Court File No. 38532

IN THE SUPREME COURT OF CANADA
(On Appeal from the Manitoba Court of Appeal)

BETWEEN:

K.G.K.

APPELLANT (Appellant)

- and -

HER MAJESTY THE QUEEN

RESPONDENT (Respondent)

- and –

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CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO,
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INTERVENERS

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Appellant was convicted of repeatedly sexually abusing his young stepdaughter over a period of years. The trial concluded on January 21, 2016, prior to this Court's decision in *R. v. Jordan*.[1] The trial judge reserved his decision and rendered a verdict on October 25, 2016. The Appellant filed a motion for a stay of proceedings under s. 11(b) of the *Charter* the day before the verdict was scheduled to be delivered.

2. This appeal raises the important question of how to assess the time a judge takes to render a verdict in the context of s. 11(b) of the *Charter*. In particular, this Court must decide whether judicial reserve time should be included within the presumptive ceiling for unreasonable delay contemplated in *Jordan* or assessed independently.

3. The presumptive ceiling is intended to provide a certain and predictable timeframe for bringing an accused to trial. The time spent weighing the evidence and legal arguments afterwards should not fall within this ceiling, as this risks sacrificing justice for expediency.

4. All participants in the justice system play an important role in ensuring the timely administration of justice. Judges are not immune from s. 11(b). However, a practical and principled framework must take into account not only the right to a timely trial but also the judicial independence encompassed in an accused's right to a fair trial. A fair trial demands a carefully considered and reasoned verdict. It cannot entail a rush to judgment.

5. The Appellant had a fair trial. No complaint about delay was raised until well after the conclusion of the trial, one day before the verdict. The trial judge had to evaluate very serious sexual charges spanning over a decade and involving a young child. While the verdict took a long time, it was not inordinate in the circumstances and did not breach s. 11(b) of the *Charter*.

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[1] *R. v. Jordan*, 2016 SCC 27.

Facts

6. On April 11, 2013, the Appellant was charged with sexual offences against his step daughter, while she was between the ages of four and 14 years old. The charges were broken down into two periods: September 2002 to April 2008 and May 2008 to April 2013.

7. On September 6, 2013, the matter was set for preliminary inquiry which was held in Selkirk, Manitoba on October 14, 2014. The Appellant was committed to stand trial.

8. On January 29, 2015, a pre-trial conference was held and trial dates of January 11-22, 2016 were fixed by the parties and the court. The trial proceeded as scheduled, concluding on January 21, 2016. Earlier trial dates in October 2015 had been offered but defence was not available. As a result, the Manitoba Court of Appeal unanimously held that two months and three weeks should be deducted as defence delay,[2] leaving a net delay to the end of the trial of 30 months and two weeks.

9. At trial, the complainant's videotaped police statement was tendered pursuant to section 715.1 of the *Criminal Code*, and she testified. She said that the abuse started when she was very young and continued until she was 14 years old. She described a progression of abuse involving touching, fondling, licking genitals, digital penetration and attempted intercourse. Her testimony about the abuse when she was young was general in nature. She detailed specific recent incidents, for example, an instance involving the use of a vibrator and another involving the use of pornography. She was cross-examined at length, including about the earlier opportunities she had to disclose, her memory and inconsistencies between her statement, preliminary hearing testimony and evidence at trial.[3]

10. A *voir dire* was held into the admissibility of the Appellant's videotaped statement to police. In his statement, he originally denied the allegations. After being shown portions of the

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[2] Reasons for Judgment of the Manitoba Court of Appeal ("MBCA Reasons") at paras. 131 (per Hamilton J.A.) and 248 (per Cameron J.A.), [Appellant's Record ("AR"), Vol. I, Tab 6 at p. 107 and p. 144].

[3] MBCA Reasons paras. 179, 262, 269-272 [AR Vol. I. pp. 121-122, 149, 151-152]; Reasons for Conviction [AR Vol. I, Tab 2 at pp. 4-9, 15-16].

complainant's statement, the Appellant admitted that he touched the complainant's "breasts and vagina while masturbating himself on three to four occasions between 2011 and 2013." The statement was ruled voluntary and tendered as part of the Crown's case.[4]

11. The Appellant testified. He denied sexually abusing the complainant. He testified that he lied to the police. He said that he was never once alone with the complainant, even when he was her sole caregiver.[5]

12. At the end of the trial, the trial judge reserved his decision.

13. On September 30, 2016, the parties were advised that the trial judge would render his verdict on October 25, 2016.[6] The Appellant filed a delay motion on October 24, 2016.

14. The Appellant was acquitted of counts one and three: sexual interference and invitation to sexual touching between 2002 and 2008. He was convicted of counts two, four and five: sexual interference, invitation to sexual touching and sexual assault. The trial judge specified that although the Indictment included dates before 2011, he was only convicting the Appellant of incidents post-2011.[7]

15. The Appellant was sentenced on June 20, 2017 to five years in custody.[8]

Response to the Appellant's Statement of Facts

16. Contrary to the assertion at paragraph 21 of the Appellant's factum, there is no evidence that any delay in setting preliminary inquiry dates was "due to crown counsel's unavailability to

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[4] MBCA Reasons at para. 180 [AR Vol. I, Tab 6 at p. 122]; Reasons for Conviction [AR Vol. I, Tab 2 at pp. 11-12].
[5] MBCA Reasons at para. 178, [AR Vol. I, Tab 6 at p. 121]; Reasons for Conviction [AR Vol. 1, Tab 2 at pp. 10-11].
[6] Affidavit of Eric Hachinski at para 28, [AR, Vol. II, Tab 30 at p. 226].
[7] Indictment [AR Vol. I, Tab 1 at pp. 2-3]; Reasons for Conviction, [AR Vol. I, Tab 2 at pp. 16-18].
[8] Decision on Sentencing [AR Vol. I, Tab 5 at pp. 65-66].

have reasonable discussions with defence counsel." Moreover, the evidence indicates that from 2013-2015, Selkirk was one of the busiest circuits in Provincial Court, which led to considerable delays in setting hearing dates.[9]

17. The Appellant states at paragraph 22, that "defence counsel had availability earlier than the proffered date" for the preliminary inquiry. If this was the case, it was not put on the record nor did counsel request an earlier hearing date.

18. In reference to a "pre-trial application" mentioned by the Appellant at paragraphs 24 to 26 of his factum, the Crown was considering laying further charges against the Appellant involving other complainants, with a view to a joint trial.[10] In the end, this did not come to pass. The Appellant did not request earlier trial dates.

19. The Appellant claims at paragraph 27 that "defence had availability that could have accommodated this matter prior to the dates that were offered." Again, there is no support for this. No earlier available dates were ever put on the record nor did counsel request earlier trial dates.

20. While the Appellant now asserts that delay was always in issue, no obvious efforts were taken to expedite the case as it travelled through the lower courts. The Appellant appeared entirely satisfied with the pace of proceedings until the release of *Jordan*.[11]

21. The motion judge found that the Appellant had not established prejudice and declined to infer substantial prejudice in light of the Appellant's actions and inaction. He further found that the parties had conducted themselves reasonably having regard to the previous legal regime and culture.[12]

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[9] Affidavit of Eric Hachinski at paras. 6-9 [AR, Vol. II, Tab 30 at p. 217-218].
[10] Affidavit of Eric Hachinski at paras. 14 to 17 [AR, Vol. II, Tab 30, at p. 219].
[11] Appellant's Factum ("AF") at para. 174.
[12] Reasons for Judgment of the Manitoba Court of Queens's Bench on the *Charter* Application at paras. 88 and 94 ("Motion Judge's Reasons") [AR, Vol. I, Tab 4 at p. 54-55 and p. 57; and see AR, Vol. I, Tab 6, at pp. 111 and 144].

PART II – QUESTIONS IN ISSUE

22. This appeal raises the following issues:

1) Is the time a judge takes to render a decision included within the presumptive ceilings established in *Jordan*?

2) If judicial decision-making time is not included in the presumptive ceilings, how should it be analyzed under s. 11(b) of the *Charter*?

3) Was the time taken by the trial judge to deliberate and render a verdict in this case unreasonable, in violation of s. 11(b) of the *Charter*?

4) If there was a breach of s. 11(b) of the *Charter*, what is the appropriate and just remedy?

PART III – ARGUMENT

Overview of Argument

23. The actual or anticipated end of trial for the purposes of *Jordan's* presumptive ceilings should be the last scheduled day for trial. The time a judge takes to deliver a verdict is subject to s. 11(b), but the certainty required by *Jordan* and the principle of judicial independence require that the reasonableness of judicial reserve time be measured outside the presumptive ceilings.

24. There are substantial variations in how judges carry out their decision-making function and prioritize their workloads. Where judicial reserve time is shocking, inordinate and unconscionable in the circumstances, it falls outside what judicial independence allows, and will breach s. 11(b).

25. Here, the trial judge's deliberation was long, but not constitutionally unreasonable in circumstances where he had to assess allegations of sexual offences against a child that spanned over a decade. Further, the delay from charge to end of trial was, after accounting for defence delay, only two weeks above the presumptive ceiling. Considering the factual findings of the motion judge concerning prejudice, seriousness of the offence and the diligence of the parties, transitional exceptional circumstances were properly applied in this case.

26. In the alternative, if this Court finds that the trial judge's deliberation time breached s. 11(b), the Crown asks this Court to reconsider the rule that a stay of proceedings is the automatic remedy for all unreasonable delay. In the present case, a stay is not warranted as a sentence reduction would provide a just and appropriate remedy.

Preliminary Issue – What is the Total Delay?

27. The Appellant seeks to include the time taken to hear and decide his delay motion and sentencing time as part of his s. 11(b) argument, asserting that the total delay is 50 months and nine days. With respect, neither of these periods of time were considered by the motion judge. While the Manitoba Court of Appeal divided on the issue of whether to include reserve time within the ceiling, the court unanimously refused to address periods of delay which were not before the

motion judge.[13] In this regard, the Appellant erroneously asserts that Hamilton JA included all delay from charge to sentencing in her consideration of total delay.[14] She did not. Delay beyond the verdict was not considered by any of the judges below.

28. The Appellant even seeks to include decision-making time at the appellate level, arguing the total judicial deliberation time in this case is 20 months and 18 days.[15] With respect, this approach is flawed. Appellate delay has never been included in the s. 11(b) analysis.[16]

29. We submit the Court of Appeal was correct. The time periods relevant to this appeal are from the date of charge to the end of the trial on January 21, 2016 (30 months and two weeks, after accounting for defence delay) and the time under reserve to October 25, 2016 (just over nine months).

Issue 1: Judicial Deliberation Time should not be Included in the Presumptive Ceilings

30. The Crown accepts that judicial deliberation time is subject to s. 11(b) of the *Charter*. The question is whether it should be assessed independently, outside of *Jordan's* presumptive ceilings. Appellate courts, including in the case at bar, have been divided on the issue.[17]

31. We submit that judicial decision-making time should be assessed outside of the presumptive ceiling analysis for four reasons: (1) it follows logically from the certainty and predictability sought by *Jordan*; (2) it best reconciles the tension between the right to a timely trial and the exercise of judicial independence critical to a fair trial; (3) including judicial reserve time

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[13] MBCA Reasons at paras. 114 (per Hamilton J.A. in dissent, but not on this point), 248 and 284 [AR, Vol. I, Tab 6 at pp. 102, 144 and 155]; see also: *R. v. S.C.W.*, 2018 BCCA 346 at para. 28.
[14] AF at para. 165.
[15] AF at para. 148.
[16] *R. v. Potvin*, [1993] 2 S.C.R. 880.
[17] See, for example, *R. v. Mamouni*, 2017 ABCA 347 at paras 72-93 (per Slatter JA); *R. v. Brown*, 2018 NSCA 62 at paras 72-75; *R. v. King*, 2018 NLCA 66 at paras 167-182 (per Hoegg JA); *R. v. Rice*, 2018 QCCA 198 at para. 41 and 42. See also *R. v. Agostini*, 2018 QCCA 373 at para. 11; *R. v. Demers*, 2018 QCCA 617 at paras. 41-45

within a presumptive ceiling would create practical difficulties; and (4) addressing extraordinary decision delay independently is consistent with the prior law. We address each of these below.

a. *Including reserve time within the presumptive ceiling undermines the certainty and predictability sought by Jordan*

32. The presumptive ceilings were meant to enhance "[s]wift, predictable justice"[18] by giving "meaningful direction to the state on its constitutional obligations."[19] The predictability of the ceilings is their key feature, providing "clarity and assurance" that increases confidence in the administration of justice.[20] Importantly, with the creation of presumptive ceilings "[p]articipants in the criminal justice system will know, *in advance*, the bounds of reasonableness so proactive measures can be taken to remedy any delay."[21]

33. The ceilings provide a fixed target for the parties to tailor proceedings. The parties can see the clock ticking. The parties cannot, however, tailor proceedings to a judge's writing time. This is an unknown variable. Nor can the Crown or any other party, in advance, take proactive measures to remedy judicial decision-making delay. Thus, we submit that judicial decision-making time would be an ill fit in the *Jordan* calculus.

34. Further, the vast majority of delay applications are brought pre-trial, based on the "anticipated" end of trial. This requires that date to be predictably identifiable. It is impossible for the parties to predict in advance how much deliberation time will be required, if any. Even judges cannot know how a matter will ultimately unfold, what will need to be addressed in reasons, nor what other factors might affect deliberation time. Requiring courts at the time of a pre-trial s. 11(b) motion to prognosticate as to future delay relating to deliberation time is highly problematic and calls for inappropriate speculation.

35. Trial dates, on the other hand, provide the predictability of a dependable target. Thus, we submit the "anticipated end" of a judge-alone trial under *Jordan* should be the last scheduled day

[18] *R. v. Jordan*, 2016 SCC 27 at para. 28.
[19] *R. v. Jordan*, 2016 SCC 27 at para. 50.
[20] *R. v. Jordan*, 2016 SCC 27 at para. 55.
[21] *R. v. Jordan*, 2016 SCC 27 at para. 108. Emphasis in original.

for trial, that is, the day on which evidence and argument are projected to be complete. In considering the end point of the actual or anticipated end of trial, a five judge panel of the Quebec Court of Appeal unanimously held that:

> [I]t must thus be understood that the ceilings and framework include only the time required to complete the presentation of evidence at trial and pleadings. By taking the actual or anticipated end of the trial as a bookend (the latter corresponding to the duration foreseen by the parties to complete their evidence and pleadings), the Supreme Court could not have believed that the verdict would be rendered at the same time. …
>
> As such, *Jordan* sets out what is a reasonable amount of time to handle a charge – that is to say, to file evidence and to hear the parties so as to render a verdict.[22]

36. This approach is consistent with *R. v. Cody*, where this Court analyzed the total delay as follows:

> The first step under this framework entails "calculating the total delay from the charge to the actual or anticipated end of trial" (*Jordan*, at para. 60). In this case, an information was sworn against Mr. Cody on January 12, 2010, and his trial was scheduled to conclude on January 30, 2015. This makes the total delay approximately 60.5 months.[23]

This Court did not add additional time to account for potential judicial reserve time in a judge-alone trial. Rather, the *scheduled* conclusion of the trial was the appropriate marker.

b. *Reconciling the Right to Trial within a Reasonable Time and Judicial Independence Necessary for a Fair Trial*

37. A judicially imposed, bright-line presumptive ceiling does not adequately balance the right to a trial within a reasonable time with the principle of judicial independence integral to a fair trial.

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[22] *R. v. Rice*, 2018 QCCA 198 at paras. 41 and 42 (unofficial English translation). Emphasis added; see also *R. v. Agostini*, 2018 QCCA 373 at para. 11; *R. v. Demers*, 2018 QCCA 617 at paras. 41-45.

[23] *R. v. Cody*, 2017 SCC 31 at para. 21. Emphasis added.

38. It is a basic rule that "one part of the Constitution cannot be abrogated or diminished by another part of the Constitution."[24] One constitutional right does not prevail over another:

> Where apparent conflicts between different constitutional principles arise, the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them.[25]

39. Courts must interpret and apply constitutional principles in a way that reconciles competing rights and allows them to coexist.[26] Thus, where *Charter* rights come into conflict, "many if not all such conflicts will be resolved within the *Charter* ... by way of internal balancing and delineation."[27] To resolve constitutional tension, courts must give full value to the purpose, content and place of each of the respective principles in the context of the Constitution as a whole.[28]

40. The principle of judicial independence stems from several constitutional sources, including the *Charter*, and enures to the benefit of the accused. It is essential to public confidence in the proper administration of justice.[29]

41. The generally accepted core of judicial independence is:

> …the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.[30]

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[24] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 373, citing *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148.
[25] *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 at para. 69.
[26] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 50.
[27] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 52. Emphasis in original.
[28] *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 at para. 70.
[29] *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*, 2016 SCC 39 at para. 31.
[30] *R. v. Beauregard*, [1986] 2 S.C.R. 56 at 69 and 73. Emphasis added.

42. Importantly, the "independent and impartial tribunal" guaranteed by s. 11(d) of the *Charter* "does not just exclude external pressures on the trial judge. It also contemplates that the trial judge will be free to give due consideration to the issues and evidence before rendering a decision."[31]

43. As Justice Slatter noted in *R. v. Mamouni*, measured consideration is critical to a fair trial, even if it takes time: "Rushed decisions will generate more appeals and more delay … An accused may well be interested in a trial within a reasonable time, but he or she will be equally interested in knowing that the trial judge has had sufficient time to weigh all the evidence and arguments before reaching a potentially life-altering decision."[32]

44. Some judges take more time than others to decide cases. Some have a heavier caseload than others at any given time. Some experience health or personal issues from time to time. This is simply human reality. All cases require "time, effort and a good deal of thought" in order to reach a decision.[33] This is why judicial independence encompasses judges' ability to prioritize their workloads and "allows for substantial variations on how different judges approach their duties."[34]

45. As Graesser J. observed in *Creve*:

> [J]udges cannot be expected to drop everything and complete decisions immediately after they reserve to consider the arguments and review the case law. Judges' schedules are generally very busy, with limited time set aside for writing.
>
> …
>
> Judges do need to prioritize their tasks. Older reserve decisions may have to yield to newer ones, depending on the legitimate and comparative urgencies of the cases they have on reserve.[35]

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[31] *R. v. Mamouni*, 2017 ABCA 347 at para. 91 (per Slatter JA). Emphasis added.
[32] *R. v. Mamouni*, 2017 ABCA 347 at paras. 92 and 93.
[33] *Reference Re Certification in the Manitoba Health Sector*, 2019 MBCA 18 at para. 56.
[34] *R. v. Creve*, 2014 ABQB 494 at para. 110. Emphasis added.
[35] *R. v. Creve*, 2014 ABQB 494 at para. 108-109.

46. Measuring decision-making time in a criminal proceeding against a presumptive ceiling puts judges in an untenable position. Fulfilling their duty to determine the guilt or innocence of the accused inevitably causes delay. The amount of delay is unpredictable given the competing demands on a judge's adjudicative function and may depend on other case specific factors like the complexity of the matter at hand. Forcing judges to truncate their deliberations in order to meet a fixed deadline forces them to choose between rights they are sworn to protect.

47. If judges must always come to determinations within the ceilings, the conduct of the case will determine "the way in which a judge ... makes his or her decision."[36] In cases which conclude well below the ceiling, a judge may have many months to render well-crafted reasons. In cases which conclude very close to the ceiling, the judge may be left with days.

48. In her dissenting reasons, Hamilton JA expressed concern that,

> To remove a judge's decision-making time from the *Jordan* framework, 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 *Jordan* is addressing.[37]

49. With respect, this concern is unfounded. Judges are well aware of the need for timely decisions without externally imposed timelines, and remain subject to s. 11(b). Moreover, as guardians of the Constitution, judges' sworn duties include ensuring that s. 11(b) is respected. This exists independently of *Jordan*. In all cases, judges must take the time necessary to come to a reasoned decision in order to fulfill a constitutional duty that underlies public confidence in the administration of justice.

50. Recently, the Manitoba Court of Appeal observed that a key aspect of judicial independence includes independence regarding matters affecting adjudication.[38] In *Reference Re Certification in the Manitoba Health Sector*, a provision of the *Labour Relations Act* required the court to hear and render a decision on a reference question within six months. As opposed to a

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[36] *R. v. Beauregard,* [1986] 2 S.C.R. 56 at 69 and 73.
[37] MBCA Reasons at para. 122 [AR Vol. I, Tab 6 at p. 104].
[38] *Reference Re Certification in the Manitoba Health Sector*, 2019 MBCA 18 at paras. 52-53, 58.

deadline on just hearing the matter, Justice Mainella observed this deadline for judgment negatively affected independent adjudication:

> In my view, the inflexibility of section 143(4) risks the quality of justice. Judges are well aware of the importance of timeliness in rendering decisions without legislative direction. The modern legal culture is attempting to do away with complacency in all fields of the justice system. Proper judicial reasoning requires time, effort and a good deal of thought. Cases often consist of records that run into the hundreds of pages. The reasons of this Court are often delayed for complex legal research to be done, and there is always the possibility of dissenting or concurring judgments, which may require additional time. The importance of well-crafted appellate reasons go beyond the minimum requirement of telling the parties why the decision was made, providing public accountability and permitting effective appellate review (see *R. v. REM*, 2008 SCC 51 at para 11). Well-crafted reasons are important to the proper administration of justice because, in the common law tradition, written decisions (particularly from appellate courts) are important as to how third parties conduct themselves and how future court cases will be determined in similar situations.[39]

51. Similarly, the Newfoundland Court of Appeal raised concerns that a policy imposing "artificial time limits" would be ineffectual and would negatively affect both the quality of decisions and judicial independence.[40] The Court emphasized that a judge must "tak[e] the time necessary to render justice"[41] and observed that the time limits had,

> …translated into external pressures to expedite judicial decisions. There is latent danger in this. It has potential to negatively impact upon the quality of decision and on judicial independence, both of which have relevance to discharge of the judicial commitment to do justice. In connection with the latter, as LaForest J. incisively put it in para. 329 of his dissenting opinion in *Re Provincial Court Judges*, judicial independence "redounds to the benefit of the judged, not the judge". The "judged" do not reap the benefit if external pressures result in judgments of quality below the standards which the public is entitled to expect; or, worse still, if they result in errors.[42]

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[39] *Reference Re Certification in the Manitoba Health Sector*, 2019 MBCA 18 at para. 56. Emphasis added.
[40] *Newfoundland Association of Public Employees v. R.*, 2002 NLCA 72 at paras. 633-635.
[41] *Newfoundland Association of Public Employees v. R.*, 2002 NLCA 72 at para. 634.
[42] *Newfoundland Association of Public Employees v. R.*, 2002 NLCA 72 at para. 635. Emphasis added.

52. While these comments primarily related to appellate decision-making, they apply to trial decisions equally, and perhaps with greater force to criminal trials. Judges are aware of the need for timely decisions and to radically shift the culture of complacency. But subordinating quality justice to speed and subjecting decision-making time to the vagaries of the pre-trial process are not the proper way to balance competing *Charter* rights.

53. Concerns about the impact on the fairness of a verdict have led this Court to hold that exhortations to a jury must not interfere with jurors' right to deliberate in complete freedom, uninfluenced by any extraneous pressure. Thus, a "deadline for reaching a verdict should not be imposed and a jury should never be rushed into returning a verdict."[43] It would be inconceivable when instructing a jury to shackle it to the presumptive ceiling, or to exhort a deadlocked jury with a reminder that the constitutional clock is ticking. We submit the same applies to judges. In a judge-alone matter, the judge performs the jury's deliberative function and in addition must provide reasons for decision.[44] Unlike a jury, however, while deliberating and crafting reasons, the judge continues to be obligated to other - often many other - matters and duties.

54. The Appellant suggests that to avoid breaching the ceiling, judges should give oral decisions on the spot, with reasons to follow. With respect, this also trenches on judicial independence by dictating how and when judges must make their decisions. An oral decision is not always appropriate or possible. It is not a panacea for the problems with applying hard and fast deadlines to decisions.

55. Excluding judicial decision-making time from the presumptive ceilings does not insulate judges from scrutiny under s. 11(b), nor does it contribute to the culture of complacency. What can be rightly "expected from judges conscientiously bent on their responsibilities is that quality judgments be rendered in the earliest possible time frame necessary to formulate and deliver them."[45]

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[43] *R. v. G. (R.M.)*, [1996] 3 S.C.R. 362 at para. 26. Emphasis added.
[44] *R. v. Pan; R. v. Sawyer*, 2001 SCC 42 at para. 44.
[45] *Newfoundland Association of Public Employees v. R.*, 2002 NLCA 72 at para. 636.

56. The analysis endorsed by the motion judge and majority of the Court of Appeal identifies when deliberation periods exceed the bounds of judicial independence, and infringe s. 11(b). This, in turn, recognizes that excessive and unreasonable deliberation time no longer serves fair trial rights. The Crown submits this method allows each constitutional principle to have full effect, and does not subordinate one to another.

c. *Practical Difficulties of Including Judicial Decision-Making in the Ceilings*

57. In addition to concerns about the impact on judicial independence, including judicial deliberation periods within the *Jordan* ceilings creates a number of practical difficulties.

58. In *R. v. Ashraf*, Band J. of the Ontario Court of Justice subtracted her own deliberation time from the total delay. Had this period been included, the presumptive ceiling would have been breached.[46] However, including the reserve time in the total raised a number of fundamental problems:

> First, when a s. 11(b) application is brought prior to trial, as required by the Rules, one wonders how the judge will be able to determine the period he or she will require to deliberate without knowing (a) how the trial will unfold and (b) what other demands will be placed on his or her time surrounding the "anticipated end of trial". Second, in a case like this one, where counsel brought the application on a date that was initially set for trial continuation, some concerns may arise as to the optics and incentives at play. Should a judge inquire as to whether the defence is willing to waive the judge's deliberation time? In a case where the 18 month mark might be reached during the judge's period of deliberation, thereby shifting the onus, will the judge's "turnaround time" cause one party or the other to feel aggrieved or, worse, to question the judge's impartiality?
>
> Where the ceiling has already been reached, the issue is less troubling, as the Crown cannot be said to have any ability to remedy any judge-caused delay, absent extraordinary circumstances such as those in *Rahey* and *MacDougall*.[47]

59. The inclusion of judicial reserve time in the presumptive ceiling would require courts to schedule all matters to complete many months below the ceiling in order to accommodate potential

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[46] *R. v. Ashraf*, 2016 ONCJ 584 at para. 6.
[47] *R. v. Ashraf*, 2016 ONCJ 584 at para. 74 and 75.

judicial writing time, without knowing whether a decision will be reserved and, if so, how much time will be required. This is particularly problematic in a jurisdiction like Manitoba, where a judge other than the trial judge is normally assigned to manage pre-trial matters. When trial dates are scheduled, the pre-trial judge will not know who the trial judge will be, let alone be able to predict that judge's workload at that future date, or the time the trial judge will require to make a decision. If an estimate proved inaccurate, a *Charter* breach would result.

60. The effect would be a *de facto* lowering of the presumptive ceilings by an arbitrary amount - essentially new *Jordan* ceilings - which would broadly affect the conduct of trials.[48]

61. Notably, regardless of complexity, trials requiring more evidence tend to be longer and more difficult to schedule and will likely conclude closer to the ceiling. Ironically, this means that a judge who has more evidence to evaluate will be afforded less time to deliberate before breaching the presumptive ceiling.

62. Further, it will typically be inappropriate for judges to assess the constitutional implications of their own delay.[49] If judicial deliberation time were to be routinely considered as part of the presumptive ceiling, many delay motions may be accompanied by a recusal motion since it is the trial judge's conduct being impugned, as exemplified in the present case. This only adds further complexity and delay, which *Jordan* sought to remedy.

63. There are also significant evidentiary problems. The *Jordan* framework requires the Crown to explain delays that exceed the presumptive ceiling, by establishing that they meet the criteria of exceptional circumstances. But the Crown will rarely have access to information to explain why a judge could not deliver a verdict sooner. This is true in the present case. In the usual course, the Crown has little insight into the vagaries of judicial calendars, workloads, not to mention health and personal circumstances of judges. Given the need to respect the courts' institutional independence, it is not appropriate for the Crown to request an explanation.

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[48] *R. v. Jordan*, 2016 SCC 27 at para. 139.
[49] *R. v. Rahey,* [1987] 1 S.C.R. 588 para. 87 (per La Forest J).

Obviously, the Crown cannot subpoena judges to a delay hearing or otherwise require them to justify the delay.

64. The Appellant brushes past these difficulties by submitting there are "often" cases where an explanation for judicial delay is provided, and "[m]any reported cases deal with illnesses of judges or other exigencies."[50] Notwithstanding, no such cases are cited by the Appellant.

65. Finally, allowing judicial reserve time to be included in the presumptive ceilings would encourage applicants to wait until the last possible moment to put delay in issue, in the hope of accruing a maximum amount of delay. If the "actual end of trial" in a judge-alone matter were the verdict, *Jordan* motions would likely only or largely be filed post-verdict. This would not be beneficial to the administration of justice, nor foster the solution-oriented approach that underlies the *Jordan* analysis. On the contrary, it would be a return to the retrospective treatment of delay this Court eschewed in *Jordan*¸ and would allow s. 11(b) to be used as a sword to frustrate the ends of justice.[51] Rather, motions for unreasonable delay should be filed at the earliest opportunity, as soon as trial dates are known.[52]

d. *The Influence of Pre-Jordan Cases*

66. While *Jordan* drew on the previous jurisprudence, how deliberation time was treated in the past does not determine whether to include it within the ceiling. *Jordan* was a clear break from past practice in many ways. Thus, we respectfully say Hamilton JA was incorrect to hold that because judicial deliberation was treated as "inherent delay" under *Morin*, and this Court accounted for inherent delays within the presumptive ceilings, such time is necessarily part of the total delay to measure against the presumptive ceiling.[53]

67. Neither *Jordan* nor *Cody* addressed the deliberation time of trial judges. Moreover, as observed by Cameron JA, this Court suggested many ways that judges could combat the culture

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[50] AF at para. 152.
[51] *R. v. Jordan*, 2016 SCC 27 at paras. 21, 34 and 35.
[52] *R. v. Schenkels*, 2017 MBCA 62 at para 64.
[53] MBCA Reasons at paras. 111-112 [AR, Vol. I, Tab 6 at pp. 101-102].

of complacency but these were largely directed to improving the process by which a matter gets to trial - changing courtroom culture - not to attenuating or delimiting decision-making time.[54] This stands to reason. The presumptive ceiling is aimed at changing the behavior of all participants who play a role in bringing the matter to trial. Once a decision is reserved, the Crown and defence no longer have any role to play.

68. In stating that the presumptive ceilings included the inherent time requirements of the case, this Court focused on "factors that can reasonably contribute to the time it takes to prosecute a case" and on "the significant role that process now plays in our criminal justice system."[55] Nothing suggests any intention to capture the time for reserved decisions.

69. Nonetheless, pre-*Jordan* jurisprudence offers important guidance. While deliberation time was often treated as inherent delay under *Morin*, sometimes it was not. In the normal course, the comments in *R. v. Lamachia* would apply:

> [g]enerally speaking, the period of time a judge takes to prepare reasons should be considered to be part of the inherent time requirements of the case. Within reasonable limits, it is desirable that judges take the time that they need to prepare carefully reasoned decisions.[56]

70. Sometimes, however, judicial delay was treated as "other delay" and counted against the Crown. For instance, this Court in *Morin* held the actions of trial judges was a "factor which does not fit particularly well into any other category of delay."[57]

71. In other pre-*Jordan* cases, courts have analyzed the reasonableness of judicial decision-making delay as a distinct issue. For example in *R. v. Rahey*, the only period under scrutiny was "eleven months during which the trial judge was deliberating on a motion for a directed verdict."[58] While a number of matters were in dispute in the various judgments, this Court was unanimous that

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[54] MBCA Reasons at paras. 191 and 192, citing *R. v. Cody*, 2017 SCC 31 at paras. 37-39 [AR, Vol. I, Tab 6 at pp. 125-126].
[55] *R. v. Jordan*, 2016 SCC 27 at para. 51. Emphasis added.
[56] *R. v. Lamacchia*, 2012 ONSC 2583 at para. 7.
[57] *R. v. Morin*, [1992] 1 S.C.R. 771 at 800.
[58] *R. v. Rahey*, [1987] 1 S.C.R. 588 at para. 19, per Lamer J. (see also para. 43 and para. 81, per La Forest J).

eleven months was unreasonable for a directed verdict. Thus, "the trial judge was himself … entirely responsible for the alleged breach of the accused's constitutional right." [59]

72. In *R. v. Junkin*, the Manitoba Court of Queen's Bench found that 20.5 months taken by a provincial court judge to decide a mid-trial *voir dire* was unreasonable, particularly in a relatively straightforward impaired driving trial.[60] Clearwater J. wrote:

> I am unable to determine from the record before me whether the delay in question is as a result of a lack of institutional resources generally, an unusual or inordinate workload of either the court or the trial judge in question, or a combination of these factors. Ultimately, however, this unusual and lengthy delay in rendering a decision does not (and should not) lie at the feet of an accused.[61]

73. In both of these cases, there was no way to explain or justify the inordinate delay in the context of the decisions required. The delays were extraordinary and, in and of themselves, warranted a stay.

74. Standing in contrast is a case like *R. v. MacDougall*, where the judge became ill prior to a sentencing hearing.[62] This Court held that at some point the Crown must act to remove a judge who is ill and unable to complete a hearing. The Crown submits that *MacDougall* has little bearing on the instant matter as it did not address time for reserve decisions. As Cameron JA observed, if *MacDougall* dictates some Crown action "it is not obvious what the Crown should have done or when it should have done it"[63] in a case like the present one. Replacing the judge is not a viable option simply because a decision has been reserved for a long time.

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[59] *R. v. Rahey*, [1987] 1 S.C.R. 588 at para. 89, per LaForest J
[60] *R. v. Junkin*, 2011 MBQB 170 at para. 11.
[61] *R. v. Junkin*, 2011 MBQB 170 at para. 14.
[62] *R. v. MacDougall*, [1998] 3 S.C.R. 45 at para. 3.
[63] MBCA Reasons at para. 243. See also paras. 240-242 [AR, Vol. I, Tab 6 at pp. 141-143].

75. In sum, before *Jordan*, judicial decision-making delays would generally be considered inherent and neutral unless there was something extraordinary about them. In exceptional cases, inordinate reserve time could provide a distinct basis for finding a s. 11(b) breach.[64]

76. The Crown submits this is the analysis that should apply in the *Jordan* era. The motion judge and majority of the Court of Appeal were correct to consider judicial delay independently of the presumptive ceiling.

Issue 2: How should Judicial Deliberation be Analyzed outside the Ceiling?

77. While the test for delay, including judicial delay, which breaches s. 11(b) is unreasonableness, the Crown submits the standard for determining when judicial decision-making time is unreasonable is that of "shocking, inordinate and unconscionable," as expressed in *Rahey*.[65]

78. We submit the standard of reasonableness is properly high in this context for several reasons. First, it reflects the conflict of constitutional principles inherent in judicial deliberation, particularly, the tension between s. 11(b) and the need for judges to take the time necessary to uphold fair trial rights. A high threshold is demanded in order to allow judges to render a verdict with the time, effort and thought required to do justice. Second, it addresses the difficulties inherent in examining the underlying reasons for judicial delay. By requiring that the delay be unreasonable on its face, a high threshold recognizes that the parties will rarely be able to explore the reasons for such delay. Delay motions ought not to become inquiries into the workload of judges or the independent administration of the court.

79. While there are four judgments in *Rahey*, the thread connecting them is that each pair of judges thought the decision-making delay, when looked at objectively on its own, was simply too long in the circumstances to be justifiable on any reasonable basis. The Crown submits that this is the correct approach. As La Forest J described the context in *Rahey*,

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[64] *R. v. Brown*, 2018 NSCA 62 at para. 73.
[65] MBCA Reasons at para. 228 [AR, Vol. I, Tab 6 at p. 138].

> It is clear to me that Judge McIntyre's conduct amounted to a breach of s. 11(b). The delay itself was described by both courts below as shocking; there is no adequate explanation for it.[66]

80. Lamer J. put it this way:

> [T]he eleven-month delay was the result of inaction on the part of the trial judge when faced with a decision that generally is made within a few days. Glube C.J.T.D. called his delay "shocking, inordinate and unconscionable". The Court of Appeal referred to his "disgraceful slowness". In the words of s. 11(*b*), the delay is unreasonable.[67]

81. The Crown acknowledges that "shocking, inordinate and unconscionable" was a description of the delay that occurred in *Rahey*. However, when translated into the words of s. 11(b), it meant that the delay was unreasonable.[68] Analogous to the development of the presumptive ceilings, the standard of "shocking, inordinate and unconscionable" does not depart from the test of reasonableness; it simply adopts a different measure for assessing reasonableness when considering judicial deliberation time.[69]

82. "Shocking, inordinate and unconscionable" is convenient language that captures the appropriate standard, but there is no particular magic in it. The core concept is that where there can be no adequate explanation or justification for the deliberation time in light of the nature of the decision required, the delay is unreasonable. As the motion judge interpreted it, "shocking" means a delay is "significantly in excess of acceptable standards"; "inordinate" means it "significantly exceeds the time reasonably required" in a given context; and "unconscionable" delay "cannot be explained or justified on any reasonable basis, *a priori* or otherwise."[70]

83. Finding that judicial deliberation time is "shocking, inordinate and unconscionable" on the facts of a particular case indicates that the delay was constitutionally unreasonable because it cannot be justified objectively, despite the substantial leeway afforded to the manner in which

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[66] *R. v. Rahey*, [1987] 1 S.C.R. 588 at para. 127. Emphasis added.
[67] *R. v. Rahey*, [1987] 1 S.C.R. 588 at para. 43. Emphasis added.
[68] *R. v. Rahey*, [1987] 1 S.C.R. 588 at para. 43.
[69] *R v Jordan*, 2016 SCC 27 at para. 51.
[70] Motion Judge's Reasons at para. 70-73 [AR, Vol. I, Tab 4 at pp. 47-48].

different judges approach their duties.[71] This gives full constitutional effect to both s. 11(b) and the principle of judicial independence.

84. Even in the *Jordan* era, judges require sufficient time to deliberate, come to a decision and craft appropriate reasons for judgment. Some decisions, while not legally complex, require a thorough recitation of evidence and recourse to transcripts. Others may require extensive legal analysis and jurisprudential review. All cases require considered reasons, which "enhance the quality of justice in the criminal process in many ways."[72]

85. Further, the reasonableness of the time required for a judge to fulfill this adjudicative function must take into account that, unlike a jury, a judge's full efforts and time cannot be dedicated to, or dictated by, a single case. As Doherty JA aptly put it:

> No case is an island to be treated as if it were the only case with a legitimate demand on court resources. The system cannot revolve around any one case, but must try to accommodate the needs of all cases. When a case requires additional court resources the system cannot be expected to push other cases to the side and instantaneously provide those additional resources.[73]

86. In light of these considerations, the motion judge and Cameron JA were correct in the characterization of the test of reasonableness in the context of assessing judicial deliberation time.

Issue 3: Application to this Case

a. *The Time Taken for Judicial Deliberation was not Unreasonable*

87. The trial judge took nine months to render a decision. The verdict would have a life-altering impact on both the accused and the young complainant. While admittedly long, this delay was not so long that it amounts to a *Charter* breach.

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[71] *R. v. Creve*, 2014 ABQB 494 at para. 110.
[72] *R. v. Lamacchia*, 2012 ONSC 2583 at para. 7, citing *R. v. R.E.M*, 2008 SCC 51.
[73] *R. v. Allen* (1996), 92 OAC 345, 1996 CanLII 4011 at para. 27. Emphasis added.

88. The trial judge was required to navigate over a decade's worth of abuse allegations based on the complainant's evidence, which included *viva voice* testimony and her videotaped statement (pursuant to s. 715.1 of the *Criminal Code*). The majority of the Court of Appeal considered a number of contextual factors underlying the trial judge's deliberations:

- the time it took to render the verdict did not impact the timing of the trial itself;
- while there was inherent prejudice to the accused and the administration of justice, the motion judge found that it was not egregious and did not exceed the proper bounds of judicial independence;
- The evidence was presented over a period of seven days. The allegations of sexual abuse covered an 11 year timeframe;
- There were *voir dires* on both the complainant's and Appellant's statements, which included playing of video statements in court and *viva voce* evidence;
- The Appellant testified at both the *voir dire* and trial;
- While not unusually complex, the trial judge had to consider the testimony of the complainant when she was 17 years old regarding events that happened when she was very young, her statement when she was 14 years, old and cross-examination on her evidence at the preliminary inquiry;
- The trial judge also had to consider the Appellant's statement to the police, where he admitted to some of the abuse, and his evidence recanting his police statement and denying the charges; and
- The trial judge noted that he wished to consider the submissions and evidence further. He also had a "few matters under reserve."[74]

89. Both the motion judge and the majority of the appeal court (on either a shocking, inordinate and unconscionable standard, or simply unreasonableness) found the delay, although long, was not

[74] MBCA Reasons at paras 231 to 236, (per Cameron JA) [AR, Vol. I, Tab 6 at pp. 139-140].

beyond the reasonable requirements of an independent judicial actor and therefore did not breach s. 11(b).[75]

90. The Crown submits there was no error in this finding. It is instructive to compare the nature of the decision here with cases like *Rahey* and *Junkin*, where the judicial delay was found to be unreasonable. Unlike *Rahey*, which involved an eleven month delay on a motion for no evidence, a final verdict on guilt or innocence is not normally expected to be "made within a few days." Nor does nine months for a final verdict compare to the 20.5 months taken to decide a *voir dire* which was found unreasonable in *Junkin*.

91. Further, in both *Rahey* and *Junkin*, the judicial delay significantly prejudiced the conduct of the trial itself. That is not the case here. There was no associated delay in presenting evidence for either party. The case was complete on January 21, 2016.

92. The Canadian Judicial Council (CJC), in its Ethical Principles for Judges, suggests that as a matter of diligence, judges should deliver reserved judgments within six months, barring special circumstances. Special circumstances include "illness, the length or complexity of the case, an unusually heavy workload, or other factors making it impossible to give judgment sooner."[76] However, the CJC recommendation is not intended to be a judicial limitation period, nor would it be appropriate to impose it as such. For example, the nature and context of a decision (a very brief no evidence decision, for example) may well dictate that a period of less than six months would be inordinate. While the judicial delay here exceeded the CJC recommendation, by comparison, it did not approach double (*Rahey*) or more than triple (*Junkin*) the recommendation.

93. Moreover, this Court found that nine and ten months respectively of judicial delay (although not decision-related) was not unreasonable in *MacDougall* and *Gallant*.[77]

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[75] MBCA Reasons at para. 245 (per Cameron JA) and 289 (per Monnin JA) [AR, Vol. I, Tab 6 at pp. 143 and 156].
[76] Canadian Judicial Council, *Ethical Principles for Judges*, p. 21.
[77] *R. v. MacDougall*, [1998] 3 S.C.R. 45; *R. v. Gallant*, [1998] 3 S.C.R. 80.

94. While the time to render the verdict was long, given the particular circumstances and in comparison to other matters, this is not a case where nine months in reserve should be found to be unconstitutional. This period was not shocking, inordinate and unconscionable. It does not significantly exceed the time required for deliberation in the circumstances.

b. *Jordan Applied*

95. The Crown also submits that the delay in bringing this matter to trial was not unreasonable under *Jordan*. The total delay from charge (April 11, 2013) to the last day scheduled for trial (January 21, 2016) was approximately 33 months and one week.

96. When the matter appeared for pre-trial on January 29, 2015, the parties were offered several earlier trial dates, including October 19 to 30, 2015. The Crown was available, however, defence was not. As such, the Court of Appeal correctly deducted the time between the earlier trial dates offered and January 11, 2016, in accordance with *Jordan*.[78] This was a period of two months and three weeks, bringing the total delay in issue to 30 months and two weeks.[79]

97. The Appellant submits that "the motion judge found that there was no defence delay as defence counsel had dates available prior to the dates offered by the court."[80] This is incorrect. The motion judge held that it could be reasonably concluded that subtracting defence delay of two months and three weeks was appropriate, but for the purpose of his analysis gave the Appellant the benefit of the doubt by assuming the delay was 33 months and one week.[81]

98. While the Appellant now asserts that his counsel was available earlier for preliminary inquiry and trial (which is not supported by the record), this Court's conception of defence delay was intended to "discourage unnecessary inquiries into defence counsel availability at each appearance."[82] Earlier availability does not change the *Jordan* analysis. The Appellant also

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[78] MBCA Reasons at paras. 131, 248 and 284 [AR, Vol. I, Tab 6 at pp. 107, 144 and 155]; *R. v. Jordan*, 2016 SCC 27 at para. 64.
[79] Affidavit of Eric Hachinski, at para. 19 [AR, Vol. II, Tab 30 at pp. 219-220].
[80] AF at para. 167.
[81] Motion Judge's Reasons at para. 83 [AR, Vol. I, Tab 4 at pp. 32-33].
[82] *R. v. Jordan*, 2016 SCC 27 at para. 64.

submits that "defence was prepared to set a trial date at the first pre-trial conference."[83] However, again, there is no evidence that defence was prepared to do so, nor asked to do so.

99. Therefore, the net delay in this matter was properly 30 months and two weeks. As this exceeded the 30 month presumptive ceiling, the Crown was charged with rebutting the presumption of unreasonableness.

100. There were no discrete events and inordinate complexity was not in issue. The question was whether transitional exceptional circumstances applied. A determination that the exception applies is "highly contextual and discretionary" and ought to receive significant deference.[84]

101. Setting aside the judicial deliberation time in issue, none of the judges of the courts below held that time it took to complete the trial infringed s. 11(b). The motion judge held the transitional exception applied.[85] The majority of the Court of Appeal upheld this, noting the matter was just barely over the ceiling.[86] Even Hamilton JA, who would have granted a stay based on the inclusion of judicial deliberation time, held that up to the conclusion of evidence and submissions, the Appellant would not have expected the delay to be unreasonable under the previous legal regime.[87]

102. Indeed, the Appellant concedes that it was the release of *Jordan* that triggered the filing of his delay motion.[88] In other words, under *Morin* he had no expectation that the delay was unreasonable. Only when *Jordan* was rendered on July 8, 2016 - approximately six months after the close of trial - did he perceive that delay might be in issue.

103. The motion judge held that "reasonable efforts were made by the parties in the context of what had been the prevailing legal framework."[89] This is not a finding of complacency. While

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[83] AF at para. 171.
[84] *R. v. Johnston*, 2018 MBCA 8 at para. 18.
[85] Motion Judge's Reasons at para. 94 [AR, Vol. I, Tab 4 at p. 57].
[86] MBCA Reasons at paras. 248, 249 and 284 [AR, Vol. I, Tab 6 at pp. 144, 145 and 155].
[87] MBCA Reasons at para. 143 [AR, Vol. I, Tab 6 at p. 111].
[88] AF at para. 174.
[89] Motion Judge's Reasons at para. 85 [AR, Vol. I, Tab 4 at p. 33].

the Appellant now impugns how the pre-trial conferences were conducted, these "were basic case management efforts that were not out of line with accepted practice for the time."[90]

104. Notably, the record shows that the circuit court at Selkirk, Manitoba, where the preliminary inquiry was held, was one of the busiest courts in Manitoba. Delays of 12 to 14 months to set contested hearings were common.[91] In *Jordan*, this Court recognized that change takes time and lengthy institutional delays should be accounted for realistically and contextually in the transitional analysis.[92] In this case, the Crown was constrained by those systemic issues and, as noted, was found to have made reasonable efforts in that context.

105. The seriousness of the charges and prejudice were important considerations under the *Morin* framework and feature prominently in the transitional analysis. The motion judge found the Appellant had not established any obvious prejudice and declined to infer substantial prejudice based on the Appellant's inaction.[93]

106. The Appellant argues the motion judge erred in finding no prejudice to him.[94] A finding of actual or inferred prejudice for the purposes of s. 11(b) is a finding of fact, and ought not to be interfered with absent a palpable and overriding error.[95]

107. The Appellant submits that there was "inherent prejudice" because the charges were hanging over his head, he spent 86 days in custody and was subject to an absolute curfew for more than a year and a half.[96] He also relies on his inability to attend to his father's ailing health because of his release conditions.[97] However, these additional matters all arose after the Appellant was

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[90] Motion Judge's Reasons at para. 93 [AR, Vol. I, Tab 4 at p. 36].
[91] Affidavit of Eric Hachinski, paras. 6-9 [AR, Vol. II, Tab 30 at pp. 217-218].
[92] *R. v. Jordan*, 2016 SCC 27 at paras. 97 and 98.
[93] Motion Judge's Reasons at para. 88 [AR, Vol. I, Tab 4 at pp. 34-35].
[94] AF at para. 162.
[95] *R. v. Morin*, [1992] 1 S.C.R. 771 at 812, per McLachlin J.
[96] AF at para. 162.
[97] AF at para. 162.

sentenced, were not before the motion judge and, we submit, are not relevant to the present determination.

108. While the Appellant spent time in custody, the vast proportion of this was post-sentence. He was in custody awaiting bail on April 11 to 18, 2013. He was re-arrested (on other charges concerning other complainants) on September 17, 2015 and released on a new bail order on September 18, 2015. After he was sentenced, he was in custody June 20 to August 10, 2017, when he secured bail pending appeal. He was also in custody February 7 to March 5, 2019, until he secured bail pending appeal to this Court. He thus spent only a few days in pre-sentence custody. The overwhelming balance was served post-conviction, after the delay motion was determined and the Appellant was sentenced.[98]

109. The Appellant was subject to an absolute curfew beginning August 10, 2017 as a condition of his bail pending appeal.[99] It is absurd to suggest that the motion judge erred in failing to take this into account, as this bail condition did not exist when the motion was decided.

110. The Appellant requested a bail variation on May 11, 2018 to attend his father's funeral and the Crown consented.[100] This was long after his trial, conviction and the delay motion. No prejudice related to the health of his father was raised with the motion judge. It is again absurd to suggest that the motion judge or appeal court erred in failing to take these post-sentencing issues into account.

111. Moreover, the Appellant gave detailed testimony relating to specific events at trial. There was no indication delay had compromised his ability to raise a defence.

112. In addition to the central importance that the seriousness of the offence and prejudice play in transitional exceptional circumstances, this Court noted in *Cody* that general levels of diligence

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[98] AF at paras. 17, 18, 43-46 [and see, AR Vol II, Tab 28; Vol I, Tab 5; Vol II, Tab 11; Vol II, Tab 14].
[99] AF at para. 173.
[100] AF at para. 44 [AR Vol II, Tab 13].

may also be an important consideration.[101] A stark contrast between a diligent accused and indifferent Crown may have critical implications. Similarly, under *Morin*, prejudice could be inferred from the length of delay; however, inaction by an accused could negate the inference.[102]

113. In this case, there was no diligence evident or "repeated efforts to expedite the proceedings."[103] To the contrary, the Appellant chose later trial dates, never sought to expedite matters and did not bring his delay motion in a timely fashion.

114. Despite the Appellant's assertion that delay has always been a live issue,[104] he is unable to point to any instances in the record leading up to trial where unreasonable delay was raised, where attempts were made to expedite the process or any discontent with the pace of proceedings was expressed. He did make one casual inquiry with the trial judge while appearing on another matter on May 17, 2016 – after his trial was over and most of the delay had occurred. At all other instances, the Appellant appeared nothing but content with the pace of proceedings. *Jordan* was released in July 2016; however, he did not file his delay motion until October 24, 2016.[105] As such, the motion judge's finding in respect of inherent prejudice was proper and supported on the record.

115. The motion judge also correctly found that the charges were serious, involving sexual abuse of a child. There is a particularly high societal value in having such matters resolved on their merits. Any limited prejudice to the Appellant could not overcome the seriousness of the offence, especially in light of the lack of any diligent effort to expedite the trial. Rather, the matter proceeded reasonably under the former regime and, although completed before *Jordan*, wound up only two weeks over the presumptive ceiling.

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[101] *R. v. Cody* 2017 SCC 31 at para. 70.
[102] *R. v. Morin*, [1992] 1 S.C.R. 771 at 801-802, 808; *R v Sharma*, [1992] 1 S.C.R. 814 at 829.
[103] *R. v. Cody,* 2017 SCC 31 at para. 70.
[104] AF at para. 160.
[105] *R. v. Richard*, 2017 MBQB 11 at para. 23.

116. The Crown submits the majority of the Court of Appeal did not err in failing to overturn the application of the transitional exception.

Issue 4: Remedy

117. In the alternative, if this Court finds a violation of s. 11(b), the Crown submits that in the particular circumstances of this case, a sentence reduction rather than a stay of proceedings is appropriate and just. The only real period of contentious delay relates to the trial judge's delivery of reasons after the evidence and argument were complete. The Appellant does not argue that he should not have been convicted, merely that he should have been convicted sooner. He had a fair trial and does not suggest otherwise. In these circumstances, if this Court should find the trial judge's deliberation time constitutes a breach of s. 11(b), a remedy should not permit the accused to entirely escape the consequences of his conviction when a less drastic remedy is just and appropriate.

118. The notion that a stay is the automatic remedy for a violation of s. 11(b) has been subject to criticism.[106] Although the question of remedy was left open in *Morin*, this Court has not reconsidered the remedial options, even amidst the broad revision in *Jordan*.[107]

119. The Crown submits that it is appropriate to revisit the remedial options for a violation of s. 11(b) for two reasons: (1) the notion that a stay of proceedings is the only or minimum remedy for unreasonable delay is inconsistent with the unfettered discretion conferred by s. 24(1) of the *Charter* as interpreted by this Court's jurisprudence; and (2) this Court's adoption of the U.S.

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[106] The Senate Standing Committee on Legal and Constitutional Affairs, *Delaying Justice Is Denying Justice: An urgent need to address lengthy court delays in Canada* (final report), June 2017, p. 41-46; Christopher Sherrin, *Reconsidering the Charter Remedy for Unreasonable Delay in Criminal Cases*, 20 Can. Crim. L. Rev. 263 ["Sherrin"] [Book of Authorities, Tab 2]; Justice Casey Hill and Jeremy Tatum, *Re-Chartering an Old Course Rather than Staying Anew in Remedying Unreasonable Delay under the Charter*, 2012, paper presented at the Crown Defence Conference, Winnipeg, September 2012 ["Hill and Tatum"] [Book of Authorities, Tab 1].

[107] *R. v. Morin*, [1992] 1 S.C.R. 771 at 808. In *Jordan*, the majority noted that the parties had not requested such an analysis: *R. v. Jordan*, 2016 SCC 27, footnote 1 to para. 35.

jurisprudence in *Rahey* is ill-suited for the Canadian constitutional framework and is out of step with the remedial approach to unreasonable delay taken in many other common law jurisdictions.

a. *Section 24(1) confers wide remedial discretion*

120. Section 24(1) of the *Charter* is intended to "confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights."[108] This allows courts to carefully tailor remedies to the circumstances of the case so that the remedy is commensurate with the impact of the breach and fair from the perspective of the accused and society. Indeed, this Court has remarked "it is difficult to imagine language which could give the court a wider and less fettered discretion" than s. 24(1), and "it is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases".[109] And yet that is exactly what has happened in respect of unreasonable delay cases.

121. The same remedial straight-jacket has not been imposed on other *Charter* provisions. For example, a breach of s. 7 of the *Charter* does not automatically result in a stay notwithstanding that s. 7 protects the same underlying interests as s. 11(b): liberty, security of the person and fair trial rights. Thus, a broken rib and punctured lung stemming from gratuitous force, and state actors' failure to arrange for medical attention was properly remedied by a sentence reduction in *Nasogaluak*.[110] These breaches of s. 7 of the *Charter* imperiled the life and well-being of the individual yet did not warrant a stay of proceedings. However, an impact on the same s. 7 interests – liberty, security of the person and fair trial – viewed through the lens of s. 11(b) leads to a stay. The Crown submits that the law is not coherent when inferred stress and anxiety from criminal charges automatically garners a more drastic remedy than actual serious bodily harm.

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[108] *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 at para. 18.
[109] *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 965; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at paras. 24, 50 and 52; *R. v. Rahey*, [1987] 1 S.C.R. 588, *per* La Forest J., at p. 640. Emphasis added.
[110] *R. v. Nasogaluak*, 2010 SCC 6.

b. *The remedial approach in Rahey is out of step with most jurisdictions*

122. In *Rahey*, four of eight judges found the rationale for the rule that a stay is the minimal remedy was that courts lose jurisdiction after an unreasonable amount of post-charge delay.[111] Justices Le Dain and Beetz held that it was not necessary to find that the court had lost jurisdiction; it was sufficient to state that it would not be appropriate and just to continue with a trial if s. 11(b) had been violated.[112] In dissenting reasons, Justices La Forest and McIntyre argued that remedies less severe than a stay of proceedings ought to be available to judges.[113]

123. When *Rahey* was decided, this Court reviewed the American right to a "speedy trial" under the Sixth Amendment of the U.S. Constitution. American jurisprudence was relied upon by Lamer J. to support the current remedial approach to s. 11(b).[114] Notably, however, the U.S. Constitution contains no remedial provision similar to s. 24(1) of the *Charter*.

124. Since *Rahey* was decided, many common law jurisdictions have chosen to follow the approach suggested by La Forest J in his dissenting reasons in *Rahey*, rather than the American position. For example, the highest courts in New Zealand[115] and the United Kingdom[116] have held that other remedies short of a stay of proceedings may be permissible where the right to a trial within a reasonable time has been infringed. Similarly, Australia, India, South Africa, the Caribbean and much of the European community[117] have not viewed a stay of proceedings as the minimum remedy for a breach of the right to be tried without unreasonable delay.[118] The American model has even "increasingly been the subject of critical scrutiny in the United States."[119]

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[111] *R. v. Rahey*, [1987] 1 S.C.R. 588 at para. 48 (*per* Lamer J. and Dickson C.J.) and at para. 61 (*per* Wilson and Estey JJ.).
[112] *R. v. Rahey*, [1987] 1 S.C.R. 588 at para. 48.
[113] *R. v. Rahey*, [1987] 1 S.C.R. 588 at paras. 102–111.
[114] *R. v. Rahey*, [1987] 1 S.C.R. 588 at paras. 48–49 *per* Lamer J. and Dickson C.J.
[115] *Williams v. R.*, [2009] NZSC 41.
[116] *Attorney General's Reference No. 2 of 2001*, [2003] UKHL 68.
[117] Hill and Tatum, at pp. 49-51, 59 ff.
[118] Hill and Tatum, p. 60.
[119] Hill and Tatum, p. 79.

125. As Justice Hill observed, s. 11(b) has developed in Canada to a point where the right and remedy have essentially been conjoined. He advocated for a critical re-examination of the constraint on remedial options for unreasonable delay.[120]

126. Professor Sherrin has also taken the view that a stay ought not to be the minimum remedy for a s. 11(b) breach:

> That rule is based on the mistaken belief that anything less than a stay will only aggravate the problem by leading to even further delay. What matters is not so much delay itself but the impact of delay on the interests that s. 11(b) seeks to protect, and in a number of scenarios those interests can be adequately protected by remedies short of a stay.[121]

c. *Remedy for post-trial judicial delay in this case*

127. In many cases, where a trial is unreasonably delayed, a stay will likely remain the appropriate and just remedy. However, post-trial situations, including judicial delay in reaching a verdict, ought to be treated with the remedial flexibility which typically characterizes s. 24(1) of the *Charter*. Where post-trial judicial deliberation delay is in issue, we acknowledge that personal security and liberty concerns may continue to exist; however, assuming the accused had a fair trial, this major concern is significantly attenuated. In fact, taking the time needed to deliver a well-reasoned decision serves the accused's fair trial interest and ultimately will avoid delay from retrying matters where rushed decisions lead to error.[122]

128. We question whether there could be a situation that brings the administration of justice into greater disrepute than that where, after a fair and timely trial, a judge takes slightly too long to provide a verdict, and this results in an otherwise properly convicted offender going free. The just and appropriate remedy, we submit, in such circumstances is a reduction of sentence to address the excess of judicial delay. This would recognize that the judge was engaged in a constitutional

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[120] Hill and Tatum, pp. 76 to 77.
[121] Sherrin at 291.
[122] *R. v. Mamouni*, 2017 ABCA 347 at paras. 92 and 93.

duty which redounds to the benefit of the accused,[123] while at the same time vindicating the impact on the accused's interests under s. 11(b).

129. The remedial inflexibility which has crystalized around s. 11(b) is out of step with most of the common law world, owes its origin to a jurisdictional argument which is no longer compelling and is not in line with the way the s. 24(1) jurisprudence has matured since the early days of the *Charter*. Not all violations of s. 11(b) require the automatic invocation of the "ultimate",[124] "draconian"[125] and "most drastic"[126] remedy of "last resort."[127] A stay is often considered too harsh and too unfair to the administration of justice in many cases of serious *Charter* infringing state conduct. Section 11(b) should not be exempt from this analysis.

130. Here, if nine months was too long to be reasonable given the nature of the decision to be made, the Appellant was still properly convicted, after a fair and timely trial, of repeatedly sexually abusing his stepdaughter. We submit his five year sentence should be reduced to reflect these circumstances. Such a remedy would be just and appropriate as it would fully vindicate the impact of the delay on the Appellant's security of the person and liberty interests, while balancing societal interests in upholding a conviction rendered after a fair trial.

Conclusion

131. Excluding judicial reserve time from the presumptive ceilings is consonant with the certainty and predictability this Court sought to achieve in *Jordan*. It is impossible for the parties or the court to know in advance whether a verdict will be reserved and if so, how long will be required to deliberate. It also respects the critical adjudicative function guaranteed by the principle of judicial independence. If the time it takes to render a verdict is shocking, inordinate and unconscionable, it necessarily falls outside the substantial latitude afforded to judges in carrying

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[123] *Newfoundland Association of Public Employees v. R.*, 2002 NLCA 72 at para. 635, citing *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3 at para. 329.
[124] *R. v. Regan*, 2002 SCC 12 at para. 53.
[125] *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70 at para. 117.
[126] *R. v. Babos*, 2014 SCC 16 at para. 30.
[127] *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 77.

out their deliberative duties, and will breach s. 11(b). The deliberation time in this case was admittedly long but did not rise to that threshold.

PART IV – ORDER SOUGHT CONCERNING COSTS

132. There should be no order as to costs on this appeal.

PART V – ORDER SOUGHT

133. The Respondent requests an order dismissing the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on June 18th, 2019.

Michael Conner,
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Her Majesty The Queen

Charles Murray,
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PART VI – PUBLICATION BAN

134. Pursuant to s. 486.4(1) of the *Criminal Code*, there is an order prohibiting the publication of any information that could identify the child victim in this case. Since this appeal concerns the application of s. 11(b) of the *Charter*, the publication ban should not have any impact this Court's reasons provided the reasons do not identify the Appellant or complainant by name.

PART VII – LIST OF AUTHORITIES

Cases:	**Paragraph No(s).**
Attorney General's Reference No. 2 of 2001, [2003] UKHL 68	124
Conférence des juges de paix magistrats du Québec v. Québec (Attorney General), 2016 SCC 39	40
Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62	120
Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876	38, 39
Mills v. The Queen, [1986] 1 S.C.R. 863	120
New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319	38
Newfoundland Association of Public Employees v. R., 2002 NLCA 72	51, 55, 128
R. v. 974649 Ontario Inc., 2001 SCC 81	120
R. v. Agostini, 2018 QCCA 373	30, 35
R. v. Allen, 92 OAC 345, 1996 CanLII 4011	85
R. v. Ashraf, 2016 ONCJ 584	58
R. v. Babos, 2014 SCC 16	129
R. v. Beauregard, [1986] 2 S.C.R. 56	41, 47

Articles:	**Paragraph No(s).**
Justice Casey Hill and Jeremy Tatum, *Re-Chartering an Old Course Rather than Staying Anew in Remedying Unreasonable Delay under the Charter*, 2012. paper presented at the Crown Defence Conference, Winnipeg, September 2012	118, 124, 125
Christopher Sherrin, *Reconsidering the Charter Remedy for Unreasonable Delay in Criminal Cases*, 20 Can. Crim. L. Rev. 263	118, 126

Other:	**Paragraph No(s).**
Canadian Judicial Council, Ethical Principles for Judges	92
The Senate Standing Committee on Legal and Constitutional Affairs, Delaying Justice Is Denying Justice: An urgent need to address lengthy court delays in Canada (final report), June 2017, p. 41-46	118