SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Colpitts*, 2018 NSSC 41

Date: 2018-03-09
Docket: Halifax, Nova Scotia CRH No. 346068
Registry: Halifax

Between:

Robert Blois Colpitts and Daniel Frederick Potter

Applicants/Defendants

v.

Her Majesty the Queen

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Kevin Coady
Heard:	October 31, 2017 to November 7, 2017, in Halifax, Nova Scotia
Written Decision:	March 9, 2018
Subject:	Sections 7 and 11(b) of the *Charter of Rights and Freedoms*, pre-charge delay, lost evidence, post-charge delay, abuse of process, stay of proceedings
Summary:	The defendants each brought an application for a stay of proceedings under s. 7 and s. 11(b) of the *Charter*. They brought a previous unsuccessful application on the same grounds prior to the start of trial
Issues:	(1) Should the Court revisit the issue of pre-charge delay/lost evidence on this application? (2) Have the defendants established unreasonable post-charge delay requiring a stay of proceedings?

Result:

(1) The defendants failed to demonstrate actual prejudice. Pre-charge delay was not considered on this application.

(2) After deducting defence delay and delay caused by discrete exceptional circumstances, the remaining delay was 41 months -- 11 months above the presumptive ceiling in ***R. v. Jordan***. The Crown established, however, that this was a particularly complex prosecution and that it developed and followed a concrete plan to minimize the delay occasioned by such complexity.

The Court found, in the alternative, that the time the case had taken was justified based on the previous ***Morin*** legal framework, upon which the parties reasonably relied.

The defendants' applications were dismissed.

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Post Trial Ruling
Pre and Post Charge Delay

Judge:	The Honourable Justice Kevin Coady
Heard:	October 31, 2017 to November 7, 2017, in Halifax, Nova Scotia
Written Decision:	March 9, 2018
Counsel:	James Martin, Mark Covan and Scott Millar, for the Crown Brian H. Greenspan and Jane O'Neill, Q.C. for Daniel Potter R. Blois Colpitts, Self-Represented

By the Court:

> Many accused do not want to be tried at all, and many embrace any opportunity to delay judgment day. This reluctance to go to trial is no doubt a very human reaction to judgment days of any sort; as well as a reflection of the fact that in many cases delay inures to the benefit of the accused. An accused is often not interested in exercising the right bestowed on him by s. 11(b). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits. This view may seem harsh but experience supports its validity.
>
> This unique attitude on the part of the accused toward his right often puts a court in a position where it perceives itself as being asked to dismiss a charge, not because the accused was denied something which he wanted, and which could have assisted him, but rather, because he got exactly what he wanted, or was happy to have - delay. A dismissal of the charge, the only remedy available when s. 11(b) is found to have been violated sticks in the judicial craw when everyone in the courtroom knows that the last thing the accused wanted was a speedy trial. It hardly enhances the reputation of the administration of justice when an accused escapes a trial on the merits, not because he was wronged in any real sense, but rather because he successfully played the waiting game.[1]

This is one of those cases.

[1] The Court recognizes that this assessment of the defendants' motivations throughout this entire prosecution requires more than a bald assertion. The defendants have argued that attributing such a strategy to them is an acceptance of the rhetorical flourish of the Crown. They argue the evidence does not support such a damning conclusion. Consequently, the first order of business in this ruling must be to describe the basis for the Court's assessment.

Pre-trial delay

[2] The Crown preferred an indictment against Messrs. Colpitts and Potter on March 17, 2011. Justice Hood was the case management judge from that date until

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[1]The Honourable Justice David Doherty of the Ontario Court of Appeal, National Criminal Law Programme, July 1989; cited in *R. v. Askov*, [1990] 2 S.C.R. 1199, [1990] S.C.J. No. 106; *R. v. Bennett*, 1991 CarswellOnt 96, [1991] O.J. No. 884 (Ont. C.A.)

late 2013, a period of approximately 30 months. During that period, the defendants resisted efforts by the Court and the Crown to move the prosecution along. Much energy was expended on issues like access to the Nova Scotia Securities Commission ("NSSC") regulatory file and the setting of firm dates for applications and the trial.

[3] From March 2011 until January 2014, there were 22 court appearances, four case management conferences and two pre-trial conferences. The following is a brief summary of those events:

> December 2, 2011: The Crown urged the Court to set trial dates noting a concern about delay. Mr. Colpitts' counsel resisted this suggestion, claiming it was too early to set trial dates.
>
> March 5, 2012: The Crown urged the Court to set the next appearance date for April 1st. Mr. Colpitts' counsel argued that the date was too soon. The Court adjourned to April 23.
>
> April 10, 2012: The purpose of this conference was to set dates for the conflict motion brought by the Crown. The Crown proposed dates prior to April 23 "or May at the latest". Defence counsel stated that they could not be available until the middle of August. The conflict motion was set over to August 20, 2012.
>
> October 10, 2012: The Crown urged the Court to set trial dates for the fall of 2013. Defence counsel resisted, stating they were not yet in a position to set trial dates.
>
> June 19, 2013: The scheduled date for a disclosure motion was moved from July to August 2013, at the request of Defence.
>
> July 26, 2013: Mr. Colpitts' counsel wrote to Justice Hood advising, "Mr. Colpitts is not prepared to argue any motions in advance of the NSSC motion."
>
> July 29, 2013: Defence counsel and Justice Hood discussed filing the disclosure motion on August 2, but counsel for Mr. Colpitts could not meet that deadline.
>
> January 24, 2014: The trial was set for April 2, 2014, and the defendants advised they would be bringing a motion to adjourn the trial. Justice Hood had set aside the week of January 27 for motions and, consequently, those dates were lost.

Although the Court was anxious to get beyond the adjournment application, the defence could not agree on a date before the end of March 2014. Consequently, the Court set the application for Saturday, February 15, 2014. On the hearing of that application, the trial was adjourned to September 2014.

[4] A review of the record for the period March 17, 2011, to December 5, 2013, indicates that three applications were heard and decided. On August 20, 2012, the Crown's conflict motion was heard by Justice Hood. On February 19, 2013, Mr. Clarke's ***Rowbotham*** application was heard and the decision was released on May 2, 2013. On October 17, 2013, the defendants' ***McNeil*** application was heard, with a decision released on December 5, 2013. Shortly after that ruling I was appointed case management and trial judge. My first appearance was on January 27, 2014. The trial commenced on November 16, 2015 – 22 months later.

[5] The most significant issue during this period was the ongoing dispute over the acquisition of the NSSC regulatory file. The Crown took the position that it was third-party disclosure and, as such, an ***O'Connor*** application was available to the defendants. The defendants took the position that it was first-party disclosure and, as such, a ***McNeil*** application was the proper route to these materials. The defendants maintained the belief that the Crown had an obligation to acquire the file, vet the materials for relevancy and privilege, and then turn the balance over to the defendants. It should be noted that Mr. Potter had already received the regulatory file from the NSSC in mid-2009, while Messrs. Colpitts and Clarke had likewise received the materials in July 2013.

[6] In addition to the regulatory file, the defendants were seeking other NSSC materials. Most of these consisted of correspondence between the NSSC investigator and others associated with the regulatory proceedings. The defendants steadfastly relied on Justice Hood's ***McNeil*** decision (2013 NSSC 386) to maintain their original position that it was the Crown's responsibility to acquire these additional materials.

[7] It became obvious to the Court that the defendants were intransigent in their position. The Court and the Crown continuously urged the defendants to bring an ***O'Connor*** application forthwith, rather than arguing the point. The defendants resisted, citing Justice Hood's decision as authority for their position. It became apparent that the defendants valued the argument above access to the materials they sought. This led to a number of unnecessary discovery-like applications and a great deal of delay. Having achieved nothing by this route, the defendants eventually brought an ***O'Connor*** application on November 24, 2014.

[8] Production of the NSSC documents was a live issue for the defendants since the indictment was preferred. The actual hearing was held in January and February

2015. Although I did not find the materials to be "likely relevant", I released some documentation that did not require an ***O'Connor*** analysis.

[9] The issue of the NSSC materials arose at many of the case management and pre-trial conferences. The following is a brief synopsis of those proceedings:

> April 26, 2013: Mr. Martin proposed May 21 or 22 for an application about third-party records. Mr. Hodgson was unavailable but could be available the week of July 29. Mr. Potter indicated that he might join in the motion. Mr. Hodgson said he would issue a subpoena without prejudice to his argument that these were first-party records.
>
> May 22, 2013: A third-party production application was set for July 2013.
>
> June 19, 2013: Mr. Hodgson, at this case management meeting, said he was "not sure we can do anything with the July dates."
>
> July 23, 2013: Mr. Hodgson wrote the Court indicating that, given the sheer volume of material that would be provided by the NSSC, he did not believe that dates in August or September were realistic.
>
> July 29, 2013: There were discussions about when the defence would be ready. Mr. Covan said the issue of the Securities Commission's file was raised at the first pre-trial in August, 2011. He stated the Crown had taken the position from the start that this was third-party disclosure and the defence has done nothing until the subpoena was issued in July 2013.
>
> July 21, 2014: The dates of August 11-15, 2014 had been reserved for some time for the purpose of an *O'Connor* application respecting NSSC materials. These dates were not utilized for reasons advanced by the defendants. Tentative new dates of October 20-24, 2014 were reserved for an *O'Connor* application.
>
> September 24, 2014: The defendants complained about the NSSC delay in producing the secondary documents. Both the Crown and the NSSC argued that the defendants should proceed with an *O'Connor* motion. The defendants took the view that it was all about fulfilling an undertaking given to the Court by a NSSC employee (Randy Gass).
>
> September 29, 2014: This case management memo states that the week of October 20-24, 2014, was initially reserved for what the Court understood to be an *O'Connor* application. I advised the defendants that I expected all outstanding applications to be filed for that week. I also advised that not proceeding with a motion that week could very well limit the possibility of a later hearing date.

> November 10, 2014: All three defendants advised they would be filing "default" *O'Connor* applications returnable on November 24, 2014. The applications did not proceed on that date and were ultimately bumped to early 2015.

The defendants' search for the NSSC materials, and their reluctance to follow the ***O'Connor*** regime, contributed greatly to delay occasioned between January 27, 2014 and the start of the trial on November 16, 2015. During that period, the Court conducted eight pre-trial conferences and five case management conferences.

[10] Throughout this period the defendants maintained their view that all NSSC materials were first-party documents. They brought forth the following proceedings in relation to the NSSC materials:

> April 28-30, 2014: The defendants brought an application to examine Randy Gass of the NSSC. The Court stated, "Mr. Gass was examined with the consent of all counsel. Essentially this was an exercise in support of a future *O'Connor* application. No further action was taken on that notice": 2014 NSSC 177, para. 48.
>
> August 11, 2014: The defendants applied for disclosure of communications between the Crown and the NSSC. The Court released the sought after correspondence: 2014 NSSC 314.
>
> September 24, 2014: The defendants applied for an order directing the NSSC to provide a timeline/deadline for production of archived emails. The Court declined this request.
>
> October 22-24, 2014: The defendants applied to enforce an alleged commitment by Randy Gass to disclose NSSC materials. The Court stated, "The first application involves testimony from Mr. Gass on April 30, 2014. Subsequent to Justice Hood's decision, it became apparent that the NSSC intended to withhold documents from the defendants for various privilege reasons. Instead of filing an *O'Connor* application the defendants issued subpoenas to Mr. Gass to produce a broad spectrum of materials": 2014 NSSC 392, at para. 10.

[11] The defendants' intransigence was ill-founded. Justice Hood's decision, upon which they relied so heavily, does not support their position on accessing the NSSC documentation. While I make no comment on the correctness of Justice Hood's ruling that the Crown breached its ***McNeil*** obligation, her subsequent comments permit only one interpretation – the remaining NSSC materials were third-party records and an ***O'Connor*** application was the proper procedure to obtain them:

> 70 The records are third-party records but, when the conditions referred to in *McNeil* are met, the Crown has an obligation to inquire and attempt to obtain them. If it does obtain the records, then they are treated like fruits of the investigation and *Stinchcombe* applies to them.
>
> 71 *McNeil* provides a streamlined process which, when its conditions are met, bridges the gap between first-party disclosure and third-party production. If neither *Stinchcombe* nor *McNeil* apply, the *O'Connor* regime may be available to the accused.
>
> 73 It seems clear that, had the Crown met its obligation, the 40 boxes of materials delivered to Blois Colpitts' counsel pursuant to the subpoena would have been delivered to the Crown. The only question is the timing of that delivery had the Crown requested the material at a time before the subpoena was issued.
>
> 74 However, the issue is, in my view, now moot because Blois Colpitts has the Securities Commission materials now. Therefore, it is appropriate to grant the alternate remedy sought, which is to grant Blois Colpitts access to the material he now has.
>
> 75 **It appears some information is not included in those files and, if Blois Colpitts seeks that information, an *O'Connor* application is the option available to him.**
>
> [*Emphasis added*]

[12] As explained in the previous delay decision, I find that the Crown's refusal to acquire the NSSC materials was legally defensible. It was concerned, based on the Supreme Court of Canada's decisions in ***R. v. Jarvis***, 2002 SCC 73, [2002] 3 S.C.R. 757, and ***R. v. Ling***, 2002 SCC 74, [2002] 3 S.C.R. 814, that the Crown's receipt and review of compelled regulatory evidence raised *Charter* risks to the criminal prosecution. In addition, the Crown was aware that the defendants already had access to the materials as a result of their involvement in the regulatory process.

[13] The Crown's reasonable refusal to obtain documentation did not entitle the defendants to sit on their hands while delay accumulated. There is also an obligation upon defence counsel to pursue disclosure. In ***R. v. Dixon***, [1998] 1 S.C.R. 244, [1998] S.C.J. No. 17, Justice Cory stated, at para. 37:

> 37 In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's

non-disclosure affected the fairness of the trial process. In *Stinchcombe, supra,* at p. 341, defence counsel's duty to be duly diligent was described in this way:

> Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen,* [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure. This was aptly stated by the British Columbia Court of Appeal in *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365 (aff'd [1996] 3 S.C.R. 1126), at p. 374:

> . . . the disclosure process is one which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. The goal of the disclosure process is to ensure that the accused is not denied a fair trial. To that end, Crown counsel must disclose everything in its possession which is not clearly irrelevant to the defence, but the defence must also play its part by diligently pursuing disclosure from Crown counsel in a timely manner. Further, where, as here, defence counsel makes a tactical decision not to pursue disclosure of certain documents, the court will generally be unsympathetic to a plea that full disclosure of those documents was not made.

[14] The defendants knew early on that the Crown would not pursue the NSSC materials and, as of Justice Hood's decision, they were aware that the Court considered the remaining NSSC materials to be third-party documents, requiring an ***O'Connor*** application. They therefore had an obligation to make an application that had a real chance of addressing their concerns with disclosure and production.

[15] The defendants' conduct demonstrated that they were in no rush to acquire the NSSC documents. Their strategy was clear – ignore Justice Hood's conclusion that the outstanding materials were third-party records, avoid the ***O'Connor*** process at all costs, and run up the s. 11(b) clock. On the Randy Gass issue, the Court stated:

> The Crown has continuously taken the position that an *O'Connor* application is the appropriate vehicle to access third-party records. I agree with that position. **It is my view that the Defendant's [*sic*] approach amounts to an 'end run' around *O'Connor* and is driven by Section 11(b) considerations.**
>
> [*Emphasis added*]

Had the defendants filed a timely ***O'Connor*** application, none of the above proceedings would have been necessary and much delay (and expense) would have been avoided.

[16] The scheduling of the defendants' first delay/abuse of process application (2015 NSSC 224) also contributed to the overall delay. A delay application was in play at case management conferences since the beginning of this prosecution, yet it was not heard until 2015. The hearing extended from April 20, 2015, until August 10, 2015, consuming 34 days of court time.

[17] The defendants brought several other motions between January 27, 2014 and the start of this trial on November 16, 2015. These included:

> February 15, 2014: The defendants applied to adjourn the trial. It was rescheduled for January, 2015.
>
> April 28-30, 2014: The defendants brought an application for disclosure and an application for particulars. The Court dismissed the particulars motion and ordered release of three items related to the Crown's expert: 2014 NSSC 177.
>
> December 4, 2014: The defendants made a motion for recusal. It was dismissed on December 8, 2014: 2014 NSSC 431.
>
> March 9, 2015: The defendants applied to further adjourn the trial. It was moved from April 14, 2015, to May 4, 2015.
>
> April 14, 2015: The defendants argued their second recusal motion. It was dismissed on April 15, 2015: 2015 NSSC 117.
>
> September 1, 2015: The defendants applied to further adjourn the trial. It was moved to October 27, 2015, to allow the defendants additional time to prepare.
>
> September 22, 2015: The defendants brought their third recusal application, which was summarily dismissed.

The trial date was subsequently further adjourned to November 16, 2015, due to Mr. Potter's spouse's involvement in a motor vehicle accident. I find that the above applications produced little, if anything, of value for the defendants and contributed to the overall delay. The recusal motions delayed the trial, resulting in the loss of scheduled dates.

[18] In the lead-up to trial, it became obvious to the Court that the defendants were unwilling to reach reasonable agreements suggested by the Crown. Clearly there were aspects of the evidence where agreements were possible. Mr. Potter was self-represented during much of this period and that, no doubt, impeded agreements. Nonetheless, it was apparent to the Court that the Crown was always anxious to propose agreements. No such agreements were ever presented to the Court. The majority of the Supreme Court of Canada in ***R. v. Jordan***, 2016 SCC 27, [2016] S.C.J. No. 27, recognized the value of agreements in limiting delay. Justice Moldaver stated at paras. 137 and 138:

> Real change will require the efforts and coordination of all participants in the criminal justice system.
>
> For defence counsel, this means actively advancing their clients' right to a trial within a reasonable time, collaborating with Crown counsel, using Court time efficiently. Both parties should focus on making reasonable admissions, streamlining the evidence, and anticipating issues that need to be resolved in advance.

[19] The Court was frustrated during this stage of the prosecution because it was continually obliged to "keep its shoulder to the wheel" to avoid ever-increasing delay. On a teleconference on August 7, 2014, I stated as follows:

> When I read the materials, the letters that come before me, it's not lost on me that there's a sharp edge at play in this prosecution. And I don't say that directed at any one person, but I think we really have to take a step back and say, 'what can we do to make this go forward in a positive way that doesn't compromise the rights of the accused to a fair trial and their ability to make full answer and defence.'

This "sharp edge" impeded agreements that could have mitigated delay.

[20] The defendants paid little more than lip service to agreements that would shorten the trial. Mr. Potter's counsel addressed the Court as follows on September 2, 2015:

> My Lord, I also want to state to you that I would think that I would not be doing my job if I were allowed [*sic*] this trial to go ahead for the number of days there [*sic*] are talking about. The issues in this trial are not that complicated when you come down to it. I think agreements could be reached between counsel that would seriously reduce the number of days required for trial and then get to the issues that really matter rather than sit around for hundreds of days with the cash register just clinking. Even as the beneficiary of that, I don't want my client to be put through that, I would rather spend the time working with other counsel to identify the real issues here but I can't even do that My Lord until I have some time to determine what is involved but I will commit to you and to counsel that we will do that as long as other counsel wants to, we will meet and we will lock the door if necessary to get agreements on things that should be agreed to.

[21] The Crown, at para. 142 of their post-trial brief, describe the follow-up to that "commitment":

> On September 28, 2015, the Crown sent all parties an agenda for a meeting discussing agreements. It contained several options for various agreements, with time estimates for trial depending on which agreements were arrived at. It included a complete list of all potential continuity witnesses and a complete list of seizure locations for potential admissibility agreements. Ultimately all of these options were rejected. Although Ms. O'Neill and Mr. MacDonald remained counsel on a more 'limited retainer', Mr. Potter made the decision to void any potential agreements with the 'potential to re-visit as the trial proceeds'. Mr. Colpitts also adopted this position at trial. And although Ms. O'Neill, Mr. MacDonald, and eventually Mr. Greenspan returned for almost the entirety of the trial, they never revisited the Crown's overtures on agreements.

[22] While the Court was not involved in these discussions, I have no reason to question the veracity of the Crown's account. I have reviewed the correspondence in the Crown's post-trial brief and find these representations to be accurate. The lack of proposed agreements on non-contentious issues extended the length of the trial.

[23] Throughout the pre-trial period, many weeks were scheduled for the defendants' interlocutory applications but never used. I am unable to precisely quantify the loss of court time, but a review of the record indicates that these wasted dates were regular occurrences that resulted in significant downtime. It is important to note that there were dedicated Crowns, a dedicated courtroom, and a dedicated Justice. The Court and the Crown were in a perpetual state of readiness. The defendants were not.

[24] On March 3, 2014, the Court sent a memo to Scheduling with new dates that were agreed to at a February 28, 2014 case management conference. The trial was scheduled to start on January 5, 2015. The s. 11(b)/abuse of process motion was scheduled for November 24 to December 5, 2014. Other pre-trial motions were to be heard the week of April 28 to May 2, 2014. Any additional applications were scheduled for August 11-15, 2014. Very few of these dates were used.

[25] The constant adjournments throughout this pre-trial period required the agreement of this Court. In some cases the Crown consented (i.e., illness, accidents, etc.) and the Court agreed that the adjournment was warranted. In other instances, the Crown opposed an adjournment but the Court nonetheless granted the motion. Why did the Court countenance such delays? The answer is succinctly stated at para. 2 of the Crown's post-trial brief:

> Throughout these proceedings the defendants have deliberately placed the Court and the Crown between competing constitutional interests. As it relates to s. 11(b) of the *Charter*, this manifested in their consistent requests for delays. The defendants continuously threatened that if the Court did not give them more time, it would violate their constitutional right to full answer and defence. Now, having accumulated months upon months of delay, they demand that the proceedings be stayed for that very reason.

A poignant example of this behaviour followed the Court's dismissal of the defendants' first application for a delay-based stay. Immediately after the decision was released, the defendants brought a request to postpone the trial for several months. According to the defendants, they were not prepared to proceed to trial and, as such, they could not make full answer and defence.

[26] From the moment I was assigned as trial judge until the start of trial, I cannot fault the Crown with contributing to the delay. It was always ready to proceed as scheduled. It assisted the defendants where appropriate and necessary. I am also satisfied that this Court did everything in its power to move things along. The rulings on defence motions came quickly, often in a matter of days. This was the Court's attempt to counter the delays caused by the defendants.

Delay during the trial

[27] The trial began on November 16, 2015, and ended on November 7, 2017, almost exactly two years later. Evidence and argument consumed approximately 165 trial days. The Crown called 57 witnesses and Mr. Colpitts called 18 witnesses,

including himself. There were 184 exhibits. Unfortunately, delay also permeated the trial.

[28] Mid-trial defence applications consumed significant blocks of time. Those applications were as follows:

> November 16, 2015 (Day 1) Mr. Potter applied to adjourn the trial to allow an application to force the Crown to take possession of the NSSC documents so they could assess the likelihood of a conviction. Mr. Colpitts supported Mr. Potter while Mr. Clarke did not. Leave was denied.
>
> January 16, 2016 (Day 18) A defence application was made challenging the manner of the redirect of one of the Crown's technical witnesses. The defendants also applied to cease the use of the electronic monitors and revert to paper exhibits. Both motions were dismissed.
>
> February 8-11, 2016 (Day 23) The defendants brought two applications respecting the evidence of Ian Black. The first sought to limit his *viva voce* evidence. The second sought an Order that the co-conspirators exception to the hearsay rule was not available to the Crown. Both applications were dismissed at 2016 NSSC 48.
>
> August 3, 2016 (Day 79) On this date the Crown's expert, Lang Evans, was to commence his testimony. The defendants challenged his qualifications. Mr. Potter's counsel proposed an alternative style hearing which would address qualifications, scope of the expert evidence, and issues of admissibility. This motion was dismissed and a conventional *voir dire* was held until August 8. Mr. Evans was qualified as proposed at 2016 NSSC 219.
>
> October 6, 2016 (Day 92) Mr. Potter's counsel applied to allow both defendants to open their case together. This application was dismissed at 2016 NSSC 271.
>
> October 18, 2016 (Day 93) Mr. Colpitts applied to adjourn his case until January, 2017. The Court granted a two-week recess to allow for requested preparation.
>
> October 25, 2016 (Day 94) The defendants objected to the inclusion of certain documents in the document exhibit disk. The objection was dismissed by way of oral decision.
>
> January 9, 2017 (Day 111) Mr. Colpitts applied to have his witness, Rob Peters, qualified as an expert. At the conclusion of the *voir dire* he withdrew his application (when he realized it could not succeed).
>
> February 9, 2017 (Day 129) The defendants brought an application to adjourn the prosecution so they could bring a second delay application (post ***Jordan***). The

> Court directed that the defendants' delay applications be heard after the conclusion of evidence: 2017 NSSC 40.
>
> July 18, 2017 (Day 143) The defendants applied for a mistrial. Leave was denied at 2017 NSSC 200.
>
> August 10, 2017 (Day 154) The Crown and the defendants differed on the order of closing briefs and arguments. The Crown argued that the merits and delay submissions should be heard together. The defendants argued that the delay application should be decided before argument on the merits. The Court decided to hear the delay motion and closing remarks contemporaneously: 2017 NSSC 228.

Each of the above applications required adjournments to allow for the filing of briefs. In addition, there were many lesser issues raised by the defendants that also contributed to delay.

[29] Mr. Colpitts opened his case on November 2, 2016. He called 18 witnesses including himself. He called 17 witnesses over 31 days and his own testimony was spread over 15 days, ending on August 8, 2017. Many whole and partial days were lost. Mr. Colpitts regularly acknowledged he needed time to prepare. On some dates, he did not have a witness available. On other dates, he did not have enough testimony to fill the day. The loss of trial time during Mr. Colpitts' case became such a serious problem that the Court was compelled to issue a trial management ruling mid-trial (2017 NSSC 22) in an attempt to regain forward momentum. The Court commented at para. 24:

> Mr. Colpitts has been unable to advise the Court just how long he will need to complete his case, or precisely how many witnesses remain to be called. I suspect this is the result of not having prepared future witnesses. Mr. Colpitts has articulated reasons for this state of affairs but it is obvious he has not anticipated these impediments. By his own admission he has not taken advantage of the time granted to him for preparation. When witnesses are served in a timely manner, situational factors can be accommodated, as they arise, without the loss of valuable Court time and resources.

This Court's response to the situation appears at paras. 26 to 28:

> I am not going to put time limits on Mr. Colpitts' individual witnesses, as he may consider some witnesses more important than others. Instead I am directing that Mr. Colpitts complete his witnesses' evidence by the end of the day on February 2, 2017. Adding Friday, January 20th and Friday, January 27th provides him with

> 12 days. This time allocation does not include Mr. Colpitts' testimony should he elect to testify.
>
> In the event Mr. Colpitts fails to complete his witnesses by February 2nd and wishes to call others, he will have to apply to the Court for permission to do so. I, at that time, will determine what rules will apply to any such application for leave. I expect I would allow Mr. Colpitts two hours of direct to satisfy the Court they have something to add to existing testimony. If the witness has nothing to add the examination will be over without further examinations.
>
> If the witness has something to add I will permit full examination. I reserve the right to place time limits on direct and cross-examinations in such cases. Time limits will be firm but subject to variance should the circumstances so dictate. In the event Mr. Colpitts seeks leave to call more witnesses, those applications will be heard the week of February 6th to 10th, 2017.

The Court was hopeful these directions would assist Mr. Colpitts in calling his case in a more expeditious fashion. That hope was misplaced.

[30] On January 25, 2017, Mr. Colpitts filed a "Notice of Application for Timing of Calling of Defence on Behalf of R. Blois Colpitts". The filing of this Notice, and the proposed schedule therein, completely ignored the previous mid-trial ruling. It was essentially a request for reconsideration of the Court's earlier ruling. Mr. Colpitts stated that if the Court did not grant him the schedule sought in his notice, he would have to forego important witnesses to allow for preparation time. The Court, at 2017 NSSC 24, created a go-forward schedule that provided some accommodation to Mr. Colpitts.

[31] The efficiency with which Mr. Colpitts led his case was not the only problem. His choice of witnesses was another. Throughout this prosecution, the theory of the defendants was that National Bank Financial Limited ("NBFL") was somehow responsible for their present predicament. The witnesses called by Mr. Colpitts, and extensively cross-examined by Mr. Potter's counsel, were unable to give evidence that addressed either the elements of the offences charged or any discernable defence. The Court and the Crown often questioned the relevance of this testimony, but that did not deter Mr. Colpitts from pursuing it over 31 days of trial, spread over 3.5 months. It is certainly arguable that this entire period can be classified as defence delay.

[32] As discussed earlier, the defendants' unwillingness to reach reasonable agreements proposed by the Crown persisted during the trial. While there were

many missed opportunities for cooperation, the defendants' position on continuity of documentary exhibits was the most significant. Agreements on continuity are the rule, not the exception. Several weeks of Crown evidence were devoted solely to proving the continuity of exhibits. In addition, the testimony of several Crown witnesses was extended because they were required to review related correspondence.

[33] The defendants were unable to provide the Court with a defensible reason for their position on continuity. The fact that they formally admitted continuity ten months after the evidence was led suggests there was never a justification to offer.

[34] I cannot be critical of the Crown's conduct during the trial proper. It was always prepared to sit whenever time was available. As I stated in the pre-trial portion of this ruling, the Crown was always in a state of readiness. The Crown was always prepared to assist the defendants in locating materials and operating the technology. Certainly some of the Crown's witnesses took a long time to testify, but that was due to a lack of agreement on issues where agreement would normally be expected.

[35] The Crown, throughout its post-trial briefs, makes the following assertions:

- The defendants were the only parties who have ever asked that the trial be adjourned because they were not prepared.
- The defendants asked the Court to order the Crown to proceed with the evidence more slowly, resulting in 12 witnesses being moved to later months.
- There were lengthy breaks in July, August, and September, 2016 due to the accommodation of Mr. Greenspan's schedule.
- The defendants have consistently asked for delay, asserting that if they are denied, such would violate their right to full answer and defence.

I agree with these statements and the Crown's submission that "the defendants got exactly what they wanted -- delay."

Partners in the creation of delay

[36] My decision to this point applies equally to Mr. Potter and Mr. Colpitts. While I must assess each defendant's application individually, I conclude that both participated equally in creating the delay that has permeated the entirety of this

prosecution. This Court has observed a high level of consultation and cooperation between them and they have not challenged each other. Mr. Potter did not testify, while Mr. Colpitts did. Further, Mr. Potter's counsel did not cross-examine Mr. Colpitts in a way that challenged his testimony. There were no "cut throat" defences advanced by either defendant.

[37] The most significant evidence of a joint trial strategy was the application to combine their defence. I described this proposal at para. 5 of 2016 NSSC 271:

> The proposal before me would see both defendants elect to call evidence at the start of the defence case. They would then collectively design a witness list that includes both defendants' witnesses. Once a witness is called, one of the defendants would declare that witness as their own and would conduct a direct examination. The other Defendant and then the Crown would cross-examine the witness. This would continue until all of the defendants' witnesses are called. Once the witnesses have completed their evidence, the defendants could elect to take the stand. They could testify in an agreed order or, in the absence of an agreement, as per the order on the indictment.

[38] The defendants had no authority for this approach and the Crown was opposed. It argued that if the agreement between the defendants broke down, it was very likely that Mr. Colpitts' rights would be compromised. The Court responded to the defendants' proposal at para. 18:

> My concern for [the risks inherent in the proposed approach] is enhanced by the fact Mr. Colpitts does not have trial counsel. I have a duty to assist Mr. Colpitts in receiving a fair trial. The need for that assistance was apparent when, during submissions, he indicated a willingness to sign a document waiving the right to make a mistrial motion regardless of the circumstance.

If the Court had countenanced this approach, it would have created a situation where the only remedy would be a mistrial. Such an occurrence could jeopardize the future of this prosecution, at worst. At best, it would contribute to further delay.

[39] The vast majority of interlocutory and mid-trial applications were brought by both defendants. When Mr. Colpitts filed an application or raised an issue, he was supported by Mr. Potter. When Mr. Potter filed an application or raised an issue, he was supported by Mr. Colpitts. I cannot think of a single occasion where the defendants took opposing positions. On many occasions, they asked for a recess to consult with each other and counsel.

[40] Mr. Colpitts did not have his own legal counsel during the trial while, for the most part, Mr. Potter had dedicated trial counsel. It was apparent to the Court that Mr. Colpitts presented as the "point man". He regularly agreed to Mr. Potter's counsel questioning Crown witnesses first, despite his name appearing first on the indictment. While both defendants were invested in the "NBFL defence", Mr. Colpitts called those witnesses, thereby allowing Mr. Potter's counsel extensive cross-examination.

[41] Messrs. Potter and Colpitts submitted pre and post-trial briefs. Upon review, it is quickly apparent that they are aligned in their message and do not challenge one another. In situations where Mr. Potter's counsel filed notices and other documents, Mr. Colpitts' documents mirror those of Mr. Potter. The same is true of their closing written and oral submissions.

[42] The fact that both defendants are advancing this application means they are both complaining about delay. When Mr. Colpitts was calling his case, with all of its interruptions and delays, Mr. Potter did not complain. In fact, his counsel, Ms. O'Neill, said she would "not agree to limitations on Mr. Colpitts' case." The Crown addressed the consequences of this stance at para. 158 of its post-trial brief:

> By remaining silent, or by expressly supporting Mr. Colpitts, Mr. Potter acquiesced to all of the delay occasioned in this period. He is as responsible as Mr. Colpitts. As both *Jordan* and *Cody* state, 'defence counsel are therefore expected to actively advanc[e] their clients' right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and . . . us[e] court time efficiently'. Mr. Potter's counsel did nothing of the sort. They sat on their hands and watched the weeks and months accumulate, saying only that the Crown took a long time to present its case, and Mr. Colpitts has a right to full answer and defence.

I agree with this analysis. I find both defendants equally responsible for the delay in this prosecution.

The first delay application

[43] The decision on the defendants' first "pre and post charge delay - abuse of process" application was released on August 12, 2015 (2015 NSSC 224) – 11 months before the Supreme Court of Canada's seminal decisions in ***Jordan*** and ***R. v. Williamson,*** 2016 SCC 28, [2016] S.C.J. No. 28, and almost two years before the release of ***R. v. Cody,*** 2017 SCC 31, [2017] S.C.J. No. 31. These decisions fundamentally altered the landscape of s. 11(b) *Charter* litigation.

[44] In the first delay decision, the time from preferring the indictment to the anticipated conclusion of the trial was 59 months. At that time, delay applications under s. 11(b) were governed by the framework set out in ***R. v. Morin,*** [1992] 1 S.C.R. 771, [1992] S.C.J. No. 25. The ***Morin*** framework was described in ***Jordan*** as follows:

> The Morin framework requires courts to balance four factors in determining whether a breach of s. 11(b) has occurred: (1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay; and (4) prejudice to the accused's interests in liberty, security of the person, and a fair trial. Prejudice can be either actual or inferred from the length of the delay. Institutional delay in particular is assessed against a set of guidelines developed by this Court in *Morin*: eight to ten months in the provincial court, and a further six to eight months after committal for trial in the superior court. The *Morin* guidelines reflect the fact that resources are finite and there must accordingly be some tolerance for institutional delay. Institutional delay within or close to the guidelines has generally been considered to be reasonable.

[45] The Supreme Court of Canada in ***Morin*** suggested a guideline of eight to ten months for institutional delay in provincial courts and six to eight months from committal to trial in superior court for a total guideline period of 14-18 months. A review of cases decided pursuant to the ***Morin*** framework suggests trial courts did not consider these to be hard deadlines.

[46] The ***Morin*** framework has been described as "too unpredictable, too confusing, and too complex": ***Jordan***, at para. 38. That confusion manifested itself in the first delay decision in this case. In that decision, I found the defendants were responsible for delay in relation to production of the NSSC materials:

> 151 Clearly the defendants should be responsible for delay related to not bringing an *O'Connor* application in a timely manner. The difficult question is how much of that delay is the responsibility of the defendants. While this debate goes back to August 19, 2011, I am not satisfied that the defendants should wear this much delay. I am attributing delay to the defendants commencing on December 15, 2013, the date of Justice Hood's decision on *McNeil*. It will end as of January 5, 2015, the date when *O'Connor* applications were set for a hearing. Given all the factors, I attribute 12 months delay to the defendants in relation to the *McNeil/O'Connor* issue.

[47] Although I had ascribed the period of December 15, 2013 to January 5, 2015, to defence delay, I proceeded to apportion additional periods of delay (primarily to

the defence) within that same 12-month window. Earlier in the decision, I had also attributed the period from April 2014 to May 13, 2014 to inherent time requirements. Later, I allocated responsibility for the period of January 12, 2015, to September 14, 2015, to the defence, but went on to apportion further defence delay during the same period. Having thoroughly reviewed my reasons, I am satisfied that the 30 months of defence delay must be corrected to 21 months – December 15, 2013 to September 14, 2015. This period includes delay in relation to production of the NSSC materials, several adjournments, the recusal motions, the ***O'Connor*** application, and the delay application. Although the defendants point out that I initially attributed six weeks during that period to inherent time requirements, my assessment of 12 months delay in relation to the NSSC materials was, frankly, a conservative estimate. As will become clear, a period of six weeks would have no material impact on the outcome of this decision in any event. Obviously, subtracting nine months of delay from the defendants automatically increases the inherent time requirements from 16 months to 25 months. However, as I noted at para. 172 of that decision:

> Attributing forty three months of delay to the parties limits the inherent time requirements to sixteen months. This is a totally unrealistic number for such a complex case. I would have expected this case to require thirty months to prosecute. …

[48] On February 9, 2017, the defendants filed a "Notice of Application and Constitutional Issue" pursuant to ss. 7, 11(b) and 24(1) of the *Charter*. They seek an order granting a stay of proceedings. While they pleaded 29 grounds, the following are the most relevant:

> 4. The pre-charge delay of over eight years amounts to an abuse of process both under the common law and under section 7 of the *Charter of Rights and Freedoms*.
>
> …
>
> 7. Mr. Colpitts' right to be tried within a reasonable time under section 11(b) of the *Charter* has been violated.

The remaining grounds are a recital of the history of this prosecution.

[49] The defendants argue that I should revisit my decision on the first delay application and apply ***Jordan*** principles to that period of time. They set forth their position at para. 103 of Mr. Potter's post-trial brief:

> 103 While a s. 11(b) decision has previously been rendered in this matter, the Applicant submits that the findings in the original s. 11(b) decision must be revisited. Those findings were made by applying the *Morin* framework, and the decision obviously takes no account of the vastly different legal framework that now applies to s. 11(b) of the *Charter.* In the Applicant's submission, many of the reasons for attributing delays to the Crown and defence are no longer valid under the ***Jordan*** framework, and those attributions must be revisited.

[50] The defendants submit that support for their position is found in ***R. v. Nazarek,*** 2016 BCSC 1927, [2016] B.C.J. No. 2188, and ***R. v. Chang,*** 2017 ABQB 7, [2017] A.J. No. 956. The defendants rely on para. 70 of ***Nazarek*** which states:

> The law is well established that a court may exercise its discretion to revisit prior rulings. The Crown agrees that it is appropriate to revisit its ruling on s. 11(b) of the *Charter* given the significant change in the law.

In that case the trial judge exercised her discretion in favor of revisiting the initial ruling at the conclusion of the trial. A close reading of that decision suggests the trial judge dismissed the application with reasons to follow. If, in fact, reasons were not given in the first application, that would be justification for exercising her discretion as she did. The important message, however, is that the issue is a matter of judicial discretion.

[51] In ***Chang***, the trial judge dismissed a pre-***Jordan*** delay application with reasons. The accused then gave notice "of his intention to ask the Court to revisit its previous decision dismissing the section 11(b) *Charter* application in light of the passage of additional time and the decision of the Supreme Court of Canada in *R. v. Jordan.*" Mr. Chang relied on ***Nazarek***. The Court commented on this argument at paras. 12 to 14:

> 12 Counsel were unable to point to any previous decision dealing with this precise issue. While counsel for the Applicant relied on *R. v. Nazarek*, 2016 BCSC 1927, I find that the facts in *Nazarek* are distinguishable from the within matter. Moreover, the court in *Nazarek* simply concludes, without any real analysis or reference to authority, that a court may revisit its previous rulings on s. 11(b) of the *Charter*. At para. 70, the court held: 'The law is well established that a Court may exercise its discretion to revisit prior rulings. The Crown agrees that it is appropriate for this Court to revisit its ruling on s. 11(b) of the *Charter* given the significant change in the law.'

> 13 In *Nazarek*, the court dismissed the accused's initial application for a stay of proceedings on the basis of an alleged breach of s. 11(b), with reasons to follow. Less than a month later, following the release of *Jordan*, but prior to the issuance of reasons, the accused brought two further applications to re-open the delay argument, one on July 15, 2016, and a second one on September 9, 2016.
>
> 14 For the purposes of this application, I am prepared to assume that I do, indeed, have the jurisdiction to revisit my earlier decision. While a court cannot, in my view, acquire jurisdiction that does not otherwise exist through the agreement of counsel, I acknowledge that both parties in this instance urge me to proceed with reconsideration of my earlier ruling. I also take into consideration that the Applicant's s. 11(b) *Charter* right is not a static right, but rather an on-going right up until the conclusion of the proceedings. Moreover, my earlier ruling contemplated that these proceedings would conclude by February, 8 or 9, 2016. A further delay of 10 months, has, however, elapsed, as discussed above.

[52] The Court in ***Chang*** took the view that re-litigation of the same issues for the same purpose was not in the best interests of the administration of justice and would create more delay. In dismissing the second application the Court stated at paras. 17 and 20:

> [17] In my previous ruling I made a number of findings, including the finding that the Applicant had waived 16 months of the overall delay. I also found that 1 additional month was attributable to the actions of the Applicant. Even assuming that it is open to me to revisit my earlier ruling finding no breach of the Applicant's right to be tried within a reasonable time, I am not satisfied that it is open to me to re-open my previous specific findings regarding the proper characterization of specific periods of delay, particularly in light of the concession of the Applicant that there is no new evidence to be adduced relative to those findings. Rather, the Applicant urges me to re-open those findings solely on the basis that the Supreme Court's decision in ***Jordan*** has changed the law as regards the application of those findings relative to the issue of waiver and delay attributable to the actions of the accused.
>
> …
>
> [20] I do not read ***Jordan*** as advocating the re-litigation of *Charter* issues already disposed of following full and complete argument. Such an approach would promote further delay while the parties engage in the necessary preparation time to advance virtually the same arguments a second time on what is fundamentally the same issue, namely whether or not an accused person waived or otherwise causes some portions of the overall delay. Such an approach would also promote

> the use of precious judicial and court resources to re-litigate issues already addressed, thereby creating further delay within the system.

[53] Neither ***Nazarek*** nor ***Chang*** support the defendants' argument that I must revisit my first ruling. These cases merely confirm that revisiting the earlier ruling is a matter of discretion – a conclusion that is supported by para. 102 of ***Jordan***:

> 102 Ultimately, for most cases that are already in the system, the release of this decision should not automatically transform what would previously have been considered a reasonable delay into an unreasonable one. Change takes time.

[54] While I have corrected the mathematical error from the first delay decision, I will not be otherwise revisiting the overall apportionment of delay. I note, however, that the pre-trial periods of delay attributed to the defendants under ***Morin*** would, in my view, also amount to defence delay under the ***Jordan*** framework.

Pre-charge delay?

[55] The defendants urge the Court to consider pre-charge delay when deciding this application. Their position is stated at para. 50 of Mr. Potter's post-trial brief:

> The Applicant submits that the post-charge delay between the preferring of the direct indictment and the anticipated end of trial infringes his right to be tried within a reasonable time, contrary to s. 11(b) of the *Charter*. The Applicant also relies on ss. 7 and 11(d) of the *Charter*, as the lengthy delay between the commencement of the investigation and the ultimate filing of the direct indictment significantly prejudiced his right to a fair trial. This prejudice was exacerbated by the intolerable post-charge delay, but the Applicant submits that the pre-charge delay results in a separate s. 7 infringement, as demonstrated by the quality of evidence ultimately adduced at trial.

The defendants argue that once an investigation begins, the delay in laying a charge may result in an abuse of process and a breach of ss. 7 and 11(d) of the *Charter*. To succeed on such an application, the defendants must establish that the delay is so excessive as to prejudice the fairness of the trial (***R. v. L (WK),*** [1991] 1 S.C.R. 1091) and that such delay deprives the accused from making full answer and defence. In ***Mills v. The Queen***, [1986] 1 S.C.R. 863, the Supreme Court directed that it is not the length of the delay that matters, but rather the effect of that delay on trial fairness.

[56] In dismissing the defendants' first pre-charge delay application, the Court stated at para. 49:

> There is no way to credibly argue that [the decisions made by the RCMP and the Crown] would violate those fundamental principles of justice which underlie the community's sense of fair play and decency. Further, there is nothing to suggest these choices amounted to vexatious or oppressive proceedings. This is not even close to being one of the 'clearest of cases.' Section 7 of the *Charter* is not triggered. There is nothing to suggest these choices undermined society's expectation of fairness in the administration of justice.

[57] In both the current and the previous application, the defendants relied on the death of Charlie Keating, a significant KHI investor. In the previous application I was unable to conclude there was any "lost evidence" associated with the passing of Mr. Keating. In both applications, they relied on witnesses' faded memories to establish prejudice to their fair trial rights. In the first instance I determined these submissions were speculative. In this application, the only new factor was that many of Mr. Colpitts' witnesses struggled to recall events from 2000-2001, and two NBFL witnesses had passed away.

[58] In assessing the impact of "lost evidence" a Court must find that there is substantial reality to a claim that the lost evidence will impact on fair trial rights. In ***R. v. Bradford,*** [2001] 52 O.R. (3d) 257, [2001] O.J. No. 107 (Ont. C.A.), the Ontario Court of Appeal identified the substantial burden on the accused to establish actual prejudice. The Court stated at para. 8:

> The fact that a piece of evidence is missing that might or might not affect the defence will not be sufficient to establish that irreparable harm has occurred to the right to make full answer and defence. Actual prejudice occurs when the accused is unable to put forward his or her defence due to the lost evidence and not simply that the loss of the evidence makes putting forward the position more difficult. To determine whether actual prejudice has occurred, consideration of the other evidence that does exist and whether that evidence contains essentially the same information as the lost evidence is an essential consideration.

I am unable to conclude that the defendants have demonstrated actual prejudice. Consequently, pre-charge delay will not be considered on this application.

[59] There are two related factors that support this conclusion. First, the defendants, in their initial application, relied on the trial level decision in ***R. v. Hunt***, 2015 NLTD(G) 15, [2015] N.J. No. 39, where a stay was entered. The Supreme Court of Canada, at 2017 SCC 25, [2017] S.C.J. No. 25, overturned the stay. It

stated that Courts cannot impose judicial limitation periods or exercise judicial supervision over the allocation of police resources. It also established that pre-charge prejudice must relate to the state's conduct that is later assessed to be "egregious or oppressive". Generalized prejudice is insufficient.

[60] The second related factor is that the defence witnesses who struggled with memory were either former NBFL employees or others employed in the local investment industry. As stated earlier, the testimony of these witnesses did not address the elements of the offences charged or any discernable defence and, as such, it lacks weight if not relevance.

The *Jordan* framework

[61] The majority of the Supreme Court of Canada in ***Jordan*** determined that the ***Morin*** framework had allowed a "culture of complacency" to develop in relation to delay. The Court identified the shortcomings of the ***Morin*** approach at paras. 29 to 38:

> While this Court has always recognized the importance of the right to a trial within a reasonable time, in our view, developments since *Morin* demonstrate that the system has lost its way. The framework set out in *Morin* has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it.
>
> …
>
> First, its application is highly unpredictable. It has been interpreted so as to permit endless flexibility, making it difficult to determine whether a breach has occurred. The absence of a consistent standard has turned s. 11(b) into something of a dice roll, and has led to the proliferation of lengthy and often complex s. 11(b) applications, thereby further burdening the system.
>
> Second, as the parties and interveners point out, the treatment of prejudice has become one of the most fraught areas in the s. 11(b) jurisprudence: it is confusing, hard to prove, and highly subjective . As to the confusion prejudice has caused, courts have struggled to distinguish between 'actual' and 'inferred' prejudice. And attempts to draw this distinction have led to apparent inconsistencies, such as that prejudice might be inferred even when the evidence shows that the accused suffered no actual prejudice. Further, actual prejudice can be quite difficult to establish, particularly prejudice to security of the person or fair trial interests. Courts have also found that 'it may not always be easy' to distinguish between prejudice stemming from the delay versus the charge itself (*R. v. Pidskalny*, 2013 SKCA 74, 299 C.C.C. (3d) 396 (Sask. C.A.), at para. 43).

And even if sufficient evidence is adduced, the interpretation of that evidence is a highly subjective enterprise.

Despite this confusion, prejudice has, as this case demonstrates, become an important if not determinative factor. Long delays are considered 'reasonable' if the accused is unable to demonstrate significant actual prejudice to his or her protected interests. This is a problem because the accused's and the public's interests in a trial within a reasonable time does not necessarily turn on how much suffering an accused has endured. Delayed trials may also cause prejudice to the administration of justice.

Third, the *Morin* framework requires a retrospective inquiry, since the analysis of delay arises only after the delay has been incurred. Courts and parties are operating within a framework that is designed not to prevent delay, but only to redress (or not redress) it. As a consequence, they are not motivated to manage 'each case in advance to achieve future compliance with consistent standards' … **Courts are instead left to pick up the pieces once the delay has transpired. This after-the-fact review of past delay is understandably frustrating for trial judges, who have only one remedial tool at their disposal -- a stay of proceedings. It is therefore unsurprising that courts have occasionally strained in applying the *Morin* framework to avoid a stay.**

The retrospective analysis required by *Morin* also encourages parties to quibble over rationalizations for vast periods of pre-trial delay. Here, for example, the Crown argues that the trial judge erred in characterizing most of the delay as Crown or institutional delay. Had he assessed it properly, the argument goes, he would have attributed only five to eight months as Crown or institutional delay, as opposed to 34.5 months. Competing after-the-fact explanations allow for potentially limitless variations in permissible delay. As the intervener the Criminal Lawyers' Association (Ontario) submits: 'Boundless flexibility is incompatible with the concept of a *Charter* right and has proved to serve witnesses, victims, defendants and the justice system's reputation poorly'.

Finally, the *Morin* framework is unduly complex. **The minute accounting it requires might be fairly considered the bane of every trial judge's existence. Although Cromwell, J. warned in *R. v. Godin*, 2009 SCC 26 [2009] 2 S.C.R. 3 (S.C.C.), that courts must avoid failing to see the forest for the trees (para. 18), courts and litigants have often done just that.** Each day of the proceedings from charge to trial is argued about, accounted for, and explained away. **This micro-counting is inefficient, relies on judicial 'guesstimations', and has been applied in a way that allows for tolerance of ever-increasing delay.**

In sum, from a doctrinal perspective, the s. 11(b) framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts.

[*Emphasis added*]

[62] It is not surprising that the Supreme Court felt compelled to design a new framework that focuses on the proactive prevention of delay rather than on its retrospective assessment. Any move away from the tedious and often confusing "micro-counting" this Court was required to undertake in the previous delay decision is a most welcome change.

[63] The new framework includes a ceiling beyond which delay is presumptively unreasonable. Delay is calculated from the date of the charges to the actual or anticipated last day for trial. Justice Moldaver set out the new framework at paras. 46 to 48:

> [46] At the heart of the new framework is a ceiling beyond which delay is presumptively unreasonable. The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry).
>
> [47] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) *exceeds* the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.
>
> [48] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls *below* the presumptive ceiling, then the onus is on the defence to show the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.

The new framework, including the presumptive ceiling, applies to cases already in the system when ***Jordan*** was released.

[64] Judge Derrick (as she then was) in ***R. v. Mahar***, 2017 NSPC 9, [2017] N.S.J. No. 64, set forth a roadmap to be followed in applying ***Jordan***:

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

The law appears unsettled as to the meaning of the phrase "to the actual or anticipated end of trial". I take the view that this trial ended on November 7, 2017, and not when I render my decision on March 9, 2018.

[65] Defence delay was described in ***Jordan*** at paras. 61 and 63:

> Defence delay has two components. The first is delay waived by the defence (*Askov*, at pp. 1228-29; *Morin*, at pp. 790-91). 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. However, as in the past, '[i]n considering the issue of 'waiver' in the context of s. 11*(b)*, it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness" (*R. v. Conway*, [1989] 1 S.C.R. 1659, per L'Heureux-Dubé J., at p. 1686).
>
> . . .
>
> The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises 'those situations where the accused's acts either directly caused the delay . . . or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial' (*Askov*, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.

And further at para. 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 application 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.

Defence actions legitimately taken to respond to the charges fall outside defence delay and are not deducted.

[66] Defence delay was extensively canvassed in ***Cody***, and the following principles emerged:

- Where the Court and Crown are ready to proceed, but the defence is not, the resulting delay should be deducted.
- Examples of defence delay in ***Jordan*** are only examples and should not be taken as exhaustively defining deductible defence delay. It remains open to trial judges to find that other defence actions or conduct have caused delay warranting a deduction.
- The determination of whether defence conduct is legitimate is not an exact science and is something trial judges are uniquely positioned to gauge.
- Determining defence delay is highly discretionary, and appellate courts must show a correspondingly high level of deference.
- Defence conduct encompasses both substance and procedure. The decision to take a step, as well as the manner in which it is conducted, may attract scrutiny.
- Irrespective of its merit, a defence action may not be legitimate if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.
- Inaction may amount to defence conduct that is not legitimate. Defence counsel are expected to actively advance their client's right to a trial within a reasonable time.
- Legitimacy takes its meaning from the culture change demanded in ***Jordan***.

It must be acknowledged that the s. 11(b) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused.

[67] Delay (minus defence delay) that exceeds the ceiling is presumptively unreasonable. The Crown can rebut this presumption only by establishing that the delay was reasonable because of the presence of exceptional circumstances. ***Jordan***

defined exceptional circumstances as those that are out of the Crown's control because they were reasonably unforeseen or reasonably unavoidable and the Crown could not reasonably remedy the resulting delay. While the list of exceptional circumstances is not closed, there are, in general, two categories: discrete events and particularly complex cases.

[68] The majority of the Supreme Court in ***Jordan*** held that an exceptional circumstance is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. The seriousness or gravity of the offence can no longer be relied upon, nor can chronic institutional delay, to justify delay beyond the presumptive ceiling. In addition, the Court held that the absence of prejudice to the accused can also no longer be used to justify delay above a ceiling.

[69] The "exceptional circumstances analysis" begins with discrete events. The majority in ***Jordan*** discussed this concept at para. 75:

> [75] The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course, the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e. it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).

The majority stated that medical or family emergencies would generally qualify as a discrete event. If the Crown establishes discrete exceptional events which it could not reasonably mitigate or prevent, then the associated delay is to be deducted from the total net delay.

[70] The "exceptional circumstances analysis" then moves to the complexity of the case. The majority in ***Jordan*** discussed complexity at para. 77:

> [77] As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration. Particularly complex cases are cases that, because of the nature of the *evidence* or the nature of the *issues*, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large

> number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.

[71] The Court in ***Cody*** also addressed complexity and stated that, unlike defence delay and discrete events, case complexity requires a qualitative, not quantitative assessment. In other words, complexity cannot be used to deduct specific periods of delay. It is an exceptional circumstance only where the case as a whole is particularly complex.

[72] Once a trial judge finds that a case is particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No additional analysis is required: ***Jordan***, para. 80. Each case must be decided on its facts. Determining whether a case is sufficiently complex to qualify as an exceptional circumstance is well within the expertise of a trial judge.

[73] The majority in ***Jordan*** cautioned that, where the Crown relies on complexity to justify delay, the trial judge needs to consider whether the Crown developed and followed a concrete plan to minimize delay due to that complexity.

[74] In cases where the total delay falls *below* the presumptive ceiling, the delay may still be unreasonable: ***Jordan***, para. 82. If the total delay from the charge to the actual or anticipated end of trial (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) is less than the presumptive ceiling applicable to that level of court, then the defence bears the onus to show that the delay is unreasonable. To discharge that onus, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have: ***Jordan***, para. 82.

[75] ***Jordan*** also addresses transitional cases, which are cases that were "in the system" when it was decided. This prosecution is one of those cases. The majority stated at paras. 95 and 96:

> The new framework, including the presumptive ceiling, applies to cases currently in the system, subject to two qualifications.
>
> First, for cases in which the delay *exceeds* the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. **This transitional exceptional circumstance will apply when the**

> **Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice.** For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of law was reasonable. Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account.
>
> [*Emphasis added*]

[76] The Court in ***Cody*** addressed transitional cases at paras. 68-71:

> **Like case complexity, the transitional exceptional circumstance assessment involves a qualitative exercise. It recognizes "the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice" and that "change takes time" (*Jordan*, at paras. 96-97).** The Crown may rely on the transitional exceptional circumstance if it can show that "the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed" (*Jordan*, at para. 96). Put another way, the Crown may show that it cannot be faulted for failing to take further steps, because it would have understood the delay to be reasonable given its expectations prior to *Jordan* and the way delay and the other factors such as the seriousness of the offence and prejudice would have been assessed under *Morin*.
>
> **To be clear, it is presumed that the Crown and defence relied on the previous law until *Jordan* was released. In this regard, the exceptionality of the "transitional exceptional circumstance" does not lie in the rarity of its application, but rather in its temporary justification of delay that exceeds the ceiling based on the parties' reasonable reliance on the law as it previously existed** (*Jordan*, at para. 96). The transitional exceptional circumstance should be considered in cases that were in the system before *Jordan*. The determination of whether delay in excess of the presumptive ceiling is justified on the basis of reliance on the law as it previously existed must be undertaken contextually and with due "sensitiv[ity] to the manner in which the previous framework was applied" (*Jordan*, at paras. 96 and 98). Under the *Morin* framework, prejudice and seriousness of the offence "often played a decisive role in whether delay was unreasonable" (*Jordan*, at para. 96). Additionally, some jurisdictions are plagued with significant and notorious institutional delays, which was considered under *Morin* as well (*Jordan*, at para. 97; *Morin*, at pp. 799-800). For cases currently in the system, these considerations can inform whether any excess delay may be justified as reasonable (*Jordan*, at para. 96).

> It is important to clarify one aspect of these considerations. **This Court's decision in *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741, should not be read as discounting the important role that the seriousness of the offence and prejudice play under the transitional exceptional circumstance.** The facts of *Williamson* were unusual, in that it involved a straightforward case and an accused person who made repeated efforts to expedite the proceedings, which efforts stood in contrast with the Crown's indifference (paras. 26-29). Therefore, despite the seriousness of the offence and the absence of prejudice, the delay exceeding the ceiling could not be justified under the transitional exceptional circumstance. This highlights that the parties' general level of diligence may also be an important transitional consideration. But the bottom line is that all of these factors should be taken into consideration as appropriate in the circumstances.
>
> When considering the transitional exceptional circumstance, trial judges should be mindful of what portion of the proceedings took place before or after *Jordan* was released. **For aspects of the case that pre-dated *Jordan*, the focus should be on reliance on factors that were relevant under the *Morin* framework, including the seriousness of the offence and prejudice. For delay that accrues after *Jordan* was released, the focus should instead be on the extent to which the parties and the courts had sufficient time to adapt** (*Jordan*, at para. 96).
>
> [*Emphasis added*]

[77] In ***R. v. Picard***, 2017 ONCA 692, [2017] O.J. No. 4608, the Ontario Court of Appeal discussed how to apply the transitional exceptional circumstances at para. 71:

> To determine whether a transitional exceptional circumstance justifies a delay above the presumptive ceiling, the Court must conduct a contextual assessment of all the circumstances … following the example set in *Williamson* relevant circumstances include:
>
> 1. The complexity of the case.
> 2. The period of delay in excess of the *Morin* guidelines.
> 3. The Crown's response, if any, to move the case along.
> 4. The Defence efforts, if any, to move the case along.
> 5. Prejudice to the accused.

For cases currently in the system, these factors can inform whether the parties' reliance on the previous state of the law was reasonable.

[78] The motivation behind ***Jordan's*** transitional exceptional circumstance was discussed in ***R. v. Coulter***, 2016 ONCA 704, [2016] O.J. No. 5005, at para. 89:

> 89 While there are a variety of reasons for why the framework must be applied contextually and flexibly to transitional cases, ***Jordan*** stresses two in particular. **First, the administration of justice cannot tolerate a recurrence of what transpired after the release of *R. v. Askov*, [1990] 2 S.C.R. 1199 when a myriad of charges were stayed in Ontario as a result of the abrupt change in the law (*Jordan*, paras. 92 and 94). Second, it is not fair to strictly judge participants in the justice system against standards of which they had no notice.** Thus, the court must remain sensitive to the parties' reliance on the previous state of the law.
>
> [*Emphasis added*]

[79] The majority in ***Jordan*** recognized that the new framework represented a substantial change from the former approach:

> 108 **We acknowledge that this new framework represents a significant shift from past practice. First, its standpoint is prospective. Participants in the criminal justice system will know, in advance, the bounds of reasonableness so proactive measures can be taken to remedy any delay**. And the public will more clearly understand what it means to hold a trial within a reasonable time. Enhanced clarity and predictability befits a *Charter* right of such fundamental importance to our criminal justice system.
>
> 109 **Second, the new framework resolves the difficulties surrounding the concept of prejudice. Instead of being an express analytical factor, the concept of prejudice underpins the entire framework.** Prejudice is accounted for in the creation of the ceiling. It also has a strong relationship with defence initiative, in that we can expect accused persons who are truly prejudiced to be proactive in moving the matter along.
>
> 110 Prejudice has been one of the most fraught areas of s. 11(b) jurisprudence for over two decades. Understanding prejudice as informing the setting of the ceiling, rather than treating prejudice as an express analytical factor, also better recognizes that, as we have said, prolonged delays cause prejudice to not just specific accused persons, but also victims, witnesses, and the system of justice as a whole.
>
> 111 **Third, the new framework reduces, although does not eliminate, the need to engage in complicated micro-counting.** While judges will still have to determine defence delay, the inquiry beneath the ceiling into whether the case took markedly longer than it reasonably should have replaces the micro-counting process with a global assessment. This inquiry need only arise if the accused has taken meaningful and sustained steps to expedite matters. And above the ceiling, a s. 11(b) analysis is triggered only where the Crown seeks to rely on exceptional circumstances. A framework that is simpler to apply is itself of value: "... we must remind ourselves that the best test will be relatively easy to apply; otherwise, stay

> applications themselves will contribute to the already heavy load on trial judges and compound the problem of delay" (*Morin*, per McLachlin J., at p. 810).
>
> [*Emphasis added*]

[80] The majority emphasized that all participants in the criminal justice system, including the defence, will be expected to work together to avoid impermissible delay:

> 112 In addition, the new framework will help facilitate a much-needed shift in culture. In creating incentives for both sides, it seeks to enhance accountability by fostering proactive, preventative problem solving. **From the Crown's perspective, the framework clarifies the content of the Crown's ever-present constitutional obligation to bring the accused to trial within a reasonable time.** Above the ceiling, the Crown will only be able to discharge its burden if it can show that it should not be held accountable for the circumstances which caused the ceiling to be breached because they were genuinely outside its control. Crown counsel will be motivated to act proactively throughout the proceedings to preserve its ability to justify a delay that exceeds the ceiling, should the need arise. Below the ceiling, a diligent, proactive Crown will be a strong indication that the case did not take markedly longer than reasonably necessary.
>
> 113 **The new framework also encourages the defence to be part of the solution.** If an accused brings a s. 11(b) application when the total delay (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) falls below the ceiling, the defence must demonstrate that it took meaningful and sustained steps to expedite the proceedings as a prerequisite to a stay. **Further, the deduction of defence delay from total delay as a starting point in the analysis clearly indicates that the defence cannot benefit from its own delay-causing action or inaction.**
>
> 114 **The new framework makes courts more accountable, too. Absent exceptional circumstances, the ceiling limits the extent to which judges can tolerate delays before a stay must be imposed.** Indeed, courts are important players in changing courtroom culture. Many courts have developed robust case management and trial scheduling processes, focussing attention on possible sources of delay (such as pre-trial applications or unrealistic estimates of trial length) and thereby seeking to avoid or minimize unnecessary delay. Some courts, however, have not.
>
> …
>
> 116 **Ultimately, all participants in the justice system must work in concert to achieve speedier trials. After all, everyone stands to benefit from these efforts.** As Sharpe J.A. wrote in *R. v. Omar*, 2007 ONCA 117, 84 O.R. (3d) 493:
>
> > The judicial system, like all other public institutions, has limited resources at its disposal, as do the litigants and legal aid... . It is in the interest of all

> constituencies -- those accused of crimes, the police, Crown counsel, defence counsel, and judges both at trial and on appeal -- to make the most of the limited resources at our disposal. [para. 32]

> 117 Sharpe J.A.'s reference to finite resources is an important point. We are aware that resource issues are rarely far below the surface of most s. 11(*b*) applications. **By encouraging all justice system participants to be more proactive, some resource issues will naturally be resolved because parties will be encouraged to eliminate or avoid inefficient practices.** At the same time, the new framework implicates the sufficiency of resources by reminding legislators and ministers that unreasonable delay in bringing the accused persons to trial is not merely contrary to the public interest: it is constitutionally impermissible, and will be treated as such.
>
> [*Emphasis added*]

[81] The new proactive approach adopted in ***Jordan*** was endorsed in ***Cody***, at para. 36:

> To effect real change, it is necessary to do more than engage in a retrospective accounting of delay. It is not enough to 'pick up the pieces once the delay has transpired' (***Jordan***, at para. 35). A proactive approach is required that prevents unnecessary delay by targeting its root causes. All participants in the criminal justice system share this responsibility (***Jordan***, at para. 137).

[82] It must be noted that jurisprudence has long recognized that an accused has no responsibility to bring him or herself to trial; that is the duty of the Crown. The ***Jordan*** majority simply clarified the Crown's ever-present constitutional obligations. The Crown will not be held to a standard of perfection, however. It is not required to demonstrate that the steps it took to mitigate delay were ultimately successful, rather just that it took reasonable steps in an attempt to avoid the delay. As Watt J.A. stated in ***R. v. Manasseri***, 2016 ONCA 703, [2016] O.J. No. 5004, "what counts is effort and initiative, not success": para. 308. It is therefore helpful to review what the Crown can do to limit delay. Courts have identified a number of steps that can be taken:

- 'take preventative measures to address inefficient practices and resourcing problems';
- make 'reasonable and responsible decisions regarding who to prosecute and for what';

- have a 'reasonable', 'realistic', 'concrete' plan for the prosecution, especially in complex cases;

- make prompt disclosure 'with the cooperation of the police';

- engage in resolution discussions, where appropriate, as plea discussions 'are an integral element of effective case management' and can 'promote timely pleas and obviate the need to tie up judicial resources unnecessarily'. They 'honour the principles in ***Jordan*** to the extent that they allow for informed allocation of judicial resources';

- timely resort to case management. A pre-trial conference is 'arguably the most important tool of modern case-management';

- seeking admissions and making requests of the defence to streamline evidence or issues at trial;

- coordination of pre-trial applications;

- make good faith efforts to provide accurate, realistic time estimates when fixing dates; and

- 'using court time efficiently'.

[83] The Crown's obligation to engage in resolution discussions and to seek admissions and make requests of the defence to streamline evidence or issues at trial are, of course, meaningless without a corresponding obligation on the defence to work together with the Crown to accomplish these objectives. Defendants can no longer sit on their s. 11(b) rights. They must work to actively advance their right to trial within a reasonable time.

[84] The first step in the ***Jordan*** analysis is to determine total delay, that is the time between preferring the indictment (March 17, 2011) and the end of the trial (November 7, 2017). That period is 80 months, less one month between the first delay application and the release of the decision, for a total of 79 months.

[85] The second step in the ***Jordan*** analysis is to calculate and deduct delay attributable to the defendants. In the first s. 11(b) application, I set the end of the trial at February 1, 2016, or 59 months since preferring the indictment. The application ended on July 10, 2015, with a decision released on August 15, 2015. Although the total delay calculation in that decision extended to February 1, 2016, there was obviously no analysis of any delay between August 15, 2015, and the start of the trial proper on November 16, 2015. Having corrected my findings

under the ***Morin*** framework, I find that the defendants were responsible for 21 months of delay for the period up to July 10, 2015. This reduces the net delay to 58 months. I must now consider any delay that occurred between the end of the application and the start of trial.

[86] On September 1, 2015, the defendants applied to adjourn the trial from September 30, 2015, until early in 2016. The Court agreed to adjourn the trial until October 27, 2015, on the defendants' representations that they needed more time to prepare.

[87] Instead of using the time to prepare for trial, the defendants advanced their third recusal application on September 22, 2015. It was dismissed at 2015 NSSC 272. In that decision I found that "the alleged incidents of real bias amount to nothing more than speculation and unsupported inference." This was a frivolous application.

[88] I attribute two months to defence delay during the period of August 15, 2015, to the start of trial. The Court and the Crown were ready to proceed, but the defendants were not. Net delay is therefore reduced to 56 months.

[89] The trial lasted 165 days, spread over 24 months. It must be pointed out that the Court did not intend to sit on all available dates. The schedule was to sit four days per week, with a one-week break after every four weeks.

[90] The trial began on November 16, 2015, at 9:30 am. Fifteen minutes later, Mr. Potter asked for another adjournment to give him time to prepare a “fulsome brief” for an application to have the Court direct the Crown to review 85,000 pages of NSSC documents. The Court denied the application, but trial was adjourned for one day. Although that adjournment resulted in the loss of only one day, many more adjournment requests would follow. Requests were made on October 18, 2016 (two weeks of delay), December 14, 2016 (two weeks of delay) and November 21, 2016 (one week of delay). Adjournment requests by the defence during trial amount to five weeks of defence delay. This reduces net delay to 54 months, three weeks.

[91] Significant delay was caused by illegitimate defence motions. None of these applications were intended to move matters forward. They were not advanced in response to the charges or in support of a discernable defence. They had no reasonable prospect of success and their only impact was delay. On January 11, 2016, the defendants brought a motion objecting to the Crown’s use of electronic evidence at trial and challenging the manner of redirect of one of the Crown’s

witnesses. One week was lost. Following that delay, the defendants immediately brought two more mid-trial applications. The first related to the scope of Crown witness Ian Black's proposed testimony and the second was an attempt to stop the Crown from using the co-conspirator's exception to the hearsay rule to exhibit contemporaneous emails. Four weeks were lost. On October 4, 2016, the defendants applied to combine their cases. That delayed the trial for another week. Finally, the defendants made a frivolous motion for a mistrial on July 10, 2017, which resulted in a delay of three weeks. The total defence delay caused by these illegitimate defence motions is nine weeks. Net delay is reduced to 52 months, two weeks.

[92] Other defence conduct that caused delay included the defendants' refusal to reach agreement on continuity (four weeks) and the defendants' request in May 2016 that the Crown slow down the pace of the trial (two weeks). Mr. Colpitts' mismanagement of his defence caused further delay. Although difficult to quantify, I find that it created at least five weeks of delay. Net delay is reduced to 49 months, three weeks.

[93] Finally, the defendants failed to make proper use of the three-month break beginning in March 2017. This was time that had been blocked off for trial, so the parties had no other commitments scheduled. At that point, Mr. Colpitts, the trial's final witness, had completed his direct testimony and had been cross-examined by Mr. Potter's counsel. The Crown had completed one day of its cross-examination.

[94] On March 29, 2017, the Crown wrote to the defendants and explained that it would be using the time to prepare written submissions on both the *Charter* issues and the merits of the case. The Crown urged the defendants to do the same. According to Mr. Potter's counsel, they were "troubled" by the suggestion. Three days after the trial resumed, Mr. Potter elected to call no evidence and the trial concluded. The defendants then asked for four months to prepare closing submissions, which would see the parties arguing well into December 2017. Under the Crown's proposal, everything would have been completed by September 29, 2017. In light of the defence's failure to use the three-month break, I found the Crown's proposal too ambitious and scheduled closing arguments to run until November 8, 2017. If the defence had made proper (or indeed any) use of the break, I find that at least five weeks of delay could have been avoided. This leaves net delay of 48 months, two weeks.

[95] There were other factors that contributed to delay during the trial proper. The parties agreed not to sit for two weeks in each of March 2016 and March 2017 so that they could spend time with family. There was a week-long break in late April, 2016. Mr. Potter requested a week in July 2016 to attend a wedding. I deduct six weeks for these periods, leaving net delay of 47 months.

[96] Defence counsel unavailability was another issue that caused delay. I find that Mr. Greenspan's unavailability for the testimony of Langley Evans, coupled with the unavailability of Mr. Colpitts, created four weeks of delay. As a result, the total net delay after deducting defence delay is 46 months, significantly above the 30-month presumptive ceiling.

[97] Before moving on to consider exceptional circumstances, I wish to note that I take no issue with the conduct of the Crown during the trial proper. I found it took a reasonable and principled approach to the prosecution and I saw no evidence that the Crown acted arbitrarily or in bad faith. Nothing in the Crown's conduct exacerbated the delay. This was a complex prosecution and I am satisfied the Crown had a concrete plan to move it forward. The only obstacle to the plan was the conduct of the defence.

[98] With the Court having found delay that exceeds the presumptive ceiling, the burden shifts to the Crown to justify the reasonableness of the delay on the basis of "exceptional circumstances". Circumstances need not be rare to be "exceptional". The ***Jordan*** majority defined "exceptional circumstances" as outside the Crown's control because they were "reasonably unforeseeable" or "reasonably unavoidable" and "could not be reasonably remedied by the Crown": para. 69.

[99] The two categories of exceptional circumstances are (1) unanticipated discrete events and (2) complexity. The delay caused by discrete events is to be subtracted from the net delay to determine the "remaining delay". The remaining delay is then assessed against the complexity of the case to determine if the delay is unreasonable.

[100] The Crown says there were three discrete events that were not reasonably avoidable, and where the delay could not be reasonably remedied by the Crown. The first was an injury to Mr. Potter's wife. Following the September 2015 adjournment request, trial was scheduled to begin on October 27, 2015. Unfortunately, Mr. Potter's wife was injured in a motor-vehicle accident and Mr. Potter required an adjournment to contribute to her care. All parties consented to the three-week adjournment request. I agree that these three weeks must be deducted, leaving 45 months, one week of delay.

[101] The next discrete event was Bruce Clarke's change of plea. On December 9, 2015, roughly one month into trial, co-accused Bruce Clarke changed his plea to guilty. The defendants requested an adjournment to consider the implications of this development. I agree with the Crown that this event was not reasonably foreseeable. Although the Crown did suggest a shorter adjournment, there was no way to reasonably avoid the delay. This discrete event requires the deduction of three weeks, leaving 44 months, two weeks delay.

[102] Finally, all parties agree that the Court's three-and-a-half month health break in the spring of 2017 is a discrete event that must be deducted, leaving 41 months of delay, 11 months above the presumptive ceiling.

[103] The Court must now determine whether the Crown has demonstrated that this is a particularly complex case that required an inordinate amount of trial or preparation time such that the delay is justified.

[104] The defendants argue that the case was not sufficiently complex to justify the delay, and, further, that the Crown failed to have a plan in place to address the complex nature of the case. I disagree. The Court in ***Jordan*** identified several "hallmarks" of particularly complex cases at para. 77:

> … Particularly complex cases are cases that, because of the nature of the evidence or the nature of the issues, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications; novel or complicated legal issues; and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.

[105] The present case meets and exceeds these identifiers. The Court has repeatedly identified this case as one of extreme complexity. Indeed, at 2017 NSSC 227, the Court observed at para. 1:

> This trial has heard from over 75 witnesses and has received 14 exhibits which include many thousands of documents. Much of the testimony is highly technical. Describing this trial as complex and unique would be a gross understatement.

[106] In sentencing Bruce Clarke (at 2016 NSSC 101), Campbell J. described this prosecution in the following terms:

> 14 It seems that anything that relates in any way to Knowledge House Incorporated is tremendously complicated. Statements about it involve caveats, limitations and boxes of supporting documents. Almost any summary prepared by anyone will be seen by others as suspiciously incomplete or naively inaccurate or just failing to appreciate the vitally important nuances. The entire story of Knowledge House Incorporated is yet to be written. …

[107] During his adjournment submissions on September 12, 2015, Mr. Colpitts described some of the complexity of both the evidence and the issues:

> It is easy when you have unlimited resources to say you are ready, frankly. It is not easy when you don't have those resources to say you are ready and it is more than just reading the 85,000 pages of disclosure and I don't even know the exact page count for the Securities Commission… to make full answer and defence I have to review it and I not only have to speak to their witnesses but I have to put forward my own witnesses….This process has been a long, torturous process and it has been as you are well aware…it has been application after application after application and dealing with little issues and they are not little but issues…
>
> All you have to do is the math. How many pages can you, Justice Coady, read in the run of a day, assimilate it, organize it, and then put it into some reasonable thought to come forward and cross-examine witnesses, remember it, organize it, tab it, the whole thing. I think when there are hundreds of thousands of pages, all you have to do is count the days.

George MacDonald, for Mr. Potter, agreed that the trial comprised "serious and complex issues".

[108] In addition, the responsibility to estimate the length of a trial is not the Crown's alone. It is a joint responsibility shared by both the Crown and the accused. In ***R. v. Spears***, 2017 NSPC 51, [2017] N.S.J. No. 395, Judge Derrick, as she then was, wrote at para. 35:

> I find that Crown and defence share responsibility for estimating trial time. (*R. v. J.M.*, 2017 ONCJ 4, para. 52) That principle of shared responsibility is reflected in the Supreme Court of Canada's emphasis on "every actor in the justice system [having] a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with an accused person's right to a trial within a reasonable time." (*Cody*, para. 1) …

The accused knows the nature of the evidence the Crown intends to present, but the Crown does not know the plans of the accused.

[109] This case is an example of one where the Crown had no ability to anticipate the nature of the defence evidence. The "NBFL defence" had no application to criminal law concepts such as reasonable doubt or the law respecting affirmative defences. The defendants' purpose for calling this evidence was a constantly moving target, leaving both the Crown and the Court uncertain as to where it was heading. Despite the defendants' continued assurances that relevant evidence was forthcoming, the testimony from the NBFL witnesses proved only that NBFL failed to properly supervise Bruce Clarke or enforce its own policies – an admission the Crown had long been prepared to make, and one that was not actually responsive to the charges against the defendants. I agree with the following comments from para. 189 of the Crown's post-trial brief:

> This prosecution had issues of complexity that the Crown anticipated and prepared for; but no Crown counsel, or judge for that matter, could anticipate the scorched-earth litigation strategy employed here by the defendants. Further, the Crown did assertively act to address complexity and continuously attempted, in complete futility, to provide reasonable solutions to the defendants, to hold the trial within a reasonable time.

[110] The inherent timelines required for complex cases were considered in ***R. v. Scherzer***, 2009 ONCA 742, [2009] O.J. No. 4425, a pre-***Jordan*** case involving criminal charges against six police officers. Many of the issues in litigation of the case revolved around the disclosure. The trial judge found that the "vast majority" of delay was attributable to the Crown's failure to make full and complete disclosure. The Court of Appeal disagreed, finding that the time taken to bring the respondents to trial should have been regarded almost entirely as inherent time required to prosecute such a complex case. In reaching this conclusion, the Court made several statements that apply equally to this case:

> 95 … [M]any of the disclosure issues about which the defence complained were not by any means clear cut. There were serious questions on grounds of relevancy and privilege about whether or not disclosure of certain materials was required. In accordance with *Stinchcombe*, these questions would have to be resolved by the trial judge. **Many of the disclosure issues were a direct result of continuing, extensive demands from defence counsel.** This time period was part of the inherent time requirements of the case.
>
> …

> 125 … **The defence cannot at once contend that this was a simple case which could be tried in relatively short order, and at the same time make extensive disclosure and third-party records requests that significantly add to the complexity of the case and lengthen the time needed to get the case to trial.**
>
> …
>
> 126 Plainly, this was a complex case. The inherent requirements of such a case will serve to excuse longer periods of delay than for cases which are less complex. The trial judge, in our view, made two related errors in his approach to the complexity of the case and hence his approach to the inherent time requirements. First, he held that the disclosure should have been prepared as the officers concluded that they had reasonable grounds to lay charges. Second, he considered that in view of the lengthy pre-charge delay, the time that could reasonably be allowed to make disclosure should be shortened.
>
> …
>
> 131 **Given the complexity of the case, it is our view that the inherent time requirements are necessarily longer than might otherwise be considered appropriate.** In reaching this conclusion, we should not be taken as either validating or criticizing the pace of or the Crown's approach to disclosure. **However, it must be borne in mind that the defence approach to disclosure will impact on the pace of the proceedings.**
>
> [*Emphasis added*]

[111] Stock market manipulation, by its very nature, involves facts and law that are not commonly featured in Canadian fraud prosecutions. The evidence consisted primarily of witness commentary on the documentation, which provided very little narrative to guide the Court.

[112] The Crown's case focused on the many methods utilized by the conspirators to ensure the price of KHI stock on the Toronto Stock Exchange did not fall. Concepts such as buy-side domination, wash trades, margin leveraging, "warrant swaps", high closings, and stock escrow agreements are not the tools of the everyday criminal. As Hoegg J.A. stated in ***R. v. Hunt***, 2016 NLCA 61, [2016] N.J. No. 372, in the context of a pre-charge delay argument:

> 100 Complicated commercial crime is most often committed by persons in positions of power and influence and blessed with financial resources. Staying criminal charges in such cases translates into a pass for perpetrators of these crimes and could even be understood to widen the gap between the haves and have nots in our society and affect the perception that everyone is entitled to be treated equally before and under the law. Upholding the Judge's decision in this case amounts to an advance declaration that the most complicated, sophisticated

> crimes will not be prosecuted. To my mind, this result tarnishes and seriously compromises the integrity of the justice system, and accordingly would not establish abuse of process.[2]

[113] Complicated commercial frauds often result in lengthy criminal prosecutions. In ***R. v. Isaacs***, 2016 ONSC 6214, [2016] O.J. No. 5225, various fraud charges were laid against the accused in 2011. They brought a delay motion prior to trial, which was scheduled to begin in September 2016. After subtracting defence delay and exceptional discrete events from the equation, Le May J. arrived at a delay of 43 months.

[114] The ***Isaacs*** case involved 60 banker's boxes of disclosure, an anticipated 80 witnesses, a complex fraudulent scheme, and questions relating to a regulatory statute (the Ontario *Insurance Act*). Le May J. rejected the defence argument that the presumptive ceilings account for this type of complexity, and found instead that "this is exactly the type of complex case that would require time above the thirty month ceiling set out in *Jordan*": para. 158. He continued:

> 158 … The question is how much additional time would be required. My analysis of that point starts with the amount of in-court time that this proceeding will consume.
>
> 159 The amount of in-court hearing time for the preliminary inquiry, the pre-trial motions and the anticipated time for the trial itself is significant enough to qualify this as a complex case. The preliminary inquiry was four weeks, the motion on the voluntariness of the statements was two weeks, and the hearing on the Jordan application was also two weeks. In addition, the trial is expected to take seven (7) weeks or perhaps longer. In short, there will have been more than four (4) months of in-court time on this case, over and above the routine appearances that are required in every case. This clearly supports my conclusion that this is an exceptional case.
>
> 160 It also demonstrates that there will be delays at every step of this proceeding, which would necessitate **an additional 12 to 15 months of time, over and above the 30 month ceiling that *Jordan* imposes on this case.**
>
> [*Emphasis added*]

The application was dismissed.

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[2]Although Hoegg J.A. was writing in dissent, her dissenting reasons were adopted by the Supreme Court of Canada (2017 SCC 25).

[115] ***R v. Majeed***, 2017 ONSC 3554, [2017] O.J. No. 3011, was a complex fraud case with a total delay of 54.5 months. After allowing for defence delay and exceptional discrete events, the period was reduced to 39 months, 19 days. The case involved "an elaborate scheme amongst a group of co-conspirators to commit multiple frauds, each playing a different role": para. 4. The allegations spanned two years. There were multiple accused, 90 police interviews, 60 judicial authorizations, and tens of thousands of pages of disclosure. The case involved a fraud that "cannot be proven just by following a paper trail", requiring the testimony of 90 witnesses: para. 38.

[116] Nakatsuru J. found that the Crown had made reasonable efforts to manage the complexity of the case. Specifically, the Crown assisted the defendants with accessing and understanding complex disclosure, broke up the prosecution into manageable groupings, and reduced the number of accused by offering agreements in exchange for cooperation: paras. 47-50. The application for a stay was dismissed.

[117] Finally, ***R. v. Catania***, 2016 QCCQ 15023, [2016] Q.J. No. 18136, was a fraud, conspiracy, and breach of trust case with "numerous characteristics of a complex case within the meaning of *Jordan*": para. 64. The initial delay period of 61 months was reduced to 41 months after accounting for defence delay. The case involved multiple co-accused in an embezzlement scheme in the context of a real estate project implemented over a long period of time. There were several hundred thousand pages of complex disclosure, complicated applications involving third parties, and a large number of Crown witnesses including three experts. The Court found that despite some issues, "the prosecution took steps to move the case forward quickly and insisted several times that a trial date be set. Moreover, the prosecution waited a long time for certain applications that the defence announced and promised to submit": para. 70. The period of 41 months was deemed to be reasonable in the circumstances, and the application was dismissed.

Complexity of the evidence

[118] This prosecution carries every hallmark of evidentiary complexity identified by the majority of the Supreme Court of Canada in ***Jordan***. It had multiple accused involved in a complex and multi-faceted scheme with 11 co-conspirators. Their alleged crimes were carried out over an indictment period of 20 months. They used, at various overlapping times, multiple bank accounts in the names of

multiple individuals, conducting varied and multiple manipulative techniques that required extensive expert evidence to explain.

[119] Crown disclosure comprised over 15,500 documents, including hundreds of witness statements, complex financial documents and trade data, and a network of communications resulting from 31 judicial authorizations. This information was culled from over 150,000 e-mails and 700,000 electronic files. The evidence covered almost a two-year period with over 700 communications and thousands of supporting documents. This does not even include the thousands of documents this Court reviewed in the ***O'Connor*** applications for privilege and likely relevance. For Crown witnesses Dr. Lutz Ristow and Barbara Barthe, the Crown required the assistance of the German authorities under the *Mutual Legal Assistance Act*. The Crown called two expert witnesses – Mehran Shahviri and Langley Evans. Mr. Shahviri testified over five days, while Langley Evans was on the stand for 11 days (including the *voir dire* on qualifications). The defendants aggressively challenged their evidence.

[120] The evidentiary record is complicated enough, but the defendants added to this complexity by introducing issues that were irrelevant to a determination of their guilt or innocence. These included, but were not limited to:

- excessive and repeated evidence about the actions of NBFL;
- excessive and repeated evidence about the history of KHI which, while interesting, was not responsive to the charges. The Crown was always willing to concede that KHI was not a "sham" company;
- evidence about why KHI as a corporate entity ceased to exist; and,
- unfounded allegations of conspiracies among law enforcement agencies.

[121] The defendants are certainly entitled to contest issues and to bring a defence. But if the defence is lengthy and proves to be not just insufficient but largely irrelevant then, at the very least, they must accept that this adds to the complexity of the case.

Complexity of the issues

[122] As noted above, ***Jordan***'s hallmarks of a case that is complex because of the nature of the issues "may be characterized by, among other things, a large number

of charges and pre-trial applications; novel or complicated legal issues; and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case": para. 77. Once again, this case is the prototype.

[123] To say that this trial involved a large number of issues in dispute would be a gross understatement. The defendants brought 27 formal applications during the prosecution. As discussed above, many were illegitimate, as defined by the Supreme Court of Canada in ***Jordan*** and ***Cody***. Some, however, were legitimate defence conduct. Examples include Mr. Clarke's *Rowbotham* application and the first delay application. I have reviewed most of the applications earlier in this decision, and need not repeat them here. The number of applications alone does not reflect the lost court dates, the time needed to prepare written briefs, and the delay each application caused in the next step in the process.

A concrete plan

[124] A particularly complex case, on its own, will not be sufficient to justify a lengthy period beyond the presumptive ceiling. As the Court in ***Jordan*** stated at para. 79:

> [T]he trial judge will also want to consider whether the Crown, having initiated what could reasonably be expected to be a complex prosecution, developed and followed a concrete plan to minimize the delay occasioned by such complexity.

Failure to do so will result in failure to prove the exceptional circumstance.

[125] The defendants allege that "at no point did [the Crown] seek to narrow the issues, seek fair and appropriate admissions, or seek to admit evidence on consent". Having been a witness to these proceedings, I reject this assertion in its entirety.

[126] At the initial stages of the debate over access to the NSSC materials, the Crown encouraged the defendants not to spend time in 2013 arguing over who was responsible for accessing these materials. Rather, the Crown's position was the entire application to Justice Hood was moot at the point the Securities Commission was prepared to provide the materials for the mere formality of a subpoena. The effect of that process could then be argued later at the inevitable s. 11(b) motion. The defendants rejected that approach and instead spent almost all of 2013 debating an issue that was ultimately held to be moot. The discussion around these

materials began at the earliest days of the process, and the defendants leveraged this issue, to the best of their ability, to create delay. The Crown provided a reasonable option to make efficient use of court resources and the defendants rejected it.

[127] In January 31, 2014, the Crown provided the defendants with a notice under the *Canada Evidence Act* and recommended to counsel that they review the notice for the purpose of identifying potential agreements on continuity or admissibility. The defendants never responded.

[128] As previously mentioned, on September 29, 2015, two months prior to trial, the Crown approached the defence in writing with a host of suggestions for shortening the trial. The options included:

- An agreed statement of facts, followed by submissions on the legal effects of those facts.
- Defence admission to the Crown's alleged facts, followed by defence evidence and possibly Crown rebuttal evidence.
- Defence admission to *some* of the Crown's facts, followed by evidence of the Crown and the defence.
- Defence admission to some evidentiary issues, followed by evidence of the Crown and defence.

[129] With respect to evidentiary issues, the Crown provided a detailed list of continuity witnesses, and sought agreement on their evidence. In addition, the Crown outlined all of the locations from which trial evidence had been seized, seeking agreements on admissibility. Initial discussions were promising but, in the end, both Mr. Potter and Mr. Colpitts rejected every option, as was their right. Their later change in position and its effect on the prosecution has been discussed elsewhere in this decision.

[130] Those options were all in respect of the Crown's evidence, but the Crown was also open to facilitating defence evidence through agreements, and made that known to the defendants and to the Court. For example, the Crown encouraged the defendants to apply to have (the deceased) Daniel Boucher's statement tendered as evidence, or to prepare an agreed statement of facts for him. They never did.

[131] On several occasions, the Crown offered to work on an agreed statement of facts related to the NBFL witnesses, including an agreement that NBFL did not properly supervise Bruce Clarke. It was not pursued by the defence. The Crown offered to review statements of fact for particular witnesses in order to expedite the NBFL evidence process. That offer was taken up only once by Mr. Colpitts in relation to National Bank Director of Settlement Sector, Cecile Orlup. However, Mr. Colpitts provided a draft agreement less than two hours before Ms. Orlup was scheduled to testify. The Crown would not agree to the proposed facts, given that it would not actually save time and it contained details the Crown was certain that Ms. Orlup could not know (which was later confirmed when she testified). The Crown then told both Mr. Colpitts and Mr. Potter that "we remain open to working on agreements so long as we are given sufficient notice of the facts you wish to have entered". Neither took the Crown up on its offer, as was their right.

[132] But the Crown's concrete plan to minimize delay was not limited to seeking agreements. The Crown continuously and consistently created and suggested solutions to deal with the exceptional circumstances. Frequently, they were frustrated by the defendants. The examples are varied and numerous:

- Number of co-accused: The Crown made the significant decision of limiting the prosecution to the three essential members of the conspiracy. There were ample grounds to have prosecuted other members of the conspiracy, however the complexity factor had to be considered in determining the scope of the prosecution. As a result, charges were laid against the three individuals without whom the conspiracy could not have succeeded: the broker, the CEO and the lawyer.

- Access to disclosure: The Crown and police traveled to Toronto to provide training on the use of the disclosure hard drive. The Crown had the police rename all 16,000 documents on the hard drive at the request of the defendants because they wanted the search results to look better. The Crown acceded to the defendants' request to provide them with the "load files" used to organize the disclosure hard drive, only to have that result in another application in August 2014. Then after Mr. Hodgson agreed to the terms of access to the load files, he never responded to the Crown's offer to assist in putting the materials together.

- Electronic courtroom: The electronic courtroom was specifically created for this trial due to its nature and complexity. The Crown made efficient use of

it, and even operated it for Mr. Colpitts, at his direction, during his evidence. Initially all parties agreed to it, but the defendants tried to revoke their "consent", which would have increased trial time exponentially.

- Constant Crown concern over delay: As noted in the first stay decision, the Crown always had concerns about delay and repeatedly asked the Court to schedule matters promptly, over the objection of the defence.

- Crown agreements to move process along: The Crown strongly encouraged the defendants to access the NSSC materials and to argue the effect of process during the s. 11(b) hearing. The Crown pushed the defence throughout the third party record hunt to bring a proper ***O'Connor*** application, even agreeing in April 2014 to present Randy Gass as a witness in some unidentified hearing hoping that it would move the matter along. It did not. It only made it worse. And it resulted in another application in October 2014 to enforce a supposed Randy Gass undertaking.

- Abbreviated filing dates: The Crown was always prepared to file its application materials within short timelines. It agreed to receive notices in an informal manner and assisted when possible in accessing witnesses or documents.

- Booking multiple witnesses: The Crown scheduled multiple short and non-controversial witnesses in single days. This was met with an application to slow the trial by calling fewer witnesses each day.

- Continuous re-assessment of its case: After Bruce Clarke pled guilty, the Crown removed several witnesses from its list determined to be non-essential to the case against the remaining defendants. As the trial proceeded, and the strength of the evidence presented was assessed, the Crown repeatedly reduced its witness list and could have done so even further with more reasonable cooperation by the defendants.

- Efficient use of unexpected delay: The Crown used the sudden three-month adjournment near the end of trial to prepare argument, and suggested to the defendants that they do so as well.

[133] ***Jordan*** requires the Crown to demonstrate that it made reasonable efforts to mitigate any delay flowing from the exceptional circumstance. However, the Crown does not have to act against the interests of its case or accept any defence

proposal. As the Ontario Court of Appeal recently stated in ***R. v. Saikaley***, 2017 ONCA 374, [2017] O.J. No. 2377, leave to appeal denied, [2017] S.C.C.A. No. 284:

> 47 Again, we do not read *Jordan* as requiring the Crown to take any and all steps proposed by the defence to expedite matters. The Crown's reasonable and principled position on the *Dawson* application provides no basis to conclude the Crown acted arbitrarily or in bad faith in refusing to consent to the cross-examination proposed by the defence. So long as the Crown acts reasonably and consistently with its duties, it would be unconscionable to deny it the benefit of the complex case exception to the 30-month presumptive ceiling.

[134] By any metric, this case is particularly complex. Every factor identified in ***Jordan*** – volume of disclosure, number of co-accused, number of witnesses, nature of issues, expert witnesses, length of alleged offence period, number of applications, nature of issues, and so on, supports that conclusion.

[135] The entire process of investigation to prosecution illustrates the complexity of the matter. The investigation took years to complete and, not surprisingly, the process to the commencement of trial was lengthy. The trial itself has taken almost two years of court resources. Although the Crown's case was in effect only four months in length (after deducting continuity witnesses, January and February mid-trial defence motions, March holidays and the scheduling of Langley Evans), the length of the matter is proportional to all of the issues in this case, and reflects the reasonableness of the timelines in the context of all the issues.

[136] When the Crown attempted to implement a concrete and multi-faceted plan to reduce delay, the defendants were in a constant rear-guard action, pressing against the progress of the prosecution, while continuously complaining about how long the process was taking. What must be understood here, as discussed earlier in this decision, is that the defendants have resisted moving forward at every step of the entire period of delay. While complaining about the length of the trial, their actions were intended to extend it.

[137] Although the remaining delay is above the presumptive ceiling of 30 months, given the complexity of the matter and the Crown's continuous attempts to minimize the delay, under the ***Jordan*** framework, I find that the period is entirely reasonable.

[138] Even if I am wrong in concluding that the complexity of this case is sufficient to justify its length, I would find that the Crown has satisfied the Court

that the time the case has taken is justified based on the previous legal framework, upon which the parties reasonably relied.

[139] The majority in ***Jordan*** recognized that the new framework must be applied contextually and flexibly for cases currently in the system in order to avoid a recurrence of what transpired after the release of ***Askov***: para. 94. The majority further noted, at para. 96:

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

[140] This case was not merely "in the system" when the decision in ***Jordan*** was released; it was eight months into trial. I have already concluded that none of the delay that occurred after the previous delay application was caused by the Crown. It was all defence delay. There was nothing more that the Crown could have done to expedite the process following the release of ***Jordan***, and the defence, for its part, continued its efforts to lengthen the trial. In addition, this Court had previously decided that the delay leading up to July 2015 was justified under the ***Morin*** framework. The majority in ***Jordan*** noted at para. 102:

> Ultimately, for most cases that are already in the system, the release of this decision should not automatically transform what would previously have been considered a reasonable delay into an unreasonable one. Change takes time.

[141] Similarly, in ***R. v. Kemp***, 2017 ONCA 703, [2017] O.J. No. 4687, the Ontario Court of Appeal held that "[o]nly rarely will a transitional case that complied with *Morin* nevertheless be found unreasonable under *Jordan*": para. 5.

Conclusion

[142] In ***Jordan***, the majority recognized, as did Justice Doherty, that "some accused persons who are in fact guilty of their charges are content to see their trials delayed for as long as possible. Indeed, there are incentives for them to remain passive in the face of delay. Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(b) was not intended to be a sword to frustrate the ends of justice": para. 21.

[143] The defendants in this case were not the victims of delay. Indeed, they went to great efforts throughout the entirety of this prosecution to create it. It would be a miscarriage of justice to reward their efforts by staying the charges against them for delay.

[144] In conclusion, I do not find an infringement of Mr. Potter's and Mr. Colpitts' Section 11(b) rights. I dismiss both applications.

Coady, J.