IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Mahar*, 2017 NSPC 9

Date: March 2, 2017
Docket: 2844719 - 2844734
Registry: Halifax

Between:

Her Majesty the Queen

v.

Richard George Mahar

Decision – Unreasonable Delay Application

Judge:	The Honourable Judge Anne S. Derrick
Heard:	February 22, 2017
Decision:	March 2, 2017
Charges:	sections 348(1)(b); 98(1)(b); 333.1(1); 86(2); 88(1); 90(1); 92(1); 94(1); 95(1); 96(1); 117.01(1) x 2; 145(3) x 3; and 355(b) of the *Criminal Code*
Counsel:	Aileen McGinty, for the Crown Laura McCarthy, for Mr. Mahar

By the Court:

Introduction

[1] George Mahar was charged on March 13, 2015 with numerous *Criminal Code* offences relating to an alleged break and enter and firearms. After being adjourned from dates in July 2016, his trial was to proceed on February 21 and 22, 2017 although ultimately this section 11(b) *Charter* application was heard instead. Mr. Mahar is seeking a stay of proceedings on the basis that his right to a trial within a reasonable time has been denied.

[2] Mr. Mahar's application is governed by the recent Supreme Court of Canada decision in *R. v. Jordan*, 2016 SCC 27. *Jordan* set a presumptively unreasonable delay ceiling of 18 months for trials in Provincial Court. (*paragraph 46*) Crown and Defence agree that the delay in Mr. Mahar's case from charge date to the anticipated end of his trial is just over 23 months. Under *Jordan*, 23 months is a presumptively unreasonable delay.

[3] Mr. Mahar submits that none of the delay can be attributed to the Defence and that delay due to an event outside of the Crown's control, which I will be discussing, could have been mitigated by the Crown and wasn't. In the Crown's submission, the delay is not unreasonable as it is due to actions taken by the Defence or exceptional circumstances, that is, "discrete events". (*R. v. Jordan, paragraph 71*)

[4] At a pre-hearing conference on January 31, 2017 to discuss the application and its implications for the scheduled trial dates, Ms. McCarthy advised that Mr. Mahar wanted the delay application heard before the trial proceeded. She confirmed that the rescheduling of the trial to March 2, 3 and 24, 2017, a direct effect of Mr. Mahar's application, is not being factored by Defence into the calculation of the delay.

The New "Jordan" Framework

[5] In *R. v. Jordan*, the Supreme Court of Canada developed a "new framework beyond which delay is presumptively unreasonable." Delay is calculated from the date of the charges to the actual or anticipated last date for trial. I have to determine whether there should be any deductions of time from the approximately 23 month

delay and if so, whether those deductions will lower the delay below the presumptive ceiling set by *Jordan*.

[6] If the total delay from charge to the actual or anticipated end of trial, minus defence delay, exceeds the ceiling then the delay is presumptively unreasonable. The Crown can rebut this presumption by establishing exceptional circumstances. If exceptional circumstances cannot be shown "the delay is unreasonable and a stay will follow." (*paragraph 47*)

[7] The roadmap to be followed in determining a "*Jordan*" case can be described as follows:

1) Calculate Total Delay.

2) Deduct delay attributable to the Defence. (This can be delay waived by the Defence and/or delay caused solely by Defence conduct.) (*Jordan, paragraphs 61 and 63*)

3) Determine if the remaining Delay – the Net Delay – is above the presumptive ceiling.

4) If the Net Delay is above the presumptive ceiling, has the Crown shown exceptional circumstances?

5) If there are exceptional circumstances, which the Crown could not mitigate, that caused delay, this delay gets deducted from the Net Delay.

6) If the Delay that remains is below the presumptive ceiling, the burden shifts to the Defence to show that the delay is unreasonable.

7) If the Delay remains above the presumptive ceiling, a stay is warranted.

Transitional Cases

[8] The fact that Mr. Mahar's case pre-dates the *Jordan* decision must also be taken into account. *Jordan* refers to such cases as "transitional". In *R. v. Porter*, [2016] O.J. No. 5953, Pomerance, J. succinctly explains what this means:

> **6** …While *Jordan* heralds a new era, the Supreme Court of Canada was careful to ease the transition from one regime to another. The catastrophic fall-out from the earlier *Askov*, [1990] 2 S.C.R. 1199, decision, in 1990, confirmed that legal systems and legal cultures cannot change on a dime. In *Jordan*, the court acknowledged the difficulty of using new rules to judge past actions. Actions taken pre-*Jordan* were based on the law pre-*Jordan*. Actors in the justice system relied on the law as it then existed. If that reliance was reasonable, it may excuse delay that would not be tolerated in the post-*Jordan* universe.
>
> **7** In other words, the new framework will not apply strictly to cases of the transitional variety. This is not to say that delay in prior cases is more acceptable. It is only to say that parties could not be expected to govern themselves by rules that did not yet exist. There can be little doubt that, going forward, practices will change. But, for cases in the rear view mirror, the analysis must be contextually sensitive to the law and the legal culture that existed at the relevant time.

What is Defence Delay?

[9] The Crown is not asserting any waiver occurred in this case. Mr. Mahar never expressly waived his rights under section 11(b) and there is nothing in the record that supports implied waiver. What does have to be examined is whether there has been delay solely attributable to the actions of the Defence.

[10] *Jordan* establishes that "Defence actions legitimately taken to respond to the charges do not constitute defence delay." (*paragraph 66*) The Court explained this as follows:

> **65** To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already

> accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

[11] The Supreme Court of Canada has not exhaustively catalogued what can constitute defence delay and has left it to trial judges to determine how to characterize what defence has done over the history of the case. (*Jordan, paragraph 64*)

[12] An understanding of what happened in Mr. Mahar's case is obtained by a careful examination of the court appearances in 2015 and 2016. As I found errors and omissions in the transcripts provided by the Defence I listened to the court recordings and have indicated where I have relied for accuracy on those recordings exclusively. In some instances I listened to the court recording to determine if Mr. Mahar had been represented in court by duty counsel. I will be explaining why that information is relevant.

Court Appearances between March 13, 2015 and the Setting of Trial Dates on September 11, 2015

[13] Mr. Mahar's first court appearance was on March 13, 2015. His case was adjourned to March 17 for a show cause hearing. On March 17 duty counsel indicated that Mr. Mahar was seeking a referral to the Mental Health Court. That appearance occurred on March 26.

[14] The Mental Health Court is not a trial court. A threshold requirement for participation in the court is an admission of responsibility. Counsel representing Mr. Mahar in the Mental Health Court on March 26 indicated that Mr. Mahar's charges were serious and he would need to review the disclosure and receive legal advice before proceeding further and admitting to anything. He would be "fast-tracked" for intake by legal aid so that he could return to the arraignment court on the "next possible date" of April 13. Once back in regular arraignment court Mr. Mahar could re-apply for admission to the Mental Health Court. The judge conducting the Mental Health Court proceedings on March 26 explained the situation to Mr. Mahar:

> …Before you can come here there has to be a…thorough review of the file, get some legal advice, because one of the pre-conditions to being in this Court is either admitting to offences, or entering guilty pleas, and you cannot do that without getting some serious legal advice first, especially with the charges that you're facing. So we need to reroute you to see a lawyer for that purpose. If after you speak to the lawyer and you get advice and you decide to reapply…we can have you back again…(*Transcript of March 26, 2015 Mental Health Court proceedings, Exhibit "B", Affidavit of Laura McCarthy affirmed on February 6, 2017*)

[15] Mr. Mahar had five court appearances between April 13 when he returned to the arraignment court and May 12 when he was released on a recognizance with sureties. On April 13, Legal Aid counsel indicated that she had not had the opportunity to meet with Mr. Mahar and asked that the matter be put over to April 17. Mr. Mahar wanted to have a show cause hearing. His lawyer noted that bail would be a matter for Mr. Mahar to discuss with duty counsel. (*Court Recording for April 13, 2015*)

[16] On April 17 duty counsel advised that Mr. Mahar wanted his show cause adjourned to April 22 to work out a bail plan. A further adjournment was requested by duty counsel on April 22 to May 5 "to allow his bail plan to come to fruition." On May 5, duty counsel sought a further adjournment for Mr. Mahar to put "the final touches on the bail plan." (*Transcripts of April 22 and May 5, 2015, Exhibits "C" and "D", Affidavit of Laura McCarthy affirmed on February 6, 2017*)

[17] Mr. Mahar next appeared on May 12 and was released on a recognizance with sureties. Duty counsel advised the court that, "Mr. Mahar has been consenting remand for quite some time now, trying to put together some bail plans. That bail plan has finally come to fruition." Duty counsel requested that Mr. Mahar's matters be returned to court on June 9 when Mr. Mahar had other matters in the same courthouse. Duty counsel advised that he would be "submitting a new application for these latest matters to Legal Aid to make sure he has representation as soon as possible." (*Court recording for May 12, 2015*)

[18] Breach charges and render of surety brought Mr. Mahar back to court on June 5 at which time duty counsel requested a referral to the Mental Health Court. Mr. Mahar's appearance in Mental Health Court was set for June 18, 2015.

[19] On June 18 Mr. Mahar appeared with Mental Health Court counsel, Kelly Rowlett. The Crown advised that the Crown was not consenting to Mr. Mahar's admission to the Court. Mr. Mahar's matters were to be returned to "regular court" for June 29 for election and plea. Ms. Rowlett advised that materials provided to her by Mr. Mahar's family would be provided to "Ms. White." Ms. White was the Nova Scotia Legal Aid lawyer representing Mr. Mahar on these and other charges. (*Court recording for June 18, 2015*)

[20] On June 29, Ms. White asked to have Mr. Mahar's matters put over to August 3 so she could meet with him and review the disclosure. She explained that her instructions to date had been in relation to having Mr. Mahar's matters dealt with in Mental Health Court. Now that they had been "referred back…we need to review and come up with new…I don't have new instructions from Mr. Mahar." The court noted that Mr. Mahar's matters had been before the courts "since February so in August it's expected that there'll be elections and pleas entered." (*Transcript of June 29, 2015, Exhibit "H", Affidavit of Laura McCarthy affirmed on February 6, 2017*) After some discussion with Ms. White and counsel for a co-accused on one of the Informations, the date of July 22 was scheduled for return.

[21] Mr. Mahar appeared on July 22 having made an unsuccessful attempt to secure bail at a contested show cause hearing on July 16. Private defence counsel, Mr. Kuszelewski, asked to have election and plea adjourned to August 4 to allow for obtaining "full instructions" and "full discussions with the Crown…" Mr. Kuszeleski indicated that Mr. Mahar was "eager to try to move this matter forward" which was why he had suggested August 4 as the return date. (*Transcript of July 22, 2015, Exhibit "J", Affidavit of Laura McCarthy affirmed on February 6, 2017*)

[22] On August 4, Ms. McCarthy appeared with Mr. Mahar and sought an adjournment to September 18 in order to talk to the Crown about the "potential resolution of some of the matters." Ms. McCarthy noted there "may be more disclosure forthcoming" in relation to one of the Informations where there was an ongoing investigation. She said an adjournment "should buy us sufficient time to

come up with a resolution." The Court noted the cases were aging and said while "none of them are terribly bad yet…They're starting to get a little mouldy, yeah." Ms. MacCarthy concurred with her own observation that the matters were "starting to get long in the tooth." September 18 was unavailable so Mr. Mahar's return was set for September 11. (*Court recording for August 4, 2015*)

[23] On September 11, 2015 Mr. Mahar elected Provincial Court and entered not guilty pleas through Ms. McCarthy. Trial time was estimated at a day and a half and trial dates of July 26 and 27, 2016 were offered. Ms. McCarthy asked if there were earlier dates because of Mr. Mahar being bail-denied but was advised there were not. The Court was open to finding earlier dates if the docket provided the option for doing so, saying: "Perhaps at the pre-trial conference, which we'll assign a date in a moment, if counsel by that point in time are aware of any other dates that may be falling through, we could certainly consider moving this forward, but for now it looks that's the best we're going to do." The Crown said it was hoped a narrowing of the issues would reduce the trial time required and might also bring the trial forward. An in-chambers pre-trial conference date of November 27, 2015 was set. (*Transcript of September 11, 2015, Exhibit "L", Affidavit of Laura McCarthy affirmed on February 6, 2017*)

Court Appearances in 2016

[24] On January 8, 2016, a date set on December 23, 2015, Mr. Mahar appeared in court on his other matters. The July 26 and 27 trial dates were confirmed. Mr. Mahar entered guilty pleas on another Information and Ms. McCarthy advised the court that the trial date of February 8, 2016 for that matter could be released. She indicated she would be bringing a *Charter* application in relation to the break and enter and firearms charges and said: "…but we just wanted to get past this stage with the other Informations first." (*Transcript of January 8, 2016, Exhibit "N", Affidavit of Laura McCarthy affirmed on February 6, 2017*)

[25] Mr. Mahar's break and enter and firearms charges were next before the court unexpectedly on July 20. Ms. McGinty had brought the matter into court on an urgent basis so she could request an adjournment of Mr. Mahar's trial. Due to the death of her grandmother that morning in Scotland, Ms. McGinty was going to be out of the country the following week – the week of the scheduled trial dates.

[26] At the July 20 appearance Ms. McGinty indicated she was the assigned Crown. *R. v. Jordan* had been decided on July 8. Ms. McGinty commented that "with the Supreme Court decision, delay is going to be a live issue". She told the court that Ms. McCarthy had raised the possibility of a resolution and, noting that all of Mr. Mahar's other files had resolved, said she thought this file was "extremely likely" to be resolved too. (*Court recording for July 20, 2016*)

[27] Ms. McCarthy had no comment when asked by Judge Gabriel if she had anything to say in relation to Ms. McGinty's adjournment request. When February 21 and 22 were offered as new trial dates she did not ask for earlier dates, she just inquired about the possibility of a different date in February because she anticipated being out of the province "around then." She asked if there was "anything earlier in the week". She did not want "to get too much farther out than that" and declined alternative March dates. (*Court recording for July 20, 2016*)

[28] Other events occurred in 2016 that I find have no bearing on the calculation of delay: the Crown supplied additional disclosure on January 4, April 20 and July 6. This had no impact on the July trial dates which had been scheduled in September 2015. And Mr. Mahar's request for a Federal remand on July 26 and appearances on August 26 and September 19 did not affect the February 2017 scheduled trial dates.

[29] On August 26, 2016 there was a Defence request for an adjournment to September 19 to allow for further discussions about possible resolution. On September 19 Ms. McCarthy indicated that Mr. Mahar's matter had been scheduled for a status date "because there was some discussions between the Crown and Defence about resolving." She went on to say that "the Crown has provided her position but at this point I don't have instructions from Mr. Mahar to resolve at this time. He has his federal remand to his trial dates which are scheduled for February 21 and 22, 2017. In speaking with the Crown it's probably best if we don't have another status and should Mr. Mahar instruct that he would like to resolve, we would schedule before that trial date." (*Transcript of September 19, 2016, Exhibit "R", Affidavit of Laura McCarthy affirmed on February 6, 2017*)

The Analytical Framework for Calculating Delay in Mr. Mahar's Case

[30] As I noted at the start of these reasons, Mr. Mahar has waited just over 23 months for his trial. This is above the presumptively reasonable ceiling of 18 months

for Provincial Court trials. Is any of this delay attributable to the conduct of the Defence?

Delays in Bringing Mr. Mahar to Trial

[31] This is not a case where the Defence can be said to have engaged in "deliberate and calculated defence tactics aimed at causing delay" such as "frivolous applications and requests…" (*Jordan, paragraph 63*)

[32] The various events and factors that contributed to the delay between Mr. Mahar being charged on March 13, 2015 and his trial dates in February 2017 have included actions taken by Defence:

- Defence requests for a referral to Mental Health Court;
- Defence requests for time to develop a release plan;
- Defence requests for adjournments to have resolution discussions with the Crown.

[33] It is Ms. McCarthy's submission that all these delays were due to what *Jordan* has described as "defence actions legitimately taken to respond to the charges…" *Jordan* views such actions by the defence as falling "outside the ambit of defence delay." (*paragraph 65*)

[34] In addition to her argument that the Mental Health Court, bail plan, and resolution discussion delays were steps taken by Mr. Mahar "to respond to the charges", Ms. McCarthy also notes that additional disclosure was received in the period of August 4 to September 11, 2015 and that counsel had to sort out some confusion over what disclosure related to which of Mr. Mahar's several matters. At the August 4 appearance when Ms. McCarthy obtained a further adjournment to September 11 she indicated both possible further disclosure and potential resolution discussions justified putting Mr. Mahar's matters over.

Developing a Bail Plan and Requests for Referrals to the Mental Health Court

[35] The record establishes that from March 13 to May 12, 2015 Mr. Mahar was focused on getting a referral to the Mental Health Court and securing his bail. At none of the court appearances during this 2 month period did he seek to make his

election and enter pleas, which would have led to obtaining trial dates. I find this to have been Defence delay.

[36] Ms. McCarthy says Mr. Mahar's request for a referral to the Mental Health Court qualifies within what *Jordan* has referred to as "defence applications and requests that are not frivolous…" *Jordan* says that such applications and requests will "generally not count against the defence." (*paragraph 65*)

[37] Mr. Mahar was entitled to request a referral to the Mental Health Court. But I find it cannot be viewed as a request that was taken "to respond to the charges." It is not, for example, like a disclosure request or application that may be a necessary step before entering a plea and obtaining trial dates. It was an optional route that Mr. Mahar chose to take. There was nothing to prevent Mr. Mahar from getting trial dates and, in the meantime, exploring whether Mental Health Court could offer him anything. Instead he put off entering pleas - not guilty pleas would have got him trial dates - and detoured into Mental Health Court.

[38] The detour to Mental Health Court may have been premature, as Ms. McCarthy suggests, because Mr. Mahar did not have the benefit of sufficient disclosure to assess the requirement of accepting responsibility. It was however a direction that Mr. Mahar elected to take rather than seeking early trial dates in "regular" court.

[39] As for Mr. Mahar's decision to pursue bail, I do not agree with Ms. McCarthy's submission that the preparation of his release plan ought to be characterized as a feature of the proper conduct of Mr. Mahar's defence and response to the charges. Mr. Mahar could have obtained earlier trial dates and still sought his release. Indeed, as an in-custody accused it is likely he would have benefitted from efforts by the court to find early trial dates because of his status. Mr. Mahar has to bear responsibility for foregoing the option of setting trial dates while he worked on a bail plan.

[40] It is noteworthy that Mr. Mahar expressed an interest in moving his case along only after his bail had been denied. On July 22, 2015, Mr. Kuszelewski told the court he believed Mr. Mahar "is eager to try to move this matter forward…" (*Transcript of July 22, 2015, Exhibit "J", Affidavit of Laura McCarthy affirmed on February 6, 2017*) The emergence of this eagerness after his failed attempt on July 16 to secure

release is further confirmation that bail and not trial dates had been Mr. Mahar's priority.

[41] I do not accept the submission that while on remand prior to May 12 Mr. Mahar was disadvantaged in relation to entering not guilty pleas and setting trial dates because he was represented by duty counsel whose mandate was to try and secure his release. On April 13 his Legal Aid lawyer advised the court that Mr. Mahar wanted a bail hearing, which would be dealt with by duty counsel. Mr. Mahar could have chosen to make obtaining trial dates a priority but he did not. He continued to seek adjournments of plea while he worked with duty counsel on getting bail.

[42] After getting released on May 12, Mr. Mahar was to have returned to court on June 9 for election and plea, a date he chose because he had other matters in the same courthouse on that date. By June 5 he was back in custody and requesting a new referral to Mental Health Court. His admission to Mental Health Court was vetoed by the Crown and he returned to the arraignment court on June 29 for election and plea.

[43] Ms. McCarthy submitted in her written submissions that Mr. Mahar's June 5, 2015 request for a referral to Mental Health Court was on his new charges, which are not the subject of this application. I do not find that submission to be supported by the record. On June 5 the break and enter and firearms Information was before the court because Mr. Mahar's sureties were rendering. Duty counsel (Mr. Baranowski) asked that "all these matters" be referred to the Mental Health Court for June 18. The Court confirmed what he meant: "And so Application to Mental Health Court in relation to both matters? Both sets of matters?" Mr. Baranowski responded: "Yes." (*Court recording of June 5, 2015*)

[44] The JEIN (Justice Enterprise Information Network) record for the June 5, 2015 docket establishes that Mr. Mahar's matters before the court that day included case numbers 2844719 to 2844734. These are the same charges - what I have been calling the break and enter and firearms charges - that Mr. Mahar is seeking to have stayed for delay.

[45] The inclusion of the break and enter and firearms charges in the June 5 referral to the Mental Health Court is further confirmed by the record of the proceedings in

the Mental Health Court on June 18. Crown counsel advised that he was not supporting the admission to Mental Health Court of Mr. Mahar's matters stating: "We're not providing consent for this to go forward. A few reasons for that - the circumstances of the offence, they're egregious circumstances, certainly a significant violation of someone's home, and alleged theft from that home so that's one factor…" (*Court recording for June 18, 2015*) That is a description of the break and enter and firearms charges.

[46] This further excursion to the Mental Health Court led to delay that is attributable to the Defence. The decision to go down the delay-causing path of seeking referrals to Mental Health Court has been characterized as Defence delay. (*R. v. Doncaster, 2013 NSSC 325, paragraph 12*)

[47] I find that the period of March 13 to June 29 - a period of 3.5 months – is Defence delay. It is apparent that during this time Mr. Mahar was squarely focused on obtaining bail and referrals to the Mental Health Court. After his release on bail, Mr. Mahar's scheduled return on June 9 was at his request as he had other matters coming back to court on that date.

Adjournments to Obtain Fresh Instructions and for Resolution Discussions

[48] The next period - June 29 to September 11 - I am not attributing to the Defence. On June 29, Mr. Mahar's Defence counsel sought an adjournment to July 22 to get fresh instructions now that the Mental Health Court option had fallen on stony ground. I am characterizing that delay as preparation time, not previously undertaken as Mr. Mahar focused on other issues and discussions about resolution of other matters. This 2.5 month period includes two additional Defence-requested adjournments, the first, from July 22 to August 4, 2015 to obtain "full instructions" and have "full discussions with the Crown" and the second, from August 4 to September 11 to facilitate discussions with the Crown about possible resolution "of some of the matters." The record does not establish whether the resolution discussions Ms. McCarthy wanted time for from August 4 to September 11 included the break and enter and firearms charges. In any event, I am not attributing this delay to the Defence.

[49] Although Ms. McCarthy has argued in her written submissions that a request, such as the one made by counsel appearing with Mr. Mahar (Mr. Kuszelewski) on

July 22, 2015 to pursue resolution discussions, "would fall squarely into the category of proper conduct" of the Defence, I do not agree this is necessarily so. Opting for resolution discussions instead of obtaining trial dates may be a tactical choice that cannot later be used to support an argument of unreasonable delay. There will be situations that warrant the observation made by Pomerance, J. in *Porter* that it had been "more important to the accused to pursue resolution than it was to pursue an early date for the preliminary hearing." (*Porter, paragraph 62*) Having said that, Pomerance, J. also made the following comments about effective case management:

> **65** There is much to be said for the requirement that counsel discuss issues before setting a date for a judicial proceeding, be it a preliminary inquiry or a trial. This is a vital step toward defining the real issues in a case. This, in turn, is critical to the determination of how much court time is required for the proceeding. Similarly, early resolution discussions can promote timely pleas and obviate the need to tie up judicial resources unnecessarily. Whether these discussions take place in the context of a judicial pre-trial, or a non-judicial pre-trial, they are an integral element of effective case management. They honour the principles in *Jordan* to the extent that they allow for informed allocation of judicial resources.

[50] In conclusion on the issue of resolution discussions, I find there is no hard-and-fast rule as to how they should be characterized: the circumstances are going to be relevant to whether delay caused by such discussions is attributable to the Crown, the Defence or is part of the proper preparation of the Defence case.

[51] In Mr. Mahar's case I am not convinced the resolution discussions undertaken between June 29 and September 11 were incompatible with Mr. Mahar obtaining trial dates. He did in fact get trial dates for the break and enter and firearms charges before he resolved other outstanding matters through guilty pleas on January 8, 2016. However, in the circumstances where during the period of June 29 to September 11, 2015 various Defence counsel were obtaining Mr. Mahar's instructions and receiving additional disclosure, I am not going to treat that month and a half as Defence delay.

Calculating Defence Delay

[52] On September 11, 2015 Mr. Mahar made his election to Provincial Court, entered not guilty pleas and obtained the July 26 and 27, 2016 trial dates.

[53] I am satisfied that by September 11, 2015 Mr. Mahar was responsible for 3.5 months of delay – March 13 to June 29 - in getting to trial. He pursued certain objectives – referrals to the Mental Health Court and bail - over obtaining an early trial date.

Operating in a Pre-Jordan Context

[54] A relevant consideration in assessing Mr. Mahar's application is the fact that his case was unfolding from March 13, 2015 to July 8, 2016 in a pre-*Jordan* world. All the participants conducted themselves in the context of the law as it existed then. A standard that did not exist at the time cannot now be applied strictly to how the case was managed. (*Jordan, paragraph 96*)

[55] On September 11 when trial dates were set the court indicated that earlier dates might be an option if counsel identified an opening in the docket. And at earlier appearances on June 29 and August 4 judges had expressed a concern about getting Mr. Mahar's elections and pleas entered.

[56] Notwithstanding these judicial comments, the record does not indicate that Mr. Mahar made any effort to expedite his case. Defence efforts to expedite the proceedings is a factor to be considered in assessing delays in cases that were already in the system when *Jordan* was decided. (*R. v. Williamson, 2016 SCC 28, paragraph 29*) Although Ms. McCarthy asked on September 11, 2015 if there were any dates earlier than July 2016 for trial, no further inquiries or efforts were made by her at any time following that to have the trial moved forward. After the trial was adjourned from July 2016 to February 2017, court appearances for status purposes addressed ongoing resolution discussions not the issue of finding earlier trial dates.

[57] And I note that on January 8, 2016 when Mr. Mahar pleaded guilty to other charges and a scheduled trial date of February 8 was released, Ms. McCarthy did not explore making use of it for the break and enter and firearms trial.

[58] The obtaining on September 11, 2015 of trial dates in late July 2016 has to be seen in context. As the Supreme Court of Canada observed in *Jordan*:

> **100** Further, if the delay was occasioned by an institutional delay that was reasonably acceptable in the relevant jurisdiction under the *Morin* framework before this decision was released, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

The Net Delay

[59] As I noted, the Total Delay in this case is a little more than 23 months. I have found Defence Delay of 3.5 months. This leaves a Net Delay of over 20 months, which exceeds the presumptive ceiling. The issue to be addressed now is whether the Crown has shown exceptional circumstances.

Exceptional Circumstances

[60] Exceptional circumstances are circumstances that "lie outside the Crown's control" and can rebut presumptively unreasonable trial delay. The Supreme Court of Canada in *Jordan* described exceptional circumstances as beyond the Crown's control where: "(1) they are reasonably unforeseen or reasonably avoidable; *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise." (*paragraphs 68 and 69*)

[61] Mr. Mahar's case would have proceeded on July 26 and 27, 2016 but for the unexpected death of Ms. McGinty's grandmother. This was an exceptional circumstance that falls under what *Jordan* has called "discrete events." (*paragraph 71*) The Supreme Court specifically held that "medical or family emergencies (whether on the part of the accused, important witnesses, counsel or the trial judge) would generally qualify" as an exceptional circumstance. (*paragraph 72*)

[62] Ms. McGinty was the assigned Crown on Mr. Mahar's file. The record indicates that her grandmother died on July 20. Ms. McCarthy has argued that Mr. Mahar's trial is not a complex trial, does not involve vulnerable witnesses or voluminous disclosure, and consequently its carriage could have been assumed by another Crown. But Ms. McGinty points out there are experts for DNA and footprint evidence and a complainant the Crown views as vulnerable. This view is reflected

in the application brought by Ms. McGinty on July 13, 2016 for the complainant to testify by video link to mitigate the trauma of being in the courtroom with Mr. Mahar. (This application, contested by Defence, was denied on the basis that no evidence was presented to support the Crown's contention of the complainant's mental "fragility.") (*Court recording for July 13, 2016*)

[63] Ms. McGinty concedes that Mr. Mahar's trial does not qualify as complex due to "the nature of the *evidence* or the nature of the *issues*" requiring "an inordinate amount of trial or preparation time…"(*Jordan*, *paragraph 77*), but argues it cannot be said to be routine.

[64] I find there were no steps Ms. McGinty could have taken to mitigate the delay caused by the adjournment of Mr. Mahar's trial on July 20. I find it is not reasonable to think that she could have found a replacement Crown to take the case on with the trial six days away. Common sense tells me Crown availability in July – prime summer vacation time – would have been an issue. And Crowns who were not on vacation would undoubtedly have been busy with their own scheduled matters. It is unrealistic to think that this two-day case on the verge of going to trial could have been transferred to another Crown. (On July 20, 2016 Ms. McGinty described the case as requiring two days. (*Court recording for July 20, 2016*))

[65] The delay caused by Ms. McGinty's grandmother dying was a delay due to exceptional circumstances. This delay of 7 months from July 20, 2016 to February 22, 2017 is to be deducted from the Net Delay.

Calculating Delay

[66] I have found that the 23 months from Mr. Mahar being charged to the date that was scheduled to be his last day of trial (February 22, 2017) is above the presumptively unreasonable ceiling set by *Jordan*. 3.5 months of that I have attributed to the conduct of the Defence. With the net delay remaining above the presumptive ceiling I have examined the issue of the exceptional circumstances that adjourned Mr. Mahar's trial from July 2016 to February 2017. This further 7 month delay was outside the Crown's control. It constituted a "discrete event" that was not reasonably foreseeable or reasonably able to be remedied. Factoring this into the delay calculation brings Mr. Mahar's delay to just over 13 months which falls well

under the presumptive ceiling of 18 months. As my discussion of the circumstances of this case indicates, the Defence has not shown that this delay is unreasonable.

Conclusion

[67] I am satisfied that Mr. Mahar's section 11(b) rights have not been violated. He requested adjournments to facilitate certain objectives which delayed the setting of his trial dates. The adjournment at the Crown's request of his trial from July 2016 to February 2017 was due to an exceptional circumstance that does not count against the Crown. Applying the analysis in *Jordan* I find this is not a case of unreasonable delay. The application for a stay of proceedings is dismissed.

Derrick, J.P.C.