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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PART I: OVERVIEW AND STATEMENT OF THE FACTS

1. In *Regina* v. *Jordan*[1], this Honourable Court overhauled the framework for determining whether an accused's section 11(b) *Charter*[2] right to be tried within a reasonable time has been infringed. In doing so, it made clear that all criminal justice participants must combat the culture of complacency and proactively protect an accused's s. 11(b) *Charter* right.[3] Presumptive ceilings that apply from charge to the actual or anticipated "end of trial" were implemented to streamline litigation and give meaningful direction to those obligated to ensure a trial concludes within a reasonable time. At its core, the new framework requires everyone to proactively prevent delay.

2. The issue in this case is what "end of trial" means and whether the *Jordan* presumptive ceilings include deliberation time to verdict or whether deliberation time should be assessed separately to protect judicial independence and the inherent difficulties in predicting and planning for a reserve decision. If considered separately, deliberation time nevertheless remains subject to scrutiny under s. 11(b) of the *Charter*, so the issue becomes how that time ought to be assessed for unreasonable delay. If included in the presumptive ceilings, the questions that arise are how to predict the need for and length of deliberation time for the purposes of planning and for assessing time on a pre-trial s.11(b) *Charter* application, and whether and how exceptional circumstances pursuant to *Jordan* may apply. The Respondent has also raised the issue of whether a stay of proceedings continues to be the minimum remedy for a s. 11(b) *Charter* breach or whether an alternate remedy, namely a sentence reduction, is available.

3. It is Ontario's position that the "end of trial" means the point at which the case is left in the hands of the trier and out of the litigants' control. Deliberation on verdict must be excluded from the presumptive ceilings, though it remains subject to s. 11(b) *Charter* scrutiny and can become unreasonable. The test for determining whether deliberation time breaches s. 11(b) of the *Charter* remains whether the time taken for deliberation is "unreasonable", and not whether it is "shocking, inordinate and unconscionable". The framework for determining the reasonableness of this period of delay, though considered separately from the presumptive ceilings, ought to be compatible with

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[1] *R.* v. *Jordan*, 2016 SCC 27; *R.* v. *Williamson*, 2016 SCC 28.
[2] *Canadian Charter of Rights and Freedoms*, s. 11(b), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.
[3] *R.* v. *Jordan*, 2016 SCC 27, at paras. 5, 41, 85-86, 105-117, 137-139; *R.* v. *Cody*, 2017 SCC 31, at paras. 31, 36-39.

Jordan principles. As it is accepted that deliberation time can become unreasonable, the presumed point beyond which it is does should be established. Ontario suggests that point is six months. This reflects the best practice articulated by the Canadian Judicial Council, and, in Ontario, is legislated in the *Courts of Justice Act* as the period beyond which intervention by judicial administrators is required.[4] To be consistent with *Jordan*, delay-causing conduct by a party and exceptional circumstances, such as discrete events and case complexity, should be available to reduce and justify reserve time taken beyond six months. Given the relative inflexibility of judicial resources, particularly at the deliberation stage, judicial workload should also be considered.[5] If this Court determines that deliberation time must be included in the presumptive ceilings, guidance is needed on how counsel should plan for reserve decisions and how exceptional circumstances under *Jordan* will apply to deliberation time.

4. Ontario also requests that this Court set out its expectations of all criminal justice participants in the event of a reserve decision. Ontario proposes some best practices that acknowledge the limitations counsel face at the deliberation stage but that promote proactive problem-solving to progress cases to verdict as soon as possible, and that assist in creating a record in the event deliberation time is assessed for delay.

5. Finally, if permitted to address this issue, Ontario's position is that the issue of remedy ought not be decided in this case.

6. Ontario takes no position on the facts of this case.

PART II: POINTS IN ISSUE

7. It is Ontario's position that deliberation time does not fall under the *Jordan* ceilings and the issue of remedy ought not be addressed in this appeal. In particular, Ontario advances five points:

(a) Ontario interprets the "end of trial" as when the case is left in the hand of the trier, and so the *Jordan* presumptive ceilings do not apply to deliberation on verdict;

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[4] Canadian Judicial Council, "Ethical Principles for Judges", at pp. 17 and 21; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 123(5) and (6); *Code of Civil Procedure* (Quebec), CQLR c C-25.01, articles 324 and 325.

[5] *R.* v. *Jurkus*, 2018 ONCA 489, at para. 59; *R.* v. *Allen* (1996), 92 O.A.C. 345, at para. 27.

(b) Time taken to deliberate on verdict does not escape *Charter* scrutiny: if "unreasonable" it infringes the accused's s.11(b) *Charter* right. This requires a new framework for assessing deliberation time for unreasonable delay that is separate from, but compatible with, the *Jordan* framework. The proposed framework would identify the point at which deliberation time generally becomes unreasonable – which Ontario suggests is six months – and the justifications for deliberating beyond that point;

(c) In the alternative, if deliberation time is contained within the *Jordan* ceilings, guidance on how to plan for reserve time and how exceptional circumstances apply is needed;

(d) Given the constraints of the deliberation stage, expectations need to be set as to what should be done to be "proactive" in the event of a reserve decision; and

(e) The issue of alternate remedy for a s.11(b) breach ought not be addressed in this case.

PART III: BRIEF OF ARGUMENT

A. "END OF TRIAL": *JORDAN* CEILINGS DO NOT INCLUDE DELIBERATION ON VERDICT

8. Ontario and the majority of courts across the country interpret the "end of trial" to mean the point at which the case is left in the hands of the trier.[6] In judge alone trials, this is at the end of closing submissions by counsel. In jury trials, this is after the charge to the jury. The *Jordan* framework suggests that deliberation time to verdict cannot be included in the presumptive ceilings. Further judicial independence requires that deliberation time to verdict be excluded.

9. Although this Court held in *Jordan* that the inherent time requirements were absorbed into the presumptive ceilings,[7] it never expressly addressed the issue of whether deliberation time to

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[6] *R.* v. *Basha*, 2017 ONSC 5897, at paras. 110-138; aff'd in the result, 2019 ONCA 236; *R.* v. *Brown*, 2018 NSCA 62, at paras. 72-75; *R.* v. *Gambilla (appeal by Mamouni)*, 2017 ABCA 347, at paras. 84-94, per Slatter JA; leave dismissed [2018] SCCA No. 176; *R.* v. *Rice*, 2018 QCCA 198, at paras. 41-42, 86; *Agostine* c. *R.*, 2018 QCCA 373, at para. 11; *Demers* c. *R.*, 2018 QCCA 617, at para. 41; *R.* v. *King*, 2018 NLCA 66, at paras. 180-181, per Hoegg J.A., O'Brien J.A concurring; *R.* v. *Brar*, 2019 ONCJ 71, at paras. 17-48, 63-89, 100-105, 113-131; *R.* v. *Camargo*, 2018 ONCJ 740, at paras. 22-34; *R.* v. *Ashraf*, 2016 ONCJ 584, at paras. 73-76; *R.* v. *Zilney*, 2017 ONCJ 610, at paras. 17-20.

[7] *R.* v. *Jordan*, 2016 SCC 27, at paras. 53, 83, 184.

verdict is included in the presumptive ceilings. Nowhere in *Jordan*, *Williamson* or *Cody* does this Court refer to "verdict" as being the "end of trial".[8]

10. The *Jordan* framework is premised on anticipating delay and on making reasonable efforts to prevent it so that matters typically conclude within the presumptive ceilings. Including deliberation time to verdict under the presumptive ceilings poses two problems: first, it is difficult to predict whether and how long a judge will reserve the decision, and second, it is difficult for counsel to mitigate delay once the matter is under reserve. While a reserve decision can be expected in some cases, it is not always foreseen: the decision to reserve is sometimes only clear at the end of trial and can depend on a myriad of factors, including competing demands on the judge's time that are completely unrelated to the case.

11. Even if it can be expected that a judge will need to reserve judgment, the amount of time he or she will require to deliberate is not foreseeable at the planning and scheduling stage or at the pre-trial application stage. At the beginning of trial, a judge may not be able to predict what amount of time, if any, will be required for deliberation given that he or she knows little about the case that is yet to unfold. Only at the end of the trial will a judge be able to assess when the decision will likely be rendered because that is when the judge knows all the issues to be determined, the amount of evidence to be considered, and what his or her schedule permits at that moment. Once the matter is in the hands of the trier, counsel can do nothing to mitigate delay.[9] Deliberation time is completely within the control of the trier and judicial independence is engaged.

12. Judicial independence requires that judges are free to give due consideration to the issues and evidence before rendering a reasoned decision.[10] If deliberation time on verdict is included in the presumptive ceiling, given the difficulty of predicting and planning for it, judges may be forced to shoehorn their deliberations into whatever time remains under the ceiling, regardless of whether that amount of time is adequate, in order to avoid breaching the accused's s. 11(b) *Charter* right that they are constitutionally obligated to protect. This rush to judgment compromises judicial independence. The alternative would be to expect the Crown to plan for deliberation on verdict. The decision to reserve on verdict does not happen in every case, but it can happen in any case. If the Crown is expected to plan around this, the presumptive ceilings will effectively be reduced in

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[8] *R.* v. *Jordan*, 2016 SCC 27; *R.* v. *Williamson*, 2016 SCC 28; *R.* v. *Cody*, 2017 SCC 31.
[9] *R.* v. *Jordan*, 2016 SCC 27, at para. 74.
[10] Respondent's Factum, at paras. 37-56.

every case to allow for the possibility of a reserve decision, regardless of whether it occurs. The main difficulty is knowing how much time to set aside in the plan. The best practice, according to the Canadian Judicial Council, is that reserve decisions be released within six months.[11] This suggests that the Crown ought to set aside six months for a potential reserve decision in all cases, which effectively reduces the presumptive ceilings by a significant amount.

13. Deliberation on pre-trial and mid-trial applications and rulings is contemplated as being within the *Jordan* ceilings. These are distinct from deliberation on verdict because they halt the trial process before all the evidence and submissions are completed. Once the matter is in the hands of the trier, the evidence and accused's defence are complete and preserved by the record. As such, the right to a fair trial, particularly full answer and defence, as encompassed by s.11(b) of the *Charter*, is protected. Generally, applications and rulings are relatively contained aspects of a trial and feature in scheduling and case management discussions. They are often integral to progressing a trial to its end.[12] Though pre-trial motions can be complex and, in some cases, determinative, this also varies widely. Verdict, however, will always require consideration of all the evidence and issues. Subject to how they unfold, time taken to decide applications and rulings can be mitigated more readily than deliberation on verdict and may be deducted as an exceptional circumstance.[13] The only exception to this could be deliberation time on committal, which has an "end of trial" character.[14]

14. The accused's fair trial interests, particularly as they relate to mounting a defence, that are protected by s. 11(b) of the *Charter* are no longer a concern once the matter is in the hands of the trier. The accused's other interests that s. 11(b) of the *Charter* protects, namely the right to liberty

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[11] Canadian Judicial Council, "Ethical Principles for Judges", at p. 21; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.123(5) and (6).
[12] *R.* v. *Cody*, 2017 SCC 31, at paras. 36-39.
[13] *R.* v. *Rice*, 2018 QCCA 198, at para. 86; *Agostine* c. *R.*, 2018 QCCA 373, at para. 11; *R.* v. *Lavoie*, 2017 ABQB 66, at paras. 33-41; *R. v. King*, 2019 ABQB 467, at paras. 100, 105.
[14] See *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 123(5) that contemplates up to three months reserve time on committal. Reserve on committal will impact limited cases going forward given the recent *Criminal Code* amendments that have further restricted the availability of preliminary hearings; see Bill C-75, clause 238 amending s. 535 of the *Criminal Code* (received Royal Assent on June 21, 2019).

and to security of the person, extend throughout deliberation time.[15] Accordingly, judicial independence is not without limits: deliberation time remains subject to *Charter* scrutiny.

B. THE TEST REMAINS WHETHER THE DELAY WAS "UNREASONABLE"

15. Since this Court's decision in *R.* v. *Rahey,* it has been accepted that time taken for deliberation on verdict does not escape s. 11(b) *Charter* scrutiny.[16] In this case, while differing in the result, Justices Hamilton and Monnin of the Manitoba Court of Appeal agreed that the test is whether deliberation-caused delay was "unreasonable". Both found the test of "shocking, inordinate, or unconscionable" to be too high a threshold and recognized that it was not adopted by this Court in *Rahey*.[17] Whether deliberation time is unreasonable is a contextual analysis that would no doubt consider the heavy burden on judges to give reasoned decisions.

C. A NEW FRAMEWORK IS NEEDED FOR ASSESSING DELIBERATION TIME

16. Ontario proposes that a new framework, separate from but compatible with *Jordan*, for assessing deliberation time for unreasonable delay be established. It is agreed that, at some point, deliberation time can become unreasonable. To be compatible with *Jordan* principles, Ontario suggests that identifying when that point is will clarify a judge's obligations under s. 11(b) of the *Charter*. Guidance can be found in the Canadian Judicial Council's best practice of releasing reserve decisions within six months.[18] In Ontario, this expectation is echoed in the *Courts of Justice Act* which legislates intervention when deliberation exceeds six months.[19] As with *Jordan*, time taken beyond whatever point the Court identifies may be reduced by delay-causing conduct by a party and justified by exceptional circumstances, including discrete events and case complexity. The Court may also wish to consider judicial workload given that, at the point of decision-making, there is significantly less flexibility from a resource management perspective, with the only

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[15] *R.* v. *Jordan*, 2016 SCC 27, at para. 20.
[16] *R.* v. *Rahey*, [1987] 1 S.C.R. 588; *R.* v. *MacDougall*, [1998] 3 S.C.R. 45.
[17] *R.* v. *K.G.K.*, 2019 MBCA 9 at paras. 161-170, 287-288.
[18] Canadian Judicial Council, "Ethical Principles for Judges", at p.21.
[19] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.123(5) and (6). See also *Code of Civil Procedure* (Quebec), CQLR c C-25.01, articles 324 and 325.

apparent solution being to clear that judge's schedule, at the risk of putting other cases in jeopardy.[20]

17. The benefit of having a separate and clear assessment for deliberation time is three-fold. First, by having a separate assessment, counsel, case management judges and judges hearing pre-trial applications will not have to guess whether and how much reserve time is needed when proactively trying to prevent unreasonable delay or anticipating the end of trial. Second, keeping the assessment separate makes clear that judges are not expected to rush to judgment in order to shoehorn their decision into whatever time remains under the ceiling. Third, knowing in advance how much time is generally available for deliberation and what justifies going beyond that time, both preserves judicial independence and gives meaningful direction to judges on their constitutional obligation to render a verdict within a reasonable time.

18. As with *Jordan*, delay-causing conduct by a party must be deducted from deliberation time. This could include where the defence is unavailable to return on a given date for judgment or where the defence notifies the judge of delay concerns late in the deliberation, e.g. by bringing a s.11(b) application immediately before the verdict is rendered, such that the judge is unable to adjust responsively to those concerns. Where it exceeds the general expectation for deliberation time in non-complex cases, allowances ought to be permitted in view of discrete events or the complexity of the case as outlined in *Jordan*.

19. *Jordan* precludes consideration of resources as a justification for exceeding the presumptive ceiling. If deliberation time is considered separately from the presumptive ceilings, judicial resources ought to be considered. There is significantly less flexibility around reallocating judicial resources at the deliberation stage. Expecting a judge to drop everything to decide one case will place other cases at risk.

[20] *R.* v. *Jurkus*, 2018 ONCA 489, at para. 59; *R.* v. *Allen* (1996), 92 O.A.C. 345, at para. 27.

D. IF UNDER THE *JORDAN* CEILINGS, DELIBERATION IS AN EXCEPTIONAL CIRCUMSTANCE

20. If this Court finds that deliberation time falls under the presumptive ceilings, guidance is required as to whether and how exceptional circumstances apply to deliberation time.

21. Deliberation is a discrete event because it is outside of the Crown's control in that it is not caused by the Crown or within the Crown's power to mitigate. As explained above, the amount of time needed for deliberation is difficult to foresee. Once a decision is under reserve, it cannot be mitigated by counsel and so is unavoidable. The Court of Appeal for Ontario in *R.* v. *MacIsaac*[21] commented in *obiter* that reserve time does not amount to a discrete exceptional event on the basis that it is to be expected. This fails to account for the difficulty in estimating how much time will be needed for deliberation when trials are scheduled and before the full extent of the issues and evidence unfold at trial. It cannot be that Crowns are expected to plan for potential reserve time that cannot reasonably be estimated.

22. In view of this, the *Jordan* framework requires that either reserve time be capable of accurate estimation at a much earlier stage for the purposes of planning, or that reserve time is treated as unforeseeable and unavoidable by virtue of the fact that its occurrence and length is only knowable when it is too late to mitigate it.[22] For the ceilings to remain workable, that amount of time to be set aside for deliberation must be significantly less than the current best practice allowance of up to six months. Without clear guidance on how to estimate deliberation time, the Crown cannot foresee whether a case is in danger of exceeding the ceiling and so cannot plan to mitigate potential delay.

23. Second, the complexity of the case can justify deliberation time above the ceiling. The Court of Appeal for Ontario in *R.* v. *Jurkus*, declined to comment on whether judicial deliberation comes under the presumptive ceiling, but indicated that, if included, delay above the ceiling due to deliberation time can be justified in a complex case.[23] The more complex a case, the more likely it is that the trial process will run up against the presumptive ceiling and that more deliberation time will be required.

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[21] *R.* v. *MacIsaac*, 2018 ONCA 650, at paras. 32-41, 46-48.
[22] *R.* v. *Jordan*, 2016 SCC 27, at para. 74.
[23] *R.* v. *Jurkus*, 2018 ONCA 489, at paras. 67 and 71.

E. BEST PRACTICES

24. No matter how deliberation time is to be attributed, Ontario seeks this Court's guidance as to how counsel can be proactive once a decision is under reserve and how to create a record that can be assessed if deliberation time is reviewed for delay. *Jordan's* call for proactive problem-solving does not readily apply to the unique context of deliberation time requirements. Once a matter is left with the trier, counsel are profoundly limited in what they can do. As with a jury, counsel cannot ask a judge to decide the case more quickly.[24] All counsel can do is ask for an indication of when the decision might be released and express concern about *Charter* delay. It can be a difficult decision for counsel to initiate this communication for fear of how the judge – who is deciding the outcome of the case – might receive it. Second, with respect to the record, it will be very difficult to discern the reasons for deliberation time needs. There is often no information about why a judge requires a given period of time to decide a case, and the judge should not be made a witness on the application.

25. To clarify expectations and to address these practical difficulties, Ontario proposes that, once the decision is made to reserve, a trial judge should set a target date to deliver the decision in court. This would provide parties with a sense of when the decision will come and the first opportunity to express concern about anticipated delay. Further, if that target date is missed, counsel can express concerns in court. It also provides the judge with an opportunity to put on record any explanation he or she is able to provide about why the target date was missed. A missed target date should be communicated to judicial administrators, so that a judge's workload can be assessed and addressed if possible. When target dates are missed and/or explanations for missed target dates are not forthcoming, the only remaining thing that counsel can do is to write to the judge and judicial administrators, preferably jointly, to express concern about delay. Given the limitations at this stage, this ought to fulfill any obligation on the part of counsel to prevent delay. It would also encourage judges and those administrating their workloads to take steps to ensure that decisions are reached within a reasonable time. Finally, it would provide some record upon which to assess the reasonableness of the deliberation time.

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[24] *R.* v. *R.M.G.*, [1996] 3 S.C.R. 362, at para. 26.

F. ALTERNATE REMEDY FOR S. 11(B) *CHARTER* BREACH

26. In the event this Court allows Ontario to make submissions on the issue of alternate remedies for s. 11(b) *Charter* breaches as raised by the Respondent, Ontario's position is that the issue ought not be addressed in this case. First, the record is insufficient to conduct the requisite level of analysis. As it was not raised in the courts below, there is no analysis to review. Moreover, there is little debate in the recent jurisprudence to supplement the lack of record. Second, there has been insufficient notice to the appellant and to those who may have sought to intervene on this point. Third, the Respondent has offered no analysis of how this proposed change would work beyond this specific case. Given the extensive ramifications of such a change in law, this issue is best left to another case on another day. Should the Court wish to consider this issue in this case, Ontario seeks permission to file a supplemental factum and to make oral submissions.

PART IV: SUBMISSIONS AS TO COSTS

27. Ontario asks that no costs order be made against it as an intervener.

PART V: ORDER SOUGHT

28. Ontario respectfully requests that the Court not include judicial deliberation time under the *Jordan* presumptive ceilings. Ontario does not take a position on the outcome of the appeal.

ALL OF WHICH is respectfully submitted by:

Jeremy Tatham (For:)

Joanne K. Stuart
Counsel for the Intervener
Attorney General for Ontario

Dated this 24th day of July 2019.

PART VI: SUBMISSIONS ON CASE SENSITIVITY

Not applicable.

PART VII: AUTHORITIES CITED

Para(s)

Caselaw:

Secondary Sources:

Statutory Provisions: