SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Foroughi-Mobarakeh*, 2017 NSSC 100

Date: 20170331
Docket: CRAT No. 440112
Registry: Antigonish

Between:

Behrang Foroughi-Mobarakeh

Applicant

v.

Her Majesty the Queen

Restriction on Publication: s. 486.4; s. 539; and s. 648 of the *Criminal Code*

Judge:	The Honourable Justice Patrick J. Murray
Heard:	March 3, 2017, in Antigonish, Nova Scotia
Written Decision:	March 31, 2017

Counsel:	Stanley MacDonald, Q.C., for the Applicant T.W. Gorman, for Her Majesty the Queen

Section 486.4 - Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Section 539 - Order restricting publication of evidence taken at preliminary inquiry[1]

539 (1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

- (a) may, if application therefor is made by the prosecutor, and
- (b) shall, if application therefor is made by any of the accused,

make an order directing that the evidence taken at the inquiry shall not be published in any newspaper or broadcast before such time as, in respect of each of the accused,

- (c) he is discharged, or
- (d) if he is ordered to stand trial, the trial is ended.

Accused to be informed of right to apply for order

(2) Where an accused is not represented by counsel at a preliminary inquiry, the justice holding the inquiry shall, prior to the commencement of the taking of evidence at the inquiry, inform the accused of his right to make application under subsection (1).

Failure to comply with order

(3) Every one who fails to comply with an order made pursuant to subsection (1) is guilty of an offence punishable on summary conviction.

Definition of "newspaper"

(4) In this section, *newspaper* has the same meaning as in section 297.

Section 648 - Restriction on publication

648 (1) After permission to separate is given to members of a jury under subsection 647(1), no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

Offence

(2) Everyone who fails to comply with subsection (1) is guilty of an offence punishable on summary conviction.

(3) [Repealed, 2005, c. 32, s. 21]

[1] The publication bans pursuant to section 539(1) and section 648 shall remain until all proceedings against the Accused and any appeal in respect thereof, is finally concluded.

By the Court:

Introduction

[1] This is an application for a stay of proceedings based on unreasonable delay, pursuant to section 11(b) of the *Charter of Rights and Freedoms*.

[2] On March 31, 2014 Behrang Foroughi-Mobarakeh (hereinafter referred to as "Mr. Foroughi") was charged with sexual assault contrary to s. 271(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[3] Under s. 11(b) of the *Canadian Charter of Rights and Freedoms* Mr. Foroughi is entitled to be tried within a reasonable time.

[4] The Defendant elected to be tried in the Supreme Court by way of Judge with a jury. The trial is scheduled to commence on May 1, 2017, and conclude May 24, 2017.

[5] The delay therefore between the laying of the charge and the anticipated end of the trial will be 38 months.

[6] In the case of ***R v. Jordan***, 2016 SCC 27, the Supreme Court of Canada provided a new framework for determining whether s. 11(b) has been infringed.

[7] Under that new framework, the Court established a "presumptive ceiling", whereby for cases exceeding 30 months in the superior court, the delay is presumed to be unreasonable.

[8] The new framework is applicable to any case that was in the justice system when ***Jordan*** was released on July 8, 2016.

[9] The case before me is such a case. The Accused, Mr. Foroughi, was charged prior to the decision in ***Jordan***, therefore, this Court must apply the new framework with its transitional features to decide this application.

[10] In this regard both the decision in ***Jordan*** and ***R v. Williamson***, 2016 SCC 28 are relevant.

Position of the Parties

[11] The Accused, Mr. Foroughi, maintains that his right to be tried within a reasonable period of time has been breached and that the proceedings should be stayed pursuant to section 24(1) of the *Charter*.

[12] The Defence maintains that Mr. Foroughi made every effort to bring the matter to trial, despite ongoing issues with disclosure.

[13] The Crown's position is that while the total delay is 38 months, the remaining delay is 31 months, because 3 months should be deducted for Defence delay. The Crown maintains a further 4 months should be deducted for the time taken to complete the preliminary inquiry. The Crown maintains this 4 month time period was unforeseen and unavoidable, and therefore qualifies as an exceptional circumstance.

[14] The Crown states that 31 months is not unreasonable in all of the circumstances. Under the transitional provisions the Crown states that reasonableness cannot be reduced to a number, but is to be contextually determined in all of the circumstances.

[15] The Defence agrees that 3 months should be reduced from the total delay of 38 months for a net delay of 35 months. The Defence's position however, is that it ends there and the remaining delay is no less than 35 months.

[16] The Defence disagrees that the preliminary inquiry is a discrete exceptional event within the meaning as prescribed in ***Jordan***.

[17] The Defence states that it was available for a date the Court offered in excess of 3 months earlier for the preliminary inquiry. In addition, the Defence states that it elected to proceed with the preliminary inquiry despite not having had full disclosure. It would therefore be unfair to Mr. Foroughi to attribute the delay in completing the preliminary inquiry to a discrete exceptional event.

[18] The Defence's position is that the delay is unreasonable and a stay of proceedings should be issued. The Crown's position is that the delay is not unreasonable when one looks at reliance by the parties of the law as it existed pre-***Jordan***. The Crown says a stay should be refused and the trial allowed to proceed.

Statement of Facts

[19] The facts set out below (in paragraph 22) and numbered 1 – 18 are contained in the Applicant's pre-hearing memorandum. These have been agreed to by the Crown with a modification as noted in paragraph 1 of the Crown's memorandum.

[20] The modification is that the reference to defence "disclosure" requests in paragraph 4 and the "formal disclosure application" in paragraph 7 was a combined ***Stinchcombe*** (***R v. Stinchcombe***, [1991] 3 SCR 326) disclosure application (so called) and a s. 278.1 – 278.91 third party records application.

[21] The parties further agree that the Summary of Proceedings, which follows at paragraph 24 herein, is an accurate summary of events and is agreed to form part of the record for this application.

[22] As a final note, numbers 1 and 2 of the Statement of Facts below have already been referred to in the decision.

1. Pursuant to s. 11(b) of the *Canadian Charter of Rights and Freedoms* ("the Charter"), Behrang Foroughi-Mobarakeh is entitled to be tried within a reasonable time.

2. It is respectfully submitted that Mr. Foroughi-Mobarakeh's right to be tried within a reasonable time in this case has been breached and that the proceedings should be stayed pursuant to s. 24(1) of the Charter.

3. In an information sworn March 31, 2014, Mr. Foroughi-Mobarakeh was charged with sexual assault. He was arrested by the police at the Antigonish RCMP Station, questioned by the police and held for Court on April 1, 2014.

4. Over the course of the next several months, Mr. Foroughi-Mobarakeh sought disclosure, which was produced in bits and pieces. Considerable efforts were made on behalf of Mr. Foroughi-Mobarakeh to obtain full and complete disclosure. Those efforts are reflected in correspondence between the Defence and Crown, contained in Tab 1 of his Memorandum. The Defence pursued disclosure in a timely and diligent manner.

5. Despite the fact that disclosure was not complete by August 25, 2014, Mr. Foroughi-Mobarakeh entered an election on that date so that a date could be set for his preliminary inquiry. The election was to Supreme Court before a Judge and jury.

6. The preliminary inquiry proceedings took place on January 29, February 13 and May 20, 2015.

7. Even after the conclusion of the preliminary inquiry, significant disclosure remained outstanding (see Tab 1). Consequently, after many written requests, the defence brought a formal disclosure application dated December 17, 2015. The application was scheduled for a date in January, 2016 and adjourned to dates in February and March, 2016. In the end result, a Consent Order was agreed upon on March 10, 2016. In particular, disclosure from electronic devices in the possession of the complainant was ordered. After that Order was issued, the complainant delivered the wrong electronic device to the police. After the correct device was delivered to the police, it was not immediately searched. Disclosure from the electronic devices was made to the defence on July 28, 2016.

8. After the completion of the preliminary inquiry, and in order to expedite the trial proceedings, a special sitting of the Supreme Court with a jury in Antigonish was arranged and Mr. Foroughi-Mobarakeh's trial was set for May 16-30, 2016.

9. As the May, 2016 trial dates approached, the disclosure that was eventually received on July 28, 2016 remained outstanding. Further, in or around March of 2016, the police made a request of the forensic lab in Ottawa to test certain evidence seized from the home of Mr. Foroughi-Mobarakeh on March 31, 2014. Specifically, during a search conducted at Mr. Foroughi-Mobarakeh's home […], the police seized […] were stored at the Antigonish RCMP Detachment. It was not until about March of 2016 that the police were tasked to send […] the forensic lab in Ottawa. This occurred at the direction of new Crown Attorneys, who replaced the original Crown Attorney who had carriage of this prosecution.

10. On April 22, 2016, the Crown was notified by the forensic lab in Ottawa that testing […] revealed […]. An actual report in this regard was produced to the Crown and defence on April 29, 2016. Given the timing of the production of that report, and the fact that full and complete disclosure of the police investigation in this regard and the lab processes remained outstanding, the trial scheduled for May 16 – 30 was adjourned. The Crown sought the adjournment, which was inevitably granted. The defence did not waive Mr. Foroughi-Mobarakeh's right to be tried within a reasonable time.

11. The Court sought to arrange a second special sitting of the Supreme Court with a jury in Antigonish and new trial dates were set for November 14 – 29, 2016.

12. The forensic lab in Ottawa made it clear that in order to provide meaningful results, it would be necessary for the police to obtain […]. Consequently, the police were instructed by the Crown to obtain a warrant for additional samples […] and sent to the lab for testing. A general warrant for the purpose was obtained on May 10, 2016.

13. From that point forward, significant delays with respect to obtaining […] and testing […] occurred. Despite concerted efforts by the Crown Attorney responsible for this prosecution at that time to expedite the testing process, the police did not send the […] to the forensic lab until September 22, 2016.

14. Almost a full month after receiving […] at the lab, a report was provided to the Crown and defence on October 19, 2016, setting out the results of the testing […].

15. On November 2, 2016, a pre-trial conference was held by telephone. The discussions during that conference centered on a further adjournment of the trial, as a result of the late disclosure of the forensic results […]. The background facts in relation to this matter were set out in a letter from Stanley W. MacDonald, Q.C. to the Honourable Justice Patrick Murray dated November 2, 2016, a copy of which is attached hereto at Tab 2. Crown Attorney Bill Gorman agreed that the contents of that letter were accurate and it was marked as an exhibit. The defence advised that a request was being made for a further adjournment, but that Mr. Foroughi-Mobarakeh's right to be tried within a reasonable time was not being waived. Mr. Gorman acknowledged that the police were at fault for the delay, which ultimately falls at the feet of the Crown. This position was formalized in a further pre-trial telephone conference on November 7, 2016, at which time an adjournment was granted in the interests of trial fairness.

16. The Court subsequently arranged for a third special sitting of the Supreme Court with a jury in Antigonish from May 1 to 24, 2017.

17. On January 25, 2017, the Crown and defence finally received disclosure of file materials from the forensic lab, including bench notes.

18. Assuming that Mr. Foroughi-Mobarakeh's trial will proceed as planned in May of 2017, the total delay from the date the Information was laid to the end of trial will be 38 months.

Issue

[23] Has Mr. Foroughi's right to be tried within a reasonable time pursuant to s. 11(b) of the *Charter* been breached?

Summary of Proceedings

[24] The Crown and Defence have agreed that the following summary of the proceedings is accurate and that actual transcripts of those proceedings are not required. Recordings of each of the court appearances have been reviewed.

i. April 1, 2014 – This was Mr. Foroughi-Mobarakeh's first appearance in Court, which took place the day after he was arrested. The Crown was not prepared to elect and no disclosure had been made at that point. Mr. Foroughi-Mobarakeh was released on a Recognizance, a copy of which is attached at Tab 3.

ii. April 16, 2014 – The Crown elected to proceed indictably. Initial disclosure had just been received, which was essentially a summary disclosure package. The defence was aware that there was a considerable amount of disclosure to come, and election was adjourned to May 29, 2014.

iii. May 12, 2014 – An application was heard to vary Mr. Foroughi-Mobarakeh's Recognizance to allow him to attend an educational conference.

iv. May 28, 2014 – Extensive additional disclosure had just been received on May 23, 2014 and both the Crown and defence confirmed that both parties were waiting for very important information by way of disclosure. The matter was adjourned to June 30, 2014.

v. June 30, 2014 – Disclosure was still outstanding from the Biology section, and the parties had been advised that it would not be ready until the end of July. Election was adjourned to August 13, 2014.

vi. August 13, 2014 – The defence was advised that extensive disclosure had just arrived in the Crown's office on August 12, 2014 and, therefore, the matter was adjourned to August 25, 2014.

vii. August 25, 2014 – Disclosure was still not complete, but the defence entered its election so that a date could be set for the preliminary inquiry. A full day was sought. October 9, 2014 was offered and accepted by the defence, but the Crown Attorney was not available on that date. The next available date from the Court was January 29, 2015. The defence

accepted this date but it was put on record that it was accepted because it was the next available date and there was no other choice. Mr. Foroughi-Mobarakeh's release conditions were substantially altered so that he could move to Arizona, USA for employment purposes. A copy of his new Recognizance is attached at Tab 4, setting out the very strict terms and conditions and the fact that there were 8 sureties.

viii. January 29, 2015 – The preliminary inquiry commenced. The Crown sought to exclude the public and that application was denied. Evidence of the complainant was heard, but not completed. The preliminary inquiry was adjourned for continuation to February 13, 2015.

ix. February 13, 2015 – The preliminary inquiry continued with the evidence of the complainant and her husband. That evidence consumed the day. The matter was adjourned to March 4, 2015 in the hope that the preliminary inquiry could be completed on that date.

x. March 4, 2015 – There was insufficient Court time to hear any witnesses on that date and, as a result, the completion of the preliminary inquiry was adjourned to May 20, 2015.

xi. May 20, 2015 – The preliminary inquiry was completed and the next scheduled chambers date in the Supreme Court was July 7, 2015.

xii. July 7, 2015 – An appearance was made in the Supreme Court to set trial dates. The Court was available for the first two weeks of February, 2016 but counsel for Mr. Foroughi-Mobarakeh was scheduled to conduct a jury trial in Newfoundland. That trial could not be rescheduled because it was set for the month of February and involved allegations that were over 10 years old. The next available dates that the Court offered were in September of 2016, and that would have been a double booking, with this matter as a back up. The Crown Attorney suggested a special sitting of a Judge and jury in Antigonish. The presiding Judge advised that he would contact the Chief Justice to request a special jury sitting in Antigonish. The next available Chambers date was August 4, 2015, but counsel for Mr. Foroughi-Mobarakeh was scheduled to be away on vacation, so the matter was adjourned to September 1, 2015.

xiii. September 1, 2015 – The Court had arranged for a special jury sitting from May 16 – 30, 2016. Those dates were available and the trial was set for those dates. The Crown Attorney confirmed that Mr. Foroughi-Mobarakeh was subject to a very restrictive Recognizance with a number of sureties.

xiv. January 5, 2016 – A pre-trial conference was held to discuss dates for a disclosure application. That application was eventually scheduled for February 26, 2016.

xv. February 26, 2016 – The defence and Crown were prepared to proceed with the disclosure application, but the complainant did not have counsel and was prepared to sign the Consent Order without advice from counsel. A hearing was set for March 14, 2016. The May trial dates were not affected. In the end result, a Consent Order was agreed upon on March 10, 2016 for disclosure.

xvi. April 28, 2016 – The Court was advised that, in March of 2016, the police were asked to […] to the forensic lab for testing. […]. Given the timing, as previously indicated in this memorandum under the heading "Statement of Facts", an adjournment of the trial was necessary. The Crown made the adjournment request based on the new evidence. The defence indicated that the evidence was necessary and that an adjournment was inevitable. The defence specifically did not waive Mr. Foroughi-Mobarakeh's right to be tried within a reasonable time. The trial was adjourned and new dates were sought.

xvii. May 9, 2016 – The Court advised that a second special sitting of a jury in Antigonish was approved by the Chief Justice and the earliest available trial dates of November 14 to 29, 2016 were set.

xviii. August 26, 2016 – At the conclusion of the *voir dire* in relation to the admissibility of Mr. Foroughi-Mobarakeh's statement to the police, on the motion of Crown Attorney Bill Gorman, Mr. Foroughi-Mobarakeh's release conditions were significantly modified. A copy of this new Recognizance, to which Mr. Foroughi-Mobarakeh remains bound, is attached at Tab 5.

xix. November 2, 2016 – A pre-trial conference was held by telephone. The discussions during that conference centered on a further adjournment of the trial, as a result of the late disclosure of the forensic test results […]. The background facts in relation to this matter were set out in a letter from Stanley W. MacDonald, Q.C. to the Honourable Justice Patrick Murray dated November 2, 2016, a copy of which is attached hereto at Tab 2. Crown Attorney Bill Gorman agreed that the contents of that letter were accurate and it was marked as an exhibit. The defence advised that a request was being made for a further adjournment, but that Mr. Foroughi-Mobarakeh's right to be tried within a reasonable time was not being waived. Mr. Gorman acknowledged that the police were at fault for the delay, which ultimately falls at the feet of the Crown.

xx. November 7, 2016 – A further pre-trial conference was held, at which time an adjournment was granted in the interests of trial fairness.

xxi. December 5, 2016 – A telephone conference call was held, at which time the Court confirmed that the new trial dates are May 1 – 24, 2017.

The New "*Jordan*" Framework

[25] In the recent case of ***R v. Coulter***, 2016 ONCA 704, the court summarized the ***Jordan*** framework at paragraphs 34 – 59 as follows:

> A. The New Framework Summarized
>
> [34] Calculate the **total delay**, which is the period from the charge to the actual or anticipated end of trial (***Jordan***, at para. 47).
>
> [35] Subtract **defence delay** from the total delay, which results in the "**Net Delay**" (***Jordan***, at para. 66).
>
> [36] Compare the Net Delay to the presumptive ceiling (***Jordan***, at para. 66).
>
> [37] If the Net Delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of **exceptional circumstances** (***Jordan***, para. 47). If it cannot rebut the presumption, a stay will follow (***Jordan***, para. 47). In general, exceptional circumstances fall under two categories: **discrete events** and **particularly complex cases** (***Jordan***, para. 71).
>
> [38] Subtract delay caused by discrete events from the Net Delay (leaving the "**Remaining Delay**") for the purpose of determining whether the presumptive ceiling has been reached (***Jordan***, para. 75).
>
> [39] If the Remaining Delay exceeds the presumptive ceiling, the court must consider whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable (***Jordan***, at para. 80).
>
> [40] If the **Remaining Delay falls below the presumptive ceiling**, the onus is on the defence to show that the delay is unreasonable (***Jordan***, para. 48).
>
> [41] The new framework, including the presumptive ceiling, applies to cases already in the system when ***Jordan*** was released (the "**Transitional Cases**") (***Jordan***, para. 96).

Key Elements in the New Framework

(1) Defence Delay

[42] Defence delay has two components: (1) that arising from **defence waiver**; and (2) delay caused solely by the conduct of the defence ("**defence-caused delay**") (***Jordan***, paras. 61 and 63).

[43] Waiver can be explicit or implicit but, in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights (***Jordan***, para. 61).

[44] Defence-caused delay is comprised of situations where the acts of the defence either directly caused the delay or are shown to be a deliberate and calculated tactic employed to delay the trial. Frivolous applications and requests are the most straightforward examples of defence delay (***Jordan***, para. 63). Where the court and the Crown are ready to proceed but the defence is not, the defence will have directly caused the delay (***Jordan***, para. 64).

(2) Exceptional Circumstances

[45] If the Net Delay exceeds the presumptive ceiling, the onus is on the Crown to rebut the presumption of unreasonableness based on the presence of exceptional circumstances.

[46] Exceptional circumstances lie outside the Crown's control in that: (1) they are reasonably unforeseen or reasonably unavoidable; and (2) Crown counsel cannot reasonably remedy the delays emanating from the circumstances once they arise. Such circumstances need not be rare or entirely uncommon (***Jordan***, para. 69).

[47] An exceptional circumstance is the only basis upon which the Crown can discharge its burden to justify a Net Delay that exceeds the ceiling. The seriousness or gravity of the offence cannot be relied on. Nor can chronic institutional delay or the absence of prejudice to the accused (***Jordan***, para. 81).

[48] The list of exceptional circumstances is not closed but, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases (***Jordan***, para. 71).

(a) Discrete Events

[49] An illustration of a discrete event that will generally qualify is a medical or family emergency on the part of the accused, important witnesses, counsel or the trial judge (***Jordan***, para. 72).

[50] The period of delay caused by any discrete event must be subtracted from the Net Delay for the purpose of determining whether the presumptive ceiling has been reached. However, any portion of the delay caused by a discrete event that the Crown or system could reasonably have mitigated may not be subtracted (***Jordan***, para. 75).

(b) Particularly Complex Cases

[51] Particularly complex cases are cases that, because of the nature of the evidence or issues (or both), require an inordinate amount of trial or preparation time such that the delay is justified (***Jordan***, para. 77). The seriousness or gravity of the offence cannot be relied on to establish that the case is particularly complex (***Jordan***, para. 81).

[52] Where the trial judge finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No further analysis is required (***Jordan***, para. 80).

(3) Remaining Delay is Below the Presumptive Ceiling

[53] If the Remaining Delay falls below the presumptive ceiling, the onus is on the defence to show that the delay is unreasonable **(*Jordan***, para. 48). To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings ("**defence initiative**"); and (2) the case took markedly longer than it reasonably should have. Absent both of these two factors, the s. 11(*b*) application must fail (***Jordan***, para. 82).

[54] Stays beneath the presumptive ceiling should be granted only in clear cases (***Jordan***, para. 83)

(4) Transitional Cases

[55] The new framework applies to cases currently in the system (***Jordan***, para. 94). The analysis of transitional cases differs depending upon whether the Remaining Delay exceeds or falls below the presumptive ceiling.

(a) Remaining Delay Exceeds the Presumptive Ceiling

[56] Where the Remaining Delay exceeds the presumptive ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to July 8, 2016, the date that ***Jordan*** was released. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case took is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and to the fact that the

> parties' behaviour cannot be judged strictly against a standard of which they had no notice. Considerations of prejudice and the seriousness of the offence can inform whether the parties' reliance on the previous state of the law was reasonable (***Jordan***, para. 96).
>
> [57] Moreover, the Remaining Delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with significant institutional delay problems. Judges in jurisdictions plagued by lengthy, persistent and notorious institutional delays should account for this reality, as Crown counsel's behaviour is constrained by systemic delay issues (***Jordan***, para. 97).
>
> **(b) Remaining Delay Falls Below the Presumptive Ceiling**
>
> [58] For cases currently in the system in which the Remaining Delay falls below the ceiling, the two things that the defence must establish (i.e. defence initiative and whether the time the case took markedly exceeds what was reasonably required) must also be applied contextually, sensitive to the parties' reliance on the previous state of the law (***Jordan***, para. 99).
>
> [59] Further, institutional delay that was reasonably acceptable in the relevant jurisdiction under the ***Morin*** framework will be a component of the reasonable time requirements (***Jordan***, at para. 100).

Applying the Legal Framework

[26] I turn now to apply the legal framework (following ***Jordan***) to the agreed facts and proceedings before me.

[27] The first step in deciding a s. 11(b) application is to ascertain the total length of time between the charge and the actual or anticipated end of the trial. Mr. Foroughi was charged on March 31, 2014, and his trial is expected to be completed on May 24, 2017.

[28] The Defence submits that this time frame and the total delay is 38 months. The Crown acknowledges this is the time frame but states the length of delay to be evaluated is less than 38 months.

[29] Applying the new framework, I find the total delay to be 38 months.

[30] The next step is to determine whether any of this delay was waived or solely caused by the Defence.

[31] The Crown has submitted in its brief (paragraph 10) that the period from February 2016 to May 2016, a period of 3 months, has been implicitly waived by Defence counsel when the Crown and the Court were available to proceed with the trial in February 2016. The Crown says this would reduce delay by three months to 35 months.

[32] Since submitting its brief and making its oral submission on March 3, 2017 the Defence has acknowledged in writing that it was responsible for the time period from February 2016 to May 2016. Therefore 3 months must be deducted from the total delay. Basically, the Defence acknowledged, based on paragraph 69 of ***Jordan***, that notwithstanding a legitimate commitment by the Defence, delay will still be attributed to the Defence because both the Crown and the Court were available. The Defence maintains however, that this still results in a net delay of 35 months.

[33] It is the Defence position, following a review of paragraph 64 of ***Jordan*** that the 3 months should be deducted. I therefore accept the Defence position that the total delay should be reduced by this 3 months of Defence delay. This leaves the net delay at 35 months.

[34] The next step is to determine or compare the net delay to the presumptive ceiling to determine whether the net delay is below or above the presumptive ceiling in ***Jordan***, for cases going to trial in Superior Court (***Jordan*** at paragraph 66).

[35] In this case, I find that the net delay is 35 months and that it exceeds the presumptive ceiling by 5 months. It is therefore presumptively unreasonable.

[36] The burden therefore shifts to the Crown to rebut the presumption as having been due to exceptional circumstances (***Coulter*** at para 33).

[37] The next step therefore is to first determine whether the Crown has proven there were exceptional circumstances justifying the delay.

Exceptional circumstances

[38] Exceptional circumstances are circumstances that lie outside the Crown's control in this sense: 1) they are reasonably unforeseen or reasonably unavoidable; and 2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise.

[39] These circumstances do not need to be rare or uncommon. In general there are two categories: discrete events and particularly complex cases.

[40] It is clear from ***Jordan*** that exceptional circumstances are the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling (***Coulter*** at para. 47).

[41] Neither Crown or Defence have argued on this application that this case is particularly complex so as to be worthy of consideration as an exceptional circumstances. In fact, both Defence and Crown have informed the Court this is not such a case.

[42] I shall therefore restrict my analysis to the category of discrete exceptional events and will not address the category of "particularly complex cases".

[43] The Crown has submitted that the category of a discrete and exceptional event does apply here in the case of the preliminary inquiry.

Preliminary Inquiry as Discrete Event

[44] In its brief the Crown described its position in paragraph 11. In particular, it says that the delay in completing the preliminary inquiry is a discrete, exceptional event. As such it should be subtracted from the net delay for the purposes of determining whether the ceiling has been exceeded under the ***Jordan*** analysis. The Crown refers specifically to paragraph 73 as follows:

> 73. Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected — even where the parties have made a good faith effort to establish realistic time estimates — then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.

[45] The Crown submits that despite the good faith efforts of then assigned Crown counsel, the delay of the preliminary inquiry was unforeseeable and unavoidable and therefore, should be deducted.

[46] The Defence position is that the ***Jordan*** decision does not support subtracting the time it took to complete the preliminary inquiry from the net delay, as it is not a discrete exceptional event.

[47] The Defence argues it is entirely clear from paragraphs 121 and 122 of ***Jordan,*** that the preliminary inquiry in that case was not considered a discrete exceptional event, even though the underestimation resulted in the preliminary inquiry taking a full year to complete.

[48] In the present case, the period of four months is much less than the full year in ***Jordan***. I note contextually, that the Defence was available for the first date available which was October 9, 2014, but the Crown was not. A full day was sought and agreed to by Crown and Defence. The Crown was available on the next available court date of January 29, 2015. The preliminary inquiry was completed over 4 days between January 29, 2015, and May 20, 2015.

[49] I repeat here that as the net delay exceeds the presumptive ceiling, it is presumptively unreasonable and it is the Crown that has the burden to rebut the presumption by establishing the presence of exceptional circumstances. If they cannot a stay will follow.

[50] The Crown submission does not recite specific facts or reasons in support of its argument other than the preliminary inquiry took 4 months to complete "despite the good faith efforts of the then assigned Crown and Defence counsel".

[51] The Crown does not provide specific case authority where such a position was accepted, other than quoting paragraph 73 from the ***Jordan*** case itself.

[52] In that paragraph, the court in ***Jordan*** was referring to "discrete exceptional events that arise *at trial"*.

[53] ***Jordan*** states in paragraph 69 that exceptional circumstances are those that lie "outside the Crown's control" and so long as they meet this definition, they will be considered exceptional.

[54] Neither Crown or Defence were responsible for the 2 ½ month period from March 4 to May 20, 2015. They did however, have some control over giving a proper estimate. The Crown does not point to anything further that is discrete, such as inordinately long questioning by Defence or the Defence requesting that certain witnesses be called.

[55] The Defence was not solely responsible for this miscalculation which the Crown says was exercised in good faith. Under ***Jordan***, it would therefore not be defence delay. Under the old framework this would be considered institutional delay and would fall to the Crown.

[56] I have carefully considered the Crown's submission that the preliminary inquiry is a discrete event, for which 4 months should be deducted from the net delay for the purposes of calculating whether the ceiling in ***Jordan*** has been exceeded.

[57] I am of the view that simply misjudging or underestimating the time needed, is not the type of exceptional circumstance or discrete event that ***Jordan*** contemplated to exercise the delay.

[58] The best example of this is the ***Jordan*** case itself, where the court found that "Crown and Defence both shared responsibility for the preliminary inquiry underestimation". As a result, the period of one year was not deducted from the total delay.

[59] The court at paragraphs 121, 122 made it clear that the delay was to be equally attributed to crown and defence, and concluded there was no exceptional or discrete event that would be deducted, as per paragraph 125.

[60] It is true that ***Jordan*** stated that the list of things that could constitute discrete events or exceptional circumstances is not closed as long as the events were unforeseeable or unavoidable and the crown took whatever steps they could to mitigate the delay.

[61] I acknowledge that a preliminary inquiry can go awry, as can a trial due to unexpected developments. However, wrongly estimating the time for trial would not, in my view, be considered a discrete event, nor should it be for a preliminary inquiry.

[62] Contrary to being unforeseeable or unavoidable counsel are expected to be able to forecast or reasonably foresee the amount of time a preliminary inquiry or trial will take. In fact, the Courts rely on counsel's informed estimate when such matters are set down.

[63] It is not uncommon that the estimate turns out to be incorrect but here the Crown, which has the burden, has not pointed to any specific fact or event that resulted in the time allotted being insufficient.

[64] Other than wrongly estimating, there is no discrete event or exceptional circumstances that the Crown can point to here.

[65] Unlike the other examples in ***Jordan***, such as a hospital or medical emergency of counsel or a witness recanting, the Court is left to decide the issue based on counsel, albeit in good faith, being wrong.

[66] In ***R v. Trought***, 2016 ONCA 6726, the preliminary inquiry was delayed shortly after it was set, when defence counsel requested an adjournment for personal reasons. The court noted that although the situation had "cascaded" in terms of court time and availability, the defence must clearly "accept" the delay. The court as a result held that 5 months of delay for the preliminary inquiry must be attributed to the defence, as it was solely the defence that caused the delay.

[67] This is not the case here, where both Crown and Defence contributed to delay as was the case in ***Jordan***.

[68] I note further that to attribute a portion, half of the 4 months, to the Defence would not be in keeping with the ***Jordan*** rule, which considered at paragraph 69 that defence delay is delay that is caused solely or directly by the Defence.

[69] For these reasons, I find the Crown has not met its burden of showing that the preliminary inquiry is a discrete event, so as to decide the time taken to complete it.

[70] I am cognizant that of the 4 months a majority (2 ½) months is attributed to a lack of court resources on March 4, 2015, which necessitated an adjournment to May 20, 2017.

[71] Even so, I am satisfied that this is the cascading effect similar to that mentioned above in ***Trought*** and that the root cause is the same for the three (3) earlier dates, that being counsel's initial underestimation of the time required.

[72] I find there is no discrete event that qualifies as an exceptional circumstance. At this point the remaining delay, at 35 months, exceeds the ceiling.

[73] I turn now to discuss the new framework as it applies to cases already in the system when ***Jordan*** was released, and whether the "transitional exceptional circumstance(s)" applies (paragraph 96, ***Jordan***).

[74] As stated in paragraph 55 of ***Coulter***, the analysis of transitional cases differs depending upon whether the remaining delay exceeds or falls below the presumptive ceiling.

Transitional Exceptional Circumstances

[75] Because the remaining delay (35 months) here exceeds the presumptive ceiling, a transitional exceptional circumstance may arise because the charges were brought prior to July 8, 2016, the date ***Jordan*** was released.

[76] In ***Jordan***, the court held that the transitional exception circumstance will apply where "the Crown satisfies the Court that the time the case has taken is justified, based on the parties reasonable reliance on the law as it previously existed".

[77] This requires a contextual assessment, sensitive to the fact that the parties' conduct and behaviour cannot be judged strictly against a standard of which they had no notice (paragraph 96, ***Jordan***).

[78] The court in ***Jordan*** stated that considerations of prejudice and the seriousness of the offence can "inform whether the parties reliance on the previous state of the law was reasonable" (paragraph 97, ***Jordan***).

[79] The Crown in its brief emphasizes that in ***Jordan*** the court stated the analysis must always be contextual (paragraph 98) and, as acknowledged in paragraph 105, there are transitional provisions and the "framework must be applied flexibility due to the parties' reliance on the previous state of the law."

[80] I have reviewed and considered the Crown's submissions in Mr. Gorman's brief which includes the following submissions:

i. That the transitional analysis requires a contextual assessment sensitive to the ***Morin*** framework (paragraph 13) (***R v. Morin***, [1992] 1 S.C.R. 771).

ii. In ***Jordan*** the Court established guidelines, (paragraph 13) ceilings as guideposts, not absolute limitation periods. (paragraph 14)

iii. Determining a s. 11(b) right is a matter of judicial interpretation of reasonableness and not "slavish adherence to a limitation period".

iv. The main reasonableness inquiry is a balancing act between an individuals interest in a speedy trial and the community or societal interest on the criminal justice system and its fairness, efficiency and dispatch.

[81] The Crown further argues that the bail conditions were significantly relaxed in August 2016, before the 30 month threshold. It also states that the Defence (operating under the ***Morin*** guidelines) allowed the matter to continue without an 11(b) application, but yet is claiming to be prejudiced.

[82] As can be seen (at paragraph 21) of the Crown's brief, the Crown's reliance on the previous state of the law and the ***Morin*** framework, is largely predicated on this Court finding that the remaining delay was 31 months, prior to the application of the transitional provisions.

[83] The Court has not made that finding, which was sought by the Crown. Instead, this Court has found the remaining delay to be 35 months. This impacts on the Court's assessment of reasonableness.

[84] In terms of that assessment, in the recent case of ***R v. Apostol***, 2016 NSSC 241 the court stated:

> In ***Jordan***, the majority was very clear that the s. 11(b) right to be tried. Within a reasonable time for person's charged pre-***Jordan*** is no less than those charged post-***Jordan***. (Emphasis added)

[85] I have considered whether the transitional exception for cases already in the system is applicable and whether the Crown has met the burden of proving the delay is reasonable based upon their reliance on the previous law.

[86] I am satisfied that the delay that occurred in this case prior to ***Jordan*** being decided, is consistent with the delay that occurred (in part) after ***Jordan*** was decided.

[87] There were three trials set in this matter. All were set with the approval of the Chief Justice for special sittings.

[88] As stated in the facts at paragraph 22 the first trial dates, in May 2016**,** were adjourned. It was not until March 2016 that […] were sent for testing to the forensic lab in Ottawa. March 2016, was 2 years after the charge was laid. An

actual report was produced on April 29th, 2016. Given this timing and the fact that complete disclosure remained outstanding, the trial was adjourned at the Crown's request.

[89] The results were returned in April 2016, and they described evidence potentially critical to the Defence.

[90] The second trial was scheduled for November 2016. A warrant had been obtained in May 2016 requesting […] be taken. The facts disclose that these were not sent to the lab until September 2016. The results were not received until October 2016, a month before trial scheduled for November 14, 2016.

[91] This resulted in an adjournment request by the Defence, for the reasons set out in Mr. MacDonald's letter of November 2, 2016, submitted with the application materials in Tab 2.

[92] The Crown did not oppose the adjournment. The delay in submitting the samples caused the results to come back too late for the Defence to properly respond and prepare before trial.

[93] At that time I had carefully weighed and considered the adjournment request. It was inevitable and had to be granted to ensure trial fairness.

[94] The Crown took no issue with the facts as outlined in the Defence adjournment request. This included a statement to the effect that a general warrant was obtained on May 10, 2016, and disclosed to Crown and Defence on June 10, 2016. As the facts state, "from that point forward significant delays with respect to obtaining […] and testing […] occurred".

[95] I have had an opportunity to review Tab 1 of the Defence materials, summarizing the disclosure issues the defence says were problematic throughout this prosecution. I am satisfied the Defence was diligent in seeking disclosure throughout this matter but did not always receive it in a timely manner. The agreed facts reveal that on January 25, 2017 Crown and Defence finally received disclosure of file materials from the forensic lab. This was 34 months after the charge was laid.

[96] According to the agreed facts the Defence, although the November 2, 2016 request was for a further adjournment, it was made clear that the Accused's right to

be tried within a reasonable period of time was not being waived. The Defence was also careful not to waive its right at the adjournment of the trial in May 2016.

[97] As the presiding judge I inquired at the November 2 pre-trial about issues stemming from the adjournment. Both counsel were clear and agreed there were such issues but they were ancillary to the decision that had to be made at that time.

[98] In my view, it appears very little was done to remedy the deficits in disclosure and forensic testing required. This is a central theme in ***Jordan***, which stated that it is not sufficient for the Crown, once the ceiling is exceeded, to point to difficulties in the past. It must show what or how they chose to correct it at the time.

[99] The Defence has acknowledged the concerted efforts by senior Crown counsel Mr. Gorman to have matters expedited.

[100] Apart from that, no explanation has been given for the police actions resulting in delay.

[101] On the other hand, the Defence argues the Accused has done everything possible to move matters forward in an attempt to have his trial heard within a reasonable time.

[102] On the facts and evidence before me, I am prepared to accept this. In as much as the Crown (through the police) has had difficulty in disclosing (and testing) evidence on a timely basis, the Defence has been diligent in seeking to move things forward. It sought an earlier preliminary date, and put on the record it accepted the next available date because there was no other choice. It filed a formal disclosure application in December 2016, and consented to an Order for Disclosure on March 10, 2016. I am satisfied the Defence made repeated requests in writing for disclosure as shown in Tab 1.

[103] It is important to state that the burden is on the Crown to show that transitional exception applies and that it reasonably relied on the law as it existed prior to ***Jordan***.

[104] In all of the circumstances, I am not satisfied the Crown has proven the time the case has taken is justified based on the Crown having reasonably relied on the previous state of the law.

[105] Rather than place reliance on the previous state of the law, the actions of the police show only that they failed to act on a timely basis, without regard for the law, as it existed prior to ***Jordan***.

[106] This is evident by the fact that the ***Morin*** guideline of 8 - 10 months was exceeded, as it took 14 -16 months in Provincial Court between March 2014 to May/July 2015. The guideline in superior court of 6 - 8 months was exceeded as it will have taken 22 months in Supreme Court between July 2015 and May 2017.

[107] The conduct here which necessarily falls at the feet of the Crown, is exactly the type of complacency ***Jordan*** is meant to guard against.

[108] It can hardly be said that reliance on the previous state of the law is justified, when under that law the delay would be considered unreasonable. As pointed out by the Defence, the delay here exceeds the ***Morin*** guidelines, which is 14 -18 months for cases in superior court.

[109] As stated in ***Jordan***, the strength of s. 11(b) applications is not lessened simply because the case was in the system at the time ***Jordan*** was decided.

[110] The case of ***Williamson***, is the companion decision to ***Jordan***. The delay in that case was outside the suggested guidelines in ***Morin*** and involved sexual offences for which the accused had been convicted at trial.

[111] In ***Williamson***, the Supreme Court of Canada found a nearly three year delay unreasonable. The case was not complex, and as a result the court dismissed the appeal which sought to overturn the Ontario Court of Appeal decision to enter a stay of proceedings.

[112] I questioned the defence at some length as to the complexity of this case. Their response is that while aspects of the evidence may be complex the case itself is not. The Crown agrees the case is not one that is extremely complex.

[113] The Accused has been responding to this prosecution since March 2014, as has the Complainant and other participants. Under law he is presumed innocent.

[114] To summarize in terms of reliance by the Crown on previous law, there was a 2 year delay between March 2014 when evidence was obtained, and April 2016 when it was sent for testing. That time frame alone exceeds ***Morin.***

[115] Following ***Jordan*** being decided in July 2016, there was further delay whereby new samples were not sent for testing until September 2016, even though it was known since May 2016, when a warrant was issued to authorize the samples, that this testing would be necessary. This amounted to a further 6 month delay, for a total of 30 months as of September 2016.

[116] The final delay was the 6 months between the special sitting in November 2016, the second one arranged by the Court, and the trial dates in May 2017.

[117] The reasons for the adjournment request are detailed in Mr. MacDonald's letter of November 2, 2016. The Crown did not take issue with that request and I would suggest they were in no position to oppose the request, given that it was police delay that caused the test results to be submitted so late in the proceeding.

[118] For the most part these periods of delay, are attributed to the Crown but for the 3 months which the defence acknowledged is theirs.

[119] At the end of the day the Accused has been waiting for the better part of 3 years to be tried. It may be that the 4 months of preliminary inquiry would have been treated differently under the ***Morin*** factors, but the time it has taken would still exceed 30 months and the ***Morin*** guideline by a large margin.

[120] The charge here is extremely serious. The seriousness of the case is reason for concern when considered in light of society's interest in having charges such as sexual assault tried on their merits.

[121] An accused's right however is one that is entrenched in our Constitution. This must also be kept in mind in determining whether a delay is unreasonable and whether a stay of proceedings is appropriate.

[122] In ***Williamson***, the companion decision to ***Jordan,*** the Supreme Court of Canada discussed these factors at para 34:

> [34] First, a person's right to a trial within a reasonable time cannot be diminished based solely on the nature of the charges he or she faces. As this Court wrote in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 40, "*Charter* protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences." Many appellate courts across the country, including this one, have stayed serious charges, even when the total delay (minus defence delay) was *less* than that in this appeal.[1]

[123] Prejudice to the accused is presumed after the delay reaches a certain point. In paragraph 54 of ***Jordan,*** the Court acknowledged that "prejudice can be inferred by prolonged delay", citing ***Morin*** and ***R v. Godin***, 2009 SCC 26, at para. 37.

[124] I have read and considered ***Godin,*** a case heavily relied on by the Defence. I have found ***Godin*** to be instructive and on point as it contains many of the issues before me in the present case. Those include delay in obtaining technical evidence, disclosures issues, and as here, serious allegations including sexual assault.

[125] In ***Godin*** virtually all of the 30 month delay was attributable to the Crown. In restoring the stay of proceedings the Supreme Court of Canada held that the trial judge was correct to conclude the delay was unreasonable.

[126] Here the remaining delay at 35 months, is approaching the better part of 3 years for the Accused, the Complainant, and all participants.

[127] Weighing all of the factors and considering the totality of the circumstances, I am not satisfied that Crown has established that the transitional exceptional circumstance applies in this case.

[128] In the result I find that the Crown has not discharged its burden of satisfying the Court that the time the case took is justified based on the parties' reasonable reliance on the law as it previously existed.

[129] The final step under the ***Jordan*** framework would be for me to address significant institutional delay problems in a particular jurisdiction for cases of moderate complexity as described in paragraph 97. This has not been argued in the case before me.

[130] Having regard to the guidelines in ***Jordan***, no exceptional circumstances have been established by the Crown to rebut the presumption of unreasonableness. As a result, it is unnecessary for me to determine whether the Crown has demonstrated it could not reasonably remedy or prevent the delay.

[131] I therefore find the delay to be unreasonable with the result that the Accused's right under section 11(b) has been breached.

[132] In the final result the charge against Mr. Faroughi is hereby stayed. A stay of proceedings will be entered on the record, in accordance with my decision.

Murray, J.