SCC File No. 39110

SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

AZIZ PAULS, JAMAL YUSUF and JAMIS YUSUF

Appellants
(Respondent)

– and –

HER MAJESTY THE QUEEN

Respondent
(Appellant)

FACTUM OF THE RESPONDENT,
HER MAJESTY THE QUEEN
Section 691(2)(b) of the *Criminal Code*
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR /2002-156, as amended)

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PART I: STATEMENT OF THE FACTS

A. OVERVIEW OF THE RESPONDENT'S POSITION

1. In *R. v. Jordan*, this Court dramatically revised the framework for determining whether the state had breached the right of the accused to a trial within a reasonable time. The new framework was intended to be clearer, simpler, and more consistent. Alongside the new and improved framework, this Court delivered a clear message: the most effective way to bring an end to the culture of complacency towards delay is through the cooperation of all justice system participants. The principal contribution of appellate courts to that cooperative effort is to insist on the correct and consistent application of the *Jordan* framework.

2. In this case, the Court of Appeal showed appropriate deference to the judge's findings of fact but intervened to correct legal errors in the attribution of delay. The correct attribution of defence delay under the *Jordan* framework requires consideration of both the legitimacy of defence actions, and the legitimacy of the manner in which those actions are pursued. In this case, the trial judge found that the decision to have security footage examined by an expert amounted to legitimate defence action, but he failed to consider whether that action was pursued in a legitimate, delay-adverse manner. The Court of Appeal was obligated to complete the analysis. They concluded that defence counsel pursued their objective in a manner that exhibited marked inefficiency or indifference towards delay. By insisting on the correct attribution of that delay, the Court of Appeal ensured a correct result in this case and provided clear direction to counsel for future cases. This is precisely the type of forward-looking action that is expected of appellate courts in order to help combat the culture of complacency.

3. The appellants have urged this Court to modify the *Jordan* framework in ways that would undermine its clarity, simplicity, and consistency. The Court of Appeal had no difficulty resolving this appeal using the existing framework. The respondent submits that there is nothing novel or exceptional about this case that would warrant supplementing or modifying the *Jordan* framework. This Court should reject the appellants' three proposed changes.

4. **First, there is no need to clarify or modify the long-settled standards of review.** Findings of fact are reviewed for reasonableness. Once those facts have been decided, the application of those facts to the law in characterizing the delay is reviewed for correctness.

Finally, the decision about whether a section 11(b) breach has occurred must be correct and is not a discretionary finding.

5. **Second, this Court should not create a new rule for delay caused by underestimates of the required time for trial.** The appellants' submission that "an underestimate, without more, does not qualify as a discrete event or exceptional circumstance" is squarely at odds with the jurisprudence of this Court. The majority in *Jordan* could not have been clearer: "if the trial goes longer than reasonably expected – even where the parties have made a good faith effort to establish realistic time estimates – then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance."

6. **Third, this Court should not create a new three-part test for deducting delay caused by the unavailability of a co-accused.** This Court has provided clear definitions for defence delay and exceptional circumstances. If co-accused delay meets one or both of those definitions then it must be deducted. Co-accused delay will be deducted as defence delay when the accuseds are content to, or do, proceed as a collective. The delay of any accused in those circumstances is not the product of state action, and it is not emblematic of state complacency. The *Jordan* framework was intended to incentivize cooperation. Cooperation between defence counsel to find dates available for all will produce more efficient results than encouraging counsel to protect the record by focusing only on their own earliest available dates without regard for the schedule of the co-accused. If the accuseds in a joint trial do not proceed as a collective, or withdraw from a collective approach, the Crown may still be able to show that the delay caused by one of the co-accused was not reasonably foreseeable or avoidable, and could not reasonably be mitigated in relation to the others. If the Crown fails to pursue a reasonable plan, or fails to make reasonable use of severance, then the Crown may not be able to show an exceptional circumstance.

7. In this case, the Crown could not have foreseen or avoided the discrete circumstances that interrupted the trial so frequently that, by the end of trial, 14 court days were used to call 6.5 days of evidence. Each continuation associated with the need to secure those additional court days was magnified because of the scheduling restrictions of each defence counsel. Severance was not a reasonable option, and the Crown and Court were widely available. There was nothing more the Crown could have done to mitigate the delay.

8. The respondent's position is that the Court of Appeal correctly applied the *Jordan* framework to this case. In the alternative, if this Court finds any error, the respondent submits that the trial judge also failed to conduct a meaningful analysis of the transitional exceptional circumstance. This Court's decision in *Jordan* was not released until this trial was two-thirds complete. Most of the delay was a foregone conclusion. This Court should give effect to the reasonable reliance of the parties on pre-*Jordan* jurisprudence, and find no breach.

B. SUMMARY OF THE FACTS

(i) The circumstances of the offence

9. On the night of the offences, the victim attended a shisha bar called "La Fanoose" owned by one of the accused, Jamal Yusuf. By 7:00 am, most of the patrons had left except the victim, his friend Mr. Sliwa, and the three respondents. The victim was soundly intoxicated. At 7:04 am, the five men walked out of the bar. Once outside, the victim was immediately struck in the face by Jamal. He lost consciousness. Mr. Sliwa described the victim being pushed or tripped to the ground where he hit his head. Jamal straddled the victim and struck him several times in the face. He pulled him up and slammed him against a van parked in the lot. The victim suffered a head injury during this portion of the beating. Mr. Sliwa went home. The victim was carried into the bar by the respondents and placed on a chair.[1]

10. The victim was periodically beaten inside the restaurant over the course of approximately two hours. The beating occurred because of some dispute between Jamal and the victim. The victim was punched, slapped, and kicked. He was hit with a rubber tube. He was approached with a lit blow torch, although not burned with it. He was struck in the head with a chair on more than one occasion. He was helpless throughout. Periodically the appellants wiped blood from the victim's head and face before resuming the beating. At approximately 8:15am the appellants mopped up some of the blood on the floor. The victim wanted to call an ambulance for himself, but the appellants refused. Eventually, at approximately 9:45 am, the appellants

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[1] *Reasons for judgment*, Appellant's Record, v.1 tab 7, p.33-34, paras.10-13, p.35, para.17 and 20, p.58-60, paras.96-98.

allowed the victim to leave the bar. The victim suffered a broken nose that required surgery as well as other cuts and injuries that required stitches and staples.[2]

11. The two-hour beating was captured on security footage (also referred to as a "DVR" or digital video recorder). The video footage was not accompanied by any audio recording. In the absence of audio recording, the victim was asked to describe in his testimony what was taking place on video. Through the testimony of the victim and of Jamal Yusuf, the Crown and the appellants advanced entirely different interpretations of the events depicted on the security footage. On the victim's description of the footage, he was held captive and beaten according to the whims of his captors. On the appellants' interpretation of the footage, the victim was free to leave anytime, and the periodic violence depicted on screen consisted of consent fights and/or self-defence. The judge convicted all three appellants of assault causing bodily harm, and the Yusuf brothers were also convicted of unlawful confinement.

(ii) Procedural history

12. **Pre-trial proceedings.** The appellants received substantial disclosure within a month of being charged in August of 2014. On September 23, 2014, the representative for Jamal Yusuf indicated that counsel had reviewed the matter and had written for further disclosure. Similarly, the representative for Mr. Pauls said: "I know our office has gone through the disclosure in depth, and if there is more disclosure required, I'm sure a follow-up letter will be sent in the very near future."[3] On October 16, 2014 further disclosure was provided to the appellants. The respondent disagrees with the appellants' assertion at paragraph 7 of their factum that they might have been available for a JPT earlier than November 25, 2014. Defence counsel told the Court that the November 25 date "seems to be the earliest date that works for everybody", and asked to schedule the JPT for November 25 "if that's available", which it was.[4] The JPT proceeded as scheduled on November 25 and the JPT form indicates that the parties were of the view that disclosure was "complete."[5] On May 15 and June 18, 2015, counsel for Jamal Yusuf requested a new copy of the video recovered by police from "CH15" of the DVR to confirm whether it was

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[2] *Reasons for judgment*, Appellant's Record, v.1 tab 7, pp.36-40, paras.24-29, pp.58-60, paras. 96-98.
[3] *September 23, 2014*, Appellant's Record, v.2 tab 27, p.90 ln.30, p.91 ln.25.
[4] *October 16, 2014*, Appellant's Record, v.2 tab 28-29, p.99 ln.1, p.105 ln.10-20.
[5] *Section 11(b) Application Record*, Appellant's Record, v.1 tab 11, p.197-198.

blank as opposed to being defective as a result of an error in creating the disclosure disc. Pending confirmation from the Crown she anticipated making a future request for defence testing, but no request for the release of the DVR was made at that time.[6] On July 29, 2015, counsel for Jamal Yusuf, speaking for all three defence counsel, advised the Crown that she would require the release of the DVR exhibit, but that her expert was unavailable. Defence counsel said that she was "not sure what the best course of action is" until the return of her expert. The expert returned from vacation on the eve of the first day of trial.[7]

13. **August 5 and 6, 2015 - approximately one hour of evidence was heard**. The first Crown witness, Mr. Sliwa, was examined in chief. Defence counsel jointly applied for the release of the DVR, and they requested an adjournment, so that it could be examined by their expert. They took the position that they could not begin their cross-examination of Mr. Sliwa until the DVR had been examined.[8] The Crown consented to the release of the DVR, but opposed the adjournment request. He argued that defence counsel had been in possession of the disclosure explaining that the footage for "CH15" was blank ever since they had received initial disclosure a year earlier. Moreover, even if there was footage to be recovered, "CH15" was an outside camera, whereas the entire offence took place inside the bar. Nothing that took place outside the bar could justify or excuse the protracted violence inside the bar.[9] The judge granted the defence request, and the parties briefly stepped out of the courtroom to obtained continuation dates. They jointly agreed to schedule three further days. When the parties returned to the courtroom to advise the trial judge of the dates they had secured moments ago, the trial coordinator's sheet listed only one date offered in August. Defence counsel highlighted that fact, but Crown counsel corrected that information on the record to indicate that there were three dates offered for the week of August 17, all of which were rejected by counsel for Mr. Pauls.[10] According to the trial coordinator sheet, at least eight other dates were offered and rejected by defence counsel before the dates selected in January.[11]

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[6] *Section 11(b) Application Record*, Appellant's Record, v.1 tab 11, p.190, 192.
[7] *Section 11(b) Application Record*, Appellant's Record, v.1 tab 11, p.195-196.
[8] *August 5, 2015*, Appellant's Record, v.2 tab 32, pp.124-130, and 142-143.
[9] *August 5, 2015*, Appellant's Record, v.2 tab 32, pp.130-135.
[10] *August 6, 2015*, Appellant's Record, v.2 tab 33, p.205, ln.1 – p.206 ln.15.
[11] *Trial coordinator sheets*, Appellant's Record, v.1 tab 15, p.251.

14. **January 11, 12, and 14, 2016 - approximately 1.75 days of evidence was heard**. On January 11 the Crown's witness did not arrive until the afternoon due to pain related to his impending kidney surgery. Two previously unanticipated police witnesses were called in the meantime to make good use of the time. Other police officers were sent to retrieve the anticipated witness and bring him to Court. The day ended early, at 3:30 pm, because defence counsel needed to attend to a medical issue relating to his father.[12] On January 12, there was only approximately 1 hour of evidence presented because of an unexpected outburst on the part of the interpreter towards the accused and their counsel. The defence requested an adjournment to find a new interpreter. The Crown resisted, but the trial judge acceded to the defence request.[13] The only full day of evidence was January 14. The parties agreed to schedule two further days. The Crown rejected two of the dates offered by the Court because neither he nor anyone from his office could be available.[14] Defence counsel rejected 19 of the dates offered. June 20 and 24 were selected. With respect to the misestimate of trial time, the judge remarked:

> I think it's a joint responsibility though. You can't just lay it on the Crown. It's a joint responsibility and everyone agreed to that. So I'll hear you out, but that's my immediate response to what you have to say.[15]

15. **June 20 and 24, 2016 - approximately 0.5 days of evidence was heard**. On June 20, virtually the entire morning was lost as a result of the defence request to have an Arabic interpreter who spoke the same "dialect" as the witness. The information available to the Crown prior to June 20 was that standard Arabic interpretation would be adequate for any dialect, and indeed the June 20 interpreter explained that the witness was using regional slang, which was difficult for her, but that she could do it. Notwithstanding the ability of the first accredited interpreter to do the job, a second interpreter was located for the afternoon.[16] On June 24, Mr. Pauls was ill, so no evidence was called. It was at this point that the Yusuf appellants applied for severance. The trial judge denied the severance application, explaining that he saw "huge issues" with the prospect of severance at this point in the trial.[17] The parties agreed to schedule

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[12] *January 11, 2016*, Appellant's Record, v.2 tab 34, p.215 ln.25-p.216 ln.20, p.316 ln.25-30.
[13] *January 12, 2016*, Appellant's Record, v.3, tab 35, p.1, ln.5, p.36, ln.10-20, p.41 ln.10-30.
[14] *January 14, 2016*, Appellant's Record, v.3 tab 36, p.146 ln.10-20; *Trial coordinator sheets*, Appellant's Record, v.1 tab 15, p.252.
[15] *January 14, 2016*, Appellant's Record, v.3 tab 36, p.144 ln.10-15.
[16] *January 12, 2016*, Appellant's Record, v.3 tab 35, p.19 ln.5-20, p.39 ln.5-15; *January 14, 2016*, Appellant's Record, v.3 tab 38, p.166-180.
[17] *June 24, 2016*, Appellant's Record, v.3 tab 39, p.216 ln.30 – p.218 ln.25.

four more days. Two of those days (September 8 and 9) were scheduled on June 24, but the additional days required the approval of the trial coordinator who was not in the courthouse that day (the approval was needed because of the judge's status as a *per diem* judge). The Crown explained that defence counsel had undertaken to provide their availability in the coming days, and as soon as he had that information, he would secure additional dates. The Crown commented on the record that the trial judge had offered to sit on days he was no scheduled to sit when the parties were trying to find agreeable dates. [18] On an unspecified date between June 24 and September 8, the parties secured two additional dates (February 21 and 22, 2017).[19]

16. **September 8 and 9, 2016 - approximately 1.5 days of evidence was heard**. A full day of evidence was heard on September 8. The evidence continued through the morning of September 9, but in the afternoon a federal matter took precedence. The courtroom had been double-booked. The trial judge gave precedence to the federal matter because it would complete that day, whereas this matter would continue past September 9 regardless. The parties agreed to secure three additional dates (April 24, 25, and 26, 2017) in case the February dates were not sufficient. Earlier dates were offered, but the April dates were the first that all three defence counsel could accommodate.[20]

17. **February 21 and 22, 2017 - two days of evidence were heard**. The Crown's case concluded, and Jamal Yusuf began his testimony on February 21. Jamal's evidence continued on February 22.

18. **April 24, 25, and 26, 2017 - approximately 0.5 days of evidence was heard**. The evidence of Jamal Yusuf concluded on April 24 in less than an hour. The last defence witness did not attend and had not been subpoenaed. Similarly, on April 25, the last defence witness still did not attend, so no evidence was heard.[21] The Crown resisted the defence request to wait another day for their witness to attend but the trial judge acceded to the defence request. The trial judge commented that "both sides take responsibility, by the way, for the inaccurate time estimate […] I do not point fingers at either side. Both sides should have known the matter was

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[18] *June 24, 2016,* Appellant's Record, v.3 tab 39, p.216 ln.10-15, p.221 ln.15-30.
[19] *September 9, 2016 (afternoon),* Appellant's Record, v.3 tab 43, p.335 ln.25-p.336 ln.5.
[20] *September 9, 2016 (afternoon),* Appellant's Record, v.3 tab 43, p.345 ln.5, p.346 ln.1-25.
[21] *April 25, 2017,* Appellant's Record, v.4 tab 49, p.303 ln.10-25.

going to take more than two days."[22] On April 26, the last defence witness attended and testified for approximately one hour. The parties agreed to forego oral submissions in favour of written submissions, and those submissions were provided to the trial judge that day. July 7, 2017 was scheduled for judgment, and an interim date (June 2, 2017) was scheduled in case the judge had any questions about the written submissions.[23]

19. **June 2, 2017.** The parties attended to answer any questions the trial judge might have. Very brief submissions were made. The trial judge advised the parties that he had already formulated "most" of his judgment.[24]

(iii) The 11(b) application

20. After the appellants were convicted on July 7, 2017, they filed their section 11(b) application on August 8, 2017 with only three transcripts. More transcripts were filed on August 10, but the record was still incomplete. The last of the transcripts were not filed until the eve of the application hearing date. The application was argued on August 22 and 24, 2017. The submissions of the parties were mostly focused on the misestimate of the anticipated length of trial, the correspondence surrounding the black security footage of "CH15", and the correct treatment of the of reserve time, which all parties understood to have begun on April 26, 2017. The appellants did not suggest that any delay was caused by insufficient availability of the Court at any of the continuations. The appellants called no evidence of prejudice to support their submissions about the transitional exceptional circumstance.

(iv) The trial judge's 11(b) ruling

21. The trial judge placed the vast majority of the delay at the feet of the Crown and entered stays of proceedings for all three appellants. Despite the comments he made about joint responsibility for the misestimate of trial time, he attributed all delay caused by the misestimate to the Crown, while also acknowledging that the estimate was made in good faith.[25] He also faulted the Crown for failing to complete its examination of its key witness sooner than it did.[26]

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[22] *April 25, 2017*, Appellant's Record, v.4 tab 49, p.306 ln.1-10.
[23] *April 26, 2017*, Appellant's Record, v.5 tab 50, p.43 ln.10-15, p.47 ln.5-30; *August 24, 2017*, Appellant's Record, v.5 tab 52, p.254 ln.1-5.
[24] *June 2, 2017*, Appellant's Record, v.5 tab 51, p.56 ln.15.
[25] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, p.98 para.82.
[26] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, p.96 para.75.

22. With respect to the August 2015 adjournment, the judge found that the decision to have the DVR examined by an expert was legitimate and warranted the adjournment. He found that it was reasonable for the defence to have turned its attention to the issue three months before trial and that the Crown should have responded to the defence correspondence in a more timely manner. He made no findings about whether the defence had acted legitimately by waiting for the Crown to confirm the information that was in the disclosure (ie. that the original video feed for "CH15" was blank) before taking any steps to obtain the DVR for testing. He said nothing to acknowledge the defence failure to apply for the release of the DVR until the first day of trial.[27]

23. With respect to co-accused delay, the trial judge only deducted defence delay from the accused who caused it. He approached the attribution of delay in this manner both for scheduling delays and for the delay caused by Mr. Pauls' illness on June 24, 2016.

24. With respect to discrete events, the trial judge acknowledged only the duration of the discrete events, which he found to be no more than 1.5 days in January 2016 and less than one day on June 20, 2016. There was no deduction for any delay flowing from the loss of those court days. The trial judge's final calculation of net delay contained no deduction for discrete events.[28]

25. With respect to reserve time, the judge acknowledged that the case was under reserve from April 26 until July 7, 2017, however he declined to deduct that delay.[29]

(v) The Appeal to the Court of Appeal for Ontario

26. The Crown appealed from the stays of proceedings. The Crown advocated for a complete overhaul of the trial judge's attribution of delay. The Crown argued that nearly all of the delay from the start of trial until conviction ought to be deducted on account of defence delay and discrete circumstances. Only two periods would not be deducted: (1) 12 days from August 5 until August 17, 2015; and (2) a one month period from when the Crown was not available in February 2016. With respect to the delay from August 2015 until January of 2016, the Crown on appeal felt precluded from arguing for a deduction of the first 12 days in August because it could have mitigated that delay by responding more promptly to defence correspondence. However, it

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[27] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, pp.91-92, paras.68-69.
[28] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, pp. p.81 para. 32, p.87 para. 53, p.93, para.71, p.94, para.73, p.100, para.86.
[29] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, pp.97-98, paras.79-80.

advocated for a deduction of the remaining 4 months and 22 days. In response to the Crown appeal, the appellants argued to uphold the conclusions of the trial judge.[30]

27. When the appeal was argued, the 11(b) application record before the trial judge was not provided to the Court of Appeal. The record had not been made an exhibit at first instance, and so it was not available in the Court records. The Crown elected to rely on the description of those materials in the transcript rather than attempting to recreate a copy using materials obtained from outside sources. The appellants (respondents in that court) took no issue with that manner of proceeding, but they felt it was important to provide the Court of Appeal with the trial coordinator sheets. They provided those sheets in a supplementary appeal book in advance of the appeal. After the appeal was argued, and while the decision was under reserve, the Court of Appeal directed the Crown, as the appellant in that court, to file the 11(b) record that was before the trial judge. The Crown and the appellants worked together to reproduce a copy of those materials, and provided them to the Court of Appeal.[31] There was no suggestion from any of the parties at that time that there could be any unfairness flowing from providing the Court of Appeal with a copy of the material that was considered by the judge at first instance, and that was described in the transcript.

28. The Court of Appeal allowed the Crown's appeal and set aside the stays of proceedings, thereby restoring the convictions entered at trial. The Court of Appeal agreed with the Crown's submission that the misestimate of trial time could not be placed solely at the feet of the Crown. They did not agree to deduct all the delay flowing from the underestimate. Instead, in their view, the misestimate was one of several discrete circumstances that warranted deducting part of the delay from September 2016 until February 2017.[32] The Court of Appeal also agreed that the trial judge ought to have recognized that the loss of court days to discrete events led to months of delay which could not be placed solely at the feet of the Crown.[33]

29. Lastly, the Court of Appeal agreed with the Crown that the trial judge should not have placed the five months of delay following the August 2015 adjournment at the feet of the Crown,

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[30] *Decision of the Court of Appeal*, Appellant's Record, v.1 tab. 9, p.139-140, paras.58-59.
[31] *Letter from the Crown to the Court of Appeal, January 14, 2020*, Appellant's Record, v.1 tab 18, pp.259-260.
[32] *Decision of the Court of Appeal*, Appellant's Record, v.1 tab. 9, p.149, para.82.
[33] *Decision of the Court of Appeal*, Appellant's Record, v.1 tab. 9, p.145-146, paras.75-77.

although for different reasons. The Court of Appeal deferred to the judge's finding that the defence action triggering the adjournment was legitimate, but they explained that the manner in which the action was pursued, an issue about which the trial judge made no findings, was illegitimate. In the result, the delay flowing from the adjournment request was properly attributed to defence delay.[34]

PART II: RESPONDENT'S POSITION ON THE QUESTIONS

A. ISSUES RAISED BY THE APPELLANTS

Issue One:

30. Did the Court of Appeal for Ontario err in applying the wrong standard of review and/or in misapplying the standard of review by substituting its own factual findings for those of the trial judge in re-calculating which party was responsible for the delay?

No. The operative standards of review are well-established. The Court of Appeal's reasons do not reveal any error in their application.

Issue Two:

31. Did the Court of Appeal for Ontario err by, after the conclusion of argument on the appeal, requesting the Crown Appellant to file the complete 11(b) application record with the Court and/or in then relying on these materials to reject the Crown's concession in relation to a factual finding as to delay made by the trial judge, all without providing the appellants the opportunity to make submissions on the issue?

No. The requested material was already part of the court record and was fully described in the transcripts. The appellants were not denied the opportunity to make submissions because the attribution of all periods of delay was live on appeal. The Court was not bound by argument of either party on the attribution of delay - a question of law.

Issue Three:

32. Did the Court of Appeal for Ontario err by adopting the "micro-counting" approach rejected by this Court in *R. v. Jordan* in allocating delay in quarter-day increments?

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[34] *Decision of the Court of Appeal*, Appellant's Record, v.1 tab. 9, p.143-144, paras.68-72.

No. The Court of Appeal followed the *Jordan* framework without error. The *Jordan* framework requires the correct attribution of all portions of the total delay. Delay caused by discrete events must be deducted.

Issue Four:

33. Did the Court of Appeal for Ontario err by deducting periods of delay which were caused by the appellant Pauls when calculating the "net delay" for the Yusuf Appellants?

No. For most of the proceedings the appellants proceeded as a collective. Severance in the middle of trial was not a reasonable alternative. Moreover, the delay was not reasonably foreseeable or avoidable and could not be remedied by the Crown.

B. ISSUE RAISED BY THE RESPONDENT

Issue Five:

34. In the alternative, did the trial judge fail to conduct a meaningful *Morin* analysis to ascertain the application of the exceptional transitional circumstance in light of the profound impact of pre-*Jordan* law in this case?

Yes. Two-thirds of the delay in this case pre-dated this Court's *Jordan* decision. The trial judge was obligated to undertake a *Morin* analysis to determine whether the parties reasonably relied on the pre-*Jordan* law, and he failed to do so. If this Court finds that the delay falls above the presumptive *Jordan* ceiling after deducting defence delay and exceptional circumstances, the transitional exceptional circumstance should apply to justify the delay as reasonable.

PART III: STATEMENT OF ARGUMENT

A. ISSUE #1: THE STANDARDS OF REVIEW

(i) There is no need to modify or clarify the long-settled standards of review

35. This appeal turned on the application of long-settled standards of review. Once the relevant findings of fact have been made, the attribution of delay is a question of law reviewable on a standard of correctness. Those standards of review were settled under *Morin*. They are the

foundational principles for all s.11(b) appeals. If this Court had meant to change them, there would have been a clear indication of that change in *Jordan*. There is none.[35]

36. The important role of trial judges emphasized in *Jordan*, and the need for deference to their findings of fact, does not represent a change in the law; quite the opposite. This Court's language signaled that trial judges and contextual factors remain important under *Jordan*, just as they were under *Morin*. As the appellants have acknowledged in their factum, this Court offered clear guidance to the lower courts by highlighting the portions of the *Jordan* framework that rely heavily on factual findings.[36] That guidance appears to have been sufficient. Provincial appellate courts have been reviewing 11(b) rulings under *Jordan* for four years now, and there is no sign that they have had any difficulty applying the long-settled standards of review.[37]

37. In light of the objectives that drove this Court to create a new 11(b) framework, it comes as no surprise that *Jordan* does not increase the level of discretion at first instance. This Court was in search of a framework that would be clearer, more predictable, and less complex. The new framework was intended to provide meaningful direction to the state and to the other justice system participants. This Court sent a clear message to all participants, including trial and appellate courts, that they have an important role to play in preventing delay rather than merely responding to it. The best way to promote certainty in the law, and to impose a change in the culture of complacency, is to insist on a standard of correctness for the attribution of delay. As this Court explained, citing the submissions of the Criminal Lawyers' Association with approval, "Boundless flexibility is incompatible with the concept of a *Charter* right and has proved to serve witnesses, victims, defendants and the justice system's reputation poorly."[38]

38. On the facts of this case, the appellants' request for this Court to resolve the questions posed by the Manitoba Court of Appeal in the 2015 decision of *R. v. Vandermeulen (M)* about the ultimate standard of review is little more than an academic exercise. *Vandermeulen (M)* was

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[35] *R. v. Schertzer*, 2009 ONCA 742, at para.71, lv ref'd [2010] S.C.C.A. No.3; *R. v. Jurkus*, 2018 ONCA 489, at para. 25, lv ref'd [2018] S.C.C.A. No.325.

[36] *R. v. Jordan*, 2016 SCC 27, at paras. 65, 71, 79, 89, 91, 98.

[37] Note that this argument has been proposed in leave applications for at least two other recent cases, and this Court has denied leave – see *R. v. Jurkus*, [2018] S.C.C.A. No.325, and *R. v. Picard*, [2018] S.C.C.A. No. 135.

[38] *R. v. Jordan*, 2016 SCC 27, at paras. 36, 38.

decided under the *Morin* framework. At the time, the ultimate determination of reasonableness was accomplished by balancing several factors incapable of precise calculation, including proven prejudice, inferred prejudice, and the seriousness of the offence. It is with respect to that exercise that the Manitoba Court of Appeal found uncertainty in the applicable standard of review. Despite their uncertainty, that Court acknowledged that regardless of the standard of review that is applied to the final balancing exercise, "in practice there may be little or no difference in the outcomes."[39]

39. In the case at bar, the 11(b) application was not decided under *Morin*; it was decided under *Jordan*. A central feature of this Court's dramatic revision of the 11(b) framework in *Jordan* was to remove the final balancing exercise from the equation. Prejudice is now factored into the presumptive caps. The seriousness of the offence is factored into the presumptive caps. Also gone is the imprecise and inconsistent weighing exercise that led to numerous problems, one of which appears to have been confusion about the ultimate standard of review (at least in Manitoba). The ultimate determination is not an exercise of discretion. If the net delay is above the presumptive ceiling and the Crown fails to show exceptional circumstances, the result is a breach of s.11(b). If the net delay is below the presumptive ceiling, absent proof that the case took "markedly" longer than it should have, there is no breach of s.11(b). Perhaps not surprisingly, nowhere in the appellants factum have they identified how the analysis in this case would be any different depending on the standard of review applied to the ultimate decision.

40. The appellants have proposed that s.11(b) breaches should be reviewed like remedies under s.24 of the *Charter* or like sentencing decisions. Their submission fails to account for the fundamental difference in the nature of those exercises. Both the selection of an appropriate *Charter* remedy, and the selection of an appropriate sentence, are the product of an exercise of discretion.[40] Exercises of discretion are entitled to deference. By contrast, the identification of the minimum standards required by the *Charter* are not the subject of discretion. Constitutional requirements are ascertained through the application of legal tests, and the facts of each case are measured against those tests. The standard of review for that exercise is long settled. Findings

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[39] *R. v. Vandermeulen (M)*, 2015 MBCA 84, at para. 30, lv ref'd [2015] S.C.C.A. No.470.
[40] *R. v. Bjelland*, 2009 SCC 38, at para. 15; *R. v. Lacasse*, 2015 SCC 64, at paras. 43, 38.

of fact are entitled to deference, but their application to the applicable legal standard is a question of law reviewed for correctness.[41]

41. The appellants contend that the decision of the Quebec Court of Appeal in *R. v. Rice*[42] is inconsistent with the law on s.11(b) review that is applied in Ontario, British Columbia and Alberta. The respondent submits that no such inconsistency can be found in *Rice*. At paragraphs 29 to 35 of that decision, the Court of Appeal aimed to summarize the *Jordan* framework, not to supplement it. That Court recognized that deference is owed to the trial judge's assessment of the facts. The Court cited paragraph 9 of this Court's decision in *R. v. Clark*[43], which is a passage about deference to findings of fact. The Court in *Rice* also recognized that "judges must respect the analytical framework or run the risk of seeing their decision reversed by an appellate court which discerns an error of law." At paragraph 136 of its decision, the Quebec Court of Appeal effectively captured the nature of the appellate exercise: "An error in the attribution of delays in applying the analytical framework is a question of law, but this judicial exercise is undertaken with respect to findings of fact which are entitled to deference."

(ii) The Court of Appeal applied the correct standard of review to their analysis of defence delay

42. Judges are presumed to know the law.[44] In particular, appellate judges are deeply familiar with the principles of appellate review which are the cornerstone of their daily work. The presumption of correct application is reinforced where, as here, the Court explicitly recites the correct legal principles before applying them. Absent a clear indication that the Court strayed from the principles they correctly articulated, there is no basis for finding error.

43. In this case, the Court of Appeal corrected the trial judge's attribution errors, not his findings of fact. The Court of Appeal did what this Court expects of provincial appellate courts: they took steps to ensure a correct result in this case, and consistency in the law going forward, by identifying and denouncing defence actions that were inconsistent with the spirit of this Court's decisions in *Jordan* and *Cody*. This is precisely the sort of appellate guidance that will help change the culture of complacency for the better.

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[41] *R. v. Shepherd*, 2009 SCC 35, para.20.
[42] *R. c. Rice*, 2018 QCCA 198.
[43] *R. v. Clark*, 2005 SCC 2, para.9.
[44] *R. v. R.E.M.*, 2008 SCC 51, para.45.

44. The appellants contend that the Court of Appeal revisited the trial judge's factual findings about the disclosure request that triggered the first adjournment. The respondent submits that the appellants have misunderstood the nature of the error identified by the Court of Appeal. The Court did not disturb the judge's findings about the legitimacy of the request. It was the trial judge's failure to consider whether the appellants had pursued their legitimate request in an illegitimate manner that opened the door to appellate intervention. The failure to consider that relevant factor was an error of law that had to be corrected on appeal.

45. In *Cody*, this Court elaborated on the concept of defence delay. Two legal principles that emerged from that discussion are particularly relevant here.

- First: "Defence conduct encompasses both substance and procedure – the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny. […] Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s.11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference towards delay." [emphasis in original][45]
- Second: "We stress that illegitimacy in this context does not necessarily amount to professional or ethical misconduct on the part of defence counsel. […] legitimacy takes its meaning from the culture change demanded in *Jordan*. *All* justice system participants – defence counsel included – must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s.11(b) of the *Charter*." [emphasis in original][46]

46. In this case, the step taken by the appellants was to obtain the release of the DVR for testing by an expert. The manner in which defence counsel pursued that step was to wait for the Crown to double-check the information already provided in disclosure before taking any steps to secure the release of the DVR. As part of the original disclosure, defence counsel had already been informed that the police examination of the DVR revealed that "CH15" was blank. Accepting the judge's finding that it was reasonable for defence counsel not to turn their minds

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[45] *R. v. Cody*, 2017 SCC 31, at para. 32.
[46] *R. v. Cody*, 2017 SCC 31, at para. 35.

to testing that evidence until three months before trial, the fact remains that they did not take any steps to secure the release of the DVR for testing until the first day of trial.[47]

47. The testing was legitimate defence action that warranted an adjournment, but waiting three months for confirmation of information already disclosed was not legitimate. This is the distinction that was flagged by the Court of Appeal when they wrote that "the propriety of the adjournment is not the issue." The Court of Appeal did not disturb the judge's factual findings:

- They did not revisit the finding that the decision to seek the release of the video for testing was legitimate.
- They did not revisit the testing warranted an adjournment.
- They did not revisit the finding that defence counsel's initial flagging of the issue three months before trial reflected reasonable preparation time for defence counsel.
- They did not revisit the finding that the Crown could have answered the correspondence of defence counsel more promptly.

Accepting all of those findings as reasonable, the Court of Appeal explained that the judge was also obligated to consider the manner in which the appellants pursued their request. On any reasonable view of the record, the appellants took no steps to secure the release of the DVR until the first day of trial. The trial judge was required to consider whether that choice was markedly inefficient or indicative of a marked indifference towards delay. The Court of Appeal concluded that it was. They were right.

48. The appellants' argument at paragraphs 40 and 41 of their factum is a red herring. They argue that informal communication with the Crown is more efficient than formal court applications to secure the release of evidence for testing, but that is not the issue. The substance of the delay identified by the Court of Appeal had nothing to do with choosing between different channels available to secure the release of evidence for testing. The delay identified by the Court of Appeal was the failure to take any steps to secure the DVR for testing.

(iii) The Court of Appeal applied the correct standard of review to their analysis of the joint misestimate of time

49. According to this Court in *Jordan*:

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[47] *Decision of the Court of Appeal*, Appellant's Record, v.1 tab 9, p.143-144, paras. 70-71; *Section 11(b) application record*, Appellant's Record, v.1 tab 11, p.190, 192, 195-196.

> Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example […] if the trial goes longer than reasonably expected – even where the parties have made a good faith effort to establish realistic time estimates – then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.[48]

The Court of Appeal correctly recognized that this case warranted some deduction to account for the repeated good faith estimates of all parties that were reasonable, but wrong. After the initial trial estimate before the start of trial, there were further estimates for each of the trial continuations. The trial judge accepted that each estimate was made in good faith, and each was the product of consensus between the Court, the Crown, and all three defence counsel. The respondent submits that it is difficult to conceive of a more striking indicator of reasonableness than the concurrence of no fewer than four counsel and an experienced trial judge.

50. The facts underlying the allocation of delay for the joint misestimate of time are not in dispute. It is common ground that the estimates at each continuation were the product of consensus, and that the misestimates caused delay. The only point of contention is the allocation of that delay; a question of law. The impact of this deduction on the conclusions of the Court of Appeal was modest. The Court considered the joint misestimate of time as one of several discrete events that contributed to the 5 months and 12 days of delay between September 9, 2016, and February 21, 2017. The combined impact of all the discrete events prior to September 9 led the Court of Appeal to deduct a portion of that delay for each of the appellants (2 months and 21 days for the Yusuf appellants, and 4 months and 6 days for Mr. Pauls).[49]

51. The Court of Appeal's conclusion is consistent with the letter and the spirit of *Jordan*. Trial estimates can have a very significant impact on delay, especially in cases involving multiple accused. Good-faith cooperation is the best means to achieve maximum benefit from the estimate. Each party, and the Court, brings to the table his or her own experience, perspective, and knowledge of the case. After the fact, reviewing courts must be mindful that hindsight is 20/20. Trial estimates are necessarily an imperfect exercise based on incomplete information. In the context of 11(b) applications, the focus must always remain on whether the estimate was reasonable at the time it was made.

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[48] *R. v. Jordan*, 2016 SCC 27, at para. 73.
[49] *Decision of the Court of Appeal*, Appellant's Record, v.1 tab. 9, p.149, para.82.

52. The appellants have offered the bald assertion that "[a]n underestimate, without more, does not qualify as a discrete event or exceptional circumstance." Such a bright line distinction is inconsistent with the words of this Court in *Jordan*, and with the heavily contextual nature of the *Jordan* framework. It is unhelpful to consider the impact of under-estimates "without more" because there will always be "more." Trial estimates are not analyzed in a vacuum; the Court must consider context in every case. The question is whether the error in the trial estimate, considered in context, meets this Court's definition of a discrete circumstance, ie. was the error reasonably foreseeable and avoidable, or reasonably capable of correction. Several factors may inform the inquiry, although no single factor is determinative:[50]

- Whether any of the parties held back important information may be relevant.
- Whether any of the parties changed the playing field in a meaningful way after the estimate was made may be relevant.
- Whether any of the parties failed to employ reasonable solutions to mitigate the impact of the unexpected delay is relevant.

53. Any of these factors might signal that the error should have been avoided or mitigated. On the other hand, there will be some cases where the parties proceed with a reasonable, good faith estimate that simply turns out to be wrong. Human error of that nature is not a sign of complacency or indifference and it cannot reasonably be avoided. The Jordan framework was never meant to impose a standard of perfection on a human process.

54. In the circumstances of this case, the Court of Appeal was correct to deduct some delay attributable to the joint misestimate as a discrete event because the error was not reasonably avoidable or reasonably capable of correction by the Crown. The trial estimates were the product of informed consensus and knowledge of the case. Each of the estimates throughout the trial was the product of agreement between all parties and the court. At each subsequent continuation the parties had a greater understanding of the manner in which the case was developing than they did at the last. The Crown's examination in chief of the victim began after the first of the four continuations. As the Court of Appeal recognized, at each of the subsequent

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[50] *R. v. Jordan*, 2016 SCC 27, paras. 73, 116, 122; *R. v. Cody*, 2017 SCC 31, paras. 58-59; *R. v. McNeill-Crawford*, 2020 ONCA 504, paras. 24-33; *R. v. Antic*, 2019 ONCA 160, paras. 7-8, lv ref'd [2019] S.C.C.A. No. 128; *R. v. Tran*, 2012 ONCA 18, paras. 54-61; *R. v. Thompson*, 2009 ONCA 771, paras. 15-17; *R. v. Qureshi* (2004), 190 C.C.C. (3d) 453 (Ont.C.A.), para. 27.

continuations "it was clear how the Crown was proceeding."[51] Still, all parties jointly underestimated the number of days that would be required at the January continuation, and again at the June continuation. These collective underestimates serve to demonstrate that the underestimates were not emblematic of complacency or indifference. They were nothing more than reasonable human errors magnified by unpredictable interruptions and the need to coordinate multiple schedules.

55. **No party held back important information**. At the time the trial dates were set all parties were aware that the Crown intended to call two witnesses, play a 2.5-hour video, and ask questions about that video. All parties must have known that the victim's testimony would need to fill in the blanks left created by the lack of audio recording. Defence counsel advised that they would call between 0 and 3 witnesses. Nobody knew the victim would need an interpreter until shortly before the start of the trial.[52] The parties jointly agreed to schedule a two-day trial. Ultimately the Crown's case – which was heavily impacted by the unexpected need for interpretation – amounted to approximately 4.75 days of evidence. The appellant's case amounted to approximately 1.75 days of evidence which was spread over nearly 5 days of court time for no reason other than the failure of the appellants to subpoena one of their witnesses. Neither part of the trial could have been accommodated within the initial two-day estimate. All parties were mistaken.

56. **No party changed the playing field during the trial.** The trial was not delayed by surprise witnesses, dramatic mid-trial tactical changes, or complex motions filed without warning. The good-faith estimate made by all four lawyers and the Court was just wrong.

57. **The Crown did not ignore reasonable solutions.** The respondent acknowledges that it must take reasonable steps to mitigate the impact of unexpected delays. In this case, even before the release of *Jordan*, that is precisely what the Crown did. The respondent submits that on this record there were no further reasonable steps the Crown could have taken:

- The Crown and Court were widely available at every continuation. In total, throughout all the scheduling discussions before and during the trial, the Crown was available for

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[51] *Decision of the Court of Appeal*, Appellant's Record, v.1 tab. 9, p.146, para.79.

[52] According to the Crown's submissions, the victim had given multiple police statements in English – see *August 22, 2017*, v.5 tab 52, p.166, ln. 15-25.

virtually every date offered by the Court. The Crown was unavailable for only one pair of dates offered by the Court, and only because neither the assigned Crown, nor any other Crown from the office, was available.

- With the exception of the lone pair of dates in February 2016, on all other dates where the assigned Crown was unavailable, arrangements were made for a colleague to step in to ensure the continued progress of the trial.
- When one of the Crown witnesses was late unexpectedly for medical reasons, the Crown sent police officers to retrieve him and bring him to court.
- The Crown was vigilant and active when the appellants took steps that delayed the proceedings. The Crown resisted the August 2015 adjournment application. The Crown resisted the requests to replace duly accredited interpreters that were unsatisfactory to the defence. The Crown resisted the severance application that would undoubtedly have resulted in much more delay, at least for Mr. Pauls. And the Crown resisted the defence request to discard an entire court day near the end of trial to wait for a witness they had chosen not to subpoena. Irrespective of the results of those disputes, the Crown's response was the antithesis of acquiescence and complacency.
- Not one of the three appellants suggested at first instance that the Court was to blame for failing to be widely available at any point throughout the trial, and the trial judge made no finding to that effect.

58. This Court should reject any suggestion that the Crown should have mitigated delay by rushing the presentation of its evidence. The Crown is not required to "control" delay by cutting short the reasonable examination of its key witness. In evaluating the reasonable options available to mitigate delay caused by mistaken trial estimates, courts should be slow to wade into and evaluate the strategic decisions of Crown or defence counsel. The standard is reasonable diligence. As this Court explained in *R. v. Cody*: "The Crown need not exhaust every conceivable option for redressing the event in question to satisfy the reasonable diligence requirement."[53]

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[53] *R. v. Cody*, 2017 SCC 31, para. 54; *R. v. Saikaley*, 2017 ONCA 374, para. 47, leave ref'd, [2017] S.C.C.A. No. 284.

59. In this case the Crown was faulted for thoroughly examining the victim and for the "pace" of its case.[54] This sets a dangerous precedent. The range of reasonable approaches to the examination of a witness is wide, as it must be. Countless factors, evolving in real time throughout the examination, will impact strategic decisions of that nature. Those factors may or may not be apparent to the Court or easily articulated.

60. The *Jordan* principles, correctly applied, should not short-change the truth-seeking function of the trial, nor should they impede the reasonable exercise of the Crown's discretion. In this case, the Crown's decision to have the victim comment on the video as it progressed was clearly reasonable. There was no sound to accompany the footage. There were frequent lengthy stretches during which no overtly violent acts were taking place, and without hearing what the people in the video were saying, it was unclear what was taking place. Nor was it always clear which appellant was doing what. This was particularly so later in the footage when two of the three appellants, both of whom have similar builds, removed their shirts. The respective theories of the Crown and defence hinged entirely on their opposing interpretations of the activity taking place on the silent video. In view of that debate which was central to the resolution of the case, it is difficult to imagine how the victim's description of the events depicted on the video could be anything less than a critically important part of the Crown's case.

61. In considering whether there was anything unreasonable in the Crown's approach, it bears mentioning that nobody offered any concessions to shorten the direct examination of the victim and his review of the video until it was nearly complete. Until that time the appellants' position was "prove it." Only near the end of the victim's evidence in chief did counsel for Jamal Yusuf admit identity for the purpose of accelerating the review of the video. Counsel for Mr. Pauls would not admit identity but agreed that the Crown could lead. Counsel for Jamis Yusuf made no concessions at all. He said:

> I'm not sure where – what Mr. – my friend's point is, but I – I would – <u>I'd be happy if he continued on the way he is going and ask the witness to identify the people that he's asked him to</u>. [emphasis added]

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[54] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, p.96 para.75.

Later, partway through the defence case, Mr. Pauls attempted to enter a guilty plea to the lesser included offence of assault causing bodily harm.[55]

62. In the face of a late concession, made by only one of the appellants, the Crown was required to present its case under the assumption that everything depicted in the video was disputed. The appellants were certainly not required to make any concessions in relation to the video, but the *ex post facto* argument that the Crown's case failed to satisfy the reasonable diligence requirement should ring hollow in the face of the tactical choice by defence counsel not to make the reasonable concessions that would have shortened it.

63. During the trial, the trial judge was unwavering in his recognition that the misestimates represented a collective error by all parties.[56] Similarly, when the Crown pointed out that he could not speed up his examination in chief because only one of the appellants was willing to admit identity, the trial judge agreed, remarking that "if there's any issue even with respect to one of the accused persons, then obviously it's prudent to proceed the long way." [emphasis added][57] It was only in the trial judge's 11(b) ruling, delivered nearly six months after the last witness had left the stand, that his assessment changed dramatically and without explanation. Gone was any mention of collective responsibility. Instead, the judge repeatedly pointed to "the gross underestimate of trial time by the Crown" as the root cause of the delay. According to the trial judge, the Crown "chose to prosecute as it did, notwithstanding its own time estimate" and the trial estimate delay was "within the complete control of the Crown."[58]

64. The appellants point to the facts in *Jordan* and in this Court's decision in *R. v. Thanabalasingham* to support their position, but the factual context of those cases is not the same as the context in this case.[59] For instance, in both cases the court considered the impact of

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[55] *September 8, 2016*, Appellant's Record, v.3 tab 41, p. 237 ln.1 – p.238 ln.20; *April 24, 2017*, Appellant's Record, v.4 tab 48, at p. 296; August 22, 2017, Application Record, vol.5 tab 52, p.101 ln.10.

[56] *January 14, 2016*, Appellant's Record, v.3 tab 36, p.144 ln.10-15; *April 25, 2017*, Appellant's Record, v.4 tab 49, p.306 ln.1-10.

[57] *September 8, 2016*, Appellant's Record, v.3 tab 41, p. 238 ln.5-15.

[58] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, p.91, para.68, p.92, para.70, p.94, para.72, pp.95-96, paras.74-75, p.98, para.82, p.99, para.84.

[59] Interestingly, the appellants also rely on a quote from Justice Nakatsuru of the Ontario Superior Court of Justice in *R. v. Majeed*, 2017 ONSC 3554 even though Justice Nakatsuru went on to deduct delay caused by an incorrect estimate as an exceptional circumstance.

underestimating the length of the preliminary inquiry, not the trial. Parties have more flexibility to respond to delays and errors that take place earlier in the process than they do later, once the trial is in full swing.

65. In *Jordan*, the underestimate of the time required for the preliminary inquiry triggered the need to secure additional dates, but the trial judge concluded that the primary cause for the ensuing delay was the lack of available court time. The judge noted that the Crown had been unavailable to continue the preliminary inquiry from February to April. This Court remarked that the Crown had also failed to "communicate with the parties with a view to tying down the evidence that it needed to call at the preliminary inquiry", and that despite the moderate complexity of the matter, the Crown "did not have a solid plan for bringing the matter to trial within a reasonable time."[60]

66. In *Thanabalasingham*, Justice Vauclair writing for the majority of the Quebec Court of Appeal noted that the entire preliminary inquiry had been delayed by the manner in which disclosure had taken place. There were difficulties with interpretation, but in that case there was no indication that the need for interpretation was unexpected. Perhaps most importantly, Justice Vauclair found that the Crown had called evidence in support of issues that were not contested, and more broadly, the Crown had failed to pursue a cohesive plan to advance the prosecution efficiently. To the contrary, even as delays became overwhelming, the Crown was still altering the litigation landscape and creating delay by reviewing and modify its trial strategy. On further appeal, this Court upheld the decision of the majority, but made a point of remarking that "We say this without endorsing the trial judge's critical comments of the Crown's exercise of its prosecutorial discretion."[61]

67. The circumstances of this case can be distinguished from those in *Jordan* and *Thanabaladingham*. In this case the error in the trial estimate crystalized much later in the process, ie. at the start of the trial, and throughout the trial, and consequently there were fewer options available for the Crown to mitigate the resulting delay. There are no findings in either of the courts below that the Court or the Crown were slow or complacent in scheduling court dates initially or at any of the continuations. This was not a complex case for which the Crown failed

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[60] *R. v. Jordan*, 2016 SCC 27, para. 129; *R. v. Jordan*, 2014 BCCA 241, paras.21, 25, and 39.
[61] *R. v. Thanabalasingham*, 2020 SCC 18, para.5; *R. v. Thanabalasingham*, 2019 QCCA 1765, paras.114-129.

to prepare a commensurate plan of action. Severance was not a reasonable option. Accepting that the underestimate triggered the need to secure some of the additional dates, the number of dates ultimately required was double the time needed to call evidence as a result of the court time lost to exceptional circumstances. The delay caused by each continuation was magnified by the limited availability of defence counsel.

68. Ultimately the trial judge found that the trial estimates were made in good faith.[62] He made no finding that the Crown's examination in chief was unreasonable. The result was precisely the scenario contemplated by the majority in *Jordan*. The Crown and all three defence counsel jointly made several reasonable, good faith estimates, and although the trial was conducted in a reasonable manner, it went longer than expected. In those circumstances, the Court of Appeal was correct to recognize that the misestimate of trial time could not be laid solely at the feet of the Crown.

(iv) There is no evidence that the appellants were prevented from securing additional dates

69. The Court of Appeal did not misapprehend the trial judge's findings about institutional delay. There is no finding in the judge's ruling that the appellants were prevented from securing the dates they wanted at the continuation of June 24, 2016. The trial judge was not asked to make such a finding. This factual question that was first litigated at the Court of Appeal finds no support in the record and was correctly rejected by the Court of Appeal.

70. The only institutional delay identified by the trial judge occurred on the afternoon of September 9th, 2016. On that afternoon, the courtroom was double-booked. The trial judge had to choose between hearing a federal matter, which would be completed that day, or continuing this trial knowing that more dates would be required regardless. The judge chose to prioritize the federal matter. That institutional failure was acknowledged both by the trial judge and by the Court of Appeal, but neither court was of the view that it caused any delay in the grand scheme of things. Both found that the subsequent delay was a foregone conclusion, albeit for different reasons. The trial judge attributed the delay to the Crown because of the underestimate of trial time and the August 2015 adjournment.[63] The Court of Appeal attributed the delay to the

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[62] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, p.98 para.82.
[63] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, pp.95-96, paras.74-75.

numerous discrete events that had plagued the trial, and to the defence delay that led to the August 2015 adjournment.[64]

71. The trial judge made no finding that the appellants were prevented from securing more dates because of his status as a *per diem* judge. The transcript could not support such a finding. It is true that the parties decided to secure more than two dates at the June 24 continuation, and that the trial coordinator from whom they needed approval was not available when they attempted to secure those additional dates on June 24. However, the Crown explained that:

> what I've suggested and what all counsel has agreed to is they're going to email me their dates either today or very early next week. Once I get those dates, we will sort out dates of commonality between all of us, and then we will attend upon the Trial Coordinator to see if we can arrange something between September 8th and on the return date for a further day. So, that's what we – we will be actively working on looking for another date.[65][emphasis added]

The Crown also noted for the record that the judge had offered to sit on days he was not otherwise scheduled to sit to help secure dates agreeable to all parties.[66] By the time the parties returned on September 8, 2016, they had secured further dates in February, 2017. The trial judge's ruling reveals that there were earlier dates offered and rejected by counsel for Mr. Pauls, but the record is silent as to what dates were offered.[67]

72. If the appellants had felt that the judge's status had caused delay, it was incumbent on them to raise and have that fact adjudicated at first instance. They did not. Instead they made the argument for the first time in the Court of Appeal. That court rejected their argument, and that finding that is now owed appellate deference. That finding is also the only reasonable conclusion on the record. What the transcript reveals is that the Crown was willing and able to help secure dates as soon as he received the availability of defence counsel, which he was expecting either later that day, or early the following week.

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[64] *Decision of the Court of Appeal,* Appellant's Record, v.1 tab. 9, p.149 para.82.
[65] *June 24, 2016,* Appellant's Record, v.3 tab 39, p.221 ln.15-30.
[66] *June 24, 2016,* Appellant's Record, v.3 tab 39, p.216 ln.10-15.
[67] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, p.96, para.75.

B. ISSUE #2: THE APPELLANTS WERE NOT DENIED PROCEDURAL FAIRNESS AND THE COURT OF APPEAL REACHED THE CORRECT CONCLUSION

73. The live issue on the appeal to the Court of Appeal was the judge's attribution of the total delay under section 11(b). All parties knew, or ought to have known, that the Court of Appeal would be examining each portion of that delay to ensure that it was correctly attributed. The Crown's opinion about the correct attribution for any individual portion of delay did not serve to limit the live issues in that review. All parties made their submissions about the correct attribution for every single day of the proceedings. They advanced their position at first instance, and they did so again on appeal. The appellants cannot now claim to have been deprived of the opportunity to make submissions about any portion of delay. Ultimately the Court of Appeal came to the correct conclusion, and that conclusion should be upheld.

74. As a preliminary matter, the direction of the Court of Appeal to file the trial-level application record while the appeal was under reserve has no relevance to the question of procedural fairness. The Court sought access to material that had been put before the trial judge and was relied on by the parties in the court below. That material was fully and accurately described in the transcript that formed the basis for the appeal.[68] If the material had been placed in the court file in the court below as it should have been, the Court of Appeal would have had access to it without having to obtain it from the parties. When the Court directed the Crown (as the appellant in that court) to file that material, the appellants voice no objection. Instead, they helped the Crown locate copies of the requested material from within their own files. Counsel no doubt recognized that the direction to re-file material that had already been made part of the record in the court below could not conceivably give rise to procedural fairness concerns.

75. The question of procedural fairness raised by the appellants should focus on whether the Court of Appeal had an obligation to give notice to the parties that they were considering rejecting both of their positions as to the correct attribution of the delay caused by the August 2015 adjournment. The respondent submits that the Court of Appeal had no such obligation. By way of relevant context, it bears highlighting that the parties were not *ad idem* on the correct

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[68] Regarding the disclosed police notes about the DVR, see eg.: *August 5, 2015,* Appellant's Record, vol.2 tab 32, p.130-134, p.138 ln.5; *August 22, 2017,* Appellant's Record, v.5 tab 52, pp.147-159.

attribution of that delay. The position of the appellants was that the entire five months and two days ought to be counted towards the *Jordan* ceiling because of the Crown's misestimate of the anticipated length of trial and its failure to respond to the defence correspondence about "CH15" promptly. The Crown interpreted *Jordan* as precluding any deduction for the first twelve days of delay but argued that the remaining delay should be deducted on account of the joint misestimate of time and the limited availability of defence counsel.

76. The appellants were not entitled to notice that the Court of Appeal might reject both arguments. They were not deprived of the opportunity to be heard for three reasons: first, because they had clearly conveyed their position about each portion of the delay, second, because they knew or ought to have known that the correct legal attribution of the entire net delay was squarely before the Court of Appeal regardless of the positions of the parties, and third, because having exercised the opportunity to communicate their position about every portion of delay, the appellants were not entitled to notice that their position might be rejected.

77. **First, the appellants conveyed their position about the correct attribution of delay to the Court of Appeal.** They had made submissions about every portion of the net delay at trial, and the Court of Appeal received the transcript of those submissions. They re-iterated their position at the Court of Appeal in relation to every portion of the delay, including the delay following the August adjournment. There can be no suggestion that the Court of Appeal acted without knowing the appellant's position.

78. **Second, the Court of Appeal did not stray from the issues that were squarely before it.** The attribution of the entire net delay was a live issue before the Court and was reviewable for correctness. The appellants have attempted to draw parallels to cases in which trial judges have entered convictions based on theories of liability, or evidence, that were expressly disavowed by the Crown. They have also attempted to draw parallels to cases in which sentencing judges have rejected joint positions. Neither situation is analogous to this case.

79. In the trial context the onus to prove guilt is on the Crown. The defence is expected to defend against the case put against them and nothing more. Where the Crown at trial has expressly disavowed reliance on evidence, or on a theory of liability, the result may be that the case for the defence to meet is narrowed. If the trial judge strays outside the boundaries of the case to meet, a conviction might be entered in the absence of evidence that might otherwise have been called, or without recognizing the relevant jurisprudence. The result can be procedural

unfairness. By contrast, in this case the Court of Appeal made a fully informed decision. Because the onus to show the breach is on the appellants, they were required to advance and justify their position for every part of the net delay. The evidentiary record was complete, and the operative legal framework was common ground.

80. The rejection of a joint submission on sentencing after a guilty plea is also clearly distinguishable from what occurred in this case. Joint submissions are often the product of negotiations between the Crown and the defence. The joint submission may be informed by any number of factors that are not known to the Court, for instance weaknesses in the Crown's case, or the vulnerability of a key witness. Judges should not find that a joint submission would bring the administration of justice into disrepute without giving counsel the opportunity to explain the reasons behind it. If joint submissions are rejected too lightly, the Crown's ability to engage in plea negotiations is undermined. Moreover, the selection of a fit sentence, unlike the attribution of delay, is an exercise of discretion for which there is not only one correct result. The context of this case bears no resemblance to the context of joint submissions on sentence.

81. **Third, the rules of procedural fairness do not require the Court to give notice that the argument advanced by the parties might be rejected**. The true basis for the appellants' complaint is not that they were denied the opportunity to put forward their position, but rather, that they were denied the opportunity to advocate their position further, armed with the knowledge that the Court was considering rejecting it. The rules of procedural fairness do not go that far. The Court of Appeal was asked to review the attribution of delay in the appellants' trial. There were countless permutations of attributions that the Court of Appeal could have considered. The appellants were entitled to make submissions in support of the attribution they believed to be correct. The Crown was entitled to do the same. That was the time for the parties to make their case. Once the appeal was left in the hands of the Court, their task was to arrive at the correct conclusion, whether or not either party had identified it. They were under no obligation to give the parties further opportunity to advocate their position on a record they had and were familiar with, merely because the Court was considering or intending to reject a portion of the attribution advocated by one or both of the parties.[69]

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[69] *Moreau Bérubé v. New Brunswick*, [2002] 1 S.C.R. 249, paras. 74-83; *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, paras. 92-93.

C. ISSUE #3: THE COURT OF APPEAL CORRECTLY ATTRIBUTED DELAY AS REQUIRED BY THE JORDAN FRAMEWORK

82. This Court's caution in *Godin* not to "lose sight of the forest for the trees" was undoubtedly sound advice, but it was advice intended to complement the correct application of the *Morin* test, not to supersede it.[70] This Court never recommended evaluating the forest without regard for the trees. The same is true under the *Jordan* framework. In the absence of the careful, structured review mandated by *Jordan*, submissions about what constitute the "forest" and the "trees" are easily manipulated to suit the interests of either party. Consistency and coherence in the law are achieved because, first and foremost, the judge must correctly apply the *Jordan* framework to the entirety of the total delay. The judge must identify and deduct defence delay and delay caused by discrete events. There is no discretion to ignore either. In this case, Court of Appeal was correct to recognize that the loss of 2.75 days of court time to discrete events created seven months of delay and warranted some deduction.

83. The analysis of the Court of Appeal correctly followed the framework created in *Jordan*. Through the correct application of that framework, the Court of Appeal manifestly did not to lose sight of the forest for the trees. It was precisely their big-picture perspective that led the Court to recognize that the trial would have been completed below the *Jordan* ceilings, by September 2016, but for the discrete events and defence delay:

> [75] […] the trial judge ought to have given greater consideration to the impact of the interruptions of the trial that occurred on January 11, 12 and 14, 2016 to the overall delay due to discrete events (late witnesses, medical issues and interpreter problems).
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> [76] The trial judge concluded that up to one and a half days of trial time had been lost because of those events. What he did not consider was that, had those interruptions not occurred, and had the trial proceeded on the originally scheduled trial dates, five days of trial would have been completed by January 14,2016.
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> [77] Without getting into the minutiae of the debate between the Crown and the defence concerning the precise computation of discrete events in January and June 2016, absent the initial adjournment and the subsequent discrete events, there can be no doubt the evidence would have finished by September 2016 at the latest (Le., seven trial days were available to the end of June, nine to the end of September: August 5 and 6, 2015; January 11, 12 and 14, 2016; June 20 and 24, 2016; and September 8 and 9,2016).
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> [78] How then to allocate the delay between September 2016 and April 2017? The reality is that the discrete events did occur. The further reality is that until the September 9, 2016 adjournment, the parties did not set sufficient future continuation dates to give

[70] *R. v. Godin*, 2009 SCC 26, para. 18.

> themselves a chance to finish. The final reality is that even with the discrete events, without the initial defence delay, the evidence would have finished by the end of February 2017. [emphasis added][71]

84. The appellants have urged this Court to disregard the discrete events that were considered by the Court of Appeal, but there does not appear to be any dispute about whether those events were correctly identified. Both the trial judge and the Court of Appeal recognized the same discrete events, although the trial judge declined to deduct any of the resulting delay. Aside from the joint misestimate of time, the discrete events in question were:

- 1.25 days of court time out of 3 days scheduled was lost in January 2016 due to unexpected witness health issues, defence counsel's family obligations, and an outburst on the part of an interpreter which led to that interpreter being excused.[72]
- 1.5 days of court time was lost out of 2 days scheduled in June 2016 due to interpreter issues and the illness of Mr. Pauls.[73]

85. Unexpected health issues and unpredictable problems with interpretation are quintessential discrete events. The Crown cannot avoid them or anticipate them, and in this case, the Crown could not reasonably have done more to respond to them. As a result of those discrete events alone, nearly 3 days of a 6.5-day trial had to be rescheduled in two separate increments with all of the associated scheduling coordination. The last three days of evidence heard in this trial were spread over a day in September, two days in February, and three days in April. In other words, the loss of 2.75 lost court days created seven months of delay. That deduction cannot be dismissed as "micro-counting."[74]

86. The appellants have urged this Court to adopt an alternative interpretation of the time lost to discrete events and to overturn the conclusions of the Court of Appeal, but their interpretation

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[71] *Decision of the Court of Appeal*, Appellant's Record, v.1 tab. 9, p.145-146, paras.75-78.
[72] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, p.81 para. 32, p.87 para. 53, p.93, para.71; *Decision of the Court of Appeal*, Appellant's Record, v.1 tab. 9, p.122-123, para.25, pp.145-156, paras.73-77.
[73] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, p.94, para.73; *Decision of the Court of Appeal*, Appellant's Record, v.1 tab. 9, p.123-124, para.25, pp.145-156, paras.73-77.
[74] See for example *R. v. K.J.M.*, 2019 SCC 55, paras. 10 and 93-97 – where a majority of this Court applied similar reasoning to recognize the impact of a half day of court time lost as a result of the late arrival of the accused.

would have this Court revisit findings of fact about the duration of the trial. Relying on the transcripts and the findings of the trial judge, the Court of Appeal held that the evidence lasted approximately 6.5 days heard over 14 court days. The appellants, in contrast, would have this Court review delay for a trial lasting 7.25 days spread over 15 court days. The respondent submits that there is no reason this Court should revisit the factual findings of the Court of Appeal which were based on the record and the findings of the trial judge.[75]

87. Most notably, for the first time in this Court, the appellants have argued that their trial was left in the hands of the trial judge to render his decision in June 2017 rather than in April 2017. That submission is inconsistent with the decisions of both the Court of Appeal and the trial judge, and also the appellants' position at first instance. At both levels of court, the reserve time was understood to have begun on April 26. It was on that date that the evidence was complete. The closing submissions were provided to the judge in writing on that date in lieu of oral submissions, and the judge began his deliberations. Counsel was told that their clients did not have to attend, and counsel for Jamal Yusuf anticipated the possibility of relying on counsel for Jamis Yusuf to appear as her agent. Consistently with the expectations of the parties, at the brief appearance on June 2, the trial judge noted that "most" of his reasons were already complete. In their submissions on the 11(b) application, all parties recognized that the appearance scheduled for June 2, 2017 was nothing more than a date set aside in case the judge

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[75] The additional court day included in the appellants' analysis is the June 2, 2017 court appearance that took place after the start of deliberations.

The additional ¾ of a day of trial time appears to have been added in three increments: **January 11, 2016**, the appellants assert that ¾ of a day of evidence was called, rather than the half day acknowledged by the trial judge and the Court of Appeal and revealed by the transcript. On **June 20, 2016**, the appellants assert that ¾ of a day of evidence was called, rather than the half day that is apparent from the transcript, the reasons of the trial judge, and the decision of the Court of Appeal. On **June 2, 2017**, the appellants have added a third ¼ day consisting of the brief appearance that occurred after the start of deliberations.

had questions in the course of his deliberations.[76] Just as a jury may ask questions during their deliberation, so too can the judge, but irrespective of that possibility, the clock stops for the purpose of the presumptive ceilings as soon as deliberations begin.[77]

88. The appellants have advanced a thinly-veiled submission that the Court of Appeal engaged in an improper result-oriented analysis by submitting that: "conveniently, the net delay fell exactly one-half day below the threshold for the Yusuf Appellants."[78] The argument is as unfair as it is unfounded. The Court of Appeal stopped their analysis once they had reached the point at which the delay had fallen below the *Jordan* presumptive ceiling because there was no need to go further. Had the Court continued the analysis, they would have deducted more time because:

- The Court declined to decide whether reserve time should be deducted, an inquiry which would have led to the deduction of a further two months pursuant to this Court's decision in *K.G.K.*
- The Court declined to make a finding about whether there had been one date offered in late August of 2015, or three dates.
- The Court declined to decide whether co-accused delay would justify any deduction after January of 2016. They also declined to decide whether the transitional exceptional circumstance would have applied.

D. ISSUE #4: IN APPROPRIATE CASES – INCLUDING THIS ONE – CO-ACCUSED DELAY OUGHT TO BE DEDUCTED

89. The parties agree that co-accused delay must be deducted in some cases, but not in all cases. The parties agree that the Crown must remain vigilant to ensure that the delay caused by some accused does not lead to an 11(b) breach for others. The parties part company, however, on how these principles should operate within the *Jordan* framework. The respondent submits that this Court should reject the appellant's proposed three-part test, which would essentially require a waiver before co-accused delay can be deducted. Co-accused delay can and should be

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[76] *April 26, 2017,* Appellant's Record, v.5 tab 50, p.43 ln.10-20, p.46 ln.5-15, p.47 ln.1-30; *June 2, 2017,* Appellant's Record, v.5 tab 51, p.55 ln.5-10, p.56 ln.10-30; *August 24, 2017,* v.5 tab 52, p.254 ln.1-5.
[77] *R. v. K.G.K.*, 2020 SCC 7, para. 31.
[78] *Factum of the Appellants*, p.30 para.58.

assessed using the existing *Jordan* framework. The indisputable value of proceeding jointly in some cases must have been anticipated by this Court when the *Jordan* framework was created. There is no need to implement new tests or conditions to account for it. Co-accused delay may be deducted as defence delay if several accused choose to proceed through the system as a collective. If they do not, the Crown may still be able to demonstrate that co-accused delay amounts to a discrete circumstance.

(i) Co-accused delay as defence delay

90. Defence delay includes delay that is waived by the defence, and delay that is caused solely or directly by defence conduct unless it is conduct legitimately undertaken to respond to the charges. Where several jointly charged accused proceed together as a collective, the delay caused by each must be deducted for all. Just as one accused cannot benefit from his own delay-causing choices, nor should the collective be allowed to benefit from the delay caused by its members. The Court of Appeal for Ontario (in this case, *R. v. Houle*,[79] R. *v. Albinowski*,[80] and in *R. v. Brissett*,[81]) and the Nova Scotia Court of Appeal (*R. v. Potter*[82]) found that the co-accused delay in those cases met this Court's requirements for defence delay.

91. On the facts of each of those cases, the respective courts of appeal recognized that it would be artificial to hold the state responsible for the delays caused by the co-accused as long as they were content to proceed together as a collective. The recognition of defence delay for each accused under those circumstances does not represent a failure to consider them individually. To the contrary, the Court is giving effect to the acknowledgment by each individual accused that the case should proceed jointly. The accused is not "punished" for the scheduling restrictions of the co-accused any more than he can be said to have been punished for the scheduling delays of his own counsel. But the scheduling restrictions of defence counsel, whether for one accused or several, cannot be laid at the feet of the Crown.

92. The recognition of collective defence delay is consistent with the spirit of the *Jordan* framework.[83] In order to combat the culture of complacency, each accused in the collective is incentivized to cooperate and to find common ground in scheduling. By contrast, the failure to

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[79] *R. v. Houle (appeal by Baron)*, 2017 ONCA 772, para.49.
[80] *R. v. Albinowski*, 2018 ONCA 1084, paras. 33-39.
[81] *R. v. Brissett*, 2019 ONCA 11, paras. 14-16.
[82] *R. v. Potter; R. v. Colpitts*, 2020 NSCA 9, paras. 359-360.
[83] See eg. concurring reasons of Brown J.A. in *R. v. Gopie*, 2017 ONCA 728, paras. 191-207.

deduct co-accused delay would foster the culture of complacency. If each accused moves closer to the presumptive *Jordan* ceiling every time his co-accused rejects a date offered, then each accused need only concern himself with putting his own available dates on the record, whether or not those dates can be used to advance the trial.

93. The deduction of defence delay in these circumstances does not relieve the Crown of its duty to remain vigilant of each accused's 11(b) rights. To the contrary, the expectation must be that defence counsel will act in concert to highlight all possible avenues for ensuring the efficient progress of the trial. The voice of all co-accused speaking in unison will be much louder and more useful than the voice of each individual accused advocating for different and sometimes inconsistent solutions. If the Crown fails to employ the reasonable avenues to fast-track the proceedings that are urged by the defence speaking with one voice, the resulting delay will be recognized by the *Jordan* framework.

94. If the joint accused feel that the Crown has failed to make a reasonable plan for the prosecution, the Crown can be called on to respond in the context of an 11(b) application.[84] If some of the accused feel that their 11(b) rights are no longer compatible with a joint trial, for instance where one accused is causing inordinate delay,[85] then they have the option of diligently making a severance application.

95. In this case, the Court of Appeal was correct to conclude that the co-accused delay should be deducted as defence delay at least until the appellants were joined onto the same information in January of 2016. The delay was "caused solely by the conduct of the defence" as opposed to being caused by the court or the Crown. Until that point (and in the respondent's position, for several more months until the severance application), all parties recognized the clear benefit of proceeding with a joint trial. The three appellants were alleged to have acted together throughout the entire assault against the victim, and they put forward a united front in their defence of those actions at trial. They acted in unison in their request for the release of the blank security footage. The resulting adjournment request was advanced on behalf of all three. For both of the interruptions relating to the interpretation services, the appellants spoke with one voice. They

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[84] See eg. *R. v. Auclair*, 2014 SCC 6.
[85] *R. v. Manasseri*, 2016 ONCA 703, paras. 329, 331-332, 359, 372-379, lv ref'd, [2016] S.C.C.A. No. 513.

coordinated their cross-examination of the complainant.[86] All three appellants relied on the testimony of Jamal Yusuf to advance their account of the night of the offence. Their closing submissions, and later, their 11(b) submissions, were uniform in all material respects.

(ii) Co-accused delay may constitute a discrete exceptional circumstance

96. Irrespective of defence delay, if the Crown can show that delay was caused by events that were not reasonably foreseeable or avoidable, and could not reasonably be mitigated, then that delay must be deducted as a discrete exceptional event. Deducting co-accused delay that qualifies as an exceptional circumstance is required by this Court's decision in *Jordan* and is consistent with its aims. Exceptional circumstances, including those caused by co-accused delay, must be deducted because they are not the product of complacency; they are the unavoidable biproduct of a human process. The Courts of Appeal in Ontario (*R. v. Houle*[87] and *R. v. Mallozzi*[88]), British Columbia (*R. v. Singh*[89]) and Alberta (*R. v. Klassen*[90]) have all recognized that there may be cases in which co-accused delay must be deducted as a discrete exceptional circumstance.

97. In the case at bar, irrespective of the choice of the appellants to proceed as a collective, the Court of Appeal could also have deducted the co-accused delays in this case as discrete exceptional circumstances. The repeated continuations that pushed the net delay above the *Jordan* ceiling were the product of discrete events and defence delays which, by definition, could not reasonably have been foreseen or avoided by the Crown. At every continuation the Crown and the Court were widely available, but because severance was not a reasonable alternative, every continuation required the coordination of the schedules of all three defence counsel. There was nothing more the Crown could have done to mitigate the resulting delay.

98. The appellants now argue for the first time in this Court that the system failed to mitigate delay because the Court was not sufficiently "flexible" with the dates offered at each continuation. The respondent submits that this argument is not available to the appellants at this point in the proceedings. The time to have that question of fact adjudicated was at first instance, in front of the local judge who was familiar with the local conditions, and in the presence of

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[86] *August 22, 2017*, Appellant's Record, v.5 tab 52, p.94 ln.5-15.
[87] *R. v. Houle (appeal by Baron)*, 2017 ONCA 772, para.50.
[88] *R. v. Mallozzi*, 2018 ONCA 312, para.10.
[89] *R. v. Singh*, 2016 BCCA 427, paras.80-83.
[90] *R. v. Klassen*, 2018 ABCA 258, para.88.

counsel who participated in selecting the dates in question. Three years later, on second review, this Court is not well positioned to make those findings. At first instance not one of the appellants ever suggested that their matter had been delayed because the Court was not sufficiently available. As a result, there are no factual findings that could underpin any suggestion on appeal that the Court's availability caused delay.

E. ISSUE #5: IN THE ALTERNATIVE, THE TRANSITIONAL EXCEPTIONAL CIRCUMSTANCE OUGHT TO APPLY

99. According to the majority in *Jordan*, in most transitional cases "the release of this decision should not automatically transform what would previously have been considered a reasonable delay into an unreasonable one." Two-thirds of the total delay in this case took place before the release of *Jordan*. The trial was half done. All subsequent delays were largely a foregone conclusion. On the very first return date after the release of *Jordan* the Crown completed the examination in chief of its last witness. In these circumstances there can be no doubt that the parties relied heavily on the pre-*Jordan* legal framework in deciding how to conduct the case. On the basis of reasonable reliance on the *Morin* framework, the parties would not have anticipated a stay in this case because the vast majority of the delay was neither institutional nor Crown-caused. The transitional exceptional circumstance should lead this Court to conclude that the parties acted in reasonable reliance on the previous state of the law.[91]

100. Notwithstanding the significant impact of the pre-*Jordan* framework on this case, the judge only briefly referenced the transitional exceptional circumstance. He did not conduct any *Morin* analysis at all, and he declined to consider the question of prejudice. By failing to give meaningful consideration to the transitional exceptional circumstance, the trial judge erred.[92]

101. Under the *Morin* framework, institutional delay only began to accumulate where the parties were ready, but the Court was not. In joint prosecutions where severance was not a reasonable alternative, delay caused by one accused's availability was treated as neutral against the others.[93]

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[91] *R. v. Jordan*, 2016 SCC 27, paras. 96, 102.
[92] *Reasons on s.11(b) application*, Appellant's Record, v.1 tab 8, p.99; *R. v. Jordan*, 2016 SCC 27, at para. 96-97 and 102; *R. v. Picard*, 2017 ONCA 692, paras. 71-76, lv ref'd, [2018] S.C.C.A. No. 135.
[93] *R. v. Vassell*, 2016 SCC 26, para. 6; *R. v. Gopie*, 2017 ONCA 728, para. 138; *R. v. Houle (appeal by Baron)*, 2017 ONCA 772, paras. 51-62.

102. For delay caused by the need to find additional court time because of inaccurate time estimates, the resulting delay could be considered part of the inherent time requirement of the case. The classification of this type of delay depended on whether the additional dates reflected the inherent requirements of the case. Here, as discussed above, the need for additional days was caused by a combination of discrete events, and the inherent requirements of the case. The parties simply failed to recognize how long it would take to try the case. In other words, they failed to recognize the inherent requirements of the case. Under the *Morin* framework, this delay would have been neutral.[94]

103. **The intake period was 4 months**. At that point, the parties were ready to set a date. The first available date offered by the Court was seven months later. Subtracting from those seven months three months for counsel to clear their schedule and prepare for trial, that leaves four months of institutional delay.[95]

104. **The first trial date was rejected by defence** as a result of the unavailability of Mr. Pauls. The following 1.5 months ought to be defence delay for him, and inherent delay for the others. The adjournment in August is correctly attributed to the defence for failing to take any steps to secure the release of the DVR until the first day of trial. The Court was able to offer dates within weeks of the adjournment. According to the trial coordinator sheets, defence counsel rejected nine dates prior to January 11, and according to the Crown's clarification on the record, two additional rejected dates were not recorded. The Crown was available for all dates offered. No additional dates should be placed at the feet of the Court or the Crown.

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[94] *R. v. Allen* (1996), 110 C.C.C. (3d) 331 (Ont.C.A.), paras.27-29, affirmed [1997] 3 S.C.R. 700; *R. v. Tran*, 2012 ONCA 18, paras. 54-61; *R. v. Qureshi* (2004), 190 C.C.C. (3d) 453 (Ont.C.A.), para.27.

[95] On every occasion that a trial continuation was required, more than two months were needed for all three defence counsel to be available. Moreover, only three months before trial did the appellants' counsel first turn their mind to having the DVR examined. Even if that request had been pursued more diligently, that process would have taken some time. In these circumstances, the three months proposed by the Crown in its factum at first instance is appropriate – *Respondent's factum in the Ontario Court of Justice*, Appellant's Record, v.1 tab 13, p.243 para.73 – see discussion at *R. v. Lahiry*, 2011 ONSC 6780, at paras. 25-37.

105. **From January until September of 2016**, all delay was caused by the joint under-estimate of required trial time, unforeseen interruptions, and defence unavailability. The only exception was the unavailability of the Crown for dates in February of 2016. There was no shortage of available dates for the Court. Both Courts below allocated the total delay as three months for defence and two months and five days for the Crown. The total institutional/Crown delay is now six months and five days.

106. **Some institutional delay arose from the proceedings on September 9, 2016** due to the Court giving priority to another matter. The other matter was expected to be complete on that date, whereas this trial was going be adjourned regardless. Two months of delay are properly institutional as a result of prioritizing another matter, but there was no shortage of available dates. The remaining 3.5 months was caused by the unavailability of defence counsel and continued joint underestimates of the required trial time, as was the delay from February until April. The total institutional/Crown delay was then eight months and five days.

107. **From April to July, 2017** the delay was attributable to reserve time, which the parties would reasonably have anticipated to be inherent delay until the release of *Jordan***.**

108. A full *Morin* analysis therefore leads to institutional/Crown delay amounting to eight months and five days, and squarely within the 8-10 month *Morin* guideline.

109. The judge was also required to consider the seriousness of the offence and the absence of prejudice as part of the transitional exceptional circumstance. Each was an important factor under the *Morin* framework. The offences in this case were very serious. Three men engaged in the sustained beating of the confined victim for hours resulting in his hospitalization. The victim was outnumbered and was particularly vulnerable as a result of his level of intoxication. He sustained serious injuries and could easily have been even more seriously injured. As for prejudice, the respondents called no evidence. They were out of custody for the duration of their trial, and their conditions were loosened on consent as of June 24, 2016. Mr. Pauls in particular was the cause of significant delay due to his counsel's lack of availability. The last-minute nature of the appellants' 11(b) application also weighs against a finding of prejudice.

110. The timing of the application should not be understated. The respondents did not raise the possibility of an application prior to trial. They did not raise the possibility of an application when severance was denied, even after *Jordan* was released. It wasn't until after they were convicted, and a year after the release of *Jordan*, that the appellants indicated they would bring

an 11(b) application. They had yet to order any transcripts for that purpose. Some of the transcripts were not provided to the Crown until the night before the application was argued. The very late application speaks to the absence of prejudice and it speaks volumes about the expectation of the parties in the pre-*Jordan* landscape.

PART IV: SUBMISSIONS ON COSTS

111. The respondent does not seek any order for costs.

PART V: ORDER REQUESTED

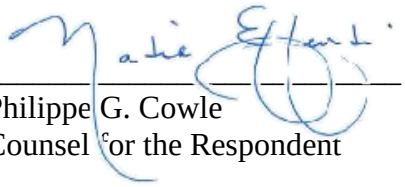
112. The Respondent respectfully requests that this Appeal be dismissed.

PART VI: RESTRICTIONS TO ACCESS OR PUBLICATION OF INFORMATION

113. There are no restrictions to access or publication in this matter that could impact this Court's reasons.

All of which is respectfully submitted this 26th day of October, 2020

Per:



Philippe G. Cowle
Counsel for the Respondent

PART VII: AUTHORITIES CITED

Jurisprudence

	Jurisprudence:	**Paragraphs :**
1.	*R. v. Schertzer*, 2009 ONCA 742, lv ref'd [2010] S.C.C.A. No.3	35
2.	*R. v. Jurkus*, 2018 ONCA 489, lv ref'd [2018] S.C.C.A. No.325	35, 36
3.	*R. v. Jordan*, 2016 SCC 27	36, 37, 49, 52, 65, 99, 100
4.	*R. v. Vandermeulen (M)*, 2015 MBCA 84, lv ref'd [2015] S.C.C.A. No.470	38
5.	*R. v. Bjelland*, 2009 SCC 38	40
6.	*R. v. Lacasse*, 2015 SCC 64	40
7.	*R. v. Shepherd*, 2009 SCC 35	40
8.	*R. v. Clark*, 2005 SCC 2	41
9.	*R. c. Rice*, 2018 QCCA 198	41
10.	*R. v. R.E.M.*, 2008 SCC 51	42
11.	*R. v. Cody*, 2017 SCC 31	45, 52, 58
12.	*R. v. McNeill-Crawford*, 2020 ONCA 504	52
13.	*R. v. Antic*, 2019 ONCA 160, lv ref'd [2019] S.C.C.A. No. 128	52
14.	*R. v. Tran*, 2012 ONCA 18	52, 102
15.	*R. v. Thompson*, 2009 ONCA 771	52
16.	*R. v. Qureshi* (2004), 190 C.C.C. (3d) 453 (Ont.C.A.)	52, 102
17.	*R. v. Saikaley*, 2017 ONCA 374, lv ref'd, [2017] S.C.C.A. No. 284	58
18.	*R. v. Majeed*, 2017 ONSC 3554	64
19.	*R. v. Jordan*, 2014 BCCA 241	65
20.	*R. v. Thanabalasingham*, 2020 SCC 18	66

	Jurisprudence:	**Paragraphs :**
21.	*R. v. Thanabalasingham*, 2019 QCCA 1765	66
22.	*Moreau Bérubé v. New Brunswick*, [2002] 1 S.C.R. 249	81
23.	*International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282	81
24.	*R. v. Godin*, 2009 SCC 26	82
25.	*R. v. K.J.M.*, 2019 SCC 55	85
26.	*R. v. K.G.K.*, 2020 SCC 7	87
27.	*R. v. Houle (appeal by Baron)*, 2017 ONCA 772	90, 96, 101
28.	*R. v. Albinowski*, 2018 ONCA 1084	90
29.	*R. v. Brissett*, 2019 ONCA 11	90
30.	*R. v. Potter; R. v. Colpitts*, 2020 NSCA 9	90
31.	*R. v. Gopie*, 2017 ONCA 728	92, 101
32.	*R. v. Auclair*, 2014 SCC 6	94
33.	*R. v. Manasseri*, 2016 ONCA 703, lv ref'd [2016] S.C.C.A. No. 513	94
34.	*R. v. Mallozzi*, 2018 ONCA 312	96
35.	*R. v. Singh*, 2016 BCCA 427	96
36.	*R. v. Klassen*, 2018 ABCA 258	96
37.	*R. v. Picard*, 2017 ONCA 692, lv ref'd, [2018] S.C.C.A. No. 135	35, 100
38.	*R. v. Vassell*, 2016 SCC 26	101
39.	*R. v. Allen* (1996), 110 C.C.C. (3d) 331 (Ont.C.A.), aff'd [1997] 3 S.C.R. 700	102
40.	*R. v. Lahiry*, 2011 ONSC 6780	103

Statutes and Regulations

	Statute, Regulation	**Section, Rule, etc.**
1.	*Canadian Charter of Rights and Freedoms* | *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11	s.11(b)
	Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11	par.11(b)

Appendix A

DELAY CHART

Adjournment	Reason	Jordan delay	Morin delay	Trial judge's conclusion
August 1, 2014 to November 25, 2014	Intake time	117d Jordan	117d Intake	3m 25d Jordan
November 25, 2014 to June 17, 2015	First available trial date	204d Jordan	114d Institutional 90d Inherent (prep time)	6m 23d Jordan
June 17, 2015 to August 5, 2015	First available trial date for defence	48d Defence / Discrete	48d Defence / neutral	1m 19d Jordan (except Pauls)
August 5, 2015 to December 7, 2015	Defence examination of original DVD exhibit	125d Defence / Discrete	125d defence / neutral	4m 2d Crown
December 7, 2015 to January 11, 2016	Pauls counsel unavailable for dates offered in December	34d Defence / Discrete	34d Defence / neutral	1m 4d Crown (except Pauls)
January 11, 2016 to June 20, 2016	Trial continuation required due to second underestimation, translator issues, witness health issues	60d Jordan (Crown) 155d Defence / Discrete	60d Crown 1d institutional 154d Defence / neutral	1.5 days discrete 3m defence 2m Jordan/Crown
June 20, 2016 to September 8, 2016	Trial continuation required due to interpreter issues, incomplete days due to court and defence commitments, and illness of Pauls	5d Jordan 75d Defence / Discrete	3d institutional 77d Defence / neutral	2m 15d Jordan (except Pauls)
September 8, 2016 to February 21, 2017	Trial continuation required due to prior discrete events and double-booked courtroom	1d Jordan 164d Defence / Discrete	73d institutional 92d neutral	5m 12d Jordan (minus 3m for Pauls)

Adjournment	Reason	Jordan delay	Morin delay	Trial judge's conclusion
February 22, 2017 to April 24, 2017	Trial continuation required due to prior discrete events	62d Discrete	62d neutral	2m 2d Jordan (minus 1m Pauls)
April 24, 2017 to June 2, 2017	Reserve time until interim June date set for potential questions arising from written closing submissions.	34d deliberation time not counted under Jordan	34d Inherent /neutral	1m 8d Jordan
June 2, 2017 to July 7, 2017	Reserve time	36d deliberation time not counted under Jordan	36d Inherent	1m 5d Jordan