SCC File No. 39110

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

B E T W E E N:

AZIZ PAULS, JAMAL YUSUF and JAMIS YUSUF

APPELLANTS

-and-

HER MAJESTY THE QUEEN

RESPONDENT

JOINT RESPONSE FACTUM OF THE APPELLANTS

(Pursuant to Rule 29(4) and 35(3) of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. Overview

1. At the Court of Appeal, in arriving at her conclusion that the net delay fell below the presumptive 18-month ceiling, Simmons J.A. did not address the Crown's argument that the trial judge failed to give meaningful consideration to the transitional exceptional circumstances ("TEC") established in *R. v. Jordan*.[1] Pursuant to Rule 29(3) of the *Rules of the Supreme Court of Canada*, the Respondent Crown ("the Crown") seeks to uphold the judgment of the Court of Appeal on the basis that the trial judge erred in staying the proceedings when he found that the TEC did not apply in this case. *Jordan* recognized that cases in the system when the framework changed, which exceeded the presumptive ceiling, could be justified by a TEC if the Crown satisfied the court that the time the case had taken was justified based on the parties' reasonable reliance on the law as it previously existed under the s. 11(b) framework from *R. v. Morin*.[2]

2. When assessing whether a TEC applied, this Court in *Jordan* explained that it would "rely on the good sense of trial judges to determine the reasonableness of the delay."[3] In this case, the trial judge determined that the delay was unreasonable and that the TEC did not apply. This was a finding which was open to him to make and one which must be afforded substantial deference on appeal since it was not tainted by palpable and overriding error. While the trial judge's reasons on this issue were brief, they demonstrate that he considered the fundamental issue of whether the delay was justified based on the parties' reasonable reliance on the law as it previously existed under the s. 11(b) framework in *Morin* and concluded it was not:

> **I do not find the Crown reasonably relied on the pre-Jordan state of the law prior to that decision being released, given the manner of the prosecution**. The inherent time requirements for this case were well in excess of the two day time estimate, and should have been recognized by the Crown at the stage of setting a date for trial. As I reviewed the matter and attempted to objectively assess this application, as has been reflected throughout, **I cannot conclude the Crown prosecuted this matter expeditiously for the following reason: the grossly inaccurate time estimate; the inaction on the requests relating to the defective video; knowing or ought to have known how it would deal with the examination of the video of the activities in the restaurant, i.e. on a virtual minute by minute basis; and not having regard to the time estimate it**

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[1] *R. v. Jordan*, 2016 SCC 27.
[2] *R. v. Morin*, [1992] 1 S.C.R. 771.
[3] *Jordan, supra*, at para. 98.

> **made at the pretrial. These factors were major considerations for this court as it traced the progress of this matter through until July 7, 2017.**[4] **[Emphasis added.]**

3. Even though the trial judge did not conduct a *Morin* analysis, his findings, which drove the *Jordan* analysis, apply with equal force. This was a case that took almost three years to complete because the Crown failed to conduct this prosecution in an expeditious manner. In *R. v. Askov,* Cory J. explained that "it is the duty of the Crown to bring the accused to trial" and that "[a]n accused has no duty to bring himself to trial. The Crown has that duty."[5] This duty was authoritatively characterized as a "fundamental precept of our criminal justice system". Against this backdrop, the TEC has no application here. It was intended for cases where the Crown stumbled over the ceiling based on "the parties'" reasonable reliance on the pre-*Jordan* law. It was never intended to excuse stays of proceedings that would have occurred in any event under *Morin*. Indeed, as discussed below, at least **18.5 months** of the delay was a result of Crown and institutional delay—well outside the *Morin* guidelines of 8-10 months. Moreover, while the charges are serious, they are not at the most serious end of the spectrum and there is significant prejudice to the Appellants which can be inferred from the length of the delay. This was one of those cases *Jordan* noted that literally took years to get through the system. On this record there is simply no basis to conclude that the trial judge erred in finding that the TEC did not apply.

4. Pursuant to Rules 29(4) and 35(4) of the *Rules of the Supreme Court of Canada*, the Appellants file this joint factum in response to the alternative issue raised by the Crown.

B. The facts

5. The relevant facts are summarized in paragraphs 7-26 of the joint factum of the Appellants which was previously filed on August 24, 2020.

PART II – STATEMENT OF ISSUES

6. The new issue raised by the Crown is: Did the trial judge err in staying the proceedings because the presumptively unreasonable delay was not justified by any TEC? The Appellants

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[4] Appellant's Record ["AR"], Vol. I, Part I, Tab 8, 11(b) Reasons, at paras. 84.
[5] *R. v. Askov*, [1990] 2 S.C.R. 1199, at paras. 57-58 and 62.

submit that in light of the Crown's conduct throughout the course of this self-described "press play" case, the trial judge did not err in using his "good sense" to find that that the delay was unreasonable and the TEC did not apply. This finding is highly fact driven, clearly supported by the evidentiary record and must be afforded substantial deference on appeal since it was not tainted by palpable and overriding error.

PART III – STATEMENT OF ARGUMENT

ISSUE 1: THE TRIAL JUDGE CORRECTLY FOUND THAT THE DELAY WAS NOT JUSTIFIED BY ANY TRANSITIONAL EXCEPTIONAL CIRCUMSTANCES

A. The analytical framework in *Morin*

7. The old s. 11(b) framework in *Morin* required the court to analyze four distinct factors: The overall length of delay from the charge until the trial's conclusion; waiver of any specific time periods; the reasons for the various periods of delay; and prejudice to the accused.[6] No single factor was determinative of the reasonableness of the delay. Rather, each factor needed to be balanced having regard to the interests s. 11(b) of the *Charter* was designed to protect; namely, the accused's liberty, security of the person and fair trial interests. The final balancing required the court to balance stage of the societal interest in seeing that accused brought to trial on the merits against an accused's interest in a prompt adjudication.[7]

B. The proper characterization of the delay under *Morin*

8. In *Morin*, this Court identified five categories of delay: The inherent time requirements of the case; actions of the defence; actions of the Crown; limits on institutional resources; and other reasons for delay.[8] The Appellants rely upon the periods of delay set out below to establish that the period of Crown and institutional delay in this case was at least **18.5 months**.

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[6] *Morin, supra,* at para. 31.
[7] *Morin, supra,* at para. 32.
[8] *Morin, supra,* at para. 31.

9. **August 2014 – August 2015** – The intake period was from the date of arrest[9] until the trial was set on November 25, 2014 – almost 4 months. The trial was scheduled for August 5 - 6, 2015. At the Court of Appeal, the Crown submitted that 1 month should be deducted from the institutional delay for counsel to prepare and clear their calendars.[10] Before this Court, the Crown argues that 3 months should be deducted. This argument must be rejected for two reasons. First, in *Jordan* this Court did not accept a similar Crown argument and therefore did not deduct **any** delay on this basis.[11] Second, in more complicated cases, the Ontario Court of Appeal has held that only 1 month should be deducted.[12] The Appellants cannot be in worse position. The Crown also goes on to subtract a further 1.5 months because the Appellant Pauls' counsel was unavailable on the first trial date offered. This submission ignores the pre-*Jordan* law. In *R. v. Godin*, this Court held that "[s]cheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(b) purposes, require defence counsel to hold themselves in a state of perpetual availability."[13] This is not a case where there were multiple earlier dates offered that counsel was not available. At the start of the trial the institutional delay stands at **7 months and 11 days.**

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[9] The Yusuf Appellants were arrested on August 1, and Pauls was arrested on August 12, 2014.
[10] Crown's Factum filed at the Ontario Court of Appeal, at para. 73.
[11] *Jordan, supra*, at paras. 64, 121-122. In support of its submission, the Crown in this case relies upon the reasoning in *R. v. Lahiry*, 2011 ONSC 6780, at paras. 25-37, as did the Respondent Crown in *Jordan* (see Factum of the Crown Respondent in *Jordan*, at paras. 72-78, https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36068/FM020_Respondent_Her-Majesty-the-Queen.pdf). The Appellant in *Jordan* asked this court to reject the approach in *Lahiry* (see Appellant's Factum in Response in *Jordan*, at paras. 22-38, https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36068/FM015_Appellant_Barrett-Richard-Jordan_Reply.PDF). Since the majority in *Jordan* did not deduct any delay on this basis, this would seem to suggest the rejection of the *Lahiry* approach. However, if it necessary to do so, the Appellants submit that the *Lahiry* approach should not be adopted and rely on the reasoning of Nordheimer J. (as he then was) in *R. v. Sikorski*, 2013 ONSC 1714, at paras. 87-98.
[12] See *R. v. Ralph*, 2014 ONCA 3, at para. 12; *R. v. Florence*, 2014 ONCA 443, at para. 63; and *R. v. Williamson*, 2014 ONCA 598, at paras. 34-37.
[13] *R. v. Godin*, 2009 SCC 26, at para. 23

10. **August 2015 – January 2016** – The loss of the August 2015 court time was due to the Crown's failure to respond to the video disclosure issue in a timely manner. Indeed, as the Crown acknowledged at the Court of Appeal, "the Crown had the ability to avoid the delay that flowed from the disclosure request, and did not do so."[14] In such circumstances, the time between August 6, 2015 and January 11, 2016, 5 months and 5 days is Crown delay.[15] As of January 2016, the Crown and institutional delay stands at **12.5 months.**

11. **January 2016 – September 2016** – As a result of the Crown's failure to reasonably estimate the length of its case, the trial could not realistically have been completed during the January or June[16] dates, even if full court days had been used. Using the trial judge's findings under *Jordan,* at least a further 2 months is delay caused by the actions of the Crown, since it stemmed directly from the Crown's mistaken trial estimate which had occurred on three occasions[17] and the Crown's unavailability in February. As of September 2016, the Crown and institutional delay stands at **14.5 months.**

12. **September 2016 – April 2017** – As the Crown acknowledges, when considering the delay from September 9, 2016, to February 21, 2017, there was at least 2 months of institutional delay due to the loss of the afternoon on September 9, 2016 in order for a sentencing matter to

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[14] Crown's Factum filed at the Ontario Court of Appeal, at para. 49.

[15] *Morin, supra,* at para. 46. The offer of earlier dates does not stop the s. 11(b) clock under *Morin,* especially when the Crown has caused the delay (*Godin, supra,* at para. 23; *R. v. N.N.M.,* 209 O.A.C. 331, at para. 23; and *R. v. Nguyen*, 2013 ONCA 169, at paras. 28, 30 and 84-87).

[16] On June 24, 2016, the trial did not proceed because of Appellant Pauls' illness. After the Yusuf Appellants' severance application was dismissed, the case was adjourned to September 8, 2016. For the Yusuf Appellants, this 2.5 month delay under *Morin* is not neutral time but rather characterized as "other reasons for delay" and weighs against the state for s. 11(b) purposes such that it cannot be relied upon by the Crown to justify the delay (see *Morin, supra,* at para. 59; *R. v. Vassell,* 2016 SCC 26, at paras. 3-7, rev'g, 2015 ABCA 409, at paras. 45-48; and *R. v. Ny,* 2016 ONSC 8031, at paras. 127-128)

[17] *R. v. Ferguson*, [2005] O.J. No. 3442 (S.C.J.), at paras. 153-154, 204; and *R. v. Purewal*, 2014 ONSC 2198, at para. 94.

proceed.[18] This brings the Crown and institutional delay to **16.5 months**. Moreover, the fact that the February 2017 dates were insufficient to complete the trial is directly attributable to the Crown's underestimation on June 24, 2016 of the time required to complete the examination-in-chief. Had the Crown's estimate been more realistic, a third day may have been set which would have enabled the parties to finish the evidence in February 2017. On these facts, the 2 months between February and April 2017 would also be delay caused by the actions of the Crown.[19] This brings the total period of Crown and institutional delay to **18.5 months**.[20]

C. The Transitional Exceptional Circumstances "Factors"

13. In *Jordan*, this Court explained that determining whether a presumptively unreasonable delay can be justified by a TEC involves a "contextual assessment, sensitive to the manner in which the previous framework was applied."[21] The onus is on the Crown to demonstrate that the delay is justified based on the parties' reasonable reliance on the law that existed prior to *Jordan*. In *R. v. Williamson*, this Court identified a number of factors in considering the TEC which were subsequently summarized by the Ontario Court of Appeal as follows: the complexity of the case; the delay in excess of the *Morin* guidelines; the Crown's response, if any, to any institutional delay; the defence efforts, if any, to move the case along; and prejudice to the accused.[22]

14. This was not a complex case. The allegations were straightforward and the case did not require a lengthy disclosure process or significant preparation time. While the period of Crown

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[18] Based on the trial judge's findings, the remaining period of delay from September 2016 to February 2017, almost 3.5 months of delay, was caused by the unavailability of trial counsel for the Appellant Pauls. As previously discussed, for the Yusuf Appellants, under *Morin*, this period of delay is characterized as "other reasons for delay" and weighs against the state.

[19] The Appellants agree with the Crown that under *Morin,* the remaining period of delay from April to July 2017, is properly characterized as part of the inherent time requirements of the case and is therefore neutral time and does not weigh against the state.

[20] For the Yusuf Appellants the total delay in this case which weighs against the state (i.e. Crown, institutional delay, and other reasons for delay) stands at **approximately 25 months**.

[21] *Jordan, supra*, at para. 96.

[22] *R. v. Williamson*, 2016 SCC 28, at paras. 24-30. See also *R. v. Gopie*, 2017 ONCA 728, at para. 178; and *R. v. Shaikh*, 2019 ONCA 895, at para. 72-88.

and institutional delay vastly exceeded the *Morin* guidelines, this was not a situation, as mentioned in *Jordan*, where the delay exceeded "the ceiling because the case [was] of moderate complexity in a jurisdiction with significant institutional delay problems".[23] Rather, the extended nature of these lengthy proceedings was caused by the manner in which the Crown chose to prosecute the case. The trial judge's findings were highly fact driven, entitled to deference, and they demonstrate that, in the words of *Jordan*, this was a simple case that vastly exceeded "the ceiling because of repeated mistakes or missteps by the Crown".[24] Like the Crown in *Jordan*, here the "prosecutors assigned to the case did not have a solid plan for bringing the matter to trial within a reasonable time."[25] The Crown's approach "reflect[ed] its indulgence in the culture of delay and complacency criticized in *Jordan*."[26]

15. The Crown's handling of this case stands in stark contrast to that of the Appellants—particularly the Yusuf Appellants. Based on the trial judge's findings, the Yusuf Appellants were only responsible for a small portion of delay. They were always anxious to proceed and move the case forward, but were prevented from doing so by the conduct of others. Indeed, at the Court of Appeal, the Crown acknowledged that the Yusuf Appellants took steps to mitigate the delay, including: the severance application, trying to obtain earlier dates on one occasion and counsel for Jamis Yusuf sending another lawyer when he could not attend the trial.[27] In addition to those factors, the Yusuf Appellants also rely on the following circumstances: asking the court to sit early, attempting to ensure an appropriate interpreter was requested given the issues that had already arisen, expressing concerns about the Crown's inaccurate estimates of time, attempting to obtain sufficient time for the evidence to be completed, and when continuation dates were set counsel did not remain silent and acquiesce to the delay, but rather they made it clear they had earlier availability and that the delay was an issue.[28]

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[23] *Jordan, supra*, at para. 97.
[24] *Jordan, supra*, at para. 98.
[25] *Jordan, supra*, at para. 129.
[26] *R. v. Manasseri*, 2016 ONCA 703, at para. 292
[27] Crown's Factum filed at the Ontario Court of Appeal, at para. 13.
[28] *See* AR, Vol. II, Part V, Tab 32, August 5, 2015, at p. 5; AR, Vol. II, Part V, Tab 33, August 6, 2016, at pp. 7-8; AR, Vol. III, Part V. Tab 36, January 14, 2016, at pp. 92-98; AR, Vol. III, Part V, Tab 39, June 24, 2016, at pp. 10-12; AR, Vol. III, Part V, Tab 42, September 9, 2016, at pp. 2-11; AR, Vol. IV, Part V, Tab 47, February 22, 2017, at pp. 146-148.

16. In *Askov,* Cory J. stated that "[t]here is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time."[29] While the Appellants did not call any evidence of prejudice, this Court has held that even in the absence of specific prejudice, "prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn."[30] The Ontario Court of Appeal has explained that when considering inferred prejudice: "[t]he entire period of the delay … is properly considered" including "neutral time periods".[31] In *Ralph,* Rosenberg J.A. held: "[w]hen an accused has had to wait almost three years for trial … it is proper to infer significant prejudice" and in *Williamson*—where the delay was 35.5 months—Lauwers J.A. concluded that "… it must be inferred that the appellant has experienced significant prejudice."[32] Therefore, since the entire period of delay in this case was approximately **3 years**, it must be understood that the Appellants experienced significant inferred prejudice.

D. Conclusion – The Final Balancing under *Morin*

17. When faced with an application for a stay of proceedings on the grounds of unreasonable delay under the *Morin* framework, a judge was required to consider many factors together in a balancing analysis. In her concurring reasons in *Morin*, McLachlin J. (as she then was) explained that "[i]n the final analysis the judge, before staying charges, must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial."[33] The trial judge's reasons demonstrate that he correctly performed the requisite balancing of the competing interest:

> **Throughout the crafting of these reasons, I did not lose sight of the fact that a verdict of guilty had been pronounced prior to the applicants bringing this application.** The public interest, in my view, is focused on matters being tried on their merits, as this case was. One of the other matters of concern is whether the rights of citizens have been violated in this process. Both considerations are important and courts try to balance these concepts as fairly as they can…. **It is my view that notwithstanding the charges or the evidence I heard, viewing the video of the events which lead to the charges, the legal issues attaching thereto and the verdicts of guilty, the Charter**

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[29] *Askov, supra,* at para. 69.
[30] *Godin, supra,* at para. 31.
[31] *R. v. Lo*, 2014 ONCA 23, at para. 2. See also *R. v. Steele*, 2012 ONCA 383, at paras. 34-36.
[32] *Ralph*, *supra*, at para. 16; and *Williamson* (C.A.), *supra*, at paras. 54-57. See also *R. v. J.C.P.,* 2018 ONCA 986*,* at para. 42-52.
[33] *Morin, supra,* at para. 87.

> **rights of those involved in the criminal justice system must be respected and, if violated, relief sought**. I have taken an objective approach in this consideration. After considering the application in great detail I find the delay for these applicants exceeds the presumptive ceiling and the matter is stayed.[34] **[Emphasis added.]**

18. In the end, the seriousness of the charges and the societal interest in a trial on the merits do not outweigh the other factors including the excessive delay caused by the conduct of the Crown, the intuitional delay, and the significant inferred prejudice suffered by the Appellants. Therefore, since the final balancing under *Morin* strongly favoured a stay of proceedings, as this Court indicated in *R. v. Cody*, and recently re-affirmed in *R. v. Thanabalasingham*, "the Crown will rarely, if ever, be successful in justifying the delay as a transitional exception circumstance under the Jordan framework."[35] **This is not one of those rare cases**.

PART IV – SUBMISSIONS REGARDING COSTS

19. The Appellants do not ask for costs, and request that no cost be awarded against them.

PART V – ORDER REQUESTED

20. The Appellants respectfully request that this Court grant the appeal and re-impose the stay of proceedings entered by the trial judge as requested in the joint factum of the Appellants filed on August 24, 2020.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January, 2021.

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[34] AR, Vol. I, Part I, Tab 8, 11(b) Reasons, at paras. 89.
[35] *R. v. Cody*, 2017 SCC 31, at para. 74. See also *R. v. Thanabalasingham*, 2020 SCC 18, at 8.

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