



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. King*, 2018 NLCA 66

Date: November 29, 2018

Docket Number: 201701H0031 & 201701H0039

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

ROBERT MICHAEL KING

RESPONDENT

Coram: Barry, Hoegg and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201401G1124
(2016 NLTD(G) 45, 2016 NLTD(G) 205
& 2017 NLTD(G) 58)

Appeal Heard: May 7, 2018

Judgment Rendered: November 29, 2018

Reasons for Judgment by: Barry J.A.

Concurring in the Result with Separate Reasons: Hoegg J.A.

Concurring with Hoegg J.A.: O'Brien J.A.

Counsel for the Appellant: Paul B. Adams

Counsel for the Respondent: Averill Baker

Barry J.A.:

I. INTRODUCTION

[1] The Crown appeals two decisions of the trial judge following pre-trial applications in a case arising from alleged unlawful exportation of ephedrine¹ into the United States from Canada.

[2] The first decision excluded evidence from postal seizures under section 24(2) of the *Charter*². The trial judge found that the searches and seizures were unreasonable and in violation of Mr. King's section 8 *Charter* rights because the trial judge concluded that information submitted by the R.C.M.P. to obtain judicial authorization was inadequate and misleading and the Canada Post officials acted as agents of the R.C.M.P.

[3] The second decision entered a stay of proceedings because the trial judge found that post-charge delay resulted in a breach of Mr. King's section 11(b) *Charter* right to a trial within a reasonable time.³

[4] Mr. King is charged under section 6 of the *Controlled Drugs and Substances Act* (the "*CDSA*")⁴ in relation to the exportation of ephedrine, a "Class A Precursor" substance under Schedule VI of the *CDSA*. He takes the position that section 5 of the *Precursor Control Regulations*⁵, made pursuant to the *CDSA*, exempts from the export permit requirement ephedrine in quantities of 0.4 grams per package or less.

[5] The interpretation of the *Precursor Control Regulations* is a matter to be resolved at trial, should the Crown be successful on this appeal. I will, however, go into some detail regarding the chronology of events in this case, so that the degree of complexity of the issues may become evident.

¹ Ephedrine is a substance which may be used in the production of methamphetamine. It is regulated under legislation in Canada and the United States.

² *Canadian Charter of Rights and Freedoms*, s. 11, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (the "*Charter*"); *R. v. King*, 2016 NLTD(G) 45, 380 Nfld. & P.E.I.R. 70.

³ *R. v. King*, 2017 NLTD(G) 58, 137 W.C.B. (2d) 332.

⁴ S.C. 1996, c. 19 (the "*CDSA*").

⁵ SOR/2002-359.

II. THE ISSUES

[6] Two main issues arise:

(i) Did the trial judge err in finding that there was a breach of section 11(b) of the *Charter* by delay in proceeding to trial, and that a stay should be entered pursuant to section 24(1) of the *Charter*?

(ii) Did the trial judge err in finding that a violation of section 8 of the *Charter* occurred?

[7] The section 8 analysis gives rise to two secondary questions, to be determined should the stay be lifted:

(i) Did the trial judge err in finding that the Canada Post inspectors were acting as agents of the R.C.M.P. when they opened and inspected packages seized from Mr. King?

(i) Did the trial judge err in finding that the R.C.M.P. officer who requested that packages handled by Canada Post for export be seized was not a “customs officer” within the meaning of the provisions of the *Canada Post Corporation Act*⁶ and the *Customs Act*⁷?

[8] The section 11(b) analysis requires a determination of the extent to which post-charge delays arising from completing disclosure, scheduling applications and awaiting judicial decisions should be included in determining whether there has been a violation of the *Charter* section 11(b) requirement of trial within a reasonable time.

[9] Because I have concluded that a breach of *Charter* section 11(b) occurred and the stay of proceedings is warranted, I do not need to deal with the section 8 argument. For the same reason, I do not need to address the respondent’s cross-appeal of the trial judge’s decision to uphold the validity of certain judicial authorizations.

III. THE RELEVANT LEGISLATION AND REGULATIONS ON EXPORTING

[10] Section 6 of the *CDSA* provides:

⁶ R.S.C. 1985, c. C-10.

⁷ R.S.C. 1985, c. 1 (2nd Supp).

Importing and exporting

6 (1) Except as authorized under the regulations, no person shall import into Canada or export from Canada a substance included in Schedule I, II, III, IV, V or VI.

Possession for the purpose of exporting

(2) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II, III, IV, V or VI for the purpose of exporting it from Canada.

Punishment

(3) Every person who contravenes subsection (1) or (2)

...

(b) if the subject matter of the offence is a substance included in Schedule III, V or VI,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or

(ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months; ...

[11] In a prosecution under the *CDSA*, the determination of guilt shall be influenced by the court's interpretation of provisions of the *CDSA*, including section 6, as well as the *Precursor Control Regulations*, including regulations 5 and 6, which state as follows:

5. With respect to any Class A precursor, a person who only sells, provides or possesses for the purpose of sale or provision is exempt from the requirements of these Regulations in respect of the activity if the person

...

(b) sells or provides Class A precursors

...

(ii) in the case of a precursor set out in column 1 of the schedule, only in a quantity, per transaction, that does not exceed the maximum quantity, expressed as an absolute amount or per package, specified for the precursor in column 2 of the schedule, and

(iii) in the case of a preparation or mixture containing a precursor set out in column 1 of the schedule, only in a quantity, per transaction, that

does not exceed the maximum quantity, expressed as an absolute quantity or per package, specified for the contained precursor in column 2 of the schedule.

6. (1) No person other than a licensed dealer may

- (a) produce a Class A precursor;
- (b) package a Class A precursor; or
- (c) sell or provide a Class A precursor.

(2) No person may possess a Class A precursor for the purpose of an activity mentioned in subsection (1), except to the extent necessary to conduct the activity in relation to the precursor, as authorized by the person's licence.

(3) A licensed dealer may import or export a Class A precursor or possess a Class A precursor for the purpose of export if the dealer complies with the conditions set out in section 7.

[12] Columns 1 and 2 of the Schedule to the regulations state as follows with respect to ephedrine:

SCHEDULE (Sections 5, 8, 9, 91.3, 91.9, 91.92 and 92)

Item	Column 1	Column 2
...	Precursor set out in Part 1 of Schedule VI to the Act	Maximum Quantity (expressed as an absolute amount or per package)
5	Ephedrine (erythro-2-(methylamino)-1-phenyl-propan-1-ol)	0.4 g per package
...		

[13] Mr. King's counsel has indicated that, had the matter proceeded to trial, Mr. King would have taken the position that the Crown's disclosure indicated that all shipments alleged to have been sent by him to the United States were within the maximum allowable quantity of 0.4 grams under section 5 of

the *Precursor Control Regulations*. Bottles seized from him each contained 50 tablets of 8 milligrams each (0.4 grams in total per bottle). Mr. King would submit that section 5 of the *Precursor Control Regulations* exempts him from the requirement of a licence or permit. The Crown says section 5 of the Regulations only exempts sales within Canada, and does not apply to the export of ephedrine from Canada, and, therefore, Mr. King should have had a licence or permit when exporting to the United States.

IV. OUTLINE OF SEARCH AND SEIZURE STEPS

[14] Canadian law enforcement agents were unsure in 2013 whether the export of ephedrine to the United States constituted an offence under the relevant legislation and regulations. One investigation in 2011 and 2012 into the actions of Mr. King was discontinued without charges being laid. A renewed investigation in 2013 saw Mr. King being charged with the current three breaches of the *CDSA*.

[15] As part of the investigation, the R.C.M.P. requested the assistance of Canada Post inspectors to have packages opened and containers of ephedrine removed from the mail.

[16] The process of search and seizure began when, in November of 2011, postal clerks became suspicious of mailings by an R. King to the United States. A postal inspector met with the R.C.M.P. on January 6, 2012, and on January 19, 2012. He revealed that some 119 parcels had been mailed by R. King. A further 360 parcels were mailed by January 27, 2012.

[17] The R.C.M.P. asked that 3 parcels be seized by Canada Post inspectors and sent to the R.C.M.P. in Halifax, Nova Scotia for examination. Later that day (January 27th) another 144 parcels were mailed to the United States.

[18] A decision was taken not to prosecute based upon the 2011 and early 2012 investigation, following discussions between the R.C.M.P., the Crown Attorney's Office and Health Canada. The Crown advised Canada Post around February 2, 2012 that the file was closed on the first investigation due to other R.C.M.P. divisional priority investigations.

[19] On May 27, 2012, the R.C.M.P. advised Canada Post that it was reopening the investigation. The charges presently before the court were laid on July 25, 2013, as a result of that reopened investigation.

[20] At a disclosure application hearing on May 1, 2015, the Crown admitted that R.C.M.P. records of the second investigation revealed competing views within the R.C.M.P. regarding the legality of the activity being carried out by Mr. King. On February 1, 2012, the R.C.M.P. by conference call had reviewed the findings from the seizure and examination of 12 bottles, each of which contained 50 eight-milligram tablets of ephedrine (0.4 grams per bottle). The coordinator of “O” Division of the R.C.M.P. at the time expressed the opinion that this did not constitute an offence as the bottles were not over the Health Canada threshold of 0.4 grams. At least one R.C.M.P. officer referred to a “loophole” in exporting regulations. But by May 27, 2012, the R.C.M.P. had decided to reopen the investigation. Three charges were laid against Mr. King on July 25, 2013, alleging unlawful export, unlawful possession for the purpose of export, and unlawful attempts to export.

[21] Mr. King sought and obtained an order excluding evidence relating to the contents of packages and containers inspected by Canada Post officials, on the basis that it was obtained without a valid search warrant, contrary to section 8 of the *Charter*.

V. THE JORDAN-CODY ANALYTICAL FRAMEWORK

[22] *R. v. Jordan*⁸ came down approximately 36 months after the laying of charges in the present case. By a five to four decision on July 8, 2016, the Supreme Court of Canada held that to cure a culture of complacency towards delay in the criminal justice system, a significant change was required in the analytical framework then employed to promote the section 11(b) *Charter* right to trial within a reasonable time. The Court abandoned the framework utilized since *R. v. Morin*⁹, which the Court concluded had encouraged retrospective inquiry regarding the reason for delay, rather than a proactive approach.

A. The Previous Morin Approach

[23] *Morin* required the court to balance 4 factors:

1. The length of the delay;
2. Defence waiver;

⁸ *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. See also the companion case, *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741.

⁹ *R. v. Morin*, [1992] 1 S.C.R. 771, 15 W.C.B. (2d) 276.

3. The reasons for the delay including the inherent needs of the case, defence delay, Crown delay, and institutional delay; and
4. Prejudice to the accused's interests in liberty, security of the person and a fair trial. Prejudice could be actual or inferred from the length of the delay.

B. The New Approach

[24] The Court in *Jordan*, found that, “since the analysis of delay arises only after the delay (under *Morin*) has been incurred, courts and parties are operating within a framework that is designed not to prevent delay, but only to redress (or not redress) it” (at para. 35). The Court quoted with approval the opinion of M. A. Code, who stated that, rather than being motivated to manage cases in advance “to achieve *future compliance* with consistent standards” (emphasis in original),¹⁰ courts are left to pick up the pieces after the fact.

[25] The Court in *Jordan* decided the way to proceed was to overrule *Morin* and adopt a framework which sets a presumptive ceiling of 18 months for cases going to trial in provincial courts and 30 months for cases going to trial in superior courts after a preliminary inquiry. The Court described the process, at paragraph 47, as follows:

If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.

The majority in *Jordan*, at paragraph 51, made clear that the concept of reasonableness has not been abandoned. Rather, a different view of how reasonableness should be assessed has been adopted.

[26] The majority, at paragraph 105, summarized the new analytical framework for section 11(b) as follows:

There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.

¹⁰ M.A. Code, *Trial Within a Reasonable Time* (Toronto: Carswell, 1992) at 117.

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.

Below the presumptive ceiling, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.

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.

C. The Cody Decision

[27] In its most recent pronouncement on the analytical framework for post-charge delay, the Supreme Court of Canada in *R. v. Cody*,¹¹ concluded the majority in this Court had erred when it found unreasonable a net delay of 44 months, after deducting 13 months waived by Cody and 3.5 months resulting from Cody's first change of counsel and from a meritless recusal application. The total delay was 60.5 months, which the dissenting judge had pointed out was more than 5 years for an estimated 5 day trial.

[28] The Supreme Court in *Cody* found that each of the Crown, the defence and "the system" had contributed to the delay. The Court stressed, at paragraph 36, as it did in *Jordan*, that all participants in the criminal justice system share responsibility to adopt a proactive approach to prevent unnecessary delay, by targeting its root causes.

D. The Jordan-Cody Three Step Approach

[29] Maranger J. in *R. v. Masilamany*,¹² provides a good summary of the *Jordan-Cody* approach:

There is a three-step analysis to be used: first, calculate the delay; second, deduct from the total any delay waived by defence or caused by the conduct of the defence; and third, where the net total exceeds the presumptive ceiling, the onus shifts to the Crown

¹¹ *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659.

¹² *R. v. Masilamany*, 2018 ONSC 3171 at para. 69.

to rebut the presumption of unreasonable delay by demonstrating that there are exceptional circumstances. If the Crown fails to do so, a stay must follow.

- [30] In applying the *Jordan* framework, a number of key points must be noted:
- (a) The *Jordan* framework is intended to prevent the defence from benefitting from “its own delay-causing actions or inactions” (*Jordan* at para. 60).
 - (b) While the defence must be permitted time to prepare and present its case, the presumptive ceiling of 30 months already accounts for certain procedural requirements (*Cody* at paras. 28-29). The Supreme Court, in setting the ceiling, has “factored in the tolerance for reasonable institutional delay established in *Morin*, as well as the inherent needs and the increased complexity of most cases” (*Jordan* at para. 83).
 - (c) Defence actions “legitimately” taken to respond to the charges fall outside the ambit of defence delay and should not be deducted (*Cody* at para. 29 and *Jordan* at para. 65).
 - (d) The only deduction for defence delay under this approach is, therefore, that which (1) is “solely or directly caused by the accused person,” and (2) flows from “defence action that is illegitimate inasmuch as it is not taken to respond to the charges”. For example, deliberate and calculated defence tactics aimed at causing delay, including frivolous applications and requests, or delays arising when the court and Crown are ready to proceed and the defence is not. The resulting delay should be deducted. But these are merely examples and should not be taken as exhaustively defining deductible defence delay (*Cody* at para. 30).
 - (e) Appeal courts must show a high level of deference to a first instance judge’s determination of whether defence conduct is legitimate. But “the decision to take a step, *as well as the manner in which it is conducted*” (emphasis in original) may attract scrutiny in terms of the overall number of applications, compliance with notice or filing requirements, and timeliness of defence applications. Irrespective of its merit, a defence action may be deemed not legitimate if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay (*Cody* at para. 32).
 - (f) Defence counsel must actively advance their client’s rights to a trial within a reasonable time, collaborate with Crown counsel when appropriate and use court time efficiently (*Cody* at para. 33).

- (g) Delay beyond the 30 month ceiling is not unreasonable if it is the result of “exceptional circumstances”. These are circumstances that:

... lie outside the Crown’s control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise

(*Cody* at para. 48).

- (h) Exceptional circumstances generally fall into two categories: discrete events, such as the emergence of new disclosure obligations, and particularly complex cases. A third form of exceptional circumstance also arises from transitional considerations where, as in *Cody* (and here) the case was already in the system when *Jordan* was decided (*Cody* at para. 46).
- (i) Similar to defence delay, discrete events result in quantitative deductions of delay caused by the discrete exceptional event (*Cody* at para. 48).
- (j) Unlike defence delay and discrete events, case complexity requires a qualitative, not quantitative assessment (*Cody* at para. 64).
- (k) A recent decision of the Quebec Court of Appeal stressed the importance of appellate courts showing deference to judges of first instance in applying the *Jordan-Cody* analytical framework and determining whether the right to be tried in a reasonable time has been respected (*R. v. Rice* at paras. 29-35)¹³. Vauclair J.A. pointed out that the judge “knows the court in which that judge functions and how it works, its context and the players involved” (*Rice* at para. 35).

[31] Before applying the *Jordan-Cody* analytical framework to the facts of this case, it will be helpful to identify some uncertainties arising from those two decisions.

VI. UNCERTAINTIES FROM *JORDAN-CODY* FRAMEWORK

[32] Commentators from the legal community have noted that uncertainties still exist after the *Cody* decision. I found particularly helpful the Report of the CIAJ Roundtable on Delays in Criminal Trials: Professionalism and a “Culture of Complacency”, Vancouver, December 2, 2017, and the Report of Meeting of

¹³ *R. v. Rice*, 2018 QCCA 198, 145 W.C.B. (2d) 29.

Roundtable participants, B.C.-Roundtable on Delays in Criminal Trials, Spring 2018, prepared by Christine Mainville. In addition, I benefitted from the insights of Oliver Fitzgerald, “*Jordan* and Classifying Decision Delay: A need for Guidance” (2017), 40 C.R. - ART 72, and Steve Coughlan, “Patterns in the *Jordan* Case Law One Year After *Cody*” (2018), 42 C.R. - ART 342.

[33] My review of the legal literature and recent cases indicate the following uncertainties arising in this area.

(i) How should courts determine what is defence action “legitimately” taken to respond to the charges, which falls outside the ambit of defence delay?

(ii) To what extent is the trial judge’s finding of “legitimate” entitled to deference on appeal?

(iii) What is meant by deductible defence delay “solely” caused by the defence?

(iv) How should a court determine if a defence action or inaction is “designed to delay” or if it “exhibits” marked inefficiency or marked indifference toward delay?

(v) How should courts protect the right of full answer and defence when performing their discretionary screening function and summarily dismissing an application?

(vi) How should courts best promote necessary collegiality and efficiency, while recognizing the tension between counsel’s ethical and professional obligations to ensure their cases proceed effectively and counsel’s duty to clients to provide full answer and defence?

(vii) When should a defence counsel be prevented from pursuing a low-probability strategy, which the trial judge may consider “frivolous”?

(viii) If the section 11(b) right is an individual one and has no collective rights dimension, when and how does promoting efficiency in the trial process trump the individual right?

(ix) If an application is brought late because counsel initially failed to identify the issue, is this conduct exhibiting marked inefficiency or marked indifference?

(x) Will defence counsel now need to provide evidence on a *Jordan* application to explain their motivations and reasoning process and make clear why they conducted the case in a certain way and not another?

(xi) If “illegitimacy” simply means a way of identifying which delay periods the defence is prevented from objecting to because they were self-inflicted and were not a necessary part of the inherent time requirements of the case (which includes litigation time), does the term refer to anything more than inefficient defence conduct?

(xii) Should deference be afforded to defence counsel’s explanation for conduct?

(xiii) If conduct is found to be illegitimate, must there be a finding that it was frivolous and intended to delay?

(xiv) Did *Cody* intend to overturn the caution against trial judges “descending into the arena” by encouraging judges to use their trial and case management powers more robustly, including the power to place reasonable limits on oral submissions, to direct that submissions be made in writing, to require an offer of proof before embarking on a lengthy *voir dire*, to defer rulings, and to direct the manner in which a *voir dire* is conducted and the order in which evidence is called?

(xv) How should courts encourage all participants to stop waiting for things to happen before taking action?

(xvi) Is there still too high a degree of complacency regarding continuations?

(xvii) How should the time it takes a judge to render a reserved decision (“judicial delay”) be classified for *Jordan-Cody* purposes?

(xviii) What is meant by “exceptional” circumstances?

(xix) How does the “exceptional” concept relate to the complexity of the case?

(xx) Are there problems with classifying judicial delay as institutional or Crown delay?

(xxi) Is judicial delay to be excluded from the *Jordan-Cody* deduction of delay for exceptional circumstances because it is inherently part of the time allowed by the ceiling and should not be “double-counted”?

(xxii) Should defence-caused delay and “exceptional circumstances” be treated similarly?

(xxiii) Is an event “exceptional” merely because it rarely happens?

(xxiv) Will delay be attributed to the defence merely because the defence passes up a date?

(xxv) Should the Crown be entitled to look to the schedule of only one prosecutor or should it be viewed as having more resources and more able to have substitutes available on a file to assist in determining trial dates?

(xxvi) When should a case be considered complex?

(xxvii) What is meant by “the parties’ reasonable reliance on the law as it previously existed” as it applies to transitional cases?

(xxviii) What constitutes a “case of moderate complexity” in a jurisdiction with significant institutional delay problems?

[34] Although it is not necessary to deal with all these questions in the present case, they provide useful contextual background and assist in understanding the difficulties involved in changing the culture of complacency regarding delay in getting to trial.

VII. THE CHRONOLOGY OF POST-CHARGE DELAY

[35] The chronology of steps in the progress of this case may be found below in Appendix A, taken for the most part from the factum of the Crown and the transcripts of appearances¹⁴. Briefly summarized, there was a total delay of 44 months and 6 days between the laying of charges and the expected end of the trial. This exceeds the 30 months that the Supreme Court of Canada in *R. v. Jordan* set as a ceiling beyond which delay is presumptively unreasonable in criminal cases.

¹⁴ A more complete history of proceedings may be found in the decision of the trial judge entering a stay (2017 NLTD(G) 58, at para. 28, 137 W.C.B. (2d) 332).

[36] The main periods of delay put forward by the Crown relate to the period from April 2, 2014 to December 9, 2014, when the Crown and the Court awaited *Charter* applications from the defence, the period from January 2015 to March 2015 when the defence allegedly delayed requesting more complete disclosure, and 5 months when the parties had awaited the filing by the trial judge of decisions which had been reserved relating to *Charter* applications. A detailed review of the transcripts of appearances reveals how and why delay occurred.

A. The Period April 2 to December 9, 2014

[37] On April 2, 2014, the Crown stated it was ready to go to trial. The defence opposed setting trial dates until the preliminary inquiry transcript had been received and reviewed. The applications judge decided not to schedule the trial dates at that time when the transcript had not yet been prepared. Defence counsel had noted the possibility of an application to quash the committal. The Court set June 19, 2014 as the date for the pre-trial conference. The Crown was unavailable before that date, a delay of 2 months and 17 days.

[38] The Court learned on June 2, 2014 that the preliminary inquiry transcript had still not been prepared because Court staff were working on other matters. Defence counsel requested that dates be set after the pre-trial conference. The Crown requested a trial date and expressed concern about the ongoing delay. The Crown expressed its understanding that disclosure had been completed.

[39] The Court offered a trial date of October 27, 2014. The defence was not available on that date and the parties settled on December 8, 2014 (a delay of approximately 1.5 months). By agreement, the matter was to be called again on September 8, 2014 to schedule any applications.

[40] On September 8, 2014, defence counsel informed the Court that she was in the process of drafting a *Charter* application. Counsel noted the large volume of material she had received on disclosure, characterizing it as “overwhelming.” The Crown had not received any notice from the defence that there would be any problem in meeting the trial date. Defence counsel requested that the trial dates be used for the *Charter* applications. The Crown requested that the original trial dates be retained.

[41] The applications judge noted that the pre-trial conference had not gone ahead because the transcript was still not completed and stated that the trial would have had to be rescheduled anyhow. The judge, despite opposition by the

Crown, cancelled the scheduled dates for the trial and set the week of December 8, 2014 (later changed to begin on December 9) for the *Charter* applications.

B. The Period December 9, 2014 to July 29, 2015

[42] On December 9, 2014, defence counsel requested an adjournment on the basis that more disclosure from the Crown on December 6 meant that the defence would need time to review the material. Defence counsel stated that the disclosure revealed the names of potential witnesses and also revealed that all information had not been previously disclosed regarding meetings between the police and Canada Post employees. The Crown agreed that the latest disclosure dealt with relevant material but argued the material was not new but merely in a format different from that previously disclosed. The applications judge agreed the defence should have a postponement to allow time to review the material and investigate which witnesses would have to be called.

[43] Crown counsel indicated she was available for hearing the adjourned *Charter* applications in February or March, 2015. Defence counsel indicated she was free from January 5 to 8. The Crown stated she preferred a date in February. Ultimately the matter was adjourned until March 9 to 13, 2015 (a delay of 3 months).

[44] On March 9, 2015 the assigned judge was ill and the matter was adjourned to March 10. On that date, the matter was further adjourned to prepare for an *O'Connor* or *Stinchcombe* application to obtain further documentation from Health Canada. The court offered March 17 to 20 for the applications.

[45] The Crown prosecutor indicated she would be on holidays from March 17 until April 7, 2015. The parties then agreed upon April 30 for continuation of the matter (a delay of 1 month and 21 days). The Court expressed concern about delay and reserved an extra day on May 1 in case the parties found they needed an extra day. Because of other matters pending, the Crown requested that it not be required to file its materials before April 17.

[46] The matter continued on May 1, 2015. The judge made a point of commenting on defence counsel suffering from “seasonal grippe.” The defence then obtained an order that the Crown should disclose any information in the possession of Health Canada dealing with the legality or illegality of exporting ephedrine to the United States relating to Mr. King. The matter was set to continue on June 1, 2015. On that date defence counsel noted they were still

awaiting the material ordered disclosed on May 1. The Crown appearing for the prosecutor noted that they were still trying to determine whether there were any undisclosed documents to which the disclosure order might apply. The Crown suggested setting the matter over to the next arraignment date. The Court noted that would be in September and instead set it for July 10, with the agreement of the defence. Also, the Court ordered that the matter be called on September 14 for a status report.

[47] The record shows the matter resumed on July 22, 2015, when the Crown indicated it had received additional disclosure several days previously and was in the process of vetting it with a view to giving it to the defence in a day or so.

[48] The Crown provided final disclosure on July 29, 2015.

C. The Period July 29, 2015 to March 31, 2017

[49] As shown in Appendix A, the parties proceeded with a number of applications in 2015, 2016 and 2017. These are more thoroughly discussed in the trial judge's decision to stay, dated March 22, 2017 (2017 NLTD(G) 58).

D. The Time Taken to Render Decisions

[50] On September 14, 2015, the Crown requested summary dismissal of what it saw as an application by the defence designed to obtain what the Crown's argument would be at trial. The Court decided not to set a separate hearing date for the application but to schedule the pre-trial conference and deal with the issue at that time. Defence counsel was not available on November 3-5, 2015, so the Court set November 10, 12 and 13 for the hearing of applications and November 29 as the date for the pre-trial conference, with December 1 for a status report.

[51] On October 1, 2015, the parties confirmed for the Court that they had had a pre-trial conference and agreed to set an extra day for argument on November 18, in addition to November 10, 12 and 13.

[52] On March 10, 2016, the Court rendered a decision on the section 8 Charter application, excluding evidence under section 24(2). Other applications dealt with the sufficiency of warrants and disclosure issues. For more detail, see the trial judge's decision to stay.

VIII. THE TRIAL JUDGE'S DECISION

[53] The trial judge classified the alleged defence delay in this case into three types: first, that due to postponements or unavailability; second, that resulting from a late request for disclosure; and third, delay arising because of defence trial tactics. I will examine the trial judge's conclusions regarding each of these.

A. Delay due to Postponements or Unavailability

[54] The trial judge first considered delay which the Crown alleges arose due to postponements by defence counsel or counsel's unavailability. The trial judge did not accept the Crown's submission that the defence, on November 20, 2013, caused a delay of 13 days in the scheduling of the preliminary inquiry. The trial judge found that, from the record, it was the Crown who preferred the later date.

[55] On the setting of trial dates, as discussed earlier, the Crown had suggested two weeks for trial commencing October 27, 2014. Defence counsel was unavailable at that time and the Court offered December 8, 2014, which the parties accepted. The trial judge found that the Crown's disclosure obligations were not fulfilled until July 29, 2015 and that, therefore, the Crown was not ready to proceed on either October 27, 2014 or on December 8, 2014.

[56] The trial judge held that delay resulting from defence counsel's request for postponement on December 9, 2014 was a defence action "legitimately taken to respond to the charges" and should therefore not be counted against the defence. The trial judge concluded that, while the disclosure of 46 pages on December 5, 2014 may have merely been previously disclosed information in a different format, the defence was entitled to have time to review the material. As such, the 3 month delay from December 9, 2014 to March 9, 2015 was not attributable to the defence.

B. Late Request for Disclosure

[57] The Crown alleged defence delay due to a late request for disclosure.

[58] On March 10, 2015, during the time scheduled for a *Charter* application, defence counsel raised an issue about the non-disclosure of Health Canada documents. Crown counsel agreed that an application on disclosure should be dealt with prior to the *Charter* application. As a result of the application, and ensuing disclosure, the *Charter* application was not heard until November 10, 2015. The Crown submitted that the eight-month delay was solely caused by the defence and should be deducted.

[59] The trial judge found that defence counsel did not cause delay by waiting until March 2015 to file a disclosure application.

[60] A letter from Health Canada to Mr. King had been entered at the preliminary inquiry by the defence. This letter had not appeared in the initial disclosures by the Crown. The trial judge concluded that by this letter the Crown was put on notice of the existence of further undisclosed Health Canada documentation, and had an obligation to initiate a further disclosure process by making reasonable inquiries of Health Canada. The trial judge did not accept the Crown's submission that delay would have been avoided if the defence had followed proper procedure and served a timely "*subpoena duces tecum*" upon Health Canada. The Crown was held responsible for nearly 15 months delay, from February 5, 2014, (the second day of the preliminary inquiry) to May 1, 2015 (the date of the applications judge's order to produce). The Crown's argument that the Health Canada documents were not relevant was rejected on an interlocutory application.¹⁵

[61] The trial judge found support for finding Crown responsibility in *R. v. McNeil*,¹⁶ at paragraphs 48 and 49. The Supreme Court in *McNeil* rejected the notion that all state authorities constitute a single entity and held that the prosecuting Crown does not have to inquire of every department of government and every police force whether they are in possession of relevant material. However, at the same time the Court recognized the Crown is not an ordinary litigant and has an obligation to make reasonable inquiries of other Crown agencies or departments if put on notice of the existence of other relevant material.

C. Delays from Trial Tactics of the Defence

[62] The trial judge rejected the Crown's submissions to attribute the following delays to the defence:

(i) 2 months from April 2, 2014 to June 2, 2014. When defence counsel was not prepared to set trial dates (on the basis that the Crown was not ready to proceed to trial on the dates which were set on June 2, 2014 as its disclosure obligation had not been fulfilled until July 29, 2015);

(ii) 4 months and 2 weeks from June 2, 2014 to October 17, 2014. The time between when defence counsel indicated an intention to file an

¹⁵ *R. v. King*, 2015 NLTD(G) 76, 366 Nfld. & P.E.I.R. 356.

¹⁶ *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66.

application to quash the committal for trial and the time a *Charter* application was filed (on the basis that defence counsel was entitled to the transcript of the preliminary inquiry before deciding whether to file an application to quash the committal for trial);

(iii) 2 weeks from October 3, 2014 until October 17, 2014. The time between what defence counsel suggested as a filing date for a *Charter* application and when the application was filed (based upon Crown consent to a requested extension for the time of filing a *Charter* application).

[63] The trial judge noted that determining the reasonableness of inherent time requirements requires consideration of the complexity of the trial. She found that the number of pre-trial applications and the voluminous disclosure made it a “moderately complex” case. She concluded that this only justified a delay beyond the *Jordan* ceiling of six months at most.

[64] The trial judge found that the only defence delay was a nominal one day arising from the failure of Mr. King to appear at his first appearance date.

IX. THE STANDARD OF REVIEW

[65] There is a difference among appellate courts as to the appropriate standard of review to apply in reviewing the trial judge’s ultimate conclusion on the reasonableness of the delay.

[66] In *R. v. Vandermeulen* (decided before *Jordan*), the Manitoba Court of Appeal thoroughly examined the positions taken by various Courts of Appeal across Canada regarding the standard of review to be applied in reviewing a trial judge’s ultimate conclusion.¹⁷

[67] Beard J.A. noted, at paras. 26-27, that the courts in Ontario and British Columbia, have adopted the standard of correctness for review of the ultimate conclusion regarding the reasonableness of a delay, but the courts in Saskatchewan, Manitoba and Nova Scotia have adopted the standard of reasonableness on the basis that arriving at the ultimate conclusion “involves the balancing of various competing interests which is a discretionary decision by the trial judge that is entitled to deference and attracts a high standard of review.”

¹⁷ *R. v. Vandermeulen*, 2015 MBCA 84, 126 W.C.B. (2d) 140. See also *R. v. J.E.K.*, 2016 ABCA 171 at para. 10, 130 W.C.B. (2d).

[68] I tend toward applying the standard of reasonableness but I need not take a final position on this issue here since nothing turns on it. As explained below, I agree with the trial judge and my position is the same whether the standard of review is correctness or reasonableness.

X. APPLICATION OF *JORDAN-CODY* TO THE FACTS

[69] Although there is a degree of overlap, I will utilize the three categories of defence delay employed by the trial judge in applying the *Jordan-Cody* analysis.

A. Postponements and Unavailability

[70] As noted earlier in discussing the trial judge's decision, the two main periods of delay relating to postponements and unavailability are the period from June 2, 2014 to December 9, 2014, while the Crown and the Court expected *Charter* applications to be filed and awaited completion of the preliminary inquiry transcript, and the period January 2014 to March 2015 when the defence allegedly sought postponements to await full disclosure, without making a request, either formally or informally, for more complete disclosure. Final disclosure only occurred on July 29, 2015.

[71] The record does not reveal attempts by Crown or defence counsel to deliberately delay the trial. There were discussions to schedule matters and, as discussed earlier, either defence counsel or the Crown from time to time would be unavailable because of prior commitments. The transcripts of appearances does not show the Crown complaining of defence-caused delay because of how the defence dealt with scheduling (except for the defence's lack of notice before its application on September 8, 2014 to use the trial dates for applications, which I deal with below).

(1) The Crown's Position

[72] The Crown summarized its position on delay relating to Health Canada disclosure, and to delayed applications generally, as follows:

To summarize, defence counsel first resisted setting trial dates for two months for no justifiable reason. The defence then declined the earliest possible trial dates due to unavailability. Defence counsel then inexplicably failed to file an intended pre-trial application for a period of approximately 7 months following arraignment which resulted in the cancellation of the originally scheduled December 2014 trial dates. Then on the eve of the scheduled application hearing, defence requested an adjournment based on the disclosure of information which it had been in possession of for approximately one year. Then, again on the eve of the re-scheduled hearing of the

Charter application in March 2015 (3.5 months later), the defence for the first time requested and then applied for additional disclosure of Health Canada records – which again resulted in the *Charter* application being adjourned.

(2) The Record of April 2, 2014

[73] To respond to the Crown’s summary set out above, the record of April 2, 2014 does not support the Crown’s position. In response to defence counsel’s comment that the defence was entitled to review the transcript from the preliminary inquiry (which it had not received by then), the applications judge asked: “Do you agree with that ... as a reasonable request?”, the Crown responded: “I’m fine with it. For the record we’re prepared to set a trial date.”

[74] Defence counsel then suggested setting a date for the pre-trial conference without scheduling trial dates and the judge stated:

I’m not going to schedule the trial dates at this point. Based on what you said, I do believe that it’s important that we have that Preliminary transcript.

The Crown responded simply with “yes.”

[75] The Crown estimated it would take two to three months to obtain the preliminary transcript and the judge commented that they would be in a position to move forward on the dates at that time. But the judge stated it was a good idea to have the pre-trial conference “because it’ll start taking shape in terms of when the trial might be, and whether or not there are going to be any applications.”

[76] The discussion then moved to whether or not there would be applications. The agent appearing for defence counsel said he thought there would be an application to quash the committal, which defence counsel could speak to at the pre-trial. The Court suggested they set the pre-trial conference date and have it called again with defence counsel present, on the June 2 arraignment date. The Crown agreed with this.

(3) A Defence Offer to Appear Earlier

[77] The agent for defence counsel offered to appear earlier, on May 22, 2014, for the pre-trial conference but the Crown stated the prosecutor’s schedule was full from April 22 to June 17. The applications judge decided to have the matter called on June 2, and a pre-trial conference set for June 19.

(4) Awaiting the Preliminary Inquiry Transcript

[78] When the parties appeared on June 2, defence counsel informed the Court that the preliminary inquiry transcript would take another 30 days to complete. Counsel said this was important as there was a “very serious possibility of an application to quash the committal to trial and she would need the transcript before proceeding”. Counsel also stated her client was out of the province and she would need to meet with him before setting trial dates. She suggested setting the pre-trial conference over from June 19 to the next arraignment date and said her preference was to set trial dates after the pre-trial conference and after she had seen the preliminary transcript and decided whether the defence was going to be filing an application to quash.

[79] The judge asked if something could be done to expedite the transcript. Defence counsel said she had been told the staff were working on something else and that was the reason for the delay.

[80] The Crown noted the next arraignment date was in September and expressed concern about the ongoing delay.

(5) Defence Agrees to Set Dates Before Transcript Completed

[81] Defence counsel noted she had received a huge amount of disclosure “in dribs and drabs” and if the Crown could commit that they are certain that disclosure had been completed and she was not “going to be bombarded with more disclosure”, then trial dates could be set.

[82] The agent for the prosecutor stated his understanding was that disclosure was complete but he did not have direct knowledge of this.

[83] The judge stated the trial dates would be set for two weeks in the fall. Any disclosure issues were to be dealt with at the pre-trial conference. The judge on his own initiative ordered that the preliminary transcript be ready by July 2 and that the trial be set for the first available date in the fall. The clerk noted this would be October 27.

(6) Cooperation in Selecting Dates

[84] That date was fine with the Crown. But defence counsel was not available then because she had other cases on October 30 and November 6 and 7. She suggested November 10. The Court Clerk noted the next available date was December 8 and both counsel agreed this was suitable.

[85] The judge noted this would give defence counsel plenty of time if she intended to make an application. The judge agreed to call the matter again on September 8 to schedule the applications, if any, and assess what needed to be done.

[86] The judge stressed the need to make sure the application was served before September 8 so the judge dealing with it could schedule it in a timely fashion and not interfere with the trial date.

(7) Defence Counsel's September 8 Request for a Postponement

[87] On September 8, 2014, defence counsel informed the Court that she was currently drafting a *Charter* application. She mentioned the large and “overwhelming” volume of material received on disclosure, dealing with 46 warrant-less seizures, 3 “massive” search sites at a home and 2 businesses, 30 production orders targeting Health Canada, encrypted emails, correspondence back to 2006 from the Pharmacy Board, 14 production orders targeting bank accounts, 4 out of Province seizures from 4 companies, and Crown applications to avoid disclosure of a “massive” amount of material.

[88] Defence counsel suggested that the Crown consider joining the defence in putting forth to the Court that the trial dates, which had been set with the consent of her agent, be used for the *Charter* applications. She said it would take her until October 30 at a minimum to finish drafting her *Charter* applications.

[89] The Crown agent appearing for the prosecutor stated the Crown asked to retain the dates “as of right now” and if the defence would be filing *Charter* applications the Crown requested an additional pre-trial conference so the parties could “better organize” themselves with respect to that. The Crown said it recognized that if the applications moved into December they could convert trial dates to application dates at that time but he wished to hold onto those as of that time.

(8) Delayed by the System

[90] The applications judge pointed out that the pre-trial conference had not gone ahead because the preliminary inquiry transcripts were not available, even though the Court had ordered them for July. The judge rescheduled the pre-trial for October 20, defence counsel agreed, but the Crown noted the prosecutor had another matter at that time. The date was moved to October 21 with a filing deadline of October 3.

[91] The judge observed that if the dates for trial were released at that time, the trial would probably not proceed until March. Despite this acknowledgement, with no further input from counsel, the judge went ahead, cancelled the trial, set the week of December 8 for the hearing of the *Charter* applications and set the next arraignment date, November 3, for confirmation of scheduling of the applications.

[92] By November 3, 2014, the defence had filed her *Charter* applications and the preliminary inquiry transcript had been received. The pre-trial conference had not gone ahead due to the illness of defence counsel. This was rescheduled with the agreement of counsel to November 27 and the *Charter* application was set to begin on December 9.

[93] I agree with the trial judge that the defence should not be penalized by the deduction of time for the period between June 2, 2014 and September 8, 2014 while the defence awaited receipt of the preliminary inquiry transcript. I deal below with delay during the period between September 2014 and March 2015.

B. Late Request for Disclosure

(1) The Crown's Obligation to Inquire and Disclose

[94] I agree with the trial judge that, in the circumstances, the Crown had an obligation to make reasonable inquiries of other Crown agencies and departments, once put on notice at the preliminary inquiry of the existence of a letter which had not been included in the Crown's disclosure packages (see *McNeil*).

(2) Inaction by the Defence

[95] I agree with the Crown that the analytical framework established in *Jordan* and reiterated in *Cody*¹⁸ contemplates an obligation on the part of defence counsel to collaborate with Crown counsel when appropriate in order to use court time efficiently. Inaction by the defence may amount to illegitimate conduct as defence counsel have a shared responsibility to actively advance their client's right to trial within a reasonable time. Defence conduct may be considered "illegitimate" if designed to delay or if it exhibits marked inefficiency or marked indifference towards delay. Courts should be very cautious, however, to avoid unfairly attributing motives of delay or indifference to defence counsel when these are not warranted. The Crown has not shown

¹⁸ See, *Jordan*, at paras. 116, 137 & 138 and *Cody*, at paras. 33 & 36.

that defence counsel deliberately or indifferently decided to delay by raising the fact that disclosure appeared to be incomplete.

[96] The defence argued that it had not received full disclosure until July 29, 2015, the date when Health Canada had provided all missing documentary information relating to the prior investigation into Mr. King's conduct during 2011 and 2012. As found by the trial judge, it appeared that prior Health Canada documents disclosed by the Crown did not include certain documents held by another branch of Health Canada.

(3) Crown Inaction Regarding Disclosure

[97] Defence counsel had requested further information on March 5, 2015. The Crown had stated it did not have further disclosure to provide and that, in any event, the information requested, if it did exist, was irrelevant because information on any prior investigation did not impact the investigation leading up to the charges in this case, the information would likely be subject to solicitor-client privilege, and the defence had been aware of the previous investigation from the onset of the current prosecution and had not made a timely application for disclosure.

[98] On May 1, 2015 an applications judge ruled against the Crown and ordered that the Crown disclose all information from Health Canada relating to the illegality or not of the export from Canada of ephedrine by Mr. King. After some further incomplete disclosures, the final disclosure occurred on July 29, 2015, as noted above.

[99] The record discloses that Mr. King had a copy of a letter from Health Canada during his preliminary inquiry in February 2014. Dated September 5, 2012, the letter informed Mr. King that his company, Heavyweight Fitness, was not allowed to sell ephedrine without a license and that the company should apply for one. An earlier production order dated October 23, 2012, directed to an official of Health Canada's Inspectorate Program, had required Health Canada to provide all documents within its possession relating to the authority of Mr. King or his companies to export ephedrine. All documents provided by one branch of Health Canada to the Crown pursuant to the production order had been disclosed to the defence. Apparently the September 5, 2012 letter had not been provided as it was held by another branch.

[100] Defence counsel neither requested nor applied for disclosure of any additional Health Canada documents until March 5, 2015 (almost a year after

the conclusion of the preliminary inquiry). The Crown notes that this occurred several days before the rescheduled hearing of a *Charter* application set for March 9-13, 2015. The disclosure application resulted in the adjournment of the scheduled *Charter* application until November 2015, pending the outcome of the application for further disclosure of Health Canada records.

[101] The Crown submits that the trial judge, by not deducting any defence delay as a result of the disclosure application, erred by, in effect, absolving the defence counsel of any responsibility to diligently pursue additional disclosure in a timely fashion. The Crown says that the defence did nothing to pursue the additional disclosure, it must have known it would require, for over a year following the February 2014 preliminary inquiry. The Crown submits it cannot be said that the defence “conducted all applications reasonably and expeditiously”, as *Jordan* contemplates.

(4) Conclusion on Disclosure

[102] I do not accept the Crown’s submission that the trial judge erred and that it was the inaction of defence counsel which contributed approximately one year of unnecessary delay to the proceedings. The trial judge correctly decided that the Crown had an obligation to make reasonable inquiries of Health Canada once put on notice of the existence of other relevant material (see *McNeil*). I am not persuaded that any delay arising from late disclosure was caused “solely” by the defence and should be deducted when performing the *Jordan-Cody* calculation.

[103] With respect, I believe my colleague, Hoegg J.A., in accepting that Health Canada must be treated as a third party such that “production of records it holds is not within the control of the prosecuting Crown in any meaningful way”, ignores the conclusion of the Supreme Court of Canada in *McNeil* that the Crown is not an ordinary litigant and has a greater obligation than other litigants to make reasonable inquiries of other Crown agencies or departments if put on notice of the existence of other relevant material.

[104] In summary, on the alleged late request for disclosure, I am not persuaded that the trial judge erred in holding the Crown responsible for the period of delay between February 2014 and July 29, 2015.

C. Delay from Trial Tactics of the Defence

[105] I agree with the trial judge that the Crown could not correctly say it was ready on April 2, 2014, to proceed to trial when its disclosure obligation had not been met until July 29, 2015.

[106] I also agree that defence counsel was entitled to a transcript of the preliminary inquiry before deciding whether to file an application to quash the committal for trial.

[107] The Crown has not proven that the defence engaged in trial tactics designed to delay. Indeed the tone of the record from the various applications paints a picture of a responsible counsel reasonably cooperating with the Crown to arrive at early trial dates and advance her client's case.

[108] The Coughlan article discusses the significance since *Jordan* of defence counsel passing up a date. It notes the comment in the pre-*Jordan* decision of *R. v. Godin*¹⁹, where the accused was found not to be obliged to accept the very first date offered:

While scheduling requires reasonable availability, and reasonable cooperation, it does not require defence counsel to hold themselves in a state of perpetual availability for s. 11(b) purposes.

I accept that this common sense approach of *Godin* still applies after *Jordan*. I expect, however, that prosecutors will be more inclined to ask for defence waivers now before agreeing to lengthy postponements.

[109] This is not a case where the defence attempted to drag out the trial process and take advantage of its own illegitimate behaviour. The primary reason for the delay were the acknowledged “complications” the Crown had experienced in obtaining full disclosure from Health Canada. The trial judge recognized this and I defer to her conclusion, which was reasonable and supported by the record.

D. The Presumptive Ceiling

[110] As discussed above, at the heart of the new *Jordan-Cody* framework is a ceiling beyond which delay is presumptively unreasonable. The ceiling is set at 18 months for cases going to trial in the provincial court and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial

¹⁹ *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3.

court after a preliminary inquiry). As this matter was set for trial in Supreme Court, the presumptive ceiling is 30 months.

[111] For convenience, I note again the 3 step analysis. If the total delay from the laying of charges to the actual or anticipated end of trial (minus defence delay) exceeds, as here, the ceiling, then the delay is presumptively unreasonable.

[112] To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow (*Jordan*, paras. 46-47). It is not necessary for the defence to prove that the Crown was at fault.

[113] In setting the presumptive ceiling, the Supreme Court of Canada was guided by the *Morin* guidelines, which set 14 to 18 months as the measure for institutional delay in provincial and superior courts. The new ceiling reflects additional time to account for other factors that can reasonably contribute to the time it takes to prosecute a case, including the inherent time requirements of the case and the increased complexity of criminal cases since *Morin* (*Jordan* at paras. 52-53). The Court confirmed that in setting the ceiling they factored in the *Morin* tolerance for institutional delay, as well as the inherent needs of cases (*Jordan* at para. 83).

E. Accounting for Defence Delay

[114] The Supreme Court has said we must begin by calculating the total delay from the charge (July 29, 2013) to the actual or anticipated end of trial (March 31, 2017), calculated by the trial judge as 44 months and 6 days (see Appendix A). Then delay attributable to the defence must be subtracted. The defence is not entitled to benefit from its own delay-causing conduct.

[115] The first component of defence delay is that waived by the defence, which is not a factor in this case. The second component is delay caused “solely” by the conduct of the defence. It comprises “those situations where the accused’s acts either directly caused the delay ... or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial” (*Jordan* at para. 63, quoting from *Askov*²⁰, at 1227-28). Covered here are deliberate and calculated tactics aimed at causing delay, including frivolous applications and requests.

²⁰ *R. v. Askov*, [1990] 2 S.C.R. 1199, 74 D.L.R. (4th) 355.

(1) Crown Submissions on Defence Delay

[116] The trial judge here did not find any examples of deliberate and calculated attempts to delay the trial of Mr. King. The Crown submits that the failure of defence counsel to prepare its *Charter* application between June 2, 2014 (when trial dates were set) and September 8, 2014 (the return date for scheduling applications), and the defence request to postpone the trial and use the trial dates for the *Charter* applications, amounted to a marked inefficiency or marked indifference to delay on the part of defence counsel. The Crown does not expressly say that defence counsel deliberately delayed the trial. But it points to this trial postponement as a seminal point in the course of trial preparation where the knock-on effect of the rescheduling resulted in much of the ultimate delay. The Crown argues that the defence must accept responsibility for causing much of this.

(2) Conclusion on Defence Delay

[117] I do not agree. First I must note that the applications judge, when responding favourably to the defence request for a postponement on September 8, 2014, pointed out that the preliminary inquiry transcript had still not been received, despite an order setting July 2, 2014 as the date when it should be ready. This introduced a period of institutional delay, for which the defence should not be held responsible. In the circumstances this cannot be viewed as a delay caused “solely” by the defence. The “system” failed to produce a timely transcript when this is mandatory by section 551 of the *Criminal Code*. See *R. v. McGrath*,²¹ *R. v. Harris*,²² and *R. v. Hayes*.²³

(3) Defence Counsel Motivation

[118] As for the motivation of defence counsel, she gave a reasonable explanation of having been “overwhelmed” by the large volume of material which had been disclosed up to that point. As noted above, *Jordan* and *Cody* set out an additional analytical framework which contemplates an obligation on the part of defence counsel to collaborate with Crown counsel when appropriate in order to use Court time efficiently. Inaction by the defence may amount to illegitimate conduct as defence counsel have a shared responsibility to actively advance their client’s right to trial within a reasonable time. Defence conduct may be considered “illegitimate” if designed to delay or if it exhibits marked

²¹ *McGrath v. The Queen* (1985), 55 Nfld. & P.E.I.R. 132, 14 W.C.B. 457 (Nfld.C.A.).

²² *R. v. Harris* (1989), 74 Nfld. & P.E.I.R. 43, 7 W.C.B. (2d) 46 (Nfld. S.C.(T.D.)).

²³ *R. v. Hayes*, 2010 NLTD 92, 297 Nfld. & P.E.I.R. 194.

inefficiency or marked indifference towards delay. Courts should be very cautious, however, to avoid unfairly attributing motives of delay or indifference to defence counsel when these are not warranted.

[119] I have been shown no reason to find that the trial judge was in error in concluding that defence counsel on September 8, 2014 was acting legitimately to advance her client's case.

[120] I also agree with the trial judge that the Crown had not completed its disclosure obligation by this date and was not in a position to proceed to trial. In any event, defence counsel was entitled to a reasonable period to examine all material disclosed.

[121] I must note, with respect, that the transcript for September 8, 2014 indicates that the applications judge may have been a little too hasty in giving up the trial dates over the objections of Crown counsel. This is an example of where the newly recommended approach to robust and, at times, summary case management might have kept this trial from being jettisoned into the maelstrom of trial rescheduling in 2015. I agree with Maranger J. in *R. v. Masilamany*,²⁴ where he stated that when reasonably unforeseen or unavoidable delay occurs “it is incumbent upon the Crown and the court to do what it can to mitigate the effect of the delay.” Within reason, the Crown and the justice system should be capable of prioritizing cases that have been delayed by unforeseen events. I have not been shown where prioritization was attempted here.

[122] Generally, a review of the record gives a picture of defence counsel who, while properly insisting upon having a preliminary inquiry transcript and full disclosure before proceeding with *Charter* applications or setting trial dates, was not seeking opportunities to delay. On several occasions she suggested earlier dates for matters than the Crown could accept. On one occasion the applications judge noted defence counsel was obviously ill. She probably could have obtained a postponement without much difficulty on that day but proceeded with the scheduled hearing. Her conduct was consistent with what would be expected of a defence counsel aiming to provide a good defence for her client. The trial judge obviously had the same impression and correctly rejected the Crown's implicit suggestion that defence counsel was not acting to advance her client's case but rather sought to delay.

²⁴ *R. v. Masilamany*, 2018 ONSC 3171 at paras. 9, 16.

[123] In summary, on the matter of postponement of the trial, I have not been persuaded that any time should be deducted in the *Jordan-Cody* calculations for the delay from June 2, 2014 to September 8, 2014 or afterwards.

F. Exceptional Circumstances

[124] Delay (minus defence delay) that exceeds the ceiling is presumptively unreasonable. The Crown may rebut this presumption by showing that the delay is reasonable because of the presence of exceptional circumstances (*Jordan* at para. 69). On appeal, the Crown argues that the trial judge erred in finding that the late disclosure, judicial delay, complexity of the case, and transitional circumstances were not sufficient to make the delay “reasonable”.

[125] Exceptional circumstances lie outside the Crown’s control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise (*Jordan* at para. 69). To be exceptional, the circumstances need not be rare or entirely uncommon.

[126] The Crown, once the ceiling is breached, must show that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling, for example by prompt resort to case management processes to seek the assistance of the court, or by seeking assistance from the defence to streamline evidence or issues for trial, or to coordinate pre-trial applications, or by resorting to any other appropriate procedural means (*Jordan* at para. 70).

[127] In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases (*Jordan* at para. 71).

[128] Discrete events are those that disturb the normal course of the matter and which the prosecutor and the defence could do nothing to prevent. They lie outside the Crown’s control in that they are reasonably unforeseen or reasonably unavoidable and Crown counsel cannot reasonably remedy the delays resulting from them once they arise. Examples are medical or family emergencies, recanting by a witness, or unexpected, unavoidable extension of the length of a trial.

(1) Discrete Event – Late Disclosure

[129] In the present case, the Crown argues that the trial judge erred in not treating the delay in disclosure of Health Canada records as a discrete event, for

which there should be a deduction of up to 8 months. The Crown argues that it is not the guarantor of third party records in other Crown agencies.

[130] Delay arising from the fact that records are in the possession of other Crown agencies or departments has been discussed above, under the heading “Late Request for Disclosure.” I have not been persuaded that the trial judge erred in concluding that the Crown, as discussed in *McNeil*, had an obligation to make reasonable inquiries of other Crown agencies and departments once put on notice of the existence of relevant material which had not been included in the Crown’s disclosure package. No deduction should be applied in the *Jordan-Cody* analysis for delay from the discrete event of admitted “complications” in obtaining full disclosure from Health Canada. The trial judge did not err in rejecting the Crown’s request for a deduction from total delay for time spent seeking to obtain Health Canada records.

[131] The trial judge did not err in concluding the Crown has not met the onus of establishing that the delayed disclosure was an exceptional discrete event which warranted a deduction from total delay for time spent seeking to obtain Health Canada records. Such a deduction would penalize the defence when the delay occurred because of inadequate follow-up by the Crown following its being put on notice by the preliminary inquiry letter that disclosure was incomplete. Defence counsel acted reasonably in initially accepting the Crown’s assurances that all relevant documents had been disclosed and assuming that the letter of Health Canada was in the voluminous material received from the Crown. Once defence counsel discovered, when preparing for applications, that the Health Canada letter which Mr. King had received was not in the disclosure package, defence counsel was reasonable in seeking to discover whether other documents in the Health Canada had not been disclosed. The facts do not support the conclusion that defence counsel delayed her request for further disclosure in order to delay arguments on pre-trial applications.

(2) Discrete Event – Judicial Delay

[132] The Crown also put forward as a discrete event the matter of “judicial” or “deliberation” delay, that is time taken up by judges in providing reasons where decisions had been reserved. The Crown argues this is another discrete event, for which time should be deducted in the *Jordan-Cody* calculation.

[133] The trial judge in the present case twice reserved decisions on pre-trial applications. The chronology of delay set out in Appendix A and in the trial judge’s decision of March 22, 2017, show that the first section 8 *Charter*

application hearing began on November 10, 2015, and was concluded on November 18, 2015. Decision was reserved and rendered on March 10, 2016, approximately 4 months later. An application to challenge the validity of judicial authorizations concluded on November 16, 2016 and was decided on December 16, 2016, one month later. I have concluded that these 5 months should not be deducted in calculating delay for the *Jordan* analysis, for the following reasons.

[134] As noted in the Fitzgerald article, cited above, the time a judge takes to render a reserved decision may extend the period between when an accused is first charged and when the trial process ends. Fitzgerald concluded from his examination of the jurisprudence that “courts across Canada have classified the time a trial judge takes to make, draft, edit and deliver a decision – what I call ‘decision delay’ – in different and conflicting ways, revealing a need for uniformity.”

[135] The impact of judicial delay on the section 11(b) analysis was not addressed in either *Jordan* or *Cody*. Certain recent decisions in other jurisdictions have held that the time it takes a court to render a decision during trial proceedings should be excluded from the calculation of net delay under the *Jordan* framework. See, for example, *R. v. K.G.K.*,²⁵ where Joyal C.J.Q.B. excluded from the *Jordan* calculations the time taken to render a decision. Joyal C.J.Q.B. recognized the need to balance the competing constitutional principles of judicial independence and the right to trial within a reasonable time. He concluded that only if the delay in preparing a decision is “shocking, inordinate and unconscionable” will judicial delay be considered unreasonable and available to the Crown for deduction to justify the total delay which occurred.

[136] No consensus may be found, however, on this point. Watson J.A., writing in *R. v. Mamouni*²⁶, held that the time to render a decision should be considered an “exceptional circumstance” for the purposes of the *Jordan* analysis. He noted that, as stated in *R. v. Lavoie*,²⁷ the time taken by judges to issue decisions is unforeseen and unavoidable, beyond the control of the Crown. Slatter J.A. in his concurring decision in *Mamouni*, decided to exclude time taken to render a decision. He found that time awaiting a decision is not “delay” as contemplated in *Jordan* and *Cody* and should not be counted in the section 11(b) analysis at all.

²⁵ *R. v. K.G.K.*, 2017 MBQB 96.

²⁶ *R. v. Mamouni*, 2017 ABCA 347.

²⁷ *R. v. Lavoie*, 2017 ABQB 66.

[137] In *R. v. Gatt*,²⁸ the trial judge concluded that the time taken for a judge to decide whether to commit after a preliminary inquiry should be included in calculating the total period of delay. But in *R. v. Hammer*,²⁹ the trial judge followed *K.G.K.* and held that the time spent on a reserved decision should not count toward the total period of delay unless the time taken was “shocking, inordinate and unconscionable”.

[138] The Coughlan article considers what should be regarded as inherently part of the time allowed by the ceiling. Coughlan argues that under the new *Jordan-Cody* approach the ceilings have been “dramatically extended” from the previous guidelines and these ceilings “should not be approached on the basis that they permit the accused to do the bare minimum but that anything beyond that will be deducted.” Coughlan submits that in this context “at a general level the test for whether something is defence-caused ought to be *at a minimum* as strict as asking whether it is exceptional” [*Italics in original.*]. He suggests that merely because an accused has taken steps which do not happen every time or for that matter does not happen very often, should not lead to the conclusion that it constitutes “defence-caused delay”.

[139] In the present case, I conclude the proper approach is to treat the time taken for judges to render reserved decisions generally as time which is part of the inherent time requirements of the case. It should not be considered an exceptional circumstance available to the Crown to justify the reasonableness of the total delay when applying the *Jordan-Cody* calculations unless the time taken is unreasonable in the opinion of the trial judge.

[140] I find support for this conclusion in the references to inherent time requirements being already accounted for in the calculation of the ceiling at paragraphs 53, 65 and 83 of *Jordan* and paragraph 29 of *Cody*:

53. ... (t)he presumptive ceiling also reflects additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case. These factors include the inherent time requirements of the case and the increased complexity of criminal cases since *Morin*. In this way, the ceiling takes into account the significant role that process now plays in our criminal justice system.

[*Jordan* at para. 53]

²⁸ 2017 ONSC 3563.

²⁹ 2017 BCPC 377.

65. To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. 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. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

[*Jordan* at para. 65]

83. We expect stays beneath the ceiling to be granted only in clear cases. As we have said, in setting the ceiling, we factored in the tolerance for reasonable institutional delay established in *Morin*, as well as the inherent needs and the increased complexity of most cases.

[*Jordan* at para. 83]

29. ... not all delay caused by defence conduct should be deducted under this component. In setting the presumptive ceilings, this Court recognized that an accused person's right to make full answer and defence requires that the defence be permitted time to prepare and present its case. To this end, the presumptive ceilings of 30 months and 18 months have "already accounted for [the] procedural requirements" of an accused person's case (*Jordan*, at para. 65; see also paras. 53 and 83). For this reason, "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay" and should not be deducted (*Jordan*, at para. 65).

[*Cody* at para. 29]

[141] When preparing a case and proceeding in a fashion designed to avoid exceeding the *Jordan-Cody* ceiling, prosecutors should take into account that the defence will be legitimately taking action to respond to the charges. This may include bringing on *Charter* applications, which will require a judge to consider and render a decision, within a reasonable period of time. Prosecutors should understand that time required in deliberations and preparations of decisions is inherent to the case. If the Crown is permitted to have this time classified as exceptional circumstances and deducted for net delay purposes, the Crown is being permitted a ceiling higher than the 30 months set out in *Jordan* and *Cody*. As noted in those cases, the Crown has already received the benefit of an allowance for such delay when the ceilings were set.

[142] The trial judge found that the applications by the defence were actions legitimately taken to respond to the charge. I see no error in this finding. I agree with Hoegg J.A. that the time the trial judge took to render her decision on

the two applications was quite reasonable and not at all excessive and could not in any way be characterized as “shocking, inordinate, or unconscionable”. The time should not be deducted in calculating total delay. I do not find it necessary to decide what the result would be if the time taken had been unreasonable.

(3) Complexity

[143] In *Cody*, the Court noted, at paragraph 63, that the second category of exceptional circumstances is concerned with particularly complex cases. Complexity cannot be used to deduct specific periods of delay. Instead, it requires a qualitative assessment that takes place after applicable quantitative deductions are made. Where the net delay exceeds the presumptive ceiling, the case’s complexity as a whole may be relied upon to justify the time that the case has taken and rebut the presumption that the delay was unreasonable (*Jordan* at para. 80). See also the recent decision of this Court in *R. v. Noftall*, 2018 NLCA 63, which considered the issue of complexity, as well as transitional exceptional circumstances.

[144] I see no error in the trial judge’s conclusion that the present case is of “moderate complexity.” The Court in *Cody*, at paragraph 64, explained that a particularly complex case is one that because of the nature of the evidence or the nature of the issues, requires an inordinate amount of trial or preparation time. Determining whether net delay is reasonable in view of the case’s overall complexity is a determination that “falls well within the expertise of a trial judge.”

[145] The trial judge did not adhere to the *Jordan-Cody* admonition to refrain from a quantitative analysis on complexity. She found that the number of pre-trial applications and the voluminous disclosure as well as possibly one unique legal issue (involving statutory interpretation to determine criminal liability) allowed the case to be characterized as being moderately complex, which only justified an exceptional circumstance delay of not more than six months. She noted this “does not equate to the 14 months by which the *Jordan* ceiling has been extended.” I read this as confirming that, under the *Jordan-Cody* analysis, the trial judge has concluded that the case’s complexity as a whole may not be relied upon to justify the time that the case has taken and to rebut the presumption that the delay was unreasonable (*Jordan* at para. 80). I find no error in this conclusion.

(4) The Transitional Exceptional Circumstance

[146] As the *Jordan* decision came out on July 8, 2016, almost 3 years from when first charges were laid in the present case (on July 25, 2013) and 8 months before the estimated end of the trial (March 31, 2017), the trial judge had to consider whether the transitional exceptional circumstance applied in this case. She noted the following explanation from paragraphs 77 and 96 of *Jordan*:

77. As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration. Particularly complex cases are cases that, because of the nature of the *evidence* or the nature of the *issues*, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.

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. Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account.

[Italics in original.]

See also, *Noftall*.

[147] The trial judge in the present case reiterated her earlier findings that it was incumbent on the Crown to make reasonable inquiries of Health Canada with respect to the undisclosed documentation produced at the preliminary inquiry in February, 2014, and that the delay in disclosing those documents (from February, 2014 to May 1, 2015) is attributable to the Crown. She calculated that

under the *Morin* analysis the Crown caused a total delay of approximately 19 months. She correctly noted that even allowing for a deduction of up to 6 months for the moderate complexity already discussed, leaves a situation where the delay still exceeds the ceiling. The trial judge concluded that even if there was an allowance for a transitional exceptional circumstance delay of 6 months and the total period of delay is adjusted by subtracting 6 months from the total calculated delay of approximately 44 months, the resulting approximately 38 months of delay is still above the 30 months presumptive ceiling set in *Jordan*. She held that the Crown had not established that 38 months of delay is justified based on the parties' reasonable reliance on pre-*Jordan* law and therefore a stay should be entered.

[148] I find no error with her approach and her findings and specifically agree with her conclusion that the Crown in the circumstances had failed to establish that “it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling” (*Jordan* at para. 70; italics in original.)

XI. SUMMARY AND DISPOSITION

[149] In summary, the trial judge did not err in concluding a stay should be entered. I would dismiss the appeal and uphold the stay.

[150] In light of this conclusion, I need not consider whether there was a violation of section 8 of the *Charter*, nor the merits of the cross-appeal.

L. D. Barry J.A.

Hoegg J.A. (Concurring in the Result with Separate Reasons)

[151] I agree with my colleague, Barry J.A., that the Crown's appeal be dismissed. However, I am unable to agree with his reasons for doing so.

[152] While I generally agree with his statements of the law respecting delay, and that exceeding the presumptive ceiling in this case is not justified by either the transitional circumstances doctrine or the complexity of the case, I differ from him respecting his treatment of: (1) the delay occasioned by the third party disclosure of additional Health Canada records, and (2) the time the judge took

to render decisions on pre-trial applications. Nevertheless, these differences of opinion do not bring the total delay under the presumptive ceiling of 30 months.

Third Party Disclosure Respecting Health Canada Records

[153] My colleague accepts that the Crown bears total responsibility for the delay associated with the defence request for disclosure of additional records from Health Canada. On the facts of this case, I simply cannot agree with that position.

[154] While Health Canada is a federal government entity, it is not considered “the Crown” for disclosure purposes (*R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 22). Health Canada is a third party, and production of records it holds is not within the control of the prosecuting Crown in any meaningful way. The fact that an applications judge ultimately ordered the Crown to obtain and disclose additional Health Canada records does not, on its own, mean that the Crown must bear responsibility for not having disclosed the additional records earlier. The applications judge’s decision does not necessarily mean that the delay associated with the defence failure to make the request in a timely fashion and the Crown’s request, subsequent acquisition, and disclosure of the additional records cannot be considered defence delay.

[155] The Supreme Court of Canada recently reiterated the distinction between first party and third party disclosure in *R. v. Gubbins*, 2018 SCC 44. First party disclosure is information that is in the possession or control of the prosecuting Crown. The regime for first party disclosure also applies to information when its nature is such that the police or other Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown. *McNeil* concerned disclosure of a police officer’s disciplinary records. Such a situation is regarded in the jurisprudence as a variation on first party disclosure which arises from the corollary duty on police to disclose materials “obviously relevant” to the accused’s case (*McNeil* at paragraph 59). Importantly, while the Crown’s duty to disclose first party disclosure not in its possession or control is an ongoing obligation, it is triggered by a defence request (*Gubbins* at paragraphs 18-24).

[156] If a first party disclosure regime does not apply to a particular case, the defence must utilize the third party disclosure process. Health Canada is a third party. The process is initiated by a defence application known as an *O’Connor* application.

[157] An aspect of third party disclosure, which was addressed in *McNeil* but not in *Gubbins*, is the obligation on the Crown to make reasonable inquiries of other government agencies when the Crown has been put on notice that the other government agency has potentially relevant information in their possession (*McNeil* at paragraphs 48-51). This obligation recognizes that the Crown is in a better position than an accused to obtain records from government agencies, and that the prosecuting Crown “should regard themselves as minister of justice assisting in the administration [rather] than as advocates” (*R. v Boucher* (1954), [1955] S.C.R. 16, 110 C.C.C. 263 at 26).

[158] In this case, the additional Health Canada records the defence was requesting were records respecting Mr. King’s export of ephedrine to the United States in 2010 and the decision made at that time not to prosecute him. The Crown had previously disclosed the non-privileged records respecting this issue which were in its possession, but not the additional Health Canada records which were not in the Crown’s possession and of which the Crown was not made aware until a defence request was made.

[159] The defence did not request the additional records in the possession of Health Canada until 13 months after the preliminary inquiry and 4 days prior to the scheduled defence application respecting alleged breaches of Mr. King’s section 8 and 9 *Charter* rights. The Crown responded to the request by advising that it had already disclosed all Health Canada records in its possession, and objected to providing additional records on the basis that they were protected by solicitor-client privilege and in any event were not relevant.

[160] Because of the Crown’s response, the defence filed an application for disclosure of the additional Health Canada records. This resulted in postponement of the scheduled *Charter* application from March 9, 2015 to November 10, 2015 – a delay of approximately eight months.

[161] Meanwhile on May 1, 2015, the defence application for disclosure of the additional Health Canada records was heard, and an applications judge (who was not the trial judge) ordered production of all non-privileged information from Health Canada that “relates to the question of the illegality or not of the export from Canada of ephedrine by Mr. King.” Notably, the applications judge did not rule that the information was relevant. He rested his reason for ordering the disclosure on the fact that the Crown had already disclosed similar information because it had been contained in its prosecuting file. However, that does not mean the requested records are relevant, which must be established to obtain third party disclosure. In accordance with the judge’s decision, which

was not appealable at that stage of the proceedings, the Crown requested the documents from Health Canada, and provided them (vetted for privilege) to the defence on July 29, 2015.

[162] The trial judge rejected the argument that the delay occasioned by this late request for disclosure of additional Health Canada records should be considered defence delay. In doing so, she placed emphasis on the fact that a letter from Health Canada – which the defence had entered at the preliminary inquiry but which had not previously been disclosed to the defence because the Crown did not have it – put the Crown on notice that additional records existed and ought to be disclosed. Accordingly, she concluded that the Crown should bear responsibility for any delay resulting from this state of affairs.

[163] The decision of the applications judge who ordered disclosure of the additional Health Canada records is not under appeal and therefore not subject to appellate scrutiny. However, I am of the view that the information he ordered disclosed is of very questionable relevance to both Mr. King's defence and the Crown's case. Whether Mr. King was investigated on a previous occasion for the same type of conduct and who made the decision not to prosecute and why are not material to the conduct of a current prosecution. The legality or illegality of the export of ephedrine by Mr. King is the issue for the court, and previous opinions, legal or investigatory, do not bear on a current prosecution. While I understand why the defence might have wanted the information, in my view entitlement to it under the third party regime set out in *O'Connor* must be established. The requirement of likely relevance was not addressed in the Judge's decision. The requirement is based on sound principle, and prevents trials from going sideways on collateral issues.

[164] In light of the very questionable relevance of the requested disclosure, it would not, and could not, have been clear to the Crown in February of 2014 that the defence would be seeking further disclosure from Health Canada. While the defence was aware that further information existed – as they were the party with the letter in their possession – they chose to say nothing about the issue until March 2015 – over a year later. Production of the letter at the preliminary inquiry does not, in my view, constitute notice to the Crown that they must request additional disclosure.

[165] The Supreme Court of Canada in *Cody* stated that defence counsel bear an obligation to actively advance their clients' rights to trials within reasonable times (paragraph 33). To say that the Crown is responsible for all of the delay resulting from the late request for disclosure of the additional Health Canada

records in the circumstances outlined above is to disregard the Supreme Court's direction that all participants in the criminal justice system share the responsibility to adopt a proactive approach to prevent unnecessary delay (*Cody* at paragraph 36).

[166] Had the defence made a timely request for the additional Health Canada disclosure, the *Charter* application could have proceeded on schedule. As such, the resulting eight-month delay is properly characterized as defence delay, and should be deducted from the 44-month total delay.

Inclusion of Judicial Decision-Making Time in the Jordan Analysis

[167] Five months of the delay in this case results from time the Judge took to decide pre-trial applications. My colleague does not deduct this delay from the overall delay. Rather, he considers it to be part of the presumptive 30 months.

[168] This case involved multiple applications prior to the *Jordan* application. On two occasions, the trial judge reserved to render written decisions.

[169] The first occasion involved two defence applications that were heard over three days on November 10, 13, and 18, 2015. The first application was to exclude certain evidence on the basis that there were violations of sections 8 and 9 of the *Charter* and section 495 of the *Criminal Code*. The second application was for further disclosure from the Crown relating to their submissions at the preliminary inquiry.

[170] The Judge rendered a decision on these applications on March 10, 2016 – approximately four months after the applications were heard. These applications resulted in mixed success for the defence. The *Charter* application resulted in exclusion of certain evidence (2016 NLTD(G) 45), and the disclosure application was dismissed (2016 NLTD(G) 46).

[171] Following the decision to exclude certain evidence, the defence filed a subsequent application to challenge the validity of a number of judicial authorizations. This application was heard on November 8 and 16, 2016. One month later, on December 16, 2016, the Judge released her decision dismissing the defence application (2016 NLTD(G) 205).

[172] There was no delay occasioned by the reserve time taken to decide the defence applications respecting the sufficiency of grounds for the warrants or the *Jordan* application. The trial date was set prior to these applications being

heard, and there is no indication on the record that reserve time was a factor in the setting of trial dates.

[173] Other defence pre-trial applications were heard, but they were decided within a day or so of the hearing, so they do not contribute to delay in any meaningful way (2015 NLTD(G) 76, 2016 NLTD(G) 158).

[174] The time judges take to decide pre-trial applications has been the subject of divergent opinion in Canada.

[175] My colleague Justice Barry treats the five months which the Judge took to render decisions respecting two of the applications as part of the inherent requirements of trial, and includes them in the presumptive 30-month ceiling. This is the approach followed in *R. v. Gatt*, 2017 ONSC 3563 as well as in *R. v. Lovett*, 2017 ABQB 701, 64 Alta. L.R. (6th) 109.

[176] Other courts have approached the issue differently. One of these different approaches is to exclude reserve time from the initial calculation of delay in the first step of the *Jordan* analysis on the theory that such time is not “delay” as contemplated in *Jordan* (*R. v. K.G.K.*, 2017 MBQB 96, [2017] 11 W.W.R. 179; *R. v. Hammer*, 2017 BCPC 377, 42 C.R. (7th) 386; *R. v. Zilney*, 2017 ONCJ 610, 390 C.R.R. (2d) 209; *R. v. Basha and Dokaj*, 2017 ONSC 5897, 399 C.R.R. (2d) 240; *R. v. Brown*, 2018 NSCA 62, 364 C.C.C. (3d) 238; *R. v. Hammer*, 2018 BCPC 56). Under this approach, if the passage of time spent preparing a decision is “shocking, inordinate and unconscionable,” the accused can pursue a remedy under 11(b) under the analysis articulated in *R. v. Rahey*, [1987] 1 S.C.R. 588, 39 D.L.R. (4th) 481, which operates independently of the *Jordan* framework.

[177] Another approach is to include reserve time when calculating the post-charge delay at first instance, but then to subtract it on the basis that it is an exceptional circumstance (*R. v. Lavoie*, 2017 ABQB 66; *R. v. Hertyk*, 2017 ONCJ 641). This approach places emphasis on the fact that the delay is entirely outside the control of the prosecuting Crown.

[178] The Alberta Court of Appeal split over which approach to take in *R. v. Mamouni*, 2017 ABCA 347, 356 C.C.C. (3d) 153, leave to appeal to SCC refused, 38091 (September 27, 2018). Justice Watson concluded that, as a general statement, reserve time is an inherent part of the process, and should be included as part of the presumptive ceiling. However, he further concluded that, in the particular case, complexity was what caused the lengthy reserve time, and

so it was appropriate to deduct the time as an exceptional circumstance. The concurring reasons of Justice Slatter adopted the approach that reserve time is not “delay” at all, and should not be included at first instance. Although Justice Crighton concurred with the reasons of Justice Watson, she specifically excluded the comments on reserve time from her endorsement stating: “It is not necessary in this appeal to decide how the time taken for reserved judgments should be dealt with in the *Jordan/Cody* framework.”

[179] I note that the Ontario Court of Appeal similarly declined to address the issue in *R. v. Jurkus*, 2018 ONCA 489, 363 C.C.C. (3d) 246, at paras. 69-71, leave to appeal to SCC requested, 38255 (August 23, 2018) and *R. v. MacIsaac*, 2018 ONCA 650, 141 O.R. (3d) 721, at para. 37.

[180] It is not necessary to resolve the issue in this appeal because removing the five months of reserve time – either on the basis that it should not be included at first instance, or because it is backed out as an exceptional circumstance – is not, on its own, sufficient to bring the period of delay within the presumptive ceiling. Even when combined with the 8 months that I would attribute to defence delay, the total delay exceeds the presumptive ceiling by resting at 31 months. Nevertheless, I am disinclined to the notion that the time a judge takes to decide pre-trial applications should be included in the 30-month presumptive ceiling.

[181] Given the different approaches taken by different provincial courts, it seems to me that the Supreme Court of Canada must decide this issue. The Supreme Court of Canada did advert to the issue from a somewhat different perspective in *Jordan*, saying at paragraph 139 “all Courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials”. I would add that, in my view, consideration of this issue should take into account judges’ workloads, the demands on their time, and the resources available to support them.

[182] As a final note, I would add that I am of the view that the time the trial judge took to render her decisions on the two applications was quite reasonable and not at all excessive, and could not in any way be characterized as “shocking, inordinate, or unconscionable”.

[183] On my analysis this case exceeds the presumptive ceiling by one month or six months (depending on how the judicial delay is treated). The remaining consideration is whether exceptional circumstances exist such that exceeding the presumptive ceiling is nonetheless reasonable. This Court dealt with that issue in *R. v. Noftall*, 2018 NLCA 63. In *Noftall* this Court ruled that the Crown had

established exceptional circumstances based in part on “the complexity inherent in charges of conspiracy to traffic in drugs against multiple accuseds” (*Noftall* paragraph 44) and concluded there was no violation of Mr. Noftall’s section 11(b) *Charter* right. In this case, Mr. King, a sole accused, is being prosecuted for exporting ephedrine, a Class A Precursor substance under Schedule VI of the *CDSA*. The cases are very different. The case against Mr. King does not involve the same level of complexity as *Noftall*. Accordingly, I conclude that the exceptional circumstances (whether based on complexity or transitional circumstances) necessary to rebut the presumption that the delay which exceeded the presumptive ceiling was nevertheless reasonable, do not exist in this case.

Other Grounds of Appeal and the Cross-Appeal

[184] In addition to appealing the stay of proceedings, the Crown has also appealed the Judge’s exclusion of certain evidence after finding that the manner in which it was obtained was contrary to section 8 of the *Charter*. As well, the defence has cross-appealed the judge’s ruling that the judicial authorizations were valid.

[185] While I have misgivings about the Judge’s decision that Mr. King’s section 8 rights were violated on the basis that the postal inspectors were acting as agents of the RCMP, it is unnecessary to resolve this issue in light of my agreement with Justice Barry to dismiss the appeal. I add that, even if it were not rendered unnecessary by my concurrence in the result of the appeal, I would also note that this Court lacks jurisdiction to determine the issue in this appeal.

[186] It has been long been recognized that “appellate jurisdiction is a creature of statute” (*C. (R.) v. Québec (Procureur général)*, 2002 SCC 52, [2002] 2 S.C.R. 762, at para 11). In the context of criminal appeals, section 674 of the *Criminal Code* further emphasizes this by establishing that, with regards to indictable offences, the only available appeal proceedings are those authorized by Parts XXI and XXVI of the *Criminal Code*.

[187] The primary statutory provisions for the appeal rights of the accused and the Crown are contained in sections 675(1) and 676(1) of the *Criminal Code*:

Right of appeal of person convicted

675(1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal

(a) against his conviction

- (i) on any ground of appeal that involves a question of law alone,
- (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or
- (iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or

(b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.

Right of Attorney General to appeal

676(1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

- (a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;
- (b) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on an indictment;
- (c) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or
- (d) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

[188] Accordingly, this Court has jurisdiction to hear the Crown’s appeal of the order granting the stay pursuant to section 676(1)(c). However, there is no statutory provision authorizing the appeal of the section 8 *Charter* issue at this stage of the proceeding.

[189] Similarly, there is no provision authorizing this Court to hear Mr. King’s cross-appeal. Section 675(1) establishes a right of appeal for a “person who is

convicted by a trial court in proceedings by indictment.” A trial court has not convicted Mr. King.

[190] While it may seem appropriate for the usage of judicial resources to have all potential matters for a future appeal resolved at this time, efficiency cannot create jurisdiction. The *Criminal Code* does not provide that, where there is one permissible ground of appeal, there is *carte blanche* to hear what would otherwise be impermissible interlocutory appeals.

L. R. Hoegg J.A.

I concur with the reasons of Hoegg J.A.: _____

F. P. O’Brien J.A.

APPENDIX A

Most Significant Events Relating to Delay

The Crown prepared a useful chart setting out the most significant events in the proceedings between the laying of charges and the expected end of trial and showing the time periods involved. I have modified somewhat the descriptions of the events.

Time period (days between)	Procedure or event	Total days (cumulative)
Prior to July 25, 2013	Pre-charge	Not counted
July 25, 2013 to Oct. 2, 2013 (69 days)	From when charge laid to first appearance	69
To November 20, 2013 (49 days)	Election to Supreme Court.	118

To February 4, 2014 (76 days)	To start of preliminary	194
To March 11, 2014 (35 days)	To decision on preliminary	229
To April 2, 2014 (22 days)	First set date in Supreme Court. Pre-trial conference set for June 19th. Crown unavailable before. Court refused to set trial dates when defence opposed as no preliminary inquiry transcript requested.	251
To June 2, 2014 (61 days)	Second set date. Transcript delayed. Ordered for July 2nd. Defence unavailable for trial until December 8. Set for then.	312
To September 8, 2014 (98 days)	To set dates for pre-trial hearings. Defence says drafting <i>Charter</i> application. Complains about volume of disclosure.	410
To December 8, 2014 (91 days)	Original trial dates, given up for Charter application. Judge refuses Crown request to hold dates. Says would have had to reschedule anyhow as preliminary transcript not ready for pre-trial conference and it not yet held. Pre-trial rescheduled for October 21. Applications set for December 8 (later revised to 9) 2014.	501
To April 30, 2015 (143 days)	Disclosure hearing	644
To November 10, 2015 (194 days)	Hearing on Canada Post searches	838
To March 10, 2016 (121 days)	Decision on section 8 Charter violations	959
To September 30, 2016 (204 days)	Decision on Crown application to re-open the <i>voir Dire</i>	1163
To December 16, 2016 (77 days)	Decision in further application regarding sufficiency of 22 warrants	1240
To January 17, 2017 (32 days)	<i>Jordan</i> hearing	1272
To March 31, 2017 (73 days)	Expected end of trial	1345
Total		1345 days is 44 months & 6 days