

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Ashraf*, 2016 ONCJ 584

DATE: 2016 10 03

COURT FILE No.: Brampton 15-3869

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

JEHANZEB MOHAMMAD ASHRAF

Before Justice Patrice F. Band

Heard on April 5 and 6 and September 19 and 21, 2016

Ruling on s. 11(b) *Charter* Application, released on October 3, 2016

Mr. P. Maund.....counsel for the Crown

Mr. L. Kwok counsel for the defendant Mr. Ashraf

BAND J.:

I. INTRODUCTION

[1] This s. 11(b) application exposes a number of practical challenges that are latent in the Supreme Court of Canada's recent decision in *R. v. Jordan*¹ – at least insofar as it applies to cases that are already in the system (“transitional cases”).

[2] Mr. Ashraf sought a stay of proceedings based on s. 11(b) of the *Charter* on September 19, 2016, his scheduled trial continuation date.

[3] Based on the defence's calculations, that date was *exactly* 18 months from the date on which he was arrested and released, having been accused of driving a motor vehicle with excess blood alcohol. On that date, and on September 21, 2016, the evidence came to an end and the parties made their submissions on the merits as well as Mr. Ashraf's s. 11(b) application. I reserved my decision, and adjourned the matter to October 17, 2016.

[4] In the interim, the Court of Appeal for Ontario released *R. v. Coulter*,² its first decision interpreting *Jordan*.

¹ 2016 SCC 27.

² 2016 ONCA 704.

[5] If the final arguments marked the “end of the trial” and if the Crown’s calculations are correct, then the *Charter*-relevant or “net delay” is 17 months and two days; if the Defence’s calculations are correct, it is 18 months and two days.

[6] If the date on which I render my decision determines the “end of the trial” for s. 11(b) purposes, then on either party’s calculation the 18 month ceiling may have been reached during my period of deliberation.

II. THE POST-JORDAN CHALLENGES RAISED BY THIS APPLICATION

[7] As the Court stated in *Jordan*, the first step for the trial judge under the new framework is to calculate the “total delay.” From that, any “defence delay” must be subtracted to yield the “net delay.” Once that is done, the trial judge can determine whether the remaining delay is above or below the presumptive ceiling (18 months in the provincial courts).

[8] The calculation of the net delay has important consequences: it determines the burden of proof and the legal test to be applied to the facts. It means the difference between a presumptive breach (and its attendant stay of proceedings) on one hand, and a presumptively reasonable delay, on the other.³

[9] The chronology in Mr. Ashraf’s case raises the following questions.

- A. Does the “11(b) clock” start ticking on the date of the arrest or the swearing of the Information?
- B. How does one compute “total delay”? Does one count the total number of days and divide by 30? Or does one simply count each month that has elapsed, as one does with birthdays, rent and mortgage payments?
- C. Ought the calculation of “net delay” itself be done flexibly and contextually, with due regard for the parties’ reliance on the previous state of the law? Put another way, is *R. v. Godin*, [2009] S.C.J. No. 26 still applicable in the context of transitional cases?
- D. How does one characterize and account for the time the trial judge takes to consider, draft and render his or her decision in relation to the “anticipated end of trial”?

III. CHRONOLOGY – TIME TO TRIAL

Investigation/Arrest/Release from the Station: March 20, 2015

[10] Mr. Ashraf was investigated at the roadside on March 20, 2015. After providing a sample into a roadside screening device, which yielded a “fail”, he was arrested. He

³ In *Coulter*, *supra*, at para. 107, the Court indicated that the defence’s burden in a transitional case falling below the presumptive ceiling is to rebut the presumption that the remaining delay was reasonable.

then provided a sample of his breath into an approved instrument, which yielded readings in excess of the legal limit. He was later released from the station on a promise to appear.

Swearing of the Information: March 30, 2015

[11] For reasons that were not explained to me, the Information was not sworn until March 30, 2015. In my experience, it is not unusual for police to swear the Information some time between the arrest date and the first appearance in this jurisdiction, notwithstanding the statutory requirement that they do so “as soon as practicable.”⁴

Pre-Trial Steps: April 1, 2015 to September 21, 2016

[12] Mr. Ashraf first appeared in court on April 1, 2015. Initial disclosure was provided, and the matter was adjourned to April 29, 2015.

[13] On April 29, 2015, further disclosure was provided. The matter was adjourned to June 23, 2015.

[14] On May 21, 2015, defence counsel wrote a detailed letter to the Crown requesting further disclosure, including a request for video footage from the “sally port”, police division hallways and cells. By this time, counsel had reviewed the disclosure that had been provided.

[15] On June 3, 2015, defence counsel was retained and filed a Designation of Counsel. Further additional disclosure was provided and defence counsel asked that the matter be adjourned to June 24, 2015. The court advised that June 24 was full and that the next available date was July 8, 2015.

[16] On July 8, 2015, a DVD was provided by way of additional disclosure, and defence counsel asked that the matter be adjourned to July 29, 2015. The court advised that July 29 was a busy day and suggested August 5, 2015.

[17] On August 5, 2015, a Crown Pre-Trial Conference had been held, at which the parties agreed (rightly) that a Judicial Pre-Trial (“JPT”) was required. It was set for September 17, and the matter was adjourned to September 21, 2015 to be spoken to.

[18] On September 21, 2015, the parties attended to set the trial date. The first date that was offered to the parties, and which the Crown could accommodate, was March 17-18, 2016. Defence counsel was unavailable. The next dates offered, April 5 and 6, 2016, were accepted and the matter was adjourned to those dates in 307 court.

The Trial: April 5-6, 2016

[19] During the week of April 4, 2016, I was sitting in 403 court. This matter was “traversed” into my court on April 5, as the previous day’s matter had ended earlier than anticipated.

⁴ Section 505 of the *Criminal Code*.

[20] On the morning of April 5, I explained to counsel that the Court Reporter had a commitment that required her to leave court at approximately 3:30 p.m. and also that I had some continuing matters set for April 6 (this included a sentencing hearing relating to an importation of over 3 kg of cocaine).

[21] The trial began on April 5 in the morning, and we ended at 3:45 p.m. On April 6, we resumed this matter at approximately 12:30 p.m. At approximately 3:55 p.m., I sent the parties to obtain a continuation date. In our courthouse, that process can take 30-45 minutes at the end of the day.

[22] They returned 35 minutes later with a continuation date of September 19 in hand. The dates offered had been June 8, August 8, August 10, August 12 and September 19. Both sides put their s. 11(b) concerns on the record.

[23] The Crown was unavailable from June 8 to August 12 because of a combination of factors including Crown School, a Superior Court trial, vacation and paternity leave. The Crown made some efforts to see if the matter could be assigned to a colleague, but Crown School made that impossible.

[24] The defence was unavailable on August 10.

[25] In all, 3.5 hours of court time on April 5 and 6 were unavailable to this case due to other commitments. To put that in context, a matter that is estimated to require more than 3 hours of court time is deemed to require more than one day of trial time in Brampton.

Trial Continuation and s. 11(b) Application: September 19-21, 2016

[26] Mr. Ashraf gave his evidence-in-chief on April 6, 2016, and the matter was adjourned to September 19 with the understanding that Mr. Ashraf would be cross-examined by the Crown, the defence would close its case and the parties would make their submissions.

[27] On June 16, the defence filed its s. 11(b) Application materials. They included all transcripts, affidavits and a detailed and case-specific factum.

[28] Defence counsel, Mr. Kwok, made the Application returnable on the continuation date even though the Trial Coordinator had offered him a date in early July. While that date would have allowed him to comply with Rule 2.4, which states that s. 11(b) applications are to be heard at least 60 days before the trial, it would have put him in technical breach of his Rule 3.1 obligation to give the Crown 30 days' notice. He would have been 8-10 days short. He made this decision without seeking to discuss the issue of compliance with the Rules with the Crown or bringing it to my attention.

[29] On September 19, Mr. Kwok submitted that I ought to hear the Application and come to a determination of that issue before continuing with the trial proper. In doing

so, he relied on the Rules and case law⁵ indicating that such applications ought to be dealt with prior to trial.

[30] The Crown took the position that the trial proper should be completed and that arguments on the merits and on the Application should follow.

[31] Both parties agreed that the resolution of that issue was within my discretion.

[32] I decided that we would complete the trial proper before moving on to the Application. I placed my reasons for doing so on the record. Essentially, I found that this was the most efficient way to proceed given how close the trial was to completion. To proceed with the Application first would have led to an adjournment given its complexities as a transitional post-*Jordan* case. This would have indirectly allowed the defence to manufacture delay. In fact, we were unable to complete the matter on September 19. Fortunately, all of us were able to make ourselves available on September 21.

[33] I take this opportunity to comment on Mr. Kwok's unilateral decision to decline the date offered in early July. I appreciate that the Rules can present challenges in cases involving trial continuations. However, Rule 3.1(3) clearly states that notice periods can be lengthened or shortened on consent of the parties or by an order of the court. In my view, Mr. Kwok's failure to raise the issue of notice with the Crown or, in the alternative, with me, was a mistake. This is precisely the kind of issue that calls for communication among the parties and, where that fails, direction from the trial judge.

IV. APPLYING THE JORDAN FRAMEWORK TO CASES ALREADY IN THE SYSTEM

Delays above the 18 month ceiling

[34] In *Jordan*, the Supreme Court identified ceilings beyond which delays are presumptively unreasonable in the trial courts. For trials in the provincial courts, the ceiling is 18 months. To calculate the delay, judges must tally up the time between the charge and the actual or anticipated trial date, and subtract from that period any defence delay. If the remainder exceeds the ceiling, then it falls to the Crown to establish the presence of exceptional circumstances or, in the case of matters that preexist the release of *Jordan*, the applicability of the "transitional exceptional circumstance."

[35] As the Supreme Court explained at paras. 69-75, exceptional circumstances lie outside the Crown's control. They are (1) reasonably unforeseen or reasonably unforeseeable and (2) the Crown cannot reasonably remedy the delays that arise from them. It is incumbent on the Crown "to show that it took reasonable steps to avoid and address the problem before the delay exceeded the ceiling." These steps need not have been successful; however, they need to have been taken. Where delays were caused by discrete exceptional events, they must be subtracted from the total period of delay for purposes of determining whether the ceiling has been exceeded.

⁵ Mr. Kwok relied on *R. v. Chue*, [2011] O.J. No. 4149 (S.C.J.) and *R. v. Pioneer Construction Inc.*, [2006] O.J. No. 1874 (C.A.). See also *R. v. Cisar*, [2014] O.J. No. 952 (C.A.).

[36] The Supreme Court discussed situations where it was anticipated that a trial would end below the ceiling, but did not. In such cases, “the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling.”⁶ Finally, the Court wrote that when an issue arises at trial close to the ceiling, “it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.”⁷

[37] At paras. 96-98 of *Jordan*, the Supreme Court described the “transitional exceptional circumstance” as follows.

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... 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.

...

Moreover, the delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with significant institutional delay problems. Judges in jurisdictions plagued by lengthy, persistent, and notorious institutional delays should account for this reality, as Crown counsel’s behaviour is constrained by systemic delay issues.

...

On the other hand, the s. 11(b) rights of all accused persons cannot be held in abeyance while the system works to respond to this new framework. Section 11(b) breaches will still be found and stays of proceedings will still be entered for cases currently in the system. For example, if the delay in a simple case vastly exceeds the ceiling because of repeated mistakes or missteps by the Crown, the delay might be unreasonable even though the parties were operating under the previous framework.

Defence delay

[38] There are two types of defence delay. The first, delay waived by the defence, is not relevant in this case. The second is delay “caused solely by the conduct of the defence.” For example, “deliberate and calculated defence tactics aimed at causing delay.” Another example is where both the Crown and the court are ready to proceed, but the defence is not.⁸

⁶ At para. 74.

⁷ *Ibid.*

⁸ *Ibid.*, at paras. 61-64.

Delays Below the 18 Month Ceiling

[39] Where the total delay falls below the 18 month ceiling, the defence bears the burden of demonstrating that the delay is unreasonable. To do so, the defence must establish that:

- (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.

[40] Stays in such cases are “to be granted only in clear cases.”⁹

- ***Meaningful steps and sustained effort***

[41] As the Court explained, judges “should consider what the defence could have done, and what it actually did, to get the case heard. Substance matters, not form.” In assessing those actions, judges must remember that it is not appropriate to question every decision with the benefit of hindsight. “The defence is required to act reasonably, not perfectly.”¹⁰

- ***Time markedly exceeded***

[42] Reasonable time requirements of a case are a function of a number of factors including complexity, local considerations, and whether the Crown took reasonable steps to expedite the proceedings. Like the defence, the Crown is not held to the standard of perfection.

[43] Judges should employ their knowledge of their own jurisdiction. This includes how long a case of a similar nature “typically takes to get to trial in light of relevant local and systemic circumstances.” This is not an analysis that lends itself to precise calculation.¹¹

- ***The framework must be applied flexibly and contextually***

[44] The criteria of defence initiative and whether the total delay markedly exceeds what is reasonable must be applied contextually, in a manner that is “sensitive to the parties’ reliance on the previous state of the law.” In close cases, “any defence initiative” prior to the release of *Jordan* “would assist the defence in showing that the delay markedly exceeds what was reasonably required.” The court must still consider whether the accused’s action or inaction is inconsistent with the desire for a speedy trial.

[45] The Court cautioned that “a stay of proceedings below the ceiling will be even more difficult to obtain for cases currently in the system.” The time requirements must also reflect the “high level of tolerance for institutional delay in particular localities.”

⁹ *Ibid*, at paras. 82-83.

¹⁰ *Ibid*, at paras. 84-85.

¹¹ *Ibid*, at paras. 87-91.

[46] In sum, the release of *Jordan* “should not automatically transform what would previously have been considered a reasonable delay into an unreasonable one.”¹²

V. THE CONTEXT: PEEL REGION

[47] In *R. v. Reid*, [2005] O.J. No.5618 (O.S.C.J.) Durno J., sitting as a summary conviction appeal judge, held that the trial judge had erred in applying the 8 to 10 month guideline to Peel Region in a case that he characterized as “somewhat more than a straightforward case.” The appropriate guideline in Peel for institutional delay in a “somewhat more than straightforward case” was 8 -9 months. More recently, in *R. v. Ratneswaran*, (2013) O.J. No 5037 and *R. v. Purewal*, (2014) O.J. No 2824, Durno, J. acknowledged that 8 to 9 months of institutional delay as set out by the Court of Appeal in *R. v. Rego*, (2005) O.J. No. 4768 is still appropriate in Peel for a straightforward case.

[48] As I indicated in *R. v. Tran*, [2016] O.J. No. 4516, Peel Region is not a locality that has a “high level of tolerance for institutional delay.”¹³ As a general rule, adjournments of trials or matters in the plea court are routinely accompanied by the parties’ positions concerning s. 11(b) rights. Since early 2015, with the cooperation of the Defence and Crown, this court has instituted new approaches to judicial pre-trials and trial scheduling. The goals have been to foster resolutions where appropriate and to minimize delay and inefficiency by estimating trial length more accurately, reducing day-of-trial “collapse rates” and eliminating the need for trial continuations.

VI. PRELIMINARY QUESTIONS

A. When does the “s. 11(b) clock” start to tick?

[49] The Information in this case was sworn 10 days after Mr. Ashraf was arrested and released. The defence urges me to find that the clock started running on March 20, the date of the arrest. He argues that in cases where an accused is arrested and released with a promise to appear, the date on which the Information is sworn is an arbitrary criterion, since it depends on the whim of the police. It should not be determinative.

[50] The Crown argues that the clock did not start running until the date on which the Information was sworn. For this proposition, he relies on the fact that in *Jordan*, the Court refers to the date of the *charge* and not of *arrest*. Further, this principle has its roots in *R. v. Kalanj* (1989), 48 C.C.C. (3d) (S.C.C.), and was recently applied in *R. v. Gandhi*, [2016] O.J. No. 4638 (S.C.) and *Edan*, *supra*.

[51] I begin with *Jordan*. The majority refers a number of times to the delay between the “charge” and the actual or anticipated end of trial.¹⁴ It could be said that the word “charge” in this context is not entirely free of ambiguity. As the Chief Justice wrote in *R. v. MacDougall*, [1998] 3 S.C.R. 45 at para. 16, being “charged with an offence” can bear different meanings.

¹² *Ibid*, at paras. 99-102.

¹³ For the same conclusion, see *R. v. Edan*, [2016] O.J. No. 493 (C.J.).

¹⁴ *Supra*, at paras. 47, 48, 49, 60, 82 and 119.

[52] However, in the French version of *Jordan*, the majority employs the phrase *le dépôt des accusations*. That phrase denotes the *laying* of charges or the swearing of an Information. It is also the phrase used in *Kalanj*, *supra*, and *Askov*. In my view, this clears up any perceived ambiguity inherent in the English word “charge” in *Jordan*.

[53] I am aware of cases involving delays between arrest and release, on one hand, and the swearing of an Information, on the other, in which judges have found that using the latter as the starting point would be unfair.¹⁵

[54] In light of the clear language employed in *Jordan* and how it was interpreted in *Coulter*, I have come to the conclusion that the s. 11(b) clock begins to run on the date of the swearing of the Information. In doing so, I am sensitive to the strong arguments pulling towards the contrary view in certain cases as a matter of fairness. However, to yield to those arguments would require me to find, implicitly, that the Supreme Court of Canada overruled its decision in *Kalanj* without referring to it. I am not prepared to do so.

B. How does one calculate delay?

[55] Given the pivotal nature of the 18 month mark, the question of exactly how to compute delay is important. If one counts the total days and divides by 30, one result obtains. If one starts at one date, and counts each month that has elapsed, one arrives at a different answer. For example: 542 days elapsed between the date of the swearing of the Information and the close of the case on September 21, 2016 in this case. If one divides that number by 30, the result is 18 months and two days. If one begins on March 30, 2014 and counts each complete month plus the remaining days, the result is 17 months and 21 days.

[56] The *big picture* is an overarching theme in *Jordan*. Judges ought to avoid failing to see the forest for the trees. At para. 91, when discussing the calculation of time, the Court urges judges to refrain from parsing each day or month; rather, “judges should step back from the *minutiae* and adopt a bird’s-eye view of the case.” At para. 111, the Court suggests that the new framework “replaces the micro-accounting process with a global assessment.”

[57] By establishing presumptive ceilings, the *Jordan* decision also aims to “enhance analytical simplicity.” There is an important public interest component to this new approach: “the clarity and assurance it provides will build public confidence in the administration of justice.”¹⁶

[58] I believe that the method of calculating delay that is most consistent with *Jordan*’s goals is to start at one date and count the number of months that have elapsed since. It is clear, simple and accords with common sense and everyday experience.

¹⁵ See, for example, *R. v. Swaminathan*, [2015] O.J. No. 3883 (C.J.) and cases cited within that decision.

¹⁶ *Ibid*, at paras. 49-51, 55.

[59] Interestingly, the *Interpretation Act* (which applies only to statutory construction), mandates a similar approach to counting months.¹⁷

[60] Therefore, leaving aside the question of the time the matter is under reserve, I would assess the total delay at 17 months and 21 days.

C. Can the defence reasonably rely on *R. v. Godin* in transitional cases?

[61] The Crown submits that I ought to subtract the 20 days between March 17, the first trial date offered, and April 6, 2016, the trial date that was set. He bases his argument on the clear and unequivocal wording in para. 64 of *Jordan*, and the way it was applied in its companion case, *R. v. Williamson*, [2016] SCC 28. He also points to *Gandhi, supra*, and *R. v. Kennedy*, [2016] O.J. No. 4357 (S.C.) as recent examples of this approach.

[62] Since then, in *Coulter*, the Court of Appeal appears to have done so in relation to a one-week period when defence counsel was unavailable. In relation to two other longer periods of defence counsel unavailability, the parties had agreed that the delay was defence delay.

[63] Mr. Kwok urges me to find that *Godin, supra*, can insulate the defence from this approach – at least in transitional cases. In *Godin*, defence counsel was unavailable on the first offered date for a rescheduled preliminary inquiry, causing a 6 week delay. The Supreme Court held that it would be unfair to place the responsibility for that part of the delay on defence counsel, stating that “s. 11(b) does not require defence counsel to hold themselves in a state of perpetual availability.”¹⁸

[64] While I note that *Jordan* did not explicitly refer to *Godin*, it is clear that it has necessarily (albeit tacitly) overruled it in relation to charges that post-date July 8, 2016.

[65] However, in the absence of clear language in *Jordan* removing its *rationale* from the prior state of the law, I find that a contextual application of the new framework set out in *Jordan* in a manner that is “sensitive to the parties’ reliance on the previous state of the law” requires me to consider *Godin* in this case.

¹⁷ Section 28 reads:

Where there is a reference to a period of time consisting of a number of months after or before a specified day, the period is calculated by

(a) counting forward or backward from the specified day the number of months, without including the month in which that day falls;

(b) excluding the specified day; and

(c) including in the last month counted under paragraph (a) the day that has the same calendar number as the specified day or, if that month has no day with that number, the last day of that month. R.S.C., 1985, c. I-21

¹⁸ At para. 23.

[66] This is because the calculation of the “net delay” is an integral part of the new framework. As the Court wrote at para. 60,

Application of this framework, as under the *Morin* framework, begins with calculating the total delay from the charge to the actual or anticipated end of trial. Once that is determined, delay attributable to the defence must be subtracted.

[67] To the extent that *Gandhi* and *Kennedy* hold otherwise, I note that they did not refer to *Godin* and are not binding upon this court.

[68] *Coulter* is obviously binding on this court, but again, *Godin* is not referred to and the issue does not appear to have been argued. I also note that in *Williamson*, it was the accused himself who turned down dates in favour of a family commitment, not counsel.

[69] In this case, I find that Mr. Kwok reasonably relied on *Godin* when he turned down the first offered trial date due to his own unavailability and accepted one 20 days later. Put another way, I find that the possibility of his decision being visited on his client later would not have been within Mr. Kwok’s reasonable contemplation at the time.

[70] At heart, to hold otherwise would seem unfair in this case.

[71] As a result, I do not subtract the 20 days from the total delay.

[72] Had the gap between the two dates been longer, or had Mr. Kwok turned down more than one date, things might have been different.

D. The time it takes the judge to consider, draft and render judgment

[73] In *R. v. Rahey*¹⁹ and *MacDougall, supra*, the Supreme Court of Canada held that s. 11(b) rights extend to the time of sentencing and even beyond, where an appeal is launched.

[74] It would seem, then, that the time a judge takes to render a decision must be included in the calculation of “total delay.” This raises a number of problems. First, when a s. 11(b) application is brought prior to trial, as required by the Rules, one wonders how the judge will be able to determine the period he or she will require to deliberate without knowing (a) how the trial will unfold and (b) what other demands will be placed on his or her time surrounding the “anticipated end of trial”. Second, in a case like this one, where counsel brought the application on a date that was initially set for trial continuation, some concerns may arise as to the optics and incentives at play. Should a judge inquire as to whether the defence is willing to waive the judge’s deliberation time? In a case where the 18 month mark might be reached during the judge’s period of deliberation, thereby shifting the onus, will the judge’s “turnaround time” cause one party or the other to feel aggrieved or, worse, to question the judge’s impartiality?

¹⁹ [1987] 1 S.C.R. 588.

[75] Where the ceiling has already been reached, the issue is less troubling, as the Crown cannot be said to have any ability to remedy any judge-caused delay, absent extraordinary circumstances such as those in *Rahey* and *MacDougall*.

[76] In this case, I would subtract my deliberation time from the “total delay.” I do so because of the manner in which the Application was scheduled. Had Mr. Kwok raised the issue of compliance with the Rules with the Crown or brought it to my attention, as he ought to have done, I am confident that the Application would have been heard prior to September 19. My confidence is based on the fact that the Application materials were complete and the Crown had approximately 20 days’ notice.

VII. APPLICATION OF THE *JORDAN* FRAMEWORK IN THIS CASE

A. Calculation of the net delay

[77] Because I have decided not to subtract the 20 days of defence unavailability or my deliberation period, the total delay and the net delay in this case are the same: 17 months and 21 days. Since the delay falls below the 18 month ceiling, the defence bears the burden of demonstrating that it is unreasonable.

B. Meaningful steps and sustained effort

[78] Mr. Kwok submits that the defence made meaningful and sustained efforts to move the matter to trial throughout. He points to a number of factors:

- Mr. Ashraf retained counsel swiftly;
- Mr. Kwok reviewed initial disclosure and wrote a detailed further disclosure request promptly;
- Mr. Kwok participated in Crown Pre-Trial and Judicial Pre-Trial conferences quickly once disclosure was complete;
- On several occasions, Mr. Kwok sought earlier return dates and trial dates than the court was able to provide;
- Mr. Kwok filed his *Charter* Application for trial in advance of the notice period set out in the Rules;
- Mr. Kwok produced a transcript of the breath room video and provided it to the Crown and the court to assist at trial;
- Mr. Kwok made reasonable, time-saving trial concessions, including the voluntariness of Mr. Ashraf’s statements in the breath room;
- Mr. Kwok prepared and filed his Book of Authorities on April 6;
- Mr. Kwok indicated that he had availability prior to September 19; and

- Mr. Kwok perfected the s. 11(b) Application quickly.

[79] The Crown argues that two aspects of Mr. Kwok's conduct are evidence that he was content with the pace of the litigation.

[80] First, Mr. Kwok waited for disclosure of the booking and cells video before setting a JPT. The Crown relies on *R. v. Kovacs-Tatar*²⁰ and *Gandhi, supra*. He also explained that, unlike a breath room video, the production of the DVD in question requires more than simply copying from the master. As a result, the time it took ought to be deemed part of the "intake" phase.

[81] Second, Mr. Kwok acquiesced to the justice of the peace on June 3 and July 8, 2015, rather than asking that the matter return earlier before a judge in 103 court. While the principal role of 103 court is to deal with guilty pleas, it also acts as a "practice court" where case management issues can be raised before a judge.

[82] In relation to the outstanding DVD disclosure, Mr. Kwok pointed to the concerns about his professional and ethical obligations to his client that are illustrated in *R. v. Malik*.²¹ The Crown argues that *Malik's* concerns are less important when the matter is heading for trial, and that counsel can move the matter forward by raising them at a JPT.

[83] I agree with the Crown and Justice Code in *Gandhi* that counsel should set a JPT in such a situation. However, the outcome of such a JPT in Brampton will not necessarily be the immediate setting of trial dates. Where counsel are unable to estimate trial time because of outstanding disclosure, the JPT judge is just as likely to play a case management role until disclosure is complete. I also note that, unlike the Crown in *Gandhi*, the Crown in this case was not urging Mr. Kwok to set a JPT in the absence of the outstanding disclosure. Nor was it challenging his right to it. In these circumstances, I cannot find that Mr. Kwok acted unreasonably or demonstrated satisfaction with the pace of the litigation.

[84] Likewise, I do not find that Mr. Kwok's failure to ask that his case be adjourned to 103 court was unreasonable or demonstrated satisfaction with the pace of the litigation. In June and July, 2015, the parties were communicating effectively, and there was no dispute as to the defence's entitlement to the DVD disclosure. At that time, this case still properly belonged in set-date court.

[85] While I have been critical of Mr. Kwok's decision to make his s. 11(b) Application returnable on the continuation date, I do not interpret it as evidence that he was content with the pace of the litigation.

[86] Mr. Kwok's conduct is not to be measured against a standard of perfection. Overall, he made meaningful and sustained efforts to move the matter to trial and demonstrated initiative in doing so.

²⁰ [2003] O.J. No. 2809 (S.C.J.).

²¹ [2014] O.J. No. 355 (S.C.J.).

C. Time markedly exceeded

[87] Mr. Kwok submits that this case is straightforward, and that its time to completion markedly exceeds what is reasonable in all the circumstances.

[88] The Crown points out that the case involved arguments under ss. 8, 9, 10(a) and 10(b) of the *Charter*. Responding to them required that the videotape of the events in the breath room be viewed at trial. The Crown also argues that its efforts to find a Crown with more availability to continue the matter, while ultimately unsuccessful, were reasonable. Lastly, the Crown submits that to find a breach in this case would be tantamount to setting a *de facto* threshold below 18 months. Because the *Jordan* ceiling took account of all relevant circumstances, it would be wrong for me to do so.

[89] Arguably, Mr. Ashraf's counsel of choice argument was more nuanced in this case than in others, insofar as it raised issues about Mr. Ashraf's access to his cell phone and to a third party (his father). Having heard all the evidence, I would characterize the case as "somewhat more than straightforward." As such, under the old guidelines, 8-9 months of institutional delay would have been reasonable.

[90] "Intake" for a case like this ought not to have taken longer than three months under the prior state of the law. This would include the DVD in question. The JPT accounted for approximately six weeks. The total institutional or Crown delays from set date to initial trial date, and then to continuation date, amount to over 11 months.

D. Efforts of the Crown

[91] While the Crown made some efforts to find a replacement in the 35 minutes that it took to set the date on April 6, I am not convinced that they were reasonable when viewed in context. It must be remembered that this case was shoe-horned into a court that was unavailable for a significant portion of the second scheduled day. That problem was apparent from the outset.

[92] But even if I am wrong about that, once the s. 11(b) Application was filed in June, the Crown ought to have redoubled its efforts. Instead, to my knowledge, nothing was done.

E. Reliance on the prior state of the law

[93] In *Jordan*, the Court noted that seriousness of the charges and prejudice were among the factors under the law as it previously existed that parties might reasonably rely upon.

[94] The Crown rightly submitted that drinking and driving cases are very serious.

[95] Mr. Ashraf's affidavit describes significant financial prejudice as a result of the trial continuation. Since the offence, he has lived and worked in Fort McMurray. The

continuation cost him over \$4,000 in additional legal, travel and accommodation costs. It also led to lost wages.

[96] I also see Mr. Ashraf's s. 11(b) Application itself, which was perfected promptly and prior to *Jordan*, as an indication of his reliance on the previous state of the law.

VIII. CONCLUSION

[97] This is a close case. But in light of the defence's initiative as well as the fact that it took place in a jurisdiction that does not show a "high level of tolerance for institutional delay," it is a clear one.

[98] At 17 months or more, I am satisfied that this case has taken markedly longer than it reasonably should have in comparison to similar cases. The 20 days that I decided not to subtract from the total delay accounted for little in my global assessment.

[99] I must add that in making this finding, I am in no way purporting to set a *de facto* ceiling for excess blood alcohol cases in Brampton. First, *Jordan* itself contemplates breaches in clear cases that fall below the ceiling, and each case will turn on its own facts. Second, the Supreme Court in *Jordan* warned that the presumptive ceiling "is not an aspirational target." To the contrary, "there is little reason to be satisfied with a presumptive ceiling on trial delay set at 18 months... This is a long time to wait for justice."²²

[100] The charge against Mr. Ashraf is therefore stayed.

Released: October 3, 2016

Justice Patrice F. Band

²² *Supra*, at paras. 56 and 57.