SCC Court File No: 38532

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)

B E T W E E N:

K.G.K.

APPELLANT
(Appellant)

A N D:

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT

*(*Pursuant to Rule 42 of *the Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The issue to be determined is whether judicial delay is part of the total delay calculation, as contemplated by the Supreme Court of Canada in *R v Jordan*, (hereinafter "*Jordan*.")[1]

2. There was a delay of nine months and four days (from January 21, 2016 to October 25, 2016) for the trial judge to render a verdict.

3. The motion judge determined that judicial decision-making time is not to be considered in determining whether the accused's section 11(b) rights pursuant to the *Canadian Charter of Rights*, (hereinafter "the *Charter*,")[2] have been breached as contemplated in *Jordan*.

4. The motion judge introduced a test not contemplated in *Jordan*. He relied on *R v Rahey*, (hereinafter "*Rahey*,")[3] to determine if, on a case by case basis, judicial decision-making time should be a factor in deciding if section 11(b) of the *Charter* has been breached. The motion judge determined that, only if the time taken is, "shocking, inordinate and unconscionable," would that period of delay be considered in relation to a *Jordan* analysis. The motion judge found the nine months decision-making time was, "comparatively long", but that it did not meet the *Rahey* standard.[4]

5. The motion judge took three months and nineteen days (from February 10, 2017 to May 29, 2017) to render his decision regarding delay.

6. Three separate appellate decisions were rendered. All of the Appellate Justices agreed that judicial decision-making fell within s. 11(b); however, Cameron JA. and Monnin JA.

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[1] *R v Jordan*, 2016 SCC 27
[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, sections 11(b) and 24(1)
[3] *R v Rahey*, [1987] 1 SCR 588
[4] *R v KGK*, 2017 MBQB 96 para 95 Appellant's Record "AR" [AR Vol I, Tab 4]

held it should be subject to separate analysis. They held that judicial decision-making time is not part of the total delay calculation in *Jordan*. Therefore, the motion judge did not err in dismissing the Appellant's motion for delay.[5]

7. Hamilton JA held that judicial decision-making time falls within the calculation of total delay in *Jordan*. She would have allowed the appeal and found that the motion judge erred in dismissing the Appellant's request for the remedy of a stay of proceedings.[6]

8. Hamilton JA. and Monnin JA. held that *Rahey* was not the applicable test when considering judicial decision-making delay in a *Jordan* analysis.

Position of the Appellant

9. The judicial decision-making delay was nine months and four days. The judicial decision-making delay with respect to the *Jordan* application was three months and nineteen days. This is a total of twelve months and twenty-three days of judicial decision-making delay.

10. The Appellant argues that the time from the date of the charge to the date of the sentencing (fifty months and nine days) is the relevant timeframe, and that the totality of the judicial delay, that being twelve months and twenty-three days, should be considered.

11. The Appellant asserts that this judicial delay must be assessed as part of the *Jordan* analysis. It is presumptively unreasonable as the total delay exceeds the thirty-month presumptive ceiling. The crown has not established a defence waiver of delay, or exceptional circumstances under either *Jordan* or the transitional *R.* v. *Morin* framework, (hereinafter "*Morin*").[7]

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[5] *R v KGK*, 2019 MBCA 9 [AR Vol I, Tab 6]
[6] *R v KGK*, 2019 (*supra*) [AR Vol I, Tab 6]
[7] *R v Morin*, [1992] 1 SCR 771 (SCC)

12. It is respectfully submitted that this delay infringed the Appellant's section 11(b) right to be tried in a reasonable time, and that Cameron JA. and Monnin JA. erred in failing to grant a stay of proceedings.

13. Without the judicial decision-making time, the total delay from the date of charge to the conclusion of closing arguments was thirty-three months and ten days. This exceeds the presumptive ceiling and would have resulted in a stay under *Morin.* The Appellant relies on the principles enunciated in *R.* v. *Junkin*[8] and *R.* v. *Vandermeulen (M).*[9]

14. The Appellant is in agreement with Hamilton JA. and Monnin JA. that the *Rahey* test is not the appropriate test to determine whether a judge's decision-making time should be considered in a *Jordan* analysis when determining whether a breach of s. 11(b) of the *Charter* has occurred.

15. Judicial delay should include decision-making delay and judicial institutional or systemic delay, which were relevant under the pre-*Jordan* framework.

Statement of Facts

Timeline of Proceedings

16. The Appellant was charged on April 11, 2013. [10]

17. On April 15, 2013 (four days post-charge) the Appellant was granted judicial interim release.[11]

18. On April 18, 2013 (seven days post-charge) the Appellant's surety was met, and he was released from custody.[12]

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[8] *R v Junkin*, 2011 MBQB 170
[9] *R v Vandermeulen (M),* 2015 MBCA 84
[10] Motion's Record Transcript April 11, 2013 MB Prov Court, [AR Vol II, Tab 28]
[11] *Ibid* Transcript April 15, 2013 MB Prov Court [AR Vol II, Tab 28]

19. The charges appeared from month to month on a Provincial Judge's Court docket in Selkirk, Manitoba. Delay in this circuit point's available hearing dates was common, with a twelve to fourteen-month delay from the setting of a date to the preliminary inquiry was not unusual at that time.[13]

20. On August 8, 2013 (three months twenty-eight days post-charge) discussions between counsel culminated in a decision being made that the matter must be set for trial.[14]

21. The Appellant wished this matter to be scheduled for trial from the outset. The delay in setting preliminary inquiry dates was due to crown counsel's unavailability to have reasonable discussions with defence counsel.[15]

22. On September 6, 2013 (four months twenty-six days post-charge) the earliest available preliminary hearing date offered to counsel was set.[16] Defence counsel had availability earlier than the proffered date.

23. On October 14, 2014 (eighteen-months three days post-charge) the preliminary hearing was conducted, and the Appellant was committed to stand trial. The matter was adjourned to the Court of Queen's Bench, Winnipeg Centre, on January 29, 2015 to arrange and schedule dates for a ten-day trial.[17]

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[12] Recognizance Provincial Court of Manitoba April 18, 2013, [AR Vol II, Tab 8]
[13] Affidavit of Eric Hachinski February 3, 2017 MB QB paras 8-9, [AR Vol II, Tab 30]
[14] Motion's Record Transcript August 9, 2013 MB Prov Court, [AR Vol II, Tab 28]
[15] *Ibid* Transcripts June 7, 2013-July 9, 2013 MB Prov Court, [AR Vol II, Tab 28]
[16] *Ibid* Transcript September 6, 2013 MB Prov Court, [AR Vol II, Tab 28]
[17] Transcript October 14, 2014 MB Prov Court, [AR Vol II, Tab 21]

24. On December 15, 2014 (twenty months four days post-charge) a pre-trial conference was conducted. Wherein crown counsel advised they were considering a pre-trial application. The matter was adjourned further for the crown to decide how it would proceed. No trial dates were contemplated at this pre-trial conference.[18]

25. On January 15, 2015 (twenty-one months four days post-charge) a second pre-trial conference was convened. The crown was still considering the application. The matter was adjourned again for the crown to determine how they would proceed. No trial dates were considered at this second pre-trial conference.[19]

26. On January 29, 2015 (twenty-one months eighteen days post-charge) a third pre-trial conference is convened. At this time crown counsel advised they would not be pursuing their pre-trial application. Trial dates were scheduled for January 11-22, 2016, and a further pre-trial conference was scheduled for June 22, 2015, with respect to outstanding disclosure.[20]

27. In setting trial dates both crown and defence were unavailable for dates between September 21 and October 2, 2015. Defence alone was unavailable October 19 to 30, 2015 and December 7 to 18 2015.[21] Notwithstanding these periods of unavailability, defence had availability that could have accommodated this matter prior to the dates that were offered and set.

28. On June 22, 2015 (twenty-six months eleven days post-charge) the previously scheduled fourth pre-trial conference was not conducted as crown counsel was not available. There was no update with respect to the outstanding disclosure at that time. The pre-trial was

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[18] Motion's Record Pre-Trial Conference Memorandum (No. 1) December 15, 2014, [AR Vol II, Tab 28]
[19] *Ibid* Pre-Trial Conference Memorandum (No. 2) January 15, 2015, [AR Vol II, Tab 28]
[20] *Ibid* Pre-Trial Conference Memorandum (No. 3) January 29, 2015, [AR Vol II, Tab 28]
[21] Affidavit of Eric Hachinski February 3, 2017 MB QB para 19, [AR Vol II, Tab 30]

initially rescheduled for September 9, 2015 but, due to defence counsel's unavailability, it was rescheduled to October 7, 2015.

29. On October 7, 2015 (twenty-nine months twenty-six days post-charge) the fourth pre-trial conference was convened. The crown was once again considering their pre-trial application, and the requested disclosure remained outstanding.

30. On January 11, 2016 (thirty-three months to the day post-charge) the trial began.[22]

31. On January 21, 2016 (thirty-three months ten days post-charge) final submissions were concluded. The trial judge reserved judgement.[23]

32. On May 17, 2016 (thirty-seven months six days post-charge) defence counsel was in a pre-trial conference with the trial judge on an unrelated matter and made inquires as to his progress regarding the verdict on reserve. The trial judge indicated his awareness the verdict remained outstanding, and advised that it would be forthcoming.[24]

33. On September 14, 2016 (forty-one months three days post-charge) the Director of Prosecutions Information Management for Manitoba Prosecutions sent a letter to the Associate Chief Justice of the Court of Queen's Bench (General Division) to inquire about the status of the verdict.[25]

34. On September 26, 2016 (forty-one months fifteen days post-charge) the Associate Chief Justice sent a letter to the Director of Prosecutions Information Management for Manitoba

[22] Record's Motion Transcript January 11, 2016 MB QB, [AR Vol II, Tab 28]
[23] *Ibid* Transcript January 21, 2016 MB QB, [AR Vol II, Tab 28]
[24] Affidavit of Eric Hachinski February 3, 2017 para 22-23, [AR Vol II, Tab 30]
[25] *Ibid* para 25, [AR Vol II, Tab 30]

Prosecutions advising, "…in the near future [the trial judge's] office will be contacting counsel to schedule a date for this decision to be delivered." [26]

35. On September 30, 2016 (forty-one months nineteen days post-charge) a date of October 25, 2016 was set for the trial judge to deliver his verdict.

36. On October 24, 2016 (forty-two months thirteen days post-charge) defence counsel filed a motion requesting a stay of proceedings on the grounds that the total delay from the date of the charge to the end of the trial exceeded the *Jordan* presumptive thirty-month ceiling, and there were no exceptional circumstances in the case to rebut the presumption of unreasonable delay.[27]

37. On October 25, 2016 (forty-two months fourteen days post-charge) the trial judge delivered his *oral* reasons for convicting the Appellant. The judgment had sat on reserve for nine months and four days.[28]

38. On January 9, 2017 (forty-four months twenty-nine days post-charge) the Appellant made a motion requesting that the trial judge recuse himself from hearing the unreasonable delay motion.[29] On January 10, 2017 the trial judge recused himself.

39. On January 30, 2017 (forty-five months nineteen days post-charge) a case management conference was held – on the record – to request further clarification from the trial judge with respect to his verdict.[30]

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[26] Letter from Justice Perlmutter dated September 26, 2016, [AR Vol II, Tab 20]
[27] Applicant's Notice of Motion October 21, 2016, [AR Vol II, Tab 10]
[28] Transcript October 25, 2016 MB QB, [AR Vol II, Tab 22]
[29] Transcripts January 9-10, 2017 MB QB, [AR Vol II, Tabs 23 & 24]
[30] Transcript January 30, 2017 MB QB, [AR Vol II, Tab 25]

40. On January 31, 2017 (forty-five months twenty days post-charge) submissions with respect to sentence were made.[31]

41. On February 10, 2017 (forty-six months post-charge) the delay motion was argued before the Chief Justice of the Manitoba Court of Queen's Bench. The motions judge reserved his decision.[32]

42. On May 29, 2017 (forty-nine months eighteen days post-charge) the delay motion was dismissed by the motions judge, three months and nineteen days subsequent to the motion being heard.[33]

43. On June 20, 2017 the Appellant was sentenced and taken into custody.[34] The total time between the date of charge and the date of sentencing was fifty months and nine days.

44. On August 10, 2017 the Appellant was granted bail pending appeal with strict conditions, which included an absolute curfew.[35] On May 11, 2018 the Appellant requested a variation to his judicial interim release order seeking an exception to his absolute curfew to allow him to attend his father's funeral out of province. [36]

45. On June 13, 2018 the Manitoba Court of Appeal heard the Appellant's appeal. On February 7, 2019 the Court of Appeal released their decision and the Appellant was again taken into custody.

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[31] Transcript January 31, 2017 MB QB, [AR Vol II, Tab 26]
[32] Transcript February 10, 2017 MB QB, [AR Vol II, Tab 27]
[33] *R v KGK, 2017* (*supra*)
[34] Sentencing Judgment of the Court of Queen's Bench, dated June 20, 2017, [AR Vol I, Tab 5]
[35] Court of Appeal for Manitoba Judicial Interim Release Order dated August 10, 2017, [AR Vol II, Tab 11]
[36] Court of Appeal for Manitoba Judicial Interim Release Order Variation dated August 22, 2017, [AR Vol II, Tab 12]; Court of Appeal for Manitoba Judicial Interim Release Order Variation dated May 11, 2018, [AR Vol II, Tab 13]

46. On March 4, 2019 the Appellant filed a Notice of Appeal to this Honourable Court. On March 5, 2019 he was granted judicial interim release on strict conditions including an absolute curfew.[37]

Motion Judge's Decision

47. The motion judge held:[38]

1. Impugned judicial delay in the context of judicial decision-making and judicial reserves ought not to be assessed or evaluated pursuant to the s. 11(b) *Jordan* framework;

2. Judicial delay in decision-making may in some circumstances – however exceptional – violate an accused's s. 11(b) right. The *Rahey* test, to be applied on a case-by-case basis, is whether the delay in the decision is, "shocking, inordinate and unconscionable." If it is, it follows that the section 11(b) delay was unreasonable;

3. The delays in the present case from charge to completion of the evidence, considered separate and apart from judicial delay, were not unreasonable under section 11(b) or the *Jordan* transitional exception; and

4. Factually, the nine-month judicial delay of the reserve judgement was not, "shocking, inordinate and unconscionable," so as to violate the applicant's section 11(b) rights and warrant the remedy of a judicial stay of proceedings.

48. The motion judge noted that *Jordan* did not deal with judicial decision-making time. The motion judge then supplanted the stricter *Rahey* test in determining judicial decision-making time *vis a vis* a *Jordan* analysis. A balance was identified between an accused's section 11(b)

[37] Letter from Supreme Court of Canada Registry dated March 4, 2019, [AR Vol II, Tab 16]; Court of Appeal for Manitoba Judicial Interim Release Order March 5, 2019, [AR Vol II, Tab 14]
[38] *R v KGK*, 2017 (*supra*) para 104, [AR Vol I, Tab 4]

right and judicial independence. The motion judge stated that this, "tension…cannot be resolved by a simple reference to a presumptive ceiling."[39] The motion judge indicated that a, "high threshold," is required to determine when judicial delay becomes unreasonable.[40]

49. The motion judge made a distinction between the, "professional/ethical issue of judicial delay and judicial delay which is constitutionally violative."[41]

50. Further, the motion judge opined that including decision-making time in the presumptive ceilings would limit the available time to try a case as it would have to allow the judge time to render a decision. He ruled that this was not the intention of the, "identifiable, predictable and certain timelines," proscribed by *Jordan*.[42]

51. The motion judge further opined about other practical issues such as recusal motions causing further delay, and the lack of available relevant information for the crown to respond to assertions of judicial delay. He emphasized that, "judges do not become witnesses nor do they file affidavits."[43] Further, "a judge's full efforts and time cannot be dedicated to or dictated by a single case."[44]

52. The motion judge concluded that *Rahey* allows for an analysis, "unencumbered by the now discarded *Morin* factors which were not in play in *Rahey*."[45] The motion judge however declined to apply a *Jordan* analysis to the facts of this case.

53. The motion judge found the net delay to be thirty-three months and one week. It was conceded that there were no discrete event exceptional circumstances, and that the case was not complex.[46]

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[39] *R v KGK*, 2017 (*supra*) para 6, [AR Vol I, Tab 4]
[40] *Ibid* para 77, [AR Vol I, Tab 4]
[41] *Ibid* para 61, [AR Vol I, Tab 4]
[42] *Ibid* para 55, [AR Vol I, Tab 4]
[43] *Ibid* para 59, [AR Vol I, Tab 4]
[44] *Ibid* para 76, [AR Vol I, Tab 4]
[45] *Ibid* para 69, [AR Vol I, Tab 4]
[46] *Ibid* para 82, [AR Vol I, Tab 4]

54. The motion judge considered the transitional exception. It was noted that under *Morin*, judicial decision-making time was part of the inherent time requirements[47]

55. The motion judge made reference to the Canadian Judicial Council that in terms of, "diligence," judges should deliver reserve judgements within six months, barring special circumstances. These special circumstances include, "illness, the length or complexity of the case, an unusually heavy workload, or other factors making it impossible to give judgments sooner."[48]

56. The motion judge went on to indicate that six months was, "best practice." The motion judge found that it may be, "undue" delay; however, the delay in this case was not necessarily constitutionally unreasonable. Further, judicial delay is an ethical not a juridical matter.[49]

57. Undue judicial delay is properly overseen and regulated by the court's Chief Justice, Associate Chief Justice or Senior Regional Judge, who would best appreciate, balance and regulate the professional and personal factors that surround specific judicial delay.[50]

58. The motion judge was of the view that the delay from charge to verdict was thirty-three months and one week.[51]

59. The motion judge concluded that, "reasonable efforts were made by the parties in the context of what had been the prevailing legal framework and culture during the period in which *Morin* was the constitutional reference point."[52] He noted that prejudice and the seriousness of the offence were particularly relevant, and found that the, "charges are serious, no obvious prejudice has been established by the applicant,"[53] other than inherent prejudice.

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[47] *Ibid* para 30, 32, [AR Vol I, Tab 4]
[48] *Ibid* para 78, [AR Vol I, Tab 4]
[49] *Ibid* paras 78, 79, [AR Vol I, Tab 4]
[50] *Ibid* para 79, [AR Vol I, Tab 4]
[51] *Ibid* para 83, [AR Vol I, Tab 4]
[52] *Ibid* para 85, [AR Vol I, Tab 4]
[53] *Ibid* para 88, [AR Vol I, Tab 4]

60. The motion judge considered the Applicant's, "late filing," of the delay motion in the context of inherent prejudice.[54]

61. The motion judge mentioned that the issue of delay was not raised until the day before the conviction was entered.[55]

62. The motion judge noted that there was relatively little evidence before the court with respect to the degree of complexity of this case, and little information about the personal circumstances of the judge and/or his workload.[56]

The Appellate Decisions

Hamilton JA's Decision

63. Hamilton JA. held that this was a transitional case. She found that the motion judge erred in assessing the nine months taken to render a verdict as delay that is outside the *Jordan* framework.[57]

64. She concluded that the total delay from charge to verdict was forty-two months and two weeks. Defence delay of two months and three weeks was deducted for a net delay of thirty-nine months and three weeks.[58]

65. Hamilton JA. Found that there were no exceptional circumstances in this case, and that the crown had not demonstrated that the transitional exception applied. [59]

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[54] *Ibid,* [AR Vol I, Tab 4]
[55] *Ibid,* [AR Vol I, Tab 4]
[56] *Ibid* para 101, [AR Vol I, Tab 4]
[57] *R v KGK* 2019 (*supra*) para 159, [AR Vol I, Tab 6]
[58] *Ibid* para 160, [AR Vol I, Tab 6]
[59] *Ibid,* [AR Vol I, Tab 6]

66. Hamilton JA. held that, under *Morin*, the delay was forty-two months and two weeks. She indicated that the amount of delay in this case was unreasonable under *Jordan* or *Morin*, pursuant to section 11(b) of the *Charter*.[60]

67. Justice Hamilton determined the case of *Rahey* was not applicable to an analysis of these facts. She stated that *Rahey* did not stand for the principle that judicial decision-making time must be, "shocking, inordinate and unconscionable," in order to attract a *Charter* remedy.[61]

68. As a result, she decided that she did not have to consider the principles enunciated in *Rahey*. She indicated that the amount of delay pursuant to *Jordan* or *Morin* was unreasonable.

69. There were four separate judgements in *Rahey*, not one of them referred to the test of "shocking, inordinate and unconscionable." Those were the words the lower court used to describe the delay in that case.[62]

70. Hamilton, JA. was unaware of any appellate cases or academic commentary utilizing the test employed by the motion judge. She noted that the lower court cases in which a test of, "shocking, inordinate and unconscionable" had been applied were recent cases that in fact relied upon the motion judge's application of such a test in the present case.[63]

71. Hamilton J.A. was of the view that the motions judge erred in law in concluding that *Rahey* established the test of, "shocking, inordinate and unconscionable," in his assessment of whether the trial judge's decision-making time breached the Appellant's section 11(b) right to be tried within a reasonable period of time. Rather, she found that the test applied in *Rahey* was whether the decision making-time, in the context of all of the circumstances of the case, was unreasonable for the purpose of addressing the Appellant's section 11(b) motion for a stay of proceedings.[64]

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[60] *Ibid*, [AR Vol I, Tab 6]
[61] *Ibid* para 161, [AR Vol I, Tab 6]
[62] *Ibid* para 165-167, [AR Vol I, Tab 6]
[63] *Ibid* para 168, [AR Vol I, Tab 6]
[64] *Ibid* para 169, [AR Vol I, Tab 6]

72. Hamilton, JA. found that the motion judge had erred in law and as such his decision was not entitled to deference.[65] She went on to state that, even if judicial decision-making time falls outside of *Jordan*, the delay of nine months was unreasonable within a *Morin* analysis and therefore the remedy of a stay of proceedings was appropriate in this case.

73. In *Jordan*, the majority of the Supreme Court of Canada called for all participants in the justice system, including judges, to leave behind a culture of complacency towards delay and adopt a culture of reasonably prompt justice. A *Jordan* framework requires the court to be more accountable.[66]

74. In coming to her conclusions Hamilton JA noted that *Jordan* does not refer to judicial decision-making time. She interpreted the majority's decision in *Jordan* contextually and understood its purpose to address the culture of complacency that existed prior to the *Jordan* decision. As a result, she concluded that a court's decision-making time is to be included in a calculation of total delay when applying the *Jordan* framework.[67]

75. Hamilton JA held that as a result of *MacDougall* inherent time requirements will include reasonable time periods for <u>any judge</u> (not just an ill one) to make a decision [emphasis in the original]. Further, the implication is that if a reasonable time period for a healthy judge's decision-making has been exceeded (whether conviction or sentencing), and it would be reasonable for the crown to intervene, then any delay in taking steps would be counted against the crown.[68]

76. Inherent time periods in *Morin* include a reasonable period of time for any judge to make a decision and will be treated as neutral.[69]

77. Hamilton JA summarized Pre-*Jordan* section 11(b) jurisprudence as follows:[70]

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[65] *Ibid*, [AR Vol I, Tab 6]
[66] *Ibid* para 113, [AR Vol I, Tab 6]
[67] *Ibid* para 75, [AR Vol I, Tab 6]
[68] *Ibid* para 99, [AR Vol I, Tab 6]
[69] *Ibid* para 100, [AR Vol I, Tab 6]
[70] *Ibid* para 105, [AR Vol I, Tab 6]

1. Section 11(b) protection extends to a decision or verdict, and sentencing, and that the entire period of time, from charge until decision and sentencing, should be considered under *Morin*;

2. There are inherent time requirements in all cases which should be treated as neutral and part of the inherent time requirements of the case will include a reasonable timeframe for a judge to consider and render a decision, whether on a motion, conviction, or sentencing;

3. The crown and judiciary have responsibility in ensuring accused individuals are tried within a reasonable time period;

4. At a certain point, the crown has to intervene if a judge takes too much decision-making time. There must be a balance between judicial independence and the accused's section *11*(b) rights; and

5. The timeframe under review should be viewed holistically, and a court should not "lose sight of the forest through the trees"[71].

78. Hamilton JA decided that judicial decision-making time, whether for interlocutory matters or the verdict, is part of the time period to consider when determining whether the total delay is above or below the presumptive ceiling. This reflects: 1) the majority in *Jordan*; 2) pre-*Jordan* section 11(b) jurisprudence, which included decision-making time for verdict as inherent; 3) the approach in *Jordan* to include inherent time requirements of a case within the presumptive ceilings; and 4) the clear message to all players in the justice system, including judges, to address the culture of complacency with respect to delay.[72]

[71] *R v Godin*, [2009] 2 SCR 3 para 18
[72] *R v KGK*, 2019 (*supra*) para 116, [AR Vol I, Tab 6]

79. She found the fact that judicial decision-making time is commonplace, underscores it is part of inherent time requirements of a case and is included in the presumptive ceilings unless the crown can demonstrate exceptional circumstances in *Jordan*.[73]

80. Judicial decision-making time is not necessarily delay as defined traditionally. It falls within total delay as in *Jordan*. Time beyond that which is reasonably required to make the decision is delay.[74]

81. Judicial decision-making time considered as inherent and/or delay falls within the *Jordan* presumptive ceilings. When there is a complicated case or discrete event, the exceptional circumstance attenuates the "bright line"[75] of the presumptive ceiling.[76]

82. Trial Judges are under an ethical obligation to release their decisions as soon as possible in the circumstances.[77] The Canadian Judicial Council six-month guideline does not provide a presumption of reasonableness in all circumstances.[78]

83. Judicial Independence has never insulated judges from scrutiny under section 11(b) (see *Rahey SCC, and MacDougall*). To remove judicial decision-making time from *Jordan,* would have the effect of insulating judges from the governing principles for all actors in the system to address the culture of complacency in the criminal justice system that is addressed in *Jordan*.[79]

84. Further, judges must address issues that call for scrutiny of their own actions or biases in other circumstances, such as recusal motions themselves. Under the previous section

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[73] *Ibid* para 117, [AR Vol I, Tab 6]
[74] *Ibid* para 118, [AR Vol I, Tab 6]
[75] *R v Mamouni*, 2017 ABCA 347 para 55
[76] *R v KGK*, 2019 (*supra*) para 119, [AR Vol I, Tab 6]
[77] Canadian Judicial Council, "Ethical Principles for Judges" (last visited April 9, 2019) at 21, online (pdf): <www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>
[78] *R v KGK*, 2019 (*supra*) para 121, [AR Vol I, Tab 6]
[79] *Ibid* para 122, [AR Vol I, Tab 6]

11(b) framework, a judge could also be asked to assess the constitutional aspects of his or her own delay.[80]

85. A judge's particular circumstances may excuse some or all of the decision-making time if such circumstances are placed on the court record. In *Vandermeulen*,[81] an e-mail from the preliminary hearing judge to counsel advising that he had taken an unexpected leave of absence during that time resulted in the time where the judge was excused as being inherent delay.[82]

86. Trial judges are capable of estimating how long it might take to write a decision following the last day set for an anticipated trial.[83] An example of this is found in *R v JM.*[84]

87. Hamilton JA held judicial decision-making time is to be assessed in *Jordan*. Judicial decision-making time is not an exceptional event. Circumstances may exist to characterize an exceptional event for which some time deduction could be made. What constitutes exceptional circumstances is not a closed list and "will depend on the judge's good sense and experience"[85]. Judicial decision-making time can be considered, with other circumstances, when determining if the case is complex.[86]

88. A case will not automatically be considered exceptionally complex because one aspect of the case is complex, or it took a long time to make a decision.[87]

89. It was for those reasons that Hamilton JA found the motion judge erred in concluding that judicial decision-making is not within the *Jordan* framework, and is to be assessed separately on a case-by-case basis by applying the *Rahey* test.[88]

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[80] *Ibid* para 123, [AR Vol I, Tab 6]
[81] *R v Vandermeulen* (M), (supra) para 84
[82] *R v KGK*, 2019 (*supra*) para 124, [AR Vol I, Tab 6]
[83] *Ibid* para 125, [AR Vol I, Tab 6]
[84] *R v JM*, 2017 ONCJ 4
[85] *R v Jordan*, 2016 SCC 27 para 71
[86] *R v KGK*, 2019 (*supra*) para 126, [AR Vol I, Tab 6]
[87] *Ibid* para 127, [AR Vol I, Tab 6]
[88] *Ibid* para 128, [AR Vol I, Tab 6]

90. Hamilton JA found under *Morin* that there was no defence waiver and assessed delay as follows:[89]

1. Five months for the court, crown and defence to be ready to set preliminary inquiry dates (from April 11, 2013 to September 6, 2013) is inherent delay;

2. 13 months and one week for the preliminary inquiry from (September 6, 2013 to October 14, 2014) is institutional delay;

3. Three months and two weeks after committal until a trial date was set (October 14, 2014 to January 29, 2015) is inherent delay;

4. Seven months and three weeks from the date of setting the trial to the first trial date offered by the court (January 29, 2015 to September 21, 2015) is divided between institutional and inherent delay. Two months and three weeks for inherent delay and five months institutional delay; and

5. 13 months between the first offered trial date September 21, 2015 to October 25, 2016, the date of verdict, divided between inherent and institutional delay. It is reasonable for 10 days of trial to take three months to decide the case. The remaining 10 months would be assessed as crown delay.

91. No deduction was made for defence delay.[90]

92. Total institutional delay is 18 months and one week, with crown delay of 10 months, for a total of 28 months and one week. *Morin's* guideline for institutional delay in superior court is 14 to 18 months for a trial after a preliminary inquiry.[91]

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[89] *Ibid* paras 135, 136, [AR Vol I, Tab 6]
[90] *Ibid* para 137, [AR Vol I, Tab 6]
[91] *Ibid* para 138, [AR Vol I, Tab 6]

93. The accused should not be faulted for not bringing the delay motion sooner considering the ever-increasing delay was due to the trial judge, in whose hands the accused's fate rested.[92]

94. Hamilton JA held that none of the delay was directly attributable to the defence in a relatively straight forward case. The inherent prejudice to the accused's security interests, given the passage of time, was significant, and the prejudice to the accused's liberty interests are relevant.[93]

95. The *Morin* standards of institutional delay would be marginally reasonable until the date of verdict, the additional crown delay and the decision-making delay push the delay above the reasonable limits. Both defence and the crown took steps to inquire about the status of the trial judge's decision. The decision was released one and half months after the crown's enquiry and almost four months after the Supreme Court delivered *Jordan*.[94]

Cameron JA's Decision

96. Cameron JA held that judicial decision-making time is subject to section 11(b). However, she found the *Jordan* ceilings did not apply to judicial decision-making time.[95]

97. Further, she felt the motion judge correctly decided that the standard of unreasonableness for judicial decision-making time is *Rahey*. She decided that the judicial decision-making delay was long in this case but not unreasonable.[96]

98. In addition, she determined that the time from charge to conclusion of the evidence was not unreasonable.[97]

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[92] *Ibid* para 143, [AR Vol I, Tab 6]
[93] *Ibid* para 146, [AR Vol I, Tab 6]
[94] *Ibid,* [AR Vol I, Tab 6]
[95] *Ibid* para 173, [AR Vol I, Tab 6]
[96] *Ibid* para 174, [AR Vol I, Tab 6]
[97] *Ibid* para 175, [AR Vol I, Tab 6]

99. In coming to these conclusions Cameron JA. relied on the absence of judicial decision-making time being mentioned in *Jordan* as an indication that it was not considered to be factored in the *Jordan* ceilings.[98]

100. It was decided that *Jordan* was concerned with moving the case through the system to the conclusion of the evidence. The court was referring to the trial process and not judicial decision-making time. [99]

101. Cameron JA described the evolution of the *Morin* analysis to include judicial decision-making as an uncomfortable fit in inherent delay.[100]

102. Therefore, she was unable to equate inherent delay such as the time it takes defence and the crown to bring a case to trial with judicial decision-making time, given the constitutional principle of judicial independence.[101]

103. Cameron JA further stated the effect of including judicial decision-making time in the *Jordan* ceilings is to transform the characterization of judicial decision-making time from neutral to time now clicking on the clock of presumptively reasonable delay in *Jordan*. The effect of imposing *Jordan* ceilings on judicial decision-making time, which, once breached, can only be justified by exceptional circumstances, raises the issue of the constitutional principle of judicial independence. Aside from sentencing, the verdict is the last step in the trial and the one least likely to be accounted for in setting trial dates.[102]

104. She agreed with the observations of the motion judge noting the interaction between the constitutional principles of section 11(b) and judicial independence. She was of the view that courts should interpret constitutional principles in a way that allows them to co-exist instead of conflict.[103]

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[98] *Ibid* para 192, [AR Vol I, Tab 6]
[99] *Ibid* paras 193, 194, [AR Vol I, Tab 6]
[100] *Ibid* para 199, [AR Vol I, Tab 6]
[101] *Ibid* para 201, [AR Vol I, Tab 6]
[102] *Ibid* para 206, [AR Vol I, Tab 6]
[103] *Ibid* para 207, [AR Vol I, Tab 6]

105. Cameron JA adopted the motion judge's observation that judicial discretion includes a judge's capacity to prioritize their own workloads, in addition to the practical considerations of the imposition of *Jordan* ceilings on judicial decision-making time.[104]

106. Further, she felt that if *Jordan* had intended to include judicial decision-making time it would have mentioned the Canadian Judicial Council guidelines.[105] The concerns of the motion judge were adopted by Cameron JA regarding the problematic and random nature of setting trial dates that include judicial decision-making time in the *Jordan* ceilings.[106]

107. She went on to find that she would not take judicial decision-making time into account in determining if the *Jordan* ceilings had been breached. The time taken to reach a decision is not immune from section 11(b), but is subject to separate analysis.[107]

108. Cameron JA. was of the view that the test in *Rahey* was ambiguous in that the language of, "shocking, inordinate and unconscionable," may have been used interchangeably with unreasonable.[108]

109. It was acknowledged that the *Rahey* standard was neither adopted nor rejected as the test for determining the reasonableness of judicial decision-making delay. Thus, she held that the motion judge did not err in interpreting *Rahey* or characterizing the test of reasonableness in judicial decision-making.[109]

110. Cameron JA agreed with the motion judge that "care must be taken before one judge comments on how long another needs to write a decision once the judge started on the decision". Further, that the six-month guideline established by the Canadian Judicial Council is "not necessarily delay which is constitutionally unreasonable."[110]

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[104] *Ibid* paras 208, 209, [AR Vol I, Tab 6]
[105] *Ibid* para 215, [AR Vol I, Tab 6]
[106] *Ibid* para 216, [AR Vol I, Tab 6]
[107] *Ibid* para 219, [AR Vol I, Tab 6]
[108] *Ibid* paras 222, 223, [AR Vol I, Tab 6]
[109] *Ibid* para 227, 228, [AR Vol I, Tab 6]
[110] *Ibid* para 229, [AR Vol I, Tab 6]

111. She held that the trial judge had given some thought to the matter. There was only minimally more evidence available at the Appellate level about the personal circumstances of the trial judge and/or his workload. The trial judge wanted to consider the submissions and evidence and had a "few matters under reserve".[111]

112. Cameron JA. indicated that if an explanation or justification is not forthcoming until the section 11(b) decision that is not fair to the parties.[112]

113. There was no authority to request a new trial judge in these circumstances. It was not obvious what the crown should have done or when they should have done it.[113]

114. She held that the length of time for the verdict was long; however, it was determined that it was reasonable to conclude that the judicial delay fell within the variation allowed by judicial independence.[114]

115. Cameron JA. found that there were two months and three weeks of defence delay to deduct in *Jordan* prior to considering whether the transitional exception applied. If the motion judge had removed that time from the calculation the total delay would have been thirty months and two weeks. She would have found it reasonable delay under *Morin*. Therefore, she held that the motion judge was correct in finding the case was a transitional exception to *Jordan*. Further, there was no section 11(b) breach. [115]

Monnin JA's Decision

116. Monnin JA. agreed with Cameron JA.'s analysis except for judicial delay. He did not agree that it is subject to the *Rahey*. He agreed with Hamilton JA. that such a test was not

[111] *Ibid* para 238, [AR Vol I, Tab 6]
[112] *Ibid* para 239, [AR Vol I, Tab 6]
[113] *Ibid* paras 242, 243, [AR Vol I, Tab 6]
[114] *Ibid* para 245, [AR Vol I, Tab 6]
[115] *Ibid* paras 248-250, [AR Vol I, Tab 6]

enunciated in *Rahey*. Reasonableness is the only test for judicial delay. The *Rahey* test sets too high a bar and is not in keeping with combating complacency.[116]

117. The issue of unreasonable delay requires a contextual approach that balances complexity, decisions arising from the evidence, and workload of a judge or court. He agreed with Cameron JA. that the delay was long but not unreasonable.[117]

PART II – QUESTIONS IN ISSUE

Issue: Whether judicial delay is part of the total delay calculation to be assessed in the context of the analytical framework of presumptive ceilings established in R v Jordan, 2016 SCC 27?

PART III – STATEMENT OF ARGUMENT

Issue: Whether judicial delay is part of the total delay calculation to be assessed in the context of the analytical framework of presumptive ceilings established in R v Jordan, 2016 SCC 27?

Judicial Decision-Making Delay

Agreements

118. The Appellant agrees with the *Jordan* framework as outlined by Hamilton JA.[118]

119. The Appellant adopts Hamilton JA.'s post-*Jordan* commentary on judicial decision-making time.[119]

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[116] *Ibid* paras 284, 287, [AR Vol I, Tab 6]
[117] *Ibid* paras 288, 289, [AR Vol I, Tab 6]
[118] *R v KGK*, (2019) (*supra)* paras 8-13, 106-113, [AR Vol I, Tab 6]
[119] *Ibid* paras 59-71, [AR Vol I, Tab 6]

120. The Appellant accepts that the summary of pre-*Jordan* section 11(b) jurisprudence as noted by Hamilton JA as an accurate representation of the state of the law.[120]

121. The Appellant agrees with Hamilton JA. that judicial decision-making delay falls within *Jordan*. It is respectfully submitted that the motion judge, Cameron JA., and Monnin JA. erred in law by excluding the judicial decision-making time from the *Jordan* framework.

122. The Appellant is in agreement with both Hamilton JA. and Monnin JA. that the *Rahey* test is not applicable to judicial decision-making delay.

123. The Appellant is in agreement with all of the decisions that there was no waiver of defence delay. The Appellant takes the position that no delay was occasioned by the defence.

124. The Appellant submits that the presumptive ceiling has been breached. There seems to be consensus that there were no exceptional circumstances and the case was not complex. All parties accept this is a transitional case under *Jordan*. Further, there is no mention of judicial decision-making delay in *Jordan.*

125. The Appellant agrees with the motion judge and Hamilton JA. that *Morin* treated judicial reserve time as inherent delay. The Appellant does not agree with Cameron JA.'s interpretation (adopted by Monnin JA.) that judicial decision-making time is not inherent delay.

126. The Appellant concurs that *MacDougall* as articulated by Hamilton JA. extends to all judges not just ill ones. Therefore, *Morin* judicial delay is inherent and treated neutrally.

127. The Appellant submits that all parties involved in the justice system, including the judiciary, are required to be more accountable.

128. The Appellant takes the position that it is incumbent upon the crown to show exceptional circumstances where judicial decision-making time exceeds the presumptive ceiling as contemplated by *Jordan*.

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[120] *Ibid* paras 76-105, [AR Vol I, Tab 6]

129. The Appellant is in agreement with Hamilton, JA that the judiciary cannot be insulated. Judges are capable of estimating decision-making time.

130. The Appellant submits that there were no exceptional circumstances and this case was not complex.

Analysis

End of Trial

131. The first step in determining whether the Appellant's s. 11(b) right was infringed is to determine the total delay between the charges and the end of trial. The anticipated end of trial as contemplated in *Jordan* has been interpreted to occur at four possible stages.[121]

a. The End of Closing Arguments;
b. Date of Verdict;
c. Post-Trial Motions; or
d. The Date of Sentencing.

132. In the case at bar the timeframes are as follows:

a. The End of Closing Arguments – from April 11, 2013-January 21, 2016 (33 months and 10 days);
b. Date of Verdict – from April 11, 2013-October 25, 2016 (42 months and 14 days);
c. Post-Trial Motions – from April 11, 2013-May 29, 2017 (49 months and 18 days); and
d. The Date of Sentencing – from April 11, 2013-June 20, 2017 (50 months and 9 days).

[121] Derek Spencer, "Extending *Jordan* to Consider Verdict and Sentencing Delays" (2019) 50 *Criminal Reports* (Seventh Series, Part 1) 30, Appellant's Book of Authorities "ABA" [ABA, Tab 2]

133. The Appellant submits that all of these timeframes must be considered under *Jordan*, and they are presumptively unreasonable as they exceed the thirty-month ceiling. The crown has not established a defence waiver of delay, or exceptional circumstances under either *Jordan* or the transitional *Morin*[122] framework.

134. If the end of trial is determined to be the end of closing arguments then judicial decision-making delay does not need to be considered in this case. If any of the other three anticipated ends of trial are utilized then judicial decision-making delay must be considered.

135. The judicial decision-making delay from the end of the closing arguments to the date of verdict is from January 21, 2016-October 25, 2016 (9 months and 4 days). The judicial decision-making delay from the delay motion arguments to the delay motion decision is from February 10, 2017-May 29, 2017 (3 months and 19 days). There is a total of 12 months and 23 days of judicial decision-making delay.

136. The Appellant argues that the time from the date of the charge to the date of the sentencing (50 months and 9 days) is the relevant timeframe and that all of the judicial delay should be considered (12 months and 23 days).

137. The issue of delay in sentencing was not dealt with in *Jordan*. It is respectfully submitted, that the right to be tried within a reasonable time under s. 11 (b) of the *Charter* extends to sentencing. Section 11 indicates, "any person charged with an offence" which includes both pre and post-conviction extending to the sentencing process.[123] This fundamental right does not change under *Jordan.*[124]

138. It is respectfully submitted, that this delay infringed the Appellant's section 11(b) right to be tried in a reasonable time and that Cameron JA. and Monnin JA. erred in not granting a stay of proceedings given the breach.

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[122] *R v Morin*, [1992] 1 SCR 771 (SCC)
[123] *R. v. MacDougall*, [1998] 3 SCR 45 at para 37
[124] Derek Spencer, "Extending *Jordan* to Consider Verdict and Sentencing Delays" (*supra*), [ABA, Tab 2]

139. In the alternative, the Appellant argues that if it is determined the relevant timeframe is from the date of the charge to the date of the post-trial motions decision (49 months and 18 days) all of the judicial decision-making delay should be considered (12 months and 23 days).

140. If the relevant timeframe is determined to be from the date of the charge to the delivery of the verdict, then nine months and four days of judicial decision-making delay is to be considered.

141. With the exclusion of judicial decision-making time, the total delay of 33 months and 10 days (from April 11, 2013 to January 21, 2016) from charge to closing arguments exceeds the presumptive ceiling and that this delay would have resulted in a stay under the transitional *Morin* framework. The Appellant relies upon the analysis as set out in *R v Junkin*[125] and *R v Vandermeulen*[126].

142. If the decision-making time is not included in the *Jordan* framework, the Appellant respectfully submits that the length of time for a decision in an uncomplicated case is unreasonable for the purposes of section 11(b). Hamilton JA. and Monnin JA. were correct in not applying a test of "shocking, inordinate and unconscionable". The Appellant relies on *Rahey* (*supra*) and *MacDougall* (*supra*).

143. Neither the case to be decided by the trial judge, nor the motion before the motion's judge, were complex cases. In each case it was open to the judge to deliver an oral decision from the bench far earlier in the process so that the parties could adequately prepare for the next steps in the proceedings. It is not uncommon for a judge to provide a written decision at a later time.

144. It is respectfully submitted that the *Rahey* test is not the appropriate test to determine whether a judge's decision-making time breaches s. 11(b) of the Charter. Alternatively, if it is

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[125] *R v Junkin*, 2011 MBQB 170
[126] *R v Vandermeulen (M)*, 2015 MBCA 84

the appropriate test in the context of this particular case, the time taken is "shocking, inordinate and unconscionable".

Motion Judge's Concerns

145. It is respectfully submitted that, although the motion judge attempted to identify a balance between judicial independence and section 11(b) rights, he ultimately supplanted judicial independence for section 11(b) rights.

146. The motion judge did not seem to appreciate what this Honourable Court said in *R.* v. *Jordan.* *Jordan* does not stand for the proposition that a judicial delay of nine months is acceptable as a starting point. If nine months is acceptable, it has to be the exception and not the rule.

147. Multiple judicial decisions may be required in any given case. The Appellant submits that the *Jordan* framework contemplates judicial decision-making time as part of the inherent delay. Nothing in the *Jordan* decision gave any indication to the contrary.

148. In this case there were a total of twelve months and twenty-three days of judicial decision-making delay at the trial stage, and seven months and twenty-five days of decision-making delay at the appellate stage. There are a total of twenty months and eighteen days of judicial decision-making delay in a case that has spanned approximately six years.

149. Concern has been raised with respect to the issue of further delay being occasioned when the accused asks a trial judge to recuse themselves from a consideration of the issue of judicial decision-making delay as it relates to a motion for unreasonable delay. A possible solution to the problem would be to institute a policy that a judge other than the trial judge would hear the delay motion without the necessity of a recusal motion. There is an obvious appearance of bias in having a judge consider the issue of whether their own delay is unreasonable.

150. In the alternative, as noted by Hamilton JA., judges are often called upon to assess their own delay and put aside their own biases.

151. The Appellant clearly accepts that the judiciary is a self-regulating body; however, clarification as to these issues from this this Honourable Court will provide guidance on these issues to courts across Canada.

152. The proposition that the unavailability of relevant information will prevent the crown from being able to respond to the reasonableness of judicial delay is also problematic. There are often cases when there is an explanation for the delay provided. Many reported cases deal with illnesses of judges or other exigencies.

153. In this case no explanation was ever provided despite the motion judge being the Chief Justice of the Court of Queen's Bench who is responsible for the scheduling of the trial judge. The delay becomes more problematic when the only plausible explanations for the delay become indecisiveness or being over worked. Neither provides a justification for unreasonable judicial decision-making delay.

154. The motion judge indicated that most cases of judicial delay are ethical and not juridical. It was stated that in the majority of cases undue judicial delay is properly overseen and regulated by the court's Chief Justice, Associate Chief Justice or Senior Regional Judge who would be in the best position to appreciate, balance and regulate the professional and personal factors that surround specific judicial delay.

155. In this case the motion judge was the Chief Justice, the Associate Chief Justice was the pre-trial judge and the justice that the crown sent the inquiry letter to. Both the Chief Justice and the Associate Chief Justice presided over the monthly assignment court as this matter was remanded from month to month as we awaited the verdict decision. It was argued at the motion that the court must control its own process. Further, an explanation was never provided by the trial judge as to the reason for the delay. The motion judge was invited to provide a reason at the hearing of the motion and none was forthcoming.

156. The Canadian Judicial Council outlines that reserve decisions should be delivered within six months barring special circumstances. Six months is the high-water mark not a minimal guideline. Most cases that have more than six months of delay typically have an explanation for the delay.

157. It is also not to be interpreted that six months is acceptable for every judicial decision. A judge may be called upon to make numerous decisions during a given case.

158. It is significant to note that this was not a complicated case. Jurors who are laypersons without legal training are called upon to determine guilt and innocence on a regular basis. They take hours, days or at most weeks, but not months, to make those decisions. It would have been available and preferable for the judges in this case to give a decision orally from the bench stating their intentions with a written decision to follow. A written decision was never provided by the trial judge in this matter despite the nine-month delay.

159. It is respectfully submitted that the motion judge was correct in not assessing any delay to the defence pursuant to either *Morin* or *Jordan*. It has been argued by counsel repeatedly that accepting the first available dates of the court is not an accurate reflection of the earliest dates available to counsel. Counsel frequently have earlier dates available than those offered by the court.

160. The motion judge was somewhat critical of defence counsel with respect to the timing of the filing of the delay motion. Delay has always been a live issue for the defence which is why the record shows that the earliest mutually available dates were accepted by the defence throughout the conduct of this case, and is why the defence was initiating the inquiries about the verdict decision. It should be noted that the onus is on the crown to move the case forward, and no efforts were undertaken to do so until after defence made inquiries with respect to the rendering of the verdict.

161. It is well settled law that defence acquiescence to the earliest dates offered by the court ought not be raised at a later date as indicia that there was no concern about delay. It is inappropriate to state that, because defence failed to raise delay at the time of the conclusion of evidence, that there was no concern as to compliance with section 11(b) of the *Charter*.

162. It is respectfully submitted that the motion judge erred in finding that there was no prejudice to the Appellant. There is inherent prejudice in that the Appellant has had these serious criminal charges hanging over his head like the Sword of Damocles for more than six

years. There was obvious prejudice in that the Appellant in this case spent eighty-six days in custody and was subject to an absolute curfew for more than one and a half years.

163. The Appellant in this case was unable to attend to his father while he was still alive as his health quickly declined and he passed away before the Appellant could make application to vary the conditions of his interim judicial release.

Hamilton JA.'s Concerns

164. The Appellant submits that section 11 applies from the date of charge until the date of sentencing. Hamilton JA.'s review of the relevant jurisprudence supports this conclusion. There is controversy in the case law as to what constitutes the, 'end of trial.'

165. In this case all anticipated, 'ends of trial,' exceed the presumptive ceilings as discussed in both *Morin* and *Jordan*. Unreasonable delay must be analyzed in the context of the total delay. As stated by Hamilton JA., the delay to be considered in this case is from charge to sentencing. All players in the justice system must be held accountable until a criminal case is finally adjudicated. Unfettered delay between the time of charge and the final adjudication of a matter is exactly the mischief that *Jordan* has addressed.

166. The Appellant submits that the appropriate calculation of delay in this case, from charge to sentencing, is fifty months and nine days and not forty-two months and fourteen days as stated by Hamilton, JA.

167. The Appellant submits that Hamilton JA. erroneously deducted two months and three weeks as defence delay. There was no defence delay in this case. The motion judge found that there was no defence delay as defence counsel had dates available prior to the trial dates offered by the court.

168. *Morin* allowed for institutional and systemic delay that is no longer acceptable in light of this Honourable Court's decision in *Jordan*. This allows the judiciary to be insulated in a way that could not have been contemplated in *Jordan*.

169. The first date that was offered for the preliminary inquiry was set. The period from September 6, 2013 to October 14, 2014 (thirteen months and eight days) constitutes institutional delay. This was the assessment made by Hamilton JA., which the Appellant submits was the correct calculation.

170. The Appellant does not agree with Hamilton JA's finding that the three month and two weeks delay between the committal until the setting of a trial date (October 14, 2014 to January 29, 2015) constitutes institutional delay.

171. It is clear from the pre-trial memoranda that the delay was occasioned as a result of the crown requesting adjournments to contemplate pre-trial motions. Defence was prepared to set a trial date at the first pre-trial conference. This amounts to two months and one day of inherent delay from (October 14, 2014 the date of committal to December 15, 2014 the first pre-trial date). There was a further delay of one month and fourteen days, from December 15, 2014 to January 29, 2015, and is attributable solely to the crown.

172. The Appellant submits that there was no defence delay as contemplated by *Morin*. An analysis of this case under the *Morin* framework would lead to the conclusion that there was both inherent and actual prejudice to the Appellant.

173. The Appellant is in agreement with Hamilton JA. that *Godin*[127] takes into account restrictions on liberty as prejudice. The Appellant in this case spent eighty-six days in custody and has been on absolute curfew for over one and a half years from (August 10, 2017- the present).

174. The Appellant agrees with Hamilton JA. that the institutional delay was just over the *Morin* guidelines at the time that the verdict was rendered. It was not reasonably foreseeable that the trial judge would take such an inordinate amount of time to release his decision. Defence counsel inquired and was advised that the verdict was forthcoming. The release of *Jordan* triggered the filing of the delay motion.

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[127] *R v Godin*, 2009 SCC 26 para 30

175. There was no onus on the Appellant to follow-up with the trial judge. It is clear that, in this case, defence counsel took a proactive position. An unreasonable delay with respect to rendering of the verdict had already taken place prior to the crown making enquiries of the Associate Chief Justice.

Cameron JA's Concerns

176. It is respectfully submitted that Cameron JA. erred in adopting the motion judge's position that judicial decision-making time ought not be a factor in assessing total delay.

177. There is no reason not to consider judicial decision-making time as 'ticking on the clock.' To do otherwise would insulate the judiciary in a manner that is contrary to the intentions of this Honourable Court as stated in *Jordan*. The judiciary cannot be given a blank cheque when it comes to delay, as advocated by the motion's judge, and endorsed by Cameron JA. Cloaking this analysis in the robe of judicial independence fails to place the appropriate burden on the judiciary to ensure that its decisions are rendered in an expeditious manner as proscribed by *Jordan*.

178. Cameron JA. adopts the same erroneous thinking as the motion judge by emphasising judicial independence over section 11(b) *Charter* rights. Cameron JA., like the motion judge, also over-emphasized the crown's inability to provide explanations for the reasons behind judicial delay. The reasons are not essential. Once the delay becomes unreasonable the onus is on the crown to move the matter forward. In this case no explanation for the judicial-decision-making delay was provided. No explanation could justify the delay. The inordinate amount of decision-making delay ought to have prompted the crown to act sooner.

179. The Appellant submits that Cameron JA. erroneously endorsed *Brown*[128] which did not consider pre-trial motion delay. With respect, the preponderance of the jurisprudence has stated that the end of the trial is sentencing, and not the last day that evidence is called.

[128] *R v Brown*, 2018 NSCA 62

180. The Appellant submits that it is obvious that the crown ought to have made enquiries of the trial judge when it became apparent that judicial decision-making time in this case had become unreasonable. It is clear from the record that, subsequent to the crown making such enquiries, a verdict was forthcoming.

181. The Appellant submits that the nine-month judicial decision-making time in this case was unreasonable.

Monnin JA's Decision

182. The Appellant submits that Monnin JA. erred in adopting Cameron JA.'s reasoning that section 11(b) ought to be subject to an analysis that lies outside of the *Jordan* framework.

183. The Appellant agrees with Monnin JA. with respect to his decision that *Rahey* does not articulate the appropriate test in relation to judicial decision-making time.

Similar Cases

184. The following cases had comparable delay to the case at bar, although the delay was not necessarily attributable to judicial decision-making delay.

185. *R v Sheikhi*[129] found delay to be unreasonable twenty-four months from the date the charge was laid.

186. *R v Godin*[130] held thirty months of delay was unreasonable.

[129] *R v Sheikhi*, [2001] M.J. No. 523 (Man. Prov. Ct.)
[130] *R v Godin*, (*supra*)

187. *R v St. Germain*[131] held thirty-seven point five months was unreasonable. Thirteen point five months was crown delay, six months was attributable to the defence, and eighteen months for inherent or systemic delay.

Institutional Judicial Delay

188. Judicial delay is comprised of two components: decision-making and institutional or systemic factors. Pre-*Jordan* cases *Morin* and *Askov*[132] accounted for institutional and systemic delay. This component is absent in *Jordan*. Unfortunately, there are still institutional or systemic factors that must be taken into account.

Conclusion

189. The Appellant agrees that this is a transitional case under *Jordan*. Cameron JA. and Monnin JA. erred in their assessments of how judicial decision-making delay should be analyzed within a *Jordan* framework.

190. The Appellant submits that the total delay constitutes fifty months and nine days. There are no exceptional circumstances. The crown has not shown transitional exceptional circumstances. The delay under *Jordan* or *Morin* for this uncomplicated case is unreasonable pursuant to section 11(b).

191. The *Rahey* case is not applicable.

192. If the judicial decision-making delay is not to be considered in *Jordan*, the judicial decision-making time in this case is unreasonable under section 11(b) as it relates to a *Morin* analysis. The Appellant's section 11(b) right has been breached and he is entitled to the remedy of a judicial stay of proceedings pursuant to section 24(1).

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[131] *R v St. Germain,* [2000] M.J. No. 621 (Man. Prov. Ct.), [ABA, Tab 1]
[132] *R v Askov*, [1990] 2 S.C.R. 1199

PART IV – COSTS

193. The Appellant does not request costs.

PART V – ORDER SOUGHT

194. The Appellant prays for an Order:

(a) Allowing their Appeal against the Respondent, with no costs to the Appellant in this Honourable Court

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS, 24th day of April 2019.

Ms. Katherine Bueti

Counsel for the Appellant

Ms. Amanda Sansregret

Counsel for the Appellant

PART VI – PUBLICATION BAN

195. Publication ban to protect the identity of the child complainant under section 486.4(1) of the *Criminal Code.*

PART VII - TABLE OF AUTHORITIES

Case **at Paragraph(s)**

Other

STATUTORY PROVISIONS

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss. 11(b) and 24(1)

Loi Constitutionnelle de 1982, Partie I, *Charte Canadienne des Droits et Libertés* ss. 11(b) et 24(1)