 6, 2017.

[125] Given the very serious nature and implications for the trial of the issues raised by Defence Counsel in the correspondence and in court on October 13, 2016, I find that the Defence action was legitimately taken to respond to the charges before the Court. Furthermore, since it was apparent to the Court that it would take the Crown Attorney and Defence Counsel some time to address the

outstanding disclosure issues and possibly prepare an agreed statement of facts, as well as the fact that there were limited days when the Court and a vacant courtroom were available before February 3, 2017, I do not consider any of the delay between October 13, 2016 and February 3, 2017 to be a deliberate tactic aimed at causing delay, nor was that period of delay waived, explicitly or implicitly, by the Defence.

February 3, 2017 to February 6, 2017:

[126] On February 3, 2017, the Crown Attorney and Defence Counsel advised the Court that the counsel had drafted an Agreed Statement of Fact which outlined the Crown Attorney's role in the August 11, 2014 withdrawal of "original charges" against Mr. Testroete which had also involved the complainant, Ms. Erika MacLeod. The Agreed Statement of Facts was filed as Exhibit 5 in the trial proceedings. Unfortunately, Ms. MacLeod was not present in court as there was a "misunderstanding" between the counsel on the issue of whether she would be subject to further cross examination - the Crown Attorney believed that the Agreed Statement of Facts had addressed the outstanding disclosure issues and that there would be no need for Ms. MacLeod to testify, whereas Defence Counsel wished to conduct further cross examination which took into account the Agreed Facts. I find that this "misunderstanding" between counsel was simply one of those unforeseen events which can happen in the normal vicissitudes of a trial.

[127] However, Ms. Mason was present and a full day of trial had been set aside for the trial continuation, she was called as a witness and her direct and cross examination were completed on February 3, 2017. While the Defence indicated that they wished to conduct further cross examination of Ms. MacLeod, Defence Counsel also indicated that one of the two lawyers, whom he had subpoenaed as a defence witness, was present. The other lawyer had previously indicated that he would not be available on February 3, 2017 as he would be out of the country on that date. However, he had confirmed that he would be available to testify on the February 6, 2017 trial continuation date. As a result, Mr. Sampson was called as a Defence witness before the Crown closed its case in order to utilize the trial time which had been scheduled by the Court.

[128] I find that there was no defence delay which should be deducted from the total delay for the period between February 3 and February 6, 2017. In fact, as I have indicated, Defence Counsel agreed to call one of his witnesses before the Crown Attorney had formally closed his case.

[129] It should also be noted that on February 3, 2017, it was anticipated that most of the trial continuation date on February 6, 2017 would be taken up by the cross examination of Ms. MacLeod and the evidence of Mr. Conway. Defence Counsel also advised the Court that he anticipated a fairly lengthy direct examination of Mr. Testroete and that he anticipated that the Crown Attorney's cross examination would be of a similar duration. Therefore, even though a full day for the trial continuation had already been established for February 6, 2017, the Court confirmed everyone's availability for Mr. Testroete's evidence to be completed during another full day for trial continuation on April 4, 2017. If additional time was needed to ensure the completion of trial evidence, the Court also scheduled a further half-day of trial time for the afternoon of April 5, 2017. The Court also confirmed that May 17, 2017 in the Windsor Provincial Court would be utilized for the closing submissions of counsel.

[130] It should also be noted that just before court closed for the day on February 3, 2017, Defence Counsel advised the Court that he had previously "raised" the length of the trial having "hit the 18-month time" and that the Court would almost certainly have to rule on a stay application. Since the early April dates had already been confirmed and it was highly unlikely that a section 11(b) **Charter** application could be perfected before April 4, 2017, the Court held, after hearing from both sides, that the evidence would be completed on the next date. In addition, the May 17, 2017 date, which had already been secured as the date for the end of the trial, that is, the closing submissions on the substantive trial issues, would, instead, be utilized for submissions on the **Charter** application.

February 6, 2017 to April 4, 2017:

[131] On February 6, 2017, Ms. MacLeod was expected to be in court for further cross examination arising from the recent disclosure or any issues which had arisen out of the filing of the Agreed Facts on February 3, 2017. However, the Crown Attorney advised the Court that Ms. MacLeod had not arrived in Kentville on February 5, 2017, as arranged by the Crown Attorney to avoid the issue of traveling during any inclement weather the next morning. In addition, the Crown Attorney advised the Court that she had not contacted him regarding her whereabouts and he did know why she was no in court.

[132] In those circumstances, Defence Counsel agreed to call Mr. Conway as the second Defence witness prior to the closing of the Crown's case, but did not wish to call Mr. Testroete until all of the Crown's evidence had been tendered, which

included his opportunity to further cross-examine Ms. MacLeod following the filing of the Agreed Facts [Exhibit 5].

[133] Although a full day for trial continuation on February 6, 2017 had been scheduled on November 1, 2016, the proceedings for the day were adjourned following Mr. Conway's testimony. The Crown Attorney had requested that the full day of scheduled trial time be utilized and that Defence Counsel should commence his direct examination of Mr. Testroete. However, Defence Counsel's position was that they had the right to make full answer and Defence and to hear all of the Crown's evidence before Mr. Testroete was called as a witness. As a result, it is fair to say that only a portion of the full day scheduled for trial continuation was utilized on February 6, 2017. However, based upon Defence Counsel's earlier request for additional trial time to complete his client's testimony, it is also fair to say that, in any event, neither the Court nor the parties had contemplated that the trial evidence would be concluded on February 6, 2017.

[134] Given the fact that the Court provided relatively early dates for the trial continuation, and the parties confirmed their availability on April 4 and April 5, 2017, I find that there was no issue of any Defence waived or Defence caused delay between February 6, 2017 and April 4, 2017.

[135] In the final analysis, on February 6, 2017, due to the absence of Ms. MacLeod, the only witness heard on that day was Mr. Conway. The direct examination and cross examination of Mr. Conway was concluded in the morning and court was then adjourned to April 4, 2017. While the Crown Attorney was of the view that the half-day of trial time should be utilized by the Defence conducting its direct examination of Mr. Testroete, despite the Court's reluctance to lose a half day of trial time which had previously been scheduled, the Court ultimately agreed with the Defence position that Mr. Testroete had the right to hear the entirety of the Crown evidence as part of his right to make full answer and Defence.

April 4, 2017 to May 17, 2017:

[136] On April 4, 2017, Ms. MacLeod attended court and the further cross examination by Defence Counsel as a follow-up to the Agreed Facts was concluded within a few minutes. Ms. MacLeod was then excused as a witness and the Crown Attorney stated that he closed his case.

[137] Immediately thereafter, Mr. Testroete was called to the witness stand and his direct examination and cross examination continued until mid-afternoon. After a short break, Defence Counsel closed his case and the Crown Attorney advised the court that he would not be calling any rebuttal evidence. Following that, the Court noted that the trial evidence transcripts had already been prepared, but it would take some time for the balance of the court appearances to be transcribed. In addition, Defence Counsel would be required to file and serve a formal notice of his section 11(b) **Charter** application and prepare a brief as well as giving the Crown Attorney a reasonable opportunity to prepare his reply to that **Charter** application. The Court scheduled April 25, 2017 at 1:00 P.M. for a conference call to confirm the status of the availability of the transcripts and to set a reasonable timeline for the filing of written briefs, if the May 17, 2017 date in the Windsor Provincial Court was to be retained for submissions on the section 11(b) **Charter** application.

[138] At the end of the proceedings on April 4, 2017, the half-day which had been scheduled for April 5, 2017 was released since all of the evidence in the trial had now been presented to the Court.

[139] Although there had been a discussion of the closing submissions on the substantive trial issues being made in early-May, 2017 and Defence Counsel had indicated those dates were not available because he would be out of the country but, he agreed to filed his **Charter** motion and written briefs well in advance of the May 17, 2017 hearing date. Given the fact that it was highly unlikely that the transcripts and briefs could be filed by Defence Counsel and the Crown Attorney by early May, 2017, I find that the Defence did not waive any delay, nor did they cause any delay, since the section 11(b) **Charter** application was to be heard on the anticipated date for the end of the trial.

[140] On May 17, 2017, the Crown Attorney made his oral submissions on the **Charter** application and also provided his position with respect to issues raised by the Court. However, on that date, Defence Counsel was unable to make oral representations to the Court, due to illness and severe laryngitis. In those circumstances, the Court allowed Defence Counsel the opportunity to file a further written brief in reply to the Crown Attorney's brief and his oral submissions. Since the section 11(b) **Charter** application was a Defence application, the Court also granted the Crown Attorney the opportunity to file a written brief in response to Defence Counsel's supplementary **Charter** brief. The Defence brief was received by the Court on May 26, 2017 and the Crown reply was received on June 4, 2017.

Determination of the Overall Net Delay:

[141] As I previously indicated, I have found that the overall or total delay from the date of the charge [May 28, 2015] to the end or anticipated end of the trial [May 17, 2017] is approximately 23 ½ months.

[142] In the preceding paragraphs, which dealt with the timeline of the trial on the dates prior to plea and then dates upon which evidence was heard or scheduled to be heard, I have analyzed those appearances in accordance with the **Jordan** framework to first determine whether there was any Defence delay which was explicitly or implicitly waived or any overall delay that was caused solely by the conduct of the Defence which included any deliberate and calculated Defence tactics aimed at causing delay or delays in scheduling where the Defence was not ready to proceed or be available, where the Crown and the court were available. However, if the Crown or the Court were not available, in addition to the Defence, then that delay would not be attributable to the Defence [see **Jordan**, supra, at para. 64].

[143] In my analysis of this issue under the previous heading, I have found that there was a Defence delay of one and a quarter (1 ¼) months from December 30, 2015 to February 9, 2016. I have also found that there was a Defence delay of four (4) months from May 30, 2016 to September 27, 2016, since there was a vacant courtroom available and that the Court and the Crown Attorney were available on the May 30, 2016 but, the defence was not available.

[144] I have also found that a quarter (¼) of a month delay was implicitly waived by the Defence between September 27 and October 6, 2016, when the September 27, 2016 date was not utilized due to the fact that Mr. Testroete's mother, who was not a witness in the trial, was not available. I have found that this was an implicit waiver as the issue was raised by the Defence, which the Court interpreted as a clear preference not to utilize the earliest date that had already been accepted by the Defence. The Crown Attorney and Defence Counsel did accept other dates which had been offered on by the Court October 6 and October 13, 2016.

[145] Having carefully analyzing this issue and reviewing the transcripts of each and every one of the days that this matter was in court, I have found, in the preceding paragraphs, that the Defence waived delay or overall delay caused by the Defence, is a total of five and a half (5 ½) months. Therefore, after deducting defence delay, I find that the overall net delay in this trial is 18 months.

[146] While I have determined that the overall net delay in this case is 18 months which also happens to be the "presumptive ceiling" established by the SCC in **Jordan**, I cannot say that the remaining delay is either above or for that matter is below the presumptive ceiling. Of course, if the overall net delay was above the presumptive ceiling, then the onus would be on the Crown to establish that there were exceptional circumstances justifying the delay or if the overall net delay is below the presumptive ceiling, then the onus would shift to the Defence to demonstrate that the delay was nonetheless unreasonable.

[147] In these circumstances, since the Crown Attorney has submitted that this trial has been subject to numerous exceptional circumstances which justified the delay, I am prepared to conduct the analysis going forward on the basis that the total overall net delay was not below the "presumptive ceiling" and therefore the onus or burden would rest on the Crown to justify the delay as having been due to Exceptional Circumstances.

Has the Crown Established Exceptional Circumstances Justifying the Delay?

[148] In **Jordan**, supra at para. 69 to 77, the SCC considered some situations which may be regarded as "exceptional circumstances" because they generally lie outside the Crown's control in the sense that they are (1) reasonably unforeseen or reasonably unavoidable and (2) Crown Counsel cannot reasonably remedy the delays emanating from those circumstances once they arrive. The circumstances which may be considered "exceptional" need not be rare or entirely uncommon for the purpose of adjudicating a section 11(b) **Charter** application. The SCC in **Jordan**, at para. 71 also noted that it would be "impossible" to identify, in advance, the circumstances that may qualify as "exceptional" and that ultimately the determination of whether the circumstances were "exceptional" would depend on the trial judge's good sense and experience since the list is "not closed."

[149] In my view, the progress of this trial has been affected by almost every one of the non-exhaustive list of "exceptional circumstances" which were contemplated by the SCC in the **Jordan** decision. Given the length of this decision, I do not intend to go into extensive detail with respect to each and every one of the several circumstances which I find to be "discrete, exceptional events" which impacted, in a very significant way, the timely progress of this trial.

[150] With respect to those circumstances which arose during this trial which I regard as "discrete, exceptional events," I find that the following circumstances are

completely illustrative of the “exceptional circumstances” which have occurred during this trial:

(a) There can be no doubt, whatsoever, that this trial has gone significantly longer than reasonably expected, even where the parties have made a good-faith effort to establish realistic time estimates [para. 73 **Jordan**]. These charges were originally scheduled for a one-half (1/2) day trial and when little progress was made during that first half day, there was a request for an additional half day for the trial continuation. After that, counsel requested five more full days for trial continuation and those days were scheduled by the Court in a proactive manner.

As a result, once the initial time estimate for trial was determined to be totally insufficient, several trial dates were scheduled with a relatively short delay between those dates. In the final analysis, evidence was called on six days, with the cross examination of the complainant essentially taking one and half days of those six days. A seventh day was actually scheduled for trial evidence [October 13, 2016] but that date was not utilized to hear any trial evidence, but rather, for discussion of a Defence motion for additional disclosure and the possibility that the Crown Attorney would be subpoenaed to be a witness in the trial. An eighth half-day was also scheduled to complete the trial evidence on April 5, 2017, but did not have to be used when the trial evidence was concluded on April 4, 2017;

(b) The SCC in **Jordan** also noted that “discrete, exceptional events,” which may include medical or family emergencies or absences of the accused, important witnesses, counsel or the trial judge, were also highlighted by the Court as another illustration of exceptional circumstances” [see **Jordan** at para. 72]. In this case, although the Crown’s second witness, Ms. Dawn Mason, the complainant’s mother had been present in court on November 26, 2015 and again on April 19, 2016, she was not called to testify on those days, due to the length of the direct examination and cross examination of her daughter, Ms. Erika MacLeod. When the cross examination of Ms. MacLeod was completed on October 6, 2016, the Court was advised that Ms. Mason was ill and unable to attend court on that date and therefore, only a portion of that full day of trial time was able to be utilized. Obviously the trial continuation date of October 13, 2016, which had been

proactively scheduled on April 19, 2016, would be available for her testimony and the start of the defence evidence.

On October 13, 2016, Ms. Mason was in court and ready to testify on the next scheduled trial continuation date. However, given the recent Defence disclosure request, the uncertainty of whether the Crown Attorney would have to recuse himself if he was to become a witness and the short amount of time between scheduled trial dates to react to the issues raised by Defence Counsel, it was determined that the appropriate action to take on October 13, 2016 was to address the issues raised by the Defence prior to continuing with the trial evidence. The illness of Ms. Mason on October 6, 2016 had an obvious effect of delaying the progress of the trial, which in reality, only became problematic as a result of the significant underestimation of the trial time required for trial, as she was available on all other trial dates.

In addition, there is no doubt that the Crown's last witness, Ms. Mason, was available and in court on October 13, 2016, but for the reasons previously mentioned, her evidence was not heard and no evidence was called by the Defence on October 13, 2016. In the final analysis, Ms. Mason's testimony was heard on February 3, 2017, instead of November 26, 2015, as had been planned by the Crown Attorney;

(c) (i) Furthermore, with respect to absences of witnesses and having to make adjustments in the scheduling of trial evidence, there was what I have previously described as a "misunderstanding" which led the Crown Attorney to believe that Ms. MacLeod was not required to be in court on February 3, 2017. I find that this "misunderstanding" occurred without any intention to delay the trial progress, but rather, simply a part of the normal vicissitudes of a trial. Furthermore, I find that this is one of those "discrete, exceptional events", which was essentially captured by the observation in **Jordan** at para. 73 that "trials are not well-oiled machines" and unforeseeable or unavoidable developments do occur which require either the Crown or for that matter, the Defence to change its approach to the case.

(ii) Then, there was the unexplained absence of Ms. MacLeod to be back in court for further cross examination on February 6, 2017, despite the Crown having made the arrangements for her to be in

Kentville the previous day in case there was inclement weather on February 6, 2017. I find that Ms. MacLeod's absence, especially in the context of the reasonable steps taken by the Crown, can only be seen as a discrete, exceptional event which was reasonably unforeseeable and unavoidable in the circumstances.

(iii) In addition, Defence Counsel had arranged for subpoenas to be issued which required the attendance of two Kentville lawyers as Defence witnesses. Those lawyers were present in court and were either excused by the Court or asked to remain on standby to be called on short notice. Ultimately, one of the lawyers was called on February 3, 2017, but the other lawyer had previously advised of the Court that he would be out of the province on that date, so his evidence was finally heard on February 6, 2017, prior to the completion of Ms. MacLeod's cross examination. There can be no doubt that these absences of witnesses for one reason or another could not be avoided and for all intents and purposes, it must be remembered that all witnesses were present on the originally scheduled half day for trial on November 26, 2015 and several subsequent dates. In those circumstances, I find that the scheduling of witnesses was obviously impacted, despite what were obviously good-faith efforts to establish realistic time estimates, by the significant underestimation of trial time required for this case.

(d) In addition, the Court had to address the very significant issues raised by Defence Counsel following the completion of Ms. MacLeod's cross examination on October 6, 2016 which impacted and ultimately canceled the previously scheduled trial date on October 13, 2016. The issue related to an additional disclosure request and the possibility that the Crown Attorney would be subpoenaed as a witness and have to recuse himself from the continued conduct of the trial. Moreover, there is no doubt that the issues raised in correspondence and on October 13, 2016 took the lawyers a few weeks to address.

In my opinion, both counsel worked diligently to address those issues in short order, but the impact of that unforeseen development meant that a reasonable amount of time was required to address that disclosure request and to confirm what was ultimately filed as Agreed Facts in the trial. Therefore, I find that the impact of the Defence disclosure request during the trial and the possibility of the Crown

Attorney becoming a witness and having to recuse himself following Ms. MacLeod's testimony on October 6, 2016, meant that the Court's potential availability for the trial continuation during a three-week period in November, 2016, which had been discussed on an earlier date was not able to be canvassed during the November 1, 2016 conference call. As a result, there was no discussion of whether a vacant courtroom would have been available in either Kentville or Windsor Nova Scotia on short notice. Therefore, the next available dates which were confirmed for the trial continuation when the Court, a vacant courtroom, the counsel and witnesses were scheduled February 3 and February 6, 2017.

Furthermore, with respect to the disclosure request and the possibility of the Crown Attorney potentially having to recuse himself in mid-trial, I agree with the Crown Attorney that this was what the court in **Jordan** described at para. 69 as being a "reasonably unforeseen or reasonably unavoidable" situation and the Crown Counsel could not reasonably remedy, in short order, the delay occasioned by the Defence disclosure request or the possibility of him being subpoenaed as a witness. At the same time, I want to specifically point out that I do not regard this issue being raised at that stage of the trial by Defence Counsel as being anything other than a step taken to legitimately and effectively represent his client in responding to the charges before the Court.

Having said that, on the other hand, I do not share the Defence view that the Crown Attorney should have reasonably foreseen that he was under an obligation to disclose the fact that he had been called by Ms. MacLeod and that he had a very brief conversation with her, prior to the Crown withdrawing the "original charges" against Mr. Testroete on his first appearance of those charges. Clearly, the Crown Attorney acted on the information provided in the statutory declaration which had been signed by Ms. MacLeod before a notary public who happened to be Mr. Testroete's lawyer on July 9, 2014 and forwarded to the Crown Attorney by Mr. Testroete's lawyer. Given those circumstances, I find that the Crown Attorney's actions demonstrated a proper exercise of his discretion to withdraw the charge based upon the fact that, after receiving that statutory declaration, in his opinion there was no longer a realistic prospect of conviction.

One final note, it is also evident from the evidence of the witnesses and the exhibits filed during the trial, that a Defence witness, Mr. Conway, was fully aware of all the developments with respect to Ms. MacLeod's statutory declaration, he had communicated with the Crown Attorney on this trial, who also the Crown Attorney on the "original" prosecution, the statutory declaration had been sent to the Crown Attorney by Mr. Conway and he was obviously aware that the Crown Attorney had acted on that statutory declaration by withdrawing the "original charges" on the first appearance date of August 11, 2014. In the end, the Crown Attorney and Defence Counsel took reasonable steps to the resolve the disclosure issue, Agreed Facts were filled and Ms. MacLeod was recalled and responded to some additional questions on cross-examination.

Unfortunately, when Defence Counsel raised the disclosure issue and the possibility of the Crown Attorney becoming a witness, during the short period of time between the October 6 and October 13, 2016 trial dates, there was simply not enough time for the Crown or the Defence to reasonably and properly address these issues. There was an obvious impact on the progress of the trial evidence as a full day of trial was not utilized for trial evidence on October 13, 2016, potential dates for the Court's available which became available in November, 2016 could not be considered and the next full day for trial could not be confirmed, based upon everyone's availability and the availability of a vacant courtroom, until four months later in early February, 2017;

(e) Furthermore, I must also take into account the fact that a full day for the trial continuation had been scheduled on February 9, 2016, but that trial date was adjourned on February 8, 2016 due to the exceptional circumstance of an impending blizzard and dangerous road and travel conditions. During early February, 2016, Nova Scotia had been hit with a series of severe winter storms which essentially shut down the province and made travel conditions extremely dangerous. While the trial was being held in Kentville, Nova Scotia, where the court staff and the Crown Attorney were located, the fact was that the Court, Defence Counsel, the witnesses and Mr. Testroete would have all been required to travel to court in Kentville from the Halifax area. Therefore, the Court convened a conference call on February 8, 2016 to address its concern for everyone's safety and

during that call, the parties agreed with the Court that it would not be reasonable to expect people to travel under those dangerous conditions. As a result, during that conference call, the full day for the trial continuation on February 9, 2016 was adjourned and rescheduled to April 19, 2016. I find that this is another example of an "exceptional circumstance" which was beyond anyone's control, but obviously, it had an impact of contributing to approximately two and half (2 ½) months on the overall total delay in the hearing of this trial.

(f) Finally, I also find that, in accommodating what I have referred to as the implied waiver of the September 27, 2016 trial continuation date because Mr. Testroete's mother, who was not a witness in the trial, could not attend, there was a cumulative effect on the total length of the trial. In other words, the fact that September 27, 2016 was not utilized meant that another trial date had to be found when the reasonably unforeseen and reasonably unavoidable circumstances came to light between October 6 and October 13, 2016. While it would be easy to say that the September 27, 2016 trial date was released by "complacency" to delay by the Court and the counsel in an attempt to accommodate the Defence preference and Mr. Testroete's mother's schedule, it must be remembered that the decision to do so was made several months before the **Jordan** decision was released. Obviously, Defence Counsel, who had already accepted the date, felt that it was important for his client's mother to be present at all court dates, otherwise he would not have raised the issue in the first place. Having said that, as things turned out, because September 27, 2016 was not used and the unforeseen and unavoidable developments arose shortly thereafter, an additional trial date had to be secured. n my opinion, the delay caused by this implicit waiver of the September 27, 2016 trial date created, what I find to be a cumulative-delay which meant that, as things turned out in retrospect, an additional day had to be secured to reach the end or anticipated end of the trial. Therefore, rather than the anticipated end of the trial being April 4, 2017, given the cumulative effect of not utilizing a day when the Court, Counsel and witnesses were available is that the Court had to secure a full day for trial continuation one and half (1 ½) months later on the May17, 2017 as the anticipated end of the trial.

[151] Having regard to the impact on the progress of the trial from all of the foregoing circumstances which I regard as having been "exceptional" and ones that were reasonably unforeseen and reasonably unavoidable and moreover, outside of the Crown's control, I find that when the delay caused by those discrete exceptional events is subtracted from the total net delay, the total remaining delay is well below the "presumptive ceiling."

[152] While the Defence took some steps to show an effort to expedite the proceedings in the face of these "exceptional circumstances" by calling the two Defence witnesses before the Crown Attorney officially closed his case and both counsel demonstrated diligence and significant effort to reasonably remedy the delay occasioned by the Defence application which was articulated during the court proceedings on October 13, 2016, I cannot conclude that the remaining delay is unreasonable taking into account all of the facts and circumstances relating to this **Charter** application.

[153] Moreover, with the total remaining delay falling well below the "presumptive ceiling" when I deduct the delay caused by the "exceptional circumstances," looking at the progress of the trial, I find that the Defence has not demonstrated that this is one of those "clear cases" [see **Jordan** at para. 76] where the total delay falls below the presumptive ceiling, but for other reasons the delay remains unreasonable.

[154] In the final analysis, I conclude that the total overall delay in this case was reasonable after having taken into account any Defence waived or caused delay and what I have found to be a significant number of "exceptional circumstances" which were present throughout the trial.

[155] In conclusion, I hereby dismiss the Defence section 11(b) **Charter** application. In doing so, I find that Mr. Testroete's section 11(b) **Charter** right, as a person **charged** with an offence, to be tried within a reasonable time has **not** be infringed.

Theodore Tax, JPC