IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *R. v. Cody*, 2016 NLCA 57
Date: October 24, 2016
Docket: 201501H0003

BETWEEN:

HER MAJESTY THE QUEEN — APPELLANT

AND:

JAMES CODY — RESPONDENT

Coram: Welsh, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador Trial Division (G) 201101G3741

Appeal Heard: March 16, 2016
Judgment Rendered: October 24, 2016

Reasons for Judgment by Hoegg J.A.
Concurred in by Welsh J.A.
Dissenting Reasons by White J.A.

Counsel for the Appellant: Robin Fowler
Counsel for the Respondent: Erin Breen

Hoegg J.A.:

INTRODUCTION

[1] The Crown appeals the judicial stay of charges against James Cody for trafficking in marihuana and cocaine, possession of a prohibited weapon and breach of probation. The charges arose from a police investigation into an interprovincial cocaine trafficking enterprise known as Operation Razorback. The stay was ordered by a Supreme Court judge following his ruling that Mr. Cody's section 11(b) *Charter* right to be tried within a reasonable time was breached.

[2] The Judge determined that the delay between when Mr. Cody was charged and the anticipated end of his trial was 60 months and 21 days. The Judge parsed this delay into the various categories set out in *R. v. Askov*, [1990] 2 S.C.R. 1199 and *R. v. Morin*, [1992] 1 S.C.R. 771, attributing some of it to actions of the Crown, some to Mr. Cody's actions, some to institutional and inherent delay and some to "other" delay. He went on to determine that Mr. Cody had suffered actual and inferred prejudice from the delay and that the prejudice "outweighed the societal interest in bringing him to trial". The Judge concluded that the delay "did not meet the test of reasonableness in section 11(b) of the *Charter*" and stayed the charges.

[3] The Judge's decision staying Mr. Cody's charges was filed on December 19, 2014. The Crown appealed, and the appeal was subsequently perfected and heard by this Court on March 16, 2016. Judgment was reserved.

[4] On July 8, 2016, the Supreme Court of Canada issued its decision in *R. v. Jordan*, 2016 SCC 27. *Jordan* substantially alters the analytical framework for deciding whether the delay between when an accused is charged and the date of the anticipated end of his or her trial is reasonable under section 11(b) of the *Charter*. Given this happenstance, the Court requested whether the Crown and Mr. Cody wished to make additional submissions. The Crown filed additional written submissions on August 11, 2016 and Mr. Cody filed additional submissions on August 29, 2016.

[5] What follows is the Court's decision under the new *Jordan* framework.

The Submissions

[6] In its pre-*Jordan* submissions, the Crown argued that the Judge erred by attributing different periods of delay to the Crown when they ought to

have been attributed to the inherent time requirements of the case or to Mr. Cody's actions. The Crown also argued that the Judge failed to consider the delays resulting from Mr. Cody's waivers, actions, and litigation choices, as well as society's interest in Mr. Cody being tried on the merits of the case against him, when balancing the interests section 11(b) is designed to protect against the causes of the delay.

[7] In its post-*Jordan* submissions, the Crown argued that its pre-*Jordan* position and submissions remain valid, and also that its appeal be allowed under the new *Jordan* framework. Under *Jordan*, the Crown submits that Mr. Cody's actions and waivers make him responsible for 20 months and 7 days delay which, when added to 22 months and 11 days delay occasioned by exceptional circumstances, totals 42 months and 18 days delay. When this total is subtracted from the total delay of 60 months and 21 days, the result is that Mr. Cody's trial was delayed by only 18 months and three days, which is well under the 30-month *Jordan* ceiling.

[8] Mr. Cody maintains his original argument that the delay in this case was not reasonable. He acknowledges his waivers of 13 months and 5 days and the four months and 21 days delay occasioned by the appointment of his former counsel to the bench (as an exceptional circumstance under *Jordan*) must be subtracted from the total, and argues that the remaining delay is over 40 months making it unreasonable as it exceeds the 30-month *Jordan* ceiling and thereby breaches his section 11(b) right and justifies the stay.

THE LAW

[9] Section 11(b) of the Canadian Charter of Rights and Freedoms states:

> 11. Any person charged with an offence has the right
>
> …
>
> (b) to be tried within a reasonable time;

Simply put, *Jordan* sets a 30-month ceiling (for cases being tried after a preliminary inquiry) beyond which delay will be presumptively unreasonable and thus a violation of the accused's section 11(b) *Charter* right unless the Crown shows that there were exceptional circumstances justifying delay. *Jordan* stipulates that the delay period is calculated by measuring the time from the laying of the charge to the anticipated end of trial and deducting delay periods for which the defence is responsible and those which can be attributed to exceptional circumstances.

[10] *Jordan* describes defence delay as composed of "clear and unequivocal" defence waivers (paragraph 61) and "delay caused solely or directly by the defence's conduct" (paragraph 66), and explains that the latter could be defence actions which "directly caused" the delay or "deliberate and calculated tactics employed to delay the trial" (paragraph 63). However, the Court clearly placed actions legitimately taken by the defence to respond to the charges outside the ambit of defence delay (paragraph 65).

[11] *Jordan* describes exceptional circumstances as circumstances that lie outside the Crown's control in the sense that they are reasonably unforeseen and unavoidable and cannot be reasonably remedied (paragraph 69). The Court observed that "it is impossible to identify in advance all circumstances that may qualify as exceptional" but in general, exceptional circumstances fall into two categories: discrete events and particularly complex cases (paragraph 71). The Court placed the onus on the Crown to demonstrate that it took reasonable steps to attempt to avoid the delay once the delay is established (paragraphs 70 to 73).

[12] The Court expressly stated that it wished to avoid the drastic consequences which flowed from immediate implementation of its 1990 decision in *Askov*, and observed that direct application of its new analytical framework to cases already in the system could be unfair to parties who conducted themselves according to pre-*Jordan* law. Accordingly, so as not to undermine the integrity of the administration of justice, it provided for a "transitional exceptional circumstance" to apply to such cases:

> [96] First, for cases in which the delay *exceeds* the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. …

[13] While *Jordan* states the present law, much of the former Supreme Court jurisprudence interpreting and applying section 11(b) remains relevant. In *Askov*, the Supreme Court recognized the importance to both

accused persons and society of a justice system that works "fairly, efficiently, and with reasonable dispatch", and listed factors for consideration in conducting a section 11(b) reasonableness of delay assessment. *Askov* recognized, as does *Jordan*, that complex cases will justify delays longer than what would be acceptable in simple cases (*Askov* page 1223 and *Jordan* at paragraph 71). *Askov* also observed that "the section 11(b) right is one which can be transformed from a protective shield to an offensive weapon in the hands of the accused" (page 1222), and observed that trial within a reasonable time is not necessarily the wish of all accused, a point the Supreme Court had made the year before in *R. v. Conway*, [1989] 1 S.C.R. 1659, wherein it ruled that the conduct of an accused must be considered in a section 11(b) analysis. The *Jordan* Court confirmed this principle at paragraph 63.

[14] In *Askov*, at page 1222, the Court stated that "[a]t some level the conduct of and prejudice to the accused must be examined", and directed that the interests of society be considered in conjunction with an accused's right to fundamental justice. The *Jordan* Court has specifically removed prejudice from the section 11(b) analysis, saying it is presumed by prolonged delay and has therefore been taken into consideration by the setting of the presumptive ceiling at 30 months (paragraph 81).

[15] In *Morin*, the Court elaborated on the principles and factors identified in *Askov*, and confirmed that the primary purpose of section 11(b) was the protection of an accused's individual rights and the secondary purpose was to vindicate society's interest in a justice system which enjoys public confidence and ensures that those who transgress the law are brought to trial and dealt with according to law (page 786-787). The *Morin* Court described the approach to determining whether a section 11(b) right has been denied as a "judicial determination balancing the interests which the section is designed to protect against factors which either lead to delay or are otherwise the cause of delay", and set out the following framework for a section 11(b) reasonableness assessment:

1. The length of delay;

2. Waiver of time periods;

3. The reasons for delay, including:

    i) inherent time requirements,

ii) actions of the criminal defendants,

iii) actions of the Crown,

iv) limits on institutional resources, and

v) other reasons for delay; and

4. Prejudice caused to the criminal defendants.

(Page 787-788.)

These factors were confirmed in *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3 (para. 2).

[16] The *Morin* Court confirmed that an accused bears the burden of establishing a breach of his or her section 11(b) *Charter* right and that a reasonableness assessment should only be undertaken if the period of delay is of sufficient length to raise an issue of unreasonableness. In this regard pre-*Jordan* law placed the burden of establishing the breach of a *Charter* right on the accused, consistent with the Supreme Court's decision in *R. v. Collins*, [1987] 1 S.C.R. 265 at page 277 and this Court's decision in *R. v. Furlong*, 2012 NLCA 29, 323 Nfld. & P.E.I.R. 77 at paragraph 21. *Jordan* modifies the burden with respect to section 11(b) of the *Charter* in that once an accused establishes delay, easily accomplished by reference to the record, the burden is on the Crown to explain and/or justify it. Nevertheless, both the *Morin* and *Jordan* Courts direct that periods of delay that have been waived or otherwise solely or directly caused by the defence are to be subtracted from the delay period.

[17] The *Morin* Court noted that the section 11(b) right "must be interpreted in a manner which recognizes the abuse which may be invoked by some accused" and stated "[t]he purpose of section 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits" and "[a]ction or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider" (page 802). The *Jordan* Court agreed, saying that "[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests are the most straightforward examples of defence delay" (paragraph 63).

[18] Also after this appeal was argued, but before *Jordan* was issued, *R. v. Vassell*, 2016 SCC 26 was decided. *Vassell* illustrates how assessment of an accused's conduct operated to his benefit. The Court ruled that Mr. Vassell's section 11(b) *Charter* right was infringed by his having to wait

"three years for a three-day trial" (paragraph 3) in circumstances where he had taken proactive steps from start to finish to have his case heard as soon as possible and had not caused any delay. The Court stated that it was incumbent on the Crown to be vigilant of Mr. Vassell's section 11(b) right despite his having been held hostage by his co-accuseds and "the inability of the system to provide earlier dates" (paragraph 7).

ANALYSIS

[19] The Judge subtracted Mr. Cody's uncontested *Askov* waivers and the delay periods he attributed to Mr. Cody's actions from the total delay of 60 months and 21 days. He then attributed several periods of delay to the Crown. At paragraph 153 of his decision, he said:

> The actions of the Crown relate to the Crown's initial refusal to allow Cody to view, or obtain a copy of the CDs containing his disclosure, in counsel's availability to conduct the trial, in providing a *McNeil* disclosure on the eve of a *Charter* application, in preparing an Agreed Statement of Facts for the *Charter voir dire* which contained errors, and in the application for recusal. The total delay occasioned thereby is 14 months and 15 days.

The Crown argues, and I agree, that the Judge made several errors in his attribution of delay periods to the Crown. I will consider the alleged errors from pre-*Jordan* and post-*Jordan* perspectives, and also address whether the transitional exception is applicable.

The Disclosure Issue

[20] The Judge attributed to the Crown the 3 month 18 day delay occasioned by the dispute relating to initial disclosure. This delay occurred between June 30, 2010 and October 18, 2010. The factual circumstances relating to it begin on June 30, 2010, when the Crown advised the defence that disclosure was available for Mr. Cody and others charged as a result of the Razorback investigation as long as all defence counsel, of whom there were several representing six different defendants, signed undertakings limiting its dissemination and use. The proposed undertaking read as follows:

> … **WHEREAS** Mike King is acting as legal counsel for the Accused with respect to the said charges;
>
> **AND WHEREAS** the Crown is providing disclosure in the format of two CDs which contain personal information of several persons other than the Accused;

> **AND WHEREAS** the Crown wishes to ensure that full disclosure is made capable of allowing the Accused to make a full answer and defence to the said charges, while ensuring that the said information contained on the CDs is protected to the greatest extent possible;
>
> **THEREFORE** Mike King hereby provides an undertaking in his capacity as legal counsel for the Accused and pursuant to the provisions of Chapter XVI of the Law Society of Newfoundland's **Code of Professional Conduct** as follows:
>
> 1. The CDs will not be copied without prior written consent of the Crown.
>
> 2. Upon the conclusion of the proceedings on the charges, and Operation Razorback in the event that Mike King ceases to act as legal counsel for the Accused with respect to the said charges, all CDs shall be returned to the Crown upon written request.
>
> 3. Nothing in this undertaking precludes the making of prints of the information contained on the CDs provided the printed materials are disseminated solely for the use of counsel, the Accused and any other person for the making of full answer and defence.

[21] Some of the Razorback defence counsel were of the view that they could not sign the proposed undertaking because they were not able to assure the Crown that their respective clients would not disseminate the disclosure or use it for other purposes. In other words, the defence counsel advised they could not undertake to abide by terms of the undertaking that were outside of their control. The Crown refused to hand over the disclosure.

[22] It was October 18, 2010 before the impasse was resolved. Resolution was ultimately negotiated, although prompted by a section 7 *Charter* application filed by all but one of the Razorback defence counsel in the Supreme Court Trial Division on August 18, 2010. Disclosure took place after the defence counsel and their respective clients provided undertakings restricting its dissemination and use. The agreement also provided that the disclosure would not be given to any potential expert witness unless the expert undertook not to disseminate it or use it for purposes other than assisting a named accused in making full answer and defence.

[23] In his allocation of this delay to the Crown, the Judge stated at paragraph 54 of his decision that the effect of the original undertaking was "to deny Cody the right to review a copy, or even view the original CDs containing his disclosure". Also, at paragraph 56 the Judge said:

> … what remains unclear is why the Crown would not permit the accused to view the original of the CDs. Counsel were permitted to view the CDs and discuss the content with their respective clients. They were also permitted to print copies from the CDs. Presumably this discussion, or the print version, could include the material otherwise classified as "personal information". I am at a loss to therefore understand why Cody was not permitted by the Crown to view a copy of the CDs, or even the original.

[24] The Crown argues that the Judge's words show that he misapprehended the terms of the originally proposed undertaking because it did not prohibit Mr. Cody from viewing the disclosure on the CDs. I agree. The Judge's words clearly belie his misapprehension of the original undertaking, for its wording did not prohibit Mr. Cody from viewing the disclosure on the CDs or from having a printed copy of the disclosure on the CDs. The proposed undertaking was clearly directed at preventing copying of the CDs. The Judge's misapprehension of this evidence, strongly expressed as it was at paragraphs 56 and 153, doubtless led him to attribute the consequential delay to the Crown. Such attribution involves the application of a legal standard to a set of facts, and if done incorrectly, in criminal law is an error of law (*R. v. Biniaris,* 2000 SCC 15, [2000] 1 S.C.R. 381 and *R. v. Sheppard,* 2002 SCC 26, [2002] 1 S.C.R. 869). Accordingly, the Judge erred in attributing the 3 months 18 days delay to the Crown.

[25] That said, the disclosure issue in this case is unique and unusual, and as such requires examination. It composes three periods of time — the five-month period between January 12, 2010 when Mr. Cody was charged and June 30, 2010 when the Crown advised the disclosure was available, the seven-week period before the defence *Charter* application was filed and the subsequent two-month period before the issue was resolved.

[26] The Crown argues that the five months and 20 days delay it took for the original disclosure to be made available should be treated as an exceptional circumstance due to the complexity of the case in which Mr. Cody was involved. The evidence was that it composed 20,209 pages, 89 warrants (of various types) and involved 1,700 hours of police overtime to prepare. The Judge agreed that the disclosure was complex. Under *Jordan* the case would also be considered particularly complex, thereby justifying delay in addition to the usual delay (paragraph 71). However, I do not accept the Crown's argument that all of the five months and 20 days is due to complexity. It seems to me that a portion of this disclosure delay would be expected in any case, so I would apportion only four months of it to the exceptional circumstances at play in this case.

[27] The seven-week period of time it took for defence counsel to file the *Charter* application is a relatively short time, and seems particularly so because it occurred during the summer months. More important, however, is that litigation counsel, of whom there were several in this case, needed time to consult, confer, consider and hopefully negotiate in an effort to resolve matters before resorting to litigation. The record shows that discussions among counsel were ongoing during these weeks and that attempts were made to resolve the impasse before resort was had to the court. The seven-week delay before defence counsel filed the *Charter* application was a reasonable period of time within which to decide, in the circumstances of the case whether court action was required. To attribute it solely or directly to either the Crown or defence would fail to recognize the fundamental nature of the dispute, its importance to the administration of justice, and the ethical obligations on both counsel to use reasonable efforts to settle disputes before resorting to litigation.

[28] The time period between August 18 when the *Charter* application was filed and when the issue was resolved on October 18 (the hearing date which provided the impetus for resolution) is also a relatively short time, or at least well within the normal time required to obtain a hearing date for judicial resolution of an interlocutory disagreement.

[29] Mr. Cody's case was one part of a large and complex criminal litigation involving five other defendants. Such litigation often involves tangly disclosure issues, and the disclosure in this case was sensitive and contained private information respecting people other than accused persons. An important part of the proposed undertaking related to handling and copying of the CDs. It goes without saying that dissemination of disclosure on CDs can be much more easily effected and sent much farther afield than dissemination of paper disclosure. I also note that there is no suggestion that the Crown was improperly motivated in respect of refusing to hand over the disclosure without the undertakings or tardy in its communication with defence counsel.

[30] In this regard, the agreement ultimately reached by counsel "on the courthouse steps" in October 2010 provided, for the first time, for counsel as well as accused persons and potential expert witnesses to provide undertakings restricting use and dissemination of disclosure. Prior to then, the practice was for the Crown to obtain all-inclusive undertakings from counsel only.

[31] Accordingly, I see the delay resulting from this disclosure dispute as legitimately falling into two *Jordan* categories: case complexity and exceptional circumstances.

[32] Mr. Cody argues that his case was only a small part of a larger case and that it was not complex. I agree with Mr. Cody that his particular case was not complex. However, the initial disclosure respecting it involved several other co-accuseds and an interprovincial drug trafficking operation, and it was complex. The evidence was that initial disclosure in this case involved 20,209 pages, 89 warrants and 1,700 hours of police overtime to prepare it. Accordingly, at least up until disclosure occurred and the parameters of Mr. Cody's case were known to him and others, his case can be fairly described as complex. Again, I note that the Judge also viewed Mr. Cody's case as complex, for he said at paragraph 44 of his decision that the five months and 20 days taken for initial disclosure was reasonable "for a case of this complexity." I am cognizant of the fact that even in a simple case disclosure takes time and is therefore accounted for in the 30-month ceiling. Only the additional time due to the complexity of the case should be considered exceptional. Determining what this time is is not an exact science. However, the effort and material involved in preparing the disclosure in this case leads me to allocate four months of the five months and 20 days to its complexity.

[33] As important, however, is that initial disclosure in this case presented a new and unusual issue, for defence counsel were no longer prepared to personally assure that their clients would not disseminate the disclosure, which is what the prevailing practice had been. I therefore do not see the Crown's refusal to provide the disclosure as unreasonable. Neither do I see the position of defence counsel – that they could not undertake to abide by terms of an undertaking that were outside their control – as unreasonable. The dispute took several months to resolve, and its resolution resulted in a new and different protocol for releasing disclosure. In my view this situation can fairly be described as a discrete event that qualifies as an exceptional circumstance under *Jordan* (paragraphs 70-71). Accordingly, under *Jordan*, the consequent delay of three months and eighteen days, as well as four months of the initial disclosure, is deductible from the overall delay.

Crown Counsel's Unavailability

[34] In May 2012 the parties appeared at Mr. Cody's arraignment and requested a trial date. They were offered a trial date in September but

Crown Counsel was unavailable due to her commitment as counsel on a previously scheduled, unrelated jury trial. Mr. Cody's trial was consequently set for a date in November, two months later. The Judge attributed this two months delay to the Crown.

[35] The Court in *Godin* addressed delay occasioned by a defence counsel's unavailability for the first and earliest court date offered. In holding that the delay between the first Court date offered to the defence and the one ultimately set by the Court should not be treated as a defence waiver, Cromwell J. stated:

> [23] … Scheduling 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. …

[36] The Ontario Court of Appeal was of a similar view in *R. v. Tran*, 2012 ONCA 18, 288 C.C.C. (3d) 177 wherein it stated at paragraph 32:

> … parties should not be deemed automatically to be ready to conduct a hearing as of the date a hearing date is set. Counsel require time to clear their schedule so they can be available for the hearing as well as time to prepare for the hearing. These time frames are part of the inherent time requirements of the case. …

[37] In this case Crown Counsel's unavailability for the first and earliest date in September was due to a previously scheduled professional commitment. Like defence counsel in *Godin* and the parties in *Tran,* Crown Counsel should not have been required to hold herself in a perpetual state of availability for any one case under pre-*Jordan* law. This short, two-month delay between the first available trial date offered and the trial date ultimately set would therefore have been part of the inherent time requirements of Mr. Cody's case in a pre-*Jordan* analysis, and the Judge would have erred in attributing it to the Crown.

[38] However, I read *Jordan* as attributing readiness delays to the party unavailable to proceed when the opposite party and the Court are ready, subject to the defence being allowed sufficient preparation time (*Jordan* paragraph 65) (I presume the Crown would be accorded the same courtesy). Accordingly, under *Jordan*, there would be no deduction of this delay from the total delay as the Crown was requesting it and would be responsible for it (*Jordan* paragraphs 64-65). To my mind, however, this situation invokes the transitional exception, for it would be unfair for this two-month delay to count against the Crown in this case. The Crown was relying on the law as it existed at the time (paragraph 94), and had no notice that readiness delays

would be assessed on a new standard which did not incorporate evaluating the reasons why a party is not ready to proceed (*Jordan* paragraph 96). Had the Crown known of the new standard, the Crown may well have made other arrangements so that it could have accommodated the earlier date. Accordingly, under *Jordan*, this two-month delay is a transitional exception and deductible from the total.

Counsel's Appointment to the Bench

[39] The Judge allocated the four-month and 21-day delay resulting from Mr. Cody's counsel being appointed to the Bench (from November 6, 2012 to March 26, 2013) to the "other" category. I agree with this allocation, and say that under *Jordan*, the resulting delay would be an exceptional circumstance, as Mr. Cody concedes. Such delay is hardly attributable to Mr. Cody, who found new counsel within a reasonable time, but also hardly a factor that supports staying Mr. Cody's charges.

The McNeil Disclosure

[40] The Crown also challenges the Judge's allocation to the Crown of three months delay related to a *McNeil* disclosure issue and submits that it is attributable to the defence under *Jordan* because Mr. Cody chose to delay the matter without knowing whether there was a McNeil disclosure issue that would affect Mr. Cody at all.

[41] The facts are that just prior to the hearing of Mr. Cody's *Charter* application respecting the sufficiency of grounds for his arrest (set to commence on March 26, 2013), it came to the Crown's attention that one of the officers involved in the investigation leading to Mr. Cody's charges was the subject of an unrelated internal disciplinary hearing. The Crown advised Mr. Cody's counsel of the situation forthwith, and she was of the view that the scheduled *Charter* application should not proceed as planned but should be postponed until the outcome of the disciplinary process and the officer's status were known. The Crown did not object, and the *Charter* application was postponed. In the end, the officer involved was disciplined, but the discipline issue did not affect the officer's credibility or his involvement in the proceedings against Mr. Cody, and was not even adverted to by Mr. Cody when his *Charter* application was ultimately heard in October 2013.

[42] Disclosure, including *McNeil* disclosure, is the constitutional right of an accused person. The Crown is obliged to provide it – it is not a matter of choice or discretion. It is different from ordinary disclosure relating to the criminal proceedings before the court in that it is related to disciplinary issues respecting police officers who are involved in those proceedings but

the disciplinary matters are generally unrelated to the proceedings before the court. While *McNeil* disclosure may be available contemporaneously with ordinary disclosure, its existence and availability are determined by incidents and investigative and hearing processes which are independent of the criminal proceedings before the court. Accordingly, *McNeil* disclosure is almost always outside of the control of the prosecuting Crown and it was in this case. Crown Counsel advised Mr. Cody of the possible existence of *McNeil* disclosure as soon as it was known to them, and then disclosed the material as soon as they were in a position to do so.

[43] The time required to make ordinary disclosure available would be categorized as an inherent time requirement of criminal proceedings in a pre-*Jordan* analysis (*Morin* page 792). Absent unusual circumstances, of which there are none in this case, there is no reason why the time required for *McNeil* disclosure ought to have been otherwise categorized by the Judge.

[44] I reject the Crown's argument that the defence should bear responsibility for this delay under *Jordan*. In my view, the Crown advised the defence of a potential issue, and then agreed with defence counsel's request for a postponement. Neither party knew the import of the issue at that stage, although that became known shortly thereafter. Under a *Jordan* analysis, the delay occasioned by the *McNeil* disclosure issue in this case falls into the "exceptional circumstance" category. The *McNeil* disclosure issue was "outside the Crown's control in the sense that [it] was reasonably unforeseen [and] reasonably unavoidable", and the Crown was not in a position to remedy the consequent delay (*Jordan* paragraph 69). I would also describe the *McNeil* disclosure issue in this case as a discrete event (paragraph 71). As such, the resulting delay of five months and two days (from May 6, 2013 to October 8, 2013 is due to an exceptional circumstance and deductible from the total delay.

The Error in the Agreed Statement of Facts

[45] The Crown argues that the Judge erred in attributing to the Crown two delay periods – a four-month and 21-day delay and a one month and six-day delay – flowing from an error made in an Agreed Statement of Facts (ASF) which was filed in relation to Mr. Cody's *Charter* application respecting the sufficiency of grounds for his arrest. The ASF was prepared by the Crown, with the consent of Mr. Cody's counsel, for the purpose of shortening the court time anticipated to be needed for Mr. Cody's application challenging the sufficiency of grounds for his arrest. It was reviewed, approved, and signed off on by Mr. Cody's counsel before it was filed.

[46] The time-line respecting the error issue is that on January 2, 2014, two weeks after the Judge had dismissed Mr. Cody's *Charter* application respecting the sufficiency of grounds for his arrest, Crown Counsel advised Defence Counsel that there was an error in the ASF. The error concerned information provided by an investigating officer which was included in the ASF. The erroneous information was to the effect that the officer had certain knowledge respecting a third party at a certain point in time, when in fact the officer did not acquire that knowledge until a later date.

[47] On January 8, 2014, the Crown wrote to the Judge advising of the error, and the parties appeared in court on January 30, 2014. Mr. Cody's counsel requested time to make an application concerning the error. She was given until February 24, 2014 to file, and the matter was adjourned to February 27, 2014 to set a hearing date. On February 27 she was ill, and the matter was enlarged to March 6, 2014, when new dates were set for filing the application, the Crown's response, and the hearing. On March 28, 2014, Mr. Cody's application, based on abuse of process, was heard. On April 25, 2014 it was dismissed, but Mr. Cody's *Charter* application respecting the sufficiency of grounds for his arrest was reopened. On June 24, 2014, witnesses were recalled for additional cross-examination on the reopened *Charter* application, and on June 27, 2014, the Judge dismissed it, affirming his previous decision that there were sufficient grounds for Mr. Cody's arrest. Mr. Cody's counsel then advised the Court of an impending application for the Judge to recuse himself on the basis that he had been exposed to an erroneous fact. The recusal application was heard on August 22, 2014 and dismissed on September 10, 2014. (On that date Mr. Cody's counsel advised the Court of an impending section 11(b) *Charter* (*Askov*) application and dates were set for its hearing.) All told, it took eight months from when the parties first knew of the error in the ASF for the issue to run its course, directly followed by the delay occasioned by Mr. Cody's *Askov* application.

[48] The Judge used January 31, 2014 as the start date for calculating the delay respecting this issue, and then divided the consequent seven-month, ten-day delay into two parts. He attributed the delay from January 31 to June 13, 2014 to the Crown, and then attributed the delay related to the recusal application from June 28 to September 10 in equal measure to the Crown and defence.

[49] In the end, the error had no affect on the proceedings respecting Mr. Cody. It did not support his abuse of process application, which on the record before this Court does not even remotely suggest that abuse of

process could be established (see *R. v. A.K.,* 2016 NLCA 23 paras. 51-58 for a discussion of the doctrine). Neither did the error contradict the officer's testimony heard at Mr. Cody's reopened *Charter* application. In fact, the officer was not even questioned on it and neither counsel saw fit to address it in argument. In dismissing the reopened application, the Judge stated that the error in the ASF was immaterial. Likewise, the recusal application, based as it was on a completely insignificant error of no consequence, was virtually a non-starter. As well, there is no suggestion that Mr. Cody was misled or that his defence was compromised by the error at any time. In short, the error was a simple oversight completely meaningless to Mr. Cody.

[50] The Judge justified his allocation of the delay period to the Crown on the basis of the fact that the Crown had penned the ASF. The error was in the evidence of a police officer which was incorporated into the ASF, and as such cannot be said to have been "penned" by the Crown in the sense that it was the original product of the prosecuting Crown. Mr. Cody did not challenge the Crown's submission that he and the Crown were in the same position *vis à vis* their knowledge of the evidence supporting his application.

[51] The Crown argues that the delay ought to be attributed to actions of the defence on the basis that Defence Counsel ought to have spotted the error if she had been diligent in her review of the ASF. I do not agree. The fact remains that both Defence and Crown Counsel were responsible for the ASF and neither spotted the error before it was filed. An ASF is a joint document for which both parties bear some responsibility regardless of which party drafted which part. In that respect, it is my view that absent unusual circumstances, both parties must be presumed to share equally for errors therein.

[52] The error in the ASF was not the result of a deliberate action or choice of either the Crown, Mr. Cody's counsel or Mr. Cody himself. It was an inadvertent oversight, and while made by an officer of the state – a police officer – it was sanctioned by both parties in the context of the Crown's good faith motivation to expedite the hearing of Mr. Cody's *Charter* application – a *Charter* application he had chosen to make and on the basis of evidence which he had the responsibility to advance. The error had no bearing whatsoever on the officer's grounds for arrest, which was the issue before the Court, and then formed the basis for three additional and ill-conceived (see paragraph 49 above) litigation choices Mr. Cody made, which took, in turn, eight months to resolve and of which none succeeded.

[53] Under *Jordan*, this delay period could be categorized as an exceptional circumstance in the "discrete events" category (paragraph 71). The error was an "unforeseeable" development, and although it may have been avoidable if either or both parties had been more meticulous, it may also have been "unavoidable" in the sense that spotting the error in the police officer's evidence at that point in the proceedings may not have been easy. This delay could also be categorized as defence delay under *Jordan*, for although the error resulted from the oversight of both parties, the three resulting *Charter* applications were made by Mr. Cody based on the knowledge that the error was meaningless to his case. They can therefore be fairly described as frivolous or illegitimate (paragraph 65). In any event, the error was an exceptional event that caused Mr. Cody's trial to go awry (paragraph 73) and the resulting delay is accordingly deductible from the total delay.

[54] This delay period could also be deductible from the overall delay because it falls into the transitional exception category under *Jordan.* The law at the times when Mr. Cody made his three applications could legitimately have been attributed to the defence, for the applications were the litigation choices of Mr. Cody. Accordingly, it would be unfair to the Crown to count the delay occasioned by them in the 30 month ceiling. The Crown may have taken different positions the applications or may have done more to resist them, or may have sought determinations of legitimacy or frivolousness following their outcomes had they known of the new law.

[55] *Jordan* states that "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay" and "defence actions that are not frivolous will also generally not count against the defence" (paragraph 65). Such statements invite a consideration of whether Mr. Cody's *Charter* application challenging the grounds for his arrest and charges was legitimate or frivolous (*Jordan* paragraph 65). Unlike the record respecting Mr. Cody's applications following the error in the ASF, the record respecting this application is sparse and the matter was not argued on appeal. Hindsight evaluations by an appellate court in these circumstances are delicate exercises, and I am loathe to attempt to make such an evaluation. I have only the fact that it was dismissed to inform a determination of frivolousness. A determination of frivolousness on that basis would not, in my view, be appropriate or fair, for it may have been a legitimate, although unsuccessful, defence action. Moreover, such a determination could lead to a "chilling effect" on accused persons making *Charter* applications. On the other hand, if the defence only has to take

responsibility for applications that are declared frivolous or illegitimate, there remains wide latitude for defence applications to result in delay exceeding the 30-month ceiling.

[56] In any event, this Court is ill-equipped to evaluate the merits of Mr. Cody's *Charter* application challenging the grounds for his arrest and charges. While the parties could have addressed this fine point in their supplemental submissions, it is not surprising that they did not do so given the significant changes to the law which they had to address on short notice. The Judge allocated the delay associated with this application to Mr. Cody in accordance with the law at the time. Accordingly, I would treat the delay as a transitional exception under *Jordan*, because that was the law the Crown was relying on at the time, and it would not be fair to the Crown to have it count within the 30-month ceiling.

Additional Comments

[57] While not strictly relevant to a *Jordan* analysis, the Judge made a specific finding which I am compelled to address. The Judge inferred that the fairness of Mr. Cody's trial would be compromised by the delay in his being tried (paragraph 186). In so finding, the Judge alluded to "witnesses [moving] about and memoires [fading]". While the effect of delay on the availability and memories of witnesses can be prejudicial to both an accused and the Crown, it is the accused who is more often thought to be the beneficiary of delay, unavailable witnesses, stale evidence and faded memories (see *Askov*, page 1222, *Morin*, page 801, and *R. v. L.(W.K.)*, [1991] 1 S.C.R. 1091, page 1100). This is in part due to the legitimate requirement for reliable and credible evidence to meet the high standard of proof necessary to obtain criminal convictions.

[58] The Judge's inference that Mr. Cody will not have a fair trial is a serious finding, and one with which I cannot agree. I do not dispute that it is open to a judge to find that an accused will not have a fair trial due to a delay-related issue, but I do not accept that a judge can infer that a trial will be unfair on the basis of delay alone. To my mind, evidence of compromise to an accused's ability to make full answer and defence to his charges would be required in order for such an inference to be drawn (see *Conway* page 1690). I am mindful of the Court's ruling in *Godin*, but note its express statement that there was evidence in that case respecting a risk to the accused's ability to make full answer and defence which caused him prejudice. While pre-*Jordan* jurisprudence permits an inference of prejudice as a result of delay, I do not understand any of the authorities as permitting a

court to infer that a trial will be unfair on the basis of delay alone. Something more is required. In this regard, I observe that it is not uncommon that charges respecting serious indictable crimes are sometimes laid a long time after the commission of an offence. It cannot seriously be argued as a general proposition that accused persons in these cases will not have fair trials.

[59] In this case the Judge inferred that Mr. Cody would not have a fair trial on the basis of delay alone and did not explain, nor did Mr. Cody allege, a basis on which his trial would be unfair. Accordingly, the Judge erred in finding that the fairness of Mr. Cody's trial would be compromised by the delay in his being tried. *Jordan* does not alter this reasoning. Its presumptive ceiling for delay is a policy decision made by the Court to address the serious problem of trial delays; it does not stand for the proposition that trials which occur beyond the 30-month ceiling are unfair.

[60] In *Jordan*, the Court made clear that prejudice to an accused no longer plays an explicit role in determining reasonableness under section 11(b) because it is taken into account in determining the presumptive ceiling (paragraph 54).

[61] The Crown strongly argued that the judge erred in finding that Mr. Cody suffered significant prejudice. A date for Mr. Cody's trial was already set for November 5, 2012 when he gave notice on June 29, 2012 that he would be making a *Charter* application challenging the grounds for his arrest and charges. The dates set for trial were then scheduled to be used for the *Charter* application. That *Charter* application did not proceed as scheduled because Mr. Cody's new counsel, as a result of his former counsel's appointment to the Bench, needed time to prepare for it. It was rescheduled to be heard in March 2013, but that date was hijacked by the *McNeil* disclosure issue. The application was eventually heard in October 2013, dismissed on December 19, 2013, and just before the parties were to appear to obtain a date for trial, the issue of the error in the ASF arose. Then followed the long delay involving failed applications lasting until Mr. Cody's *Askov* application was heard and granted. The Judge did not consider the delays related to Mr. Cody's waivers, actions and voluntary litigation choices when assessing prejudice, and also when balancing the interests section 11(b) is designed to protect against the reasons for delay. Under pre-*Jordan* law, these circumstances would have provided a basis for concluding that Mr. Cody was neither significantly prejudiced nor concerned about being tried within a reasonable time, and that his section 11(b) *Charter* right was not breached.

Conclusion

[62] In this case Mr. Cody's waivers and his election to change counsel, account for delay of 14 months and two days. The delay due to the original disclosure issues and the appointment of his former counsel to the Bench are exceptional and account for twelve months and eight days. The delay due to the *McNeil* disclosure is exceptional and accounts for five months and two days and the delay flowing from the error in the ASF and the resulting ill-conceived defence applications is exceptional and accounts for seven months and ten days. The delays due to Crown counsel's unavailability and to Mr. Cody's *Charter* application respecting the grounds for his arrest and charges totaling five months and 27 days are transitional exceptions deductible from the total. Taken together, all of the deductible delays calculate to 43 months and six days. When subtracted from the total, the result is 16 months and three days, well under the 30-month presumptive ceiling.

[63] In the result, Mr. Cody has not established that the delay in his case was unreasonable. Accordingly, there is no basis under *Jordan* to conclude that Mr. Cody's section 11(b) *Charter* right was breached, and therefore no basis on which to stay his charges. Accordingly, the Judge erred in doing so.

Disposition

[64] I would allow the Crown's appeal, and remit the matter to the Supreme Court Trial Division for trial.

_____

L. R. Hoegg J.A.

I concur: _____

B. G. Welsh J.A.

Dissenting Reasons by White J.A.:

[65] The Crown appeals from a decision staying drug and weapons charges against Mr. Cody based on unreasonable delay. My colleague, Hoegg J.A.

concludes that there is no basis for the stay and would remit the matter for trial. With respect, I disagree.

[66] In *Vassell*, the Supreme Court found that a delay of 3 years for a 3 day trial was too long. In Mr. Cody's case, 5 years for a 5 day trial (a phenomenally long time in any circumstances and twice the presumptive ceiling in *Jordan)* simply flies in the face of the section 11(b) constitutional promise (made to the accused and to society) of trial within a reasonable time. I would deny the appeal.

Background

[67] As part of the denouement of a major drug investigation called Operation Razorback, the police decided to arrest a suspected drug trafficker, Evan Brennan-Smith, and the next person he met. That next person happened to be James Cody. The police searched Mr. Cody's vehicle and found cocaine, marihuana, and a stun gun.

[68] On January 12, 2010, Mr. Cody was charged with two counts of possession for the purpose of trafficking, one count of possessing a prohibited weapon, and one count of possessing a weapon while prohibited from doing so.

[69] Progress toward trial was very slow, and on December 19, 2014, the trial judge stayed the charges against Mr. Cody based on unreasonable delay. He summarized his reasoning and the whole narrative in a table at paragraph 147:

Time Period	Reason	Length of Delay	Characterization
12 Jan 2010–30 Jun 2010	Preparation of Crown disclosure	5 months 20 days	Inherent delay
1 Jul 2010–18 Oct 2010	Dispute of requested undertaking by the Crown	3 months 18 days	Actions of the Crown
19 Oct 2010–11 Mar 2011	Awaiting preliminary inquiry	4 months 24 days	Inherent delay
12 Mar 2011–7Apr 2011	Delay due to change in counsel	27 days	Actions of Accused
8 Apr 2011–2 Apr 2012	Delay due to defence counsel's availability	11 months 25 days	Accused Askov waiver
3 Apr 2012–5 Nov 2012	Delay in part, due to Crown availability	7 months 2 days	Actions of the Crown, (2 months) and inherent delay (5 months)

Time Period	Reason	Length of Delay	Characterization
6 Nov 2012– 26 Mar 2013	Defence counsel appointed to Provincial Court	4 months 21 days	Other factors
27 Mar 2013– 6 May 2013	Delay to accommodate accused's travel	1 month 11 days	Accused Askov waiver
7 May 2013– 8 Oct 2013	*Charter* application delayed due to Crown McNeil disclosure	5 months 2 days	Actions of the Crown (3 months) Inherent delay (2 months 2 days)
9 Oct 2013– 30 Jan 2014	Accused's *Charter* application	3 months 27 days	Actions of the Accused
31 Jan 2014– 27 Jun 2014	Delay due to errors in the Agreed Statement of Facts	4 months 28 days	Actions of the Crown (4 months 21 days Inherent delay (7 days)
28 Jun 2014– 10 Sep 2014	Accused's application for recusal	2 months 13 days	Actions of both the Crown (1 month 6 days) actions of Accused (1 months 7 days)
11 Sep 2014– 30 Jan 2015	Delay to set trial date	4 months 19 days	Institutional delay
TOTAL		60 months 21 days*	
*Some minor variance is recognized due to the fact that not all months have 30 days.			

Analysis
Introduction

[70] After the hearing of this appeal but before the decision, a majority of the Supreme Court of Canada introduced a new framework for assessing unreasonable delay in *Jordan*. This is one of the first appellate decisions addressing fundamental questions about the application of this framework.

[71] In answering these questions, an intermediate appellate court must attempt to fill in the broad lines drawn by the higher court so the new framework operates as fairly and practically as possible. That begins with understanding what the new framework hopes to achieve and how it could fail.

[72] The majority in *Jordan* hopes that the new framework will prove more predictable, less confusing, and less complex than the old *Morin* factors (paragraphs 31–37). It will help end a culture of tolerance for delay (paragraphs 39–44) and promote good behaviour (paragraph 107 and 137). And it will do so without leading to a sudden flood of transitional stays (paragraphs 92-94).

[73] The minority in *Jordan* fears that the new framework will not "[avoid] complexity" but instead "simply [move] the complexities of the analysis to a new location" (paragraph 296). It fears that for most simple cases, "the ceilings are so high that they risk being meaningless" (paragraph 276). For complex cases, conversely, the new ceilings will not be achievable even in the medium or long term (paragraphs 283–284). And the minority doubts whether the transitional provisions can prevent a flood of stays in the short run (paragraph 285).

[74] What would a successful implementation of *Jordan* look like? In the short run, most cases that were reasonable under *Morin* will be protected by the transitional provisions. In the medium run, the ceilings in *Jordan* will be challenging, especially for complex cases, but the framework will give both Crown and defence incentives to act promptly and efficiently. Stays will increase temporarily and then recede. A virtuous cycle of promptness will set in. In the long run *Jordan* will mean less delay but not more stays.

[75] As the majority wrote in *Jordan*, "Real change will require the efforts and coordination of all participants in the criminal justice system" (paragraph 137), including courts (paragraph 139). An intermediate appeal court's primary role in that process is to ensure that *Jordan*, as interpreted and applied, provides the right incentives and rewards both Crown and defence for promptness.

The *Jordan* Framework

[76] The new approach to unreasonable delay was summarized at paragraph 105 of *Jordan*:

> There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is … 30 months for cases in the superior court …. Defence delay does not count towards the presumptive ceiling.
>
> Once the presumptive ceiling is exceeded, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably

> be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.
>
> …
>
> For cases currently in the system, the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

[77] I will consider each step in turn.

Was the Ceiling Exceeded?

[78] The first step in a *Jordan* analysis is to calculate the total delay. Mr. Cody was charged on January 12, 2010. His trial was scheduled to end 60 months 21 days later, on January 30, 2015.

[79] The second step is to deduct time attributable to defence delay. Defence delay includes explicit waivers, which add up in this case to 13 months and 5 days. Defence delay also includes "delay caused solely by the actions of the defence": (*Jordan* at paragraph 63). The Crown and Hoegg J.A. have suggested three periods that could be attributed to defence delay.

Change of Counsel

[80] Mr. Cody changed counsel on November 29, 2010. Crown counsel wrote back suggesting that disclosure would be available for the second week of December. It was not ready until January 11, 2011, 43 days later.

[81] At the time of the change, a focus hearing was scheduled for January 26, 2011, and a preliminary inquiry for March 11. When the matter was called on January 26, counsel dispensed with the focus hearing and rescheduled the preliminary inquiry for April 7 because defence counsel "wasn't prepared to proceed with the focus hearing this morning, nor is he able to proceed with the Preliminary on the date that it was scheduled for".

[82] Defence delay must include delays caused by voluntary changes of counsel. Otherwise the *Jordan* framework would be too susceptible to manipulation.

[83] In this case, defence counsel asked for a short adjournment of 27 days to prepare. That is significantly shorter than the 43 days the Crown took to provide copies of disclosure CDs. If defence counsel had been available on March 11 but unprepared to proceed, the proximate cause of the delay would

have been late disclosure not the change of counsel. But since defence counsel was unavailable, the 27-day adjournment is defence delay.

McNeil Disclosure

[84] Late on the Friday afternoon before Mr. Cody's *Charter* challenge to the grounds for his arrest, Crown counsel learned that one of the officers involved in Operation Razorback was under investigation. Crown counsel immediately and properly informed defence counsel, but had few details.

[85] The investigation was finally completed and disclosed by late June, but the Court was unable to schedule the matter during the summer recess, and defence counsel was booked for September, so the hearing was not scheduled until October 8, five months and two days later. In the end the allegations against the officer were true but irrelevant and not argued.

[86] The Crown argues that this delay is attributable to the defence "because it was the defendant's choice to await the outcome of a disposition hearing when learning of the existence of an allegation". But the defence does not have to choose between full answer and defence and a trial within a reasonable time, as the Court explained in *Jordan*:

> [65] [D]efence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. … We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. …

[87] If the allegation had been plainly immaterial, it would have been unreasonable for the defence to insist on an adjournment. The Crown, however, offered no information about the allegation. The defence could hardly proceed without knowing whether an officer was accused of, for example, perjury or planting evidence.

The Agreed Statement of Facts

[88] Hoegg J.A. suggests that three applications taken by the accused were frivolous and the time they took is thus defence delay.

[89] The treatment of defence applications is a particularly delicate part of *Jordan*. If it is too lax, defence counsel will have incentives to create delay with borderline applications. If it is too strict, the retrospective recharacterization of legitimate applications will undermine the operation of the thirty-month ceiling.

[90] *Jordan* sets out three principles about when defence applications constitute defence delay:

1. “Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are *the most straightforward examples* of defence delay.” (Emphasis added; paragraph 63.)
2. “[D]efence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. … [D]efence applications and requests that are not frivolous will also *generally* not count against the defence.” (Emphasis added; paragraph 65.)
3. “[F]irst instance judges are uniquely positioned to gauge the legitimacy of defence actions.” (paragraph 65.)

[91] *Jordan* calls on trial judges to be fairly aggressive and “dismiss [frivolous] applications and requests the moment it becomes apparent they are frivolous” (paragraph 63). But an application that is not dismissed as frivolous can nevertheless be defence delay if it is “aimed at causing delay”.

[92] The inquiry cannot focus on defence counsel’s subjective intentions. *Jordan* aims to promote cooperation not finger-pointing. Instead, the analysis must consider the merits of the application, the stakes, the time required, and the stage of the proceedings when the application was filed. An application filed as the 30-month ceiling approaches may be viewed differently from the same application filed promptly at the beginning of proceedings.

[93] In this case, the three contested applications flowed from an error in an agreed statement of facts that was used for the *voir dire* on the admissibility of the drugs and weapons. The agreed statement of facts was drawn up primarily by a police officer and accepted by both counsel. It erroneously stated that the police knew before arresting Mr. Cody that one Martin Tulk had been asked to move out of his house—a peripheral point. However, the error was only discovered after a decision on the *voir dire*: 2013 NLTD(G) 181, 351 Nfld. & P.E.I.R. 1.

[94] After being informed of the error in the agreed statement of facts, Mr. Cody made the first contested application. He sought to reopen the *voir dire*, as the error had shaken his confidence in the agreed statement of facts and he wanted to test the officer’s evidence under oath. He also, more ambitiously, said the error constituted an abuse of process and sought a stay of proceedings.

[95] The Court dismissed the application for a stay but reopened the *voir dire*: 2014 NLTD(G) 52, 351 Nfld. & P.E.I.R. 31. On the rehearing—the second contested application—several witnesses were recalled but not

shaken on cross-examination. The Court reaffirmed its original decision that the evidence was admissible: 2014 NLTD(G) 72, 351 Nfld. & P.E.I.R. 47.

[96] It is difficult to see how the time spent on these first two applications could be defence delay. They flowed naturally from an error in a document drafted by a police officer and approved by the Crown, and the defence request to reopen the *voir dire* was not only reasonable but successful. (The abuse-of-process argument was fanciful but did not cause any additional delay.)

[97] As it turned out defence counsel failed to shake the police witnesses on the reopened *voir dire*. It is difficult for an appellate court to say in hindsight that the result was inevitable. The results of cross-examination are difficult to predict; the trial judge's decision to reopen the *voir dire* implies that he saw a real chance of a different result.

[98] Reopening the *voir dire* was a legitimate response to the charges and circumstances. There is no basis for deducting the 4 months 28 days associated with the first two contested applications.

[99] Mr. Cody then took the third contested application, arguing that there was a reasonable apprehension of bias because the trial judge was exposed to the erroneous information in the agreed statement of facts and because he made some innocuous remarks in hearing the application (2014 NLTD(G) 100, 255 Nfld. & P.E.I.R. 108). Although the trial judge understandably treated this application with care, it was meritless. Judges are presumed to be able to disabuse themselves even of highly prejudicial information, and the information in the agreed statement of facts was not.

[100] In addition to the application's frivolousness, the circumstances surrounding the application show that it was objectively likely to cause unreasonable delay. The case was already four-and-a-half years old, and defence counsel had alluded to the possibility of an *Askov* application months earlier. As soon as the disqualification application was filed the defence filed its *Askov* application. The 2 months and 13 days this application consumed are defence delay.

[101] The total defence delay is 13 months 5 days (waivers) plus 27 days (change of counsel) plus 2 months 13 days (disqualification application): 16 months 24 days in all. Subtracting that from the total delay leaves 43 months 28 days.

Exceptional Circumstances

[102] The next step is to consider whether there are any exceptional circumstances that explain the delay. In this case, the Crown points to a number of discrete events and also to the complexity of the case.

[103] Although exceptional circumstances need not be rare or uncommon (*Jordan* at paragraph 69), the class of exceptional circumstances must not be interpreted so broadly that it encompasses every cause of delay. There are always reasons when a case takes an inordinately long time. If each reason for delay is an exceptional circumstance, the *Jordan* framework will fail to guarantee the right to trial within a reasonable time or to provide incentives for promptness.

The Appointment of Walsh P.C.J.

[104] The defence accepts one discrete exceptional circumstance. With a trial date approaching, defence counsel was appointed to the provincial court, leading to 4 months and 21 days delay.

McNeil Disclosure

[105] The Crown argues that the *McNeil* disclosure is an exceptional circumstance.

[106] The allegations against and investigation of a police officer was an "[u]nforeseeable or unavoidable development". But the Crown also has the onus of showing that the allegations were the cause of the delay. The record does not suggest that.

[107] The police informed the Crown about the allegations the Friday before the hearing. Because the investigation was incomplete they gave him only "limited" information about the allegation. Crown counsel appears to have passed on even less information to defence counsel.

[108] That course was calculated to result in an adjournment. As the trial judge said, "Not knowing the details of this potential disclosure, [defence counsel] could do little but acquiesce to a delay" (paragraph 106).

[109] In the end, the allegations resulted in discipline and were disclosed. They were immaterial to Mr. Cody's case and were not relied on. They appear to have just cleared the low threshold for disclosure.

[110] If the police had given the Crown counsel general information about the allegations, especially before the last minute, Crown counsel might have been able to conclude that the information was at most barely relevant. The Crown could have provided the defence with details, perhaps without

prejudice. The defence might not have sought an adjournment, or if it insisted, the Crown might have had grounds to request an *Askov* waiver.

[111] When an exceptional event threatens to delay a trial, the Crown has an obligation to mitigate the delay as much as possible. That duty extends to the police also. As *Jordan* at paragraph 75 states: "[A]ny portion of the delay that the Crown *and the system* could reasonably have mitigated may not be subtracted" (emphasis added). As Charron J. explained in *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at paragraph 23, "While the roles of the Crown and the police are separate and distinct, the police have a duty to participate in prosecutions". See also *Jordan* at paragraphs 41, 50, and 116.

[112] Sometimes preventing delay may require the Crown and police to disclose more and earlier than the bare constitutional minimum. The policy of doing as little as possible, as late as possible, is apt to produce delay.

[113] This episode exemplifies the "culture of delay" that *Jordan* is meant to address. Crown counsel was unable to volunteer any information beyond the constitutional minimum. Defence counsel could not proceed in the dark. And so five months was wasted waiting for an irrelevancy.

[114] If I am wrong and the *McNeil* disclosure is an exceptional circumstance, then it caused only 1 month and 22 days of delay. The Crown and the defence were prepared to proceed from June 28, 2013; the application was delayed until October 8 because no judge or courtroom was available during the summer.

The Agreed Statement of Facts

[115] The Crown also argues that the error in the agreed statement of facts was an exceptional circumstance.

[116] The error was inadvertent and understandable—but nevertheless avoidable. The agreed statement of facts was drafted by a police officer and reviewed by the Crown. *Jordan* stresses that "[e]xceptional circumstances lie *outside the Crown's control*" (emphasis in original); the error in this case was within the Crown's control.

[117] Defence counsel also had an opportunity and responsibility to detect the error. But the document was primarily drafted by the Crown and police, and the focus of the analysis is on whether the Crown could have prevented the delay, not whether anyone else could.

Initial Disclosure

[118] To protect sensitive information in the Operation Razorback disclosure, the Crown refused to disseminate the information unless defence counsel signed an undertaking that

1. The CDs will not be copied without prior written consent of the Crown.
2. Upon the conclusion of the proceedings on the charges, and Operation Razorback in the event that Mike King ceases to act as legal counsel for the Accused with respect to the said charges, all CDs shall be returned to the Crown upon written request.
3. Nothing in this undertaking precludes the making of prints of the information contained on the CDs provided the printed materials are disseminated solely for the use of counsel, the Accused and any other person for the making of full answer and defence.

[119] Defence counsel rightly refused to sign this undertaking. He could not refuse to give Mr. Cody a copy of the disclosure. But once he gave Mr. Cody a copy, he could not undertake that Mr. Cody would not copy the CDs or disseminate information or that Mr. Cody would return the disclosure.

[120] After three months and 18 days, the Crown and the defence came to an agreement on the steps of the courthouse. Defence counsel would undertake not to copy the CDs or disseminate the information in them, and Mr. Cody would sign a separate similar undertaking.

[121] The majority describes the delay as an exceptional circumstance because the Crown's position reflected current practice and cannot have been unreasonable. It is not obvious why it took the Crown months to acknowledge that defence counsel cannot sign an undertaking guaranteeing the accused's good behaviour. But regardless, the question is not whether the Crown's position was reasonable; it is whether the delay was outside the Crown's control. Here, it was clearly within the Crown's discretion to promptly resile from the patently unreasonable position of expecting defence counsel to undertake to do something over which he had no control.

[122] As the majority said at paragraph 79 of *Jordan*, "Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s. 11(b) right".

Complexity

[123] The Crown argues, and Hoegg J.A. accepts, that the initial disclosure was exceptionally complex.

[124] *Jordan* does not instruct courts to review the complexity of each step in isolation. The question is whether the case *as a whole* is complex enough to justify the delay, either because of its issues or its evidence: see paragraphs 77–80.

[125] Although the initial disclosure in this case was indeed exceptionally complex, it accounts for less than a tenth of the total delay in this case. Even after deducting defence delay and discrete events, the one complex phase represents 5 months and 20 days out of 39 months and 7 days—about an eighth.

[126] The rest of the case ought to have been fairly simple: a one-day preliminary inquiry, a five-day *voir dire* on the admissibility of the drugs and weapons, and a five-day trial. Despite the volume of the disclosure, the issues were fairly narrow and did not require inordinate preparation or trial time. This case ought to have been significantly simpler than a typical murder trial.

[127] This was a case of simple to moderate complexity that went off the rails because of a series of mishaps and missteps. Once a case goes off the rails it becomes more complex—in this case there were several additional pretrial applications, for example. These sequelae are not part of the case's complexity. They are either discrete events or defence delay or they count towards the ceiling.

Transitional Exceptional Circumstance

[128] Hoegg J.A. considers a number of discrete events as transitional exceptional circumstances.

[129] As with complexity, the transitional exception in *Jordan* does not contemplate a review of each step in isolation. Instead, there is a single transitional exception that applies "when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed" (paragraph 96). The analysis is flexible and contextual (paragraph 94).

[130] The purpose of the transitional exception is to prevent a sudden glut of stays in cases that were plainly reasonable under the old law. It is not to help the Crown overturn stays entered under the old law. The delay in this case was over five years. The trial judge thought it was unreasonable without the benefit of the guidance set out in *Jordan*, and I was prepared to dismiss the Crown's appeal based on his sound reasoning. Even if I would have been

wrong, this case was at least close to the line before *Jordan*. It would be anomalous to use the transitional exception to save it.

[131] The particular incidents Hoegg J.A. refers to are not compelling. The first is a delay of "roughly two months" when the defence and court were prepared for a trial in early fall 2012, but Crown counsel was unavailable until November. The trial judge attributed that delay to the actions of the Crown under the old law, and I agree.

[132] My colleague draws an analogy to *Godin*, where Cromwell J. said defence counsel are not expected to "hold themselves in a state of perpetual availability". But the roles of Crown and defence counsel are asymmetric. As Cory J. said in *Askov* at 1225:

> It must be remembered that it is the duty of the Crown to bring the accused to trial. It is the Crown which is responsible for the provision of facilities and staff to see that accused persons are tried in a reasonable time.

[133] Often, when busy Crown counsel and busy legal aid counsel cannot find dates, there is a sense in which the state bears the ultimate responsibility for the lack of resources on *both* sides.

[134] Nor is it obvious how *Jordan* would have affected Crown counsel's availability. The total delay up to September 2012 was already 32 months – about twice the guideline from *Morin*. Even after deducting *Askov* waivers the case was over the applicable guideline. The Crown has not suggested what it might have done differently in light of *Jordan*, but if it had reasonable alternatives it should have employed them even under the old law.

[135] The second incident Hoegg J.A. cites is the error in the agreed statement of facts. As the error was inadvertent, I do not understand how it could be "based on the parties' reasonable reliance on the law as it previously existed" (*Jordan* at paragraph 96).

[136] The third incident is the *voir dire* into the admissibility of the guns and weapons. The underlying *Charter* application was made by Mr. Cody, not the Crown, and there has been no suggestion that the application would have proceeded differently if the case had been tried under *Jordan* instead of the old law. Again, this delay is not connected to "the parties' reasonable reliance on the law as it previously existed".

Additional Comments

[137] My colleague comments on the trial judge's conclusions with respect to prejudice suggesting that the trial judge inferred that Mr. Cody would not have a fair trial. My colleague goes on to state that she does not understand any of the authorities as permitting a court to infer that a trial will be unfair on the basis of delay alone. With respect, this view is inconsistent with *Jordan* at paragraph 54:

> Once the ceiling is breached, one presumes that accused persons will have suffered prejudice to their Charter protected liberty, security of the person, and fair trial interests …

[138] My colleague also observes that it is not uncommon for charges respecting serious indictable offences to be laid a long time after the commission of an offence and states that it cannot be seriously argued that accused persons in these cases will not have fair trials. This view is unrelated to the issue at hand. The section 11(b) protection only comes into play *after* charges are laid. It is the elapsed time between laying of charges and trial that is the subject matter of any stay application – not the time from the commission of an offence.

Conclusion

[139] The case against Mr. Cody was delayed for 39 months and 7 days even after deducting defence delay and discrete exceptional circumstances. The transitional exceptional circumstance does not apply, both because the delay was excessive even under the old law and because the delay was due to missteps and mishaps and not the parties' reasonable reliance on the old law.

[140] I would deny the Crown's appeal and uphold the stay imposed by the trial judge under both a pre-*Jordan* and post-*Jordan* analysis.

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C. W. White J.A.