



SUPREME COURT OF CANADA

CITATION: R. v. Cody, 2017 SCC 31

APPEAL HEARD: April 25, 2017

JUDGMENT RENDERED: June 16, 2017

DOCKET: 37310

BETWEEN:

James Cody
Appellant

and

Her Majesty the Queen
Respondent

- and -

**Attorney General of Ontario, Attorney General of Quebec, Attorney General of
Manitoba, Attorney General of British Columbia, Attorney General of Alberta,
Director of Criminal and Penal Prosecutions and Criminal Lawyers' Association
of Ontario**
Interveners

CORAM: Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

REASONS FOR JUDGMENT: The Court
(paras. 1 to 75)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

R. v. CODY

James Cody

Appellant

v.

Her Majesty the Queen

Respondent

and

**Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Alberta,
Director of Criminal and Penal Prosecutions and
Criminal Lawyers' Association of Ontario**

Interveners

Indexed as: R. v. Cody

2017 SCC 31

File No.: 37310.

2017: April 25; 2017: June 16.

Present: Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

Constitutional law — Charter of Rights — Right to be tried within a reasonable time — Pre-Jordan delay of more than five years between charges and anticipated end of trial — Whether accused's right to be tried within reasonable time under s. 11(b) of Canadian Charter of Rights and Freedoms infringed — Framework for determining s. 11(b) infringement set out in Jordan applied.

C was charged with drugs and weapons offences on January 12, 2010. His trial was scheduled to conclude on January 30, 2015. Before the commencement of his trial, C brought an application under s. 11(b) of the *Charter*, seeking a stay of proceedings due to the delay. Because the application pre-dated the release of *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, the trial judge applied the former framework set out in *R. v. Morin*, [1992] 1 S.C.R. 771. He granted the application and stayed the proceedings. A majority of the Court of Appeal applied the *Jordan* framework and allowed the appeal, set aside the stay of proceedings and remitted the matter for trial.

Held: The appeal should be allowed and the stay of proceedings restored.

The delay in this case was unreasonable and therefore, C's right under s. 11(b) of the *Charter* was infringed. The Court of Appeal erred in its application of *Jordan*. From the time C was charged until his five-day trial was scheduled to begin, fully five years passed. The Crown, the defence and the system each contributed to

that delay. Under the *Jordan* framework, every actor in the justice system has a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with an accused person's right to a trial within a reasonable time. This framework now governs the s. 11(b) analysis and, like any of this Court's precedents, it must be followed and it cannot be lightly discarded or overruled. Properly applied, this framework provides sufficient flexibility and accounts for the transitional period of time that is required for the criminal justice system to adapt.

After the total delay from the charge to the actual or anticipated end of trial is calculated under the *Jordan* framework, delay attributable to the defence must be subtracted. Defence delay is divided into two components: delay waived by the defence and delay caused by defence conduct. The only deductible defence delay under the latter component is that which is solely or directly caused by the accused person and flows from defence action that is illegitimate inasmuch as it is not taken to respond to the charges. Illegitimacy in this context does not necessarily amount to professional or ethical misconduct, but instead takes its meaning from the culture change demanded in *Jordan*. The determination of whether defence conduct is legitimate is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. Defence conduct encompasses both substance and procedure — the decision to take a step, as well as the manner in which it is conducted, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to

the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. 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.

Beyond a retrospective accounting of delay, a proactive approach is required from all participants in the justice system to prevent and minimize delay. Trial judges should suggest ways to improve efficiency, use their case management powers and not hesitate to summarily dismiss applications and requests the moment it becomes apparent they are frivolous.

After defence delay has been deducted, the net delay must be compared to the applicable presumptive ceiling set out in *Jordan*. If the net delay exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances, which fall into two categories: discrete events and particularly complex cases. Discrete events, like defence delay, result in quantitative deductions of particular periods of time. However, case complexity requires a qualitative assessment and cannot be used to deduct specific periods of delay. Complexity is an exceptional circumstance only where the case as a whole is particularly complex. The delay caused by a single isolated step that has features of complexity should not be deducted under this category.

Transitional considerations may be taken into account as a third form of exceptional circumstances where the case was already in the system when *Jordan* was decided. Like case complexity, the transitional exceptional circumstance assessment involves a qualitative exercise. The exceptionality of the “transitional exceptional circumstance” does not lie in the rarity of its application, but rather in its temporary justification of delay that exceeds the ceiling based on the parties’ reasonable reliance on the law as it previously existed. The parties’ general level of diligence, the seriousness of the offence and the absence of prejudice are all factors that should be taken into consideration, as appropriate in the circumstances.

In this case, the total delay was approximately 60.5 months, from which the delay waived by C should be deducted (13 months). Then, two periods of time should be deducted as defence delay: the delay resulting from C’s first change of counsel (1 month) and the delay resulting from C’s recusal application (2.5 months). After accounting for these deductions, the delay is 44 months, which exceeds the 30-month ceiling set out in *Jordan* and therefore, is presumptively unreasonable.

With respect to exceptional circumstances, the following delays should be deducted as discrete events: the appointment of C’s former counsel to the bench (4.5 months) and part of the delay flowing from the *McNeil* disclosure issue that arose (3 months). The net delay is therefore 36.5 months. Despite the voluminous disclosure, this does not qualify as a particularly complex case.

In light of the trial judge's findings of real and substantial actual prejudice and that C's conduct was not inconsistent with the desire for a timely trial, the Crown cannot show that the net delay was justified based on its reliance on the previous state of the law. To the contrary, the trial judge's findings under the *Morin* framework strengthen the case for a stay of proceedings. Where a balancing of factors under that framework would have weighed in favour of a stay, the Crown will rarely, if ever, be successful in justifying the delay as a transitional exceptional circumstance under the *Jordan* framework.

Cases Cited

Applied: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; **referred to:** *R. v. Morin*, [1992] 1 S.C.R. 771; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *R. v. Dixon*, [1998] 1 S.C.R. 244; *R. v. Kutynec* (1992), 7 O.R. (3d) 277; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193; *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(b).

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Welsh, White and Hoegg JJ.A.), 2016 NLCA 57, 365 C.R.R. (2d) 111,

[2016] N.J. No. 357 (QL), 2016 CarswellNfld 405 (WL Can.), setting aside the stay of proceedings entered by Burrage J., 2014 NLTD(G) 161, 359 Nfld. & P.E.I.R. 123, 1117 A.P.R. 123, [2014] N.J. No. 395 (QL), 2014 CarswellNfld 399 (WL Can.), and remitting the matter for trial. Appeal allowed.

Michael Crystal and *Frank Addario*, for the appellant.

Croft Michaelson, Q.C., and *Vanita Goela*, for the respondent.

Tracy Kozlowski, for the intervener the Attorney General of Ontario.

Stéphane Rochette and *Abdou Thiaw*, for the intervener the Attorney General of Quebec.

Ami Kotler, for the intervener the Attorney General of Manitoba.

Trevor Shaw, for the intervener the Attorney General of British Columbia.

David A. Labrenz, Q.C., for the intervener the Attorney General of Alberta.

Nicolas Abran and *Daniel Royer*, for the intervener the Director of Criminal and Penal Prosecutions.

Megan Savard, for the intervener the Criminal Lawyers' Association of Ontario.

The following is the judgment delivered by

THE COURT —

I. Introduction

[1] In *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, this Court identified a culture of complacency towards delay in the criminal justice system. This culture was fostered by doctrinal and practical difficulties plaguing the analytical framework then applicable to the right of accused persons, guaranteed under s. 11(b) of the *Canadian Charter of Rights and Freedoms*, to be tried within a reasonable time. This appeal is yet another example of why change is necessary. From the time the appellant James Cody was charged with drugs and weapons offences until his *five-day trial* was scheduled to begin (prior to the release of this Court's decision in *Jordan*), fully *five years* passed. As we will explain, the Crown, the defence and the system each contributed to that delay. This leads us to stress, as the Court did in *Jordan*, that every actor in the justice system has a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with an accused person's right to a trial within a reasonable time.

[2] Applying the former framework from *R. v. Morin*, [1992] 1 S.C.R. 771, the trial judge found a breach of Mr. Cody's s. 11(b) *Charter* right, and stayed the proceedings. A majority of the Newfoundland and Labrador Court of Appeal reversed his decision, and remitted the matter for trial. Mr. Cody now appeals to this Court as of right.

[3] A number of the provincial Attorneys General who intervened in this matter asked this Court to modify the *Jordan* framework to provide for more flexibility in deducting and justifying delay. But *Jordan* was released a year ago. Like any of this Court's precedents, it must be followed and it cannot be lightly discarded or overruled (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 38; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 44). The *Jordan* framework now governs the s. 11(b) analysis and, properly applied, already provides sufficient flexibility and accounts for the transitional period of time that is required for the criminal justice system to adapt.

[4] Applying that framework, we find that the delay in this case was unreasonable. The Court of Appeal erred in its application of *Jordan*. Accordingly, we would allow the appeal and restore the order of the trial judge staying the proceedings against Mr. Cody.

II. Facts

[5] On January 12, 2010, Mr. Cody was arrested as a part of “Operation Razorback”, a drug trafficking investigation. While Mr. Cody was not a suspect in that investigation, he happened to be with a primary target at the time of that target’s arrest, and he too was arrested. A search of Mr. Cody’s vehicle uncovered half a kilogram of marijuana, a kilogram of cocaine and a stun gun.

[6] Mr. Cody was charged with two counts of possession for the purpose of trafficking, one count of possessing a prohibited weapon, and one count of possessing a weapon while being prohibited from doing so. He was released on bail the next day. A number of other people were also charged as a result of the investigation.

[7] Five months after Mr. Cody’s arrest, on June 30, 2010, the Crown indicated that it was prepared to provide disclosure. Because of the larger related investigation, disclosure was voluminous, comprising over 20,000 pages contained on two CDs. However, the Crown first required Mr. Cody’s counsel to sign an undertaking that would have prohibited the electronic copying of the two CDs. Mr. Cody’s counsel refused, as did other defendants’ counsel.

[8] Three months and three court appearances later, the parties remained at an impasse. Defence counsel applied to compel disclosure. The issue was referred to case management where, on September 30, 2010, a consent order was entered requiring Mr. Cody to sign his own undertaking before he could obtain a copy of the CDs. Nine months after his arrest, disclosure was released to Mr. Cody’s counsel on October 18, 2010.

[9] On November 29, 2010, Mr. Cody changed counsel. This resulted in a one-month delay of his preliminary inquiry, from March 11, 2011 to April 7, 2011. A one-year period of delay extending to April 2, 2012, was then waived by Mr. Cody.

[10] On May 1, 2012, Mr. Cody's five-day trial was scheduled to begin on November 5, 2012. These dates were then reassigned for the hearing of a *Charter* application to exclude the evidence found in Mr. Cody's vehicle at the time of his arrest.

[11] On September 3, 2012, Mr. Cody's second counsel was appointed a judge of the Provincial Court. As a result, the *Charter* application dates were vacated and, following three court appearances, the application was set down for May 6, 2013. Approximately one month of this delay was waived by the defence due to a scheduling error.

[12] On the Friday before the *Charter* application was set to be heard, the Crown advised Mr. Cody's counsel that misconduct allegations had been made against one of the police officers involved in Operation Razorback. In anticipation of forthcoming disclosure concerning these allegations, pursuant to *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, the *Charter* application was postponed. That disclosure was provided in late June 2013 and the parties were prepared to proceed by the end of that month, but the court could not accommodate a summer hearing. Because defence counsel was unavailable for September 2013, the hearing finally occurred in October

2013. Written reasons dismissing the *Charter* application were released on December 20, 2013.

[13] In January 2014, the Crown notified Mr. Cody's counsel that an agreed statement of facts used in the *Charter* application to exclude evidence had contained an error. Mr. Cody's counsel filed an application for a stay of proceedings or a mistrial, alleging a breach of his s. 7 *Charter* rights arising from the error in the agreed statement of facts. In late April 2014, that application was dismissed, the error struck from the trial judge's reasons on the initial *Charter* ruling and the *voir dire* reopened to permit Mr. Cody to cross-examine the police officer whose notes had been used to prepare the statement. At that time, Mr. Cody's counsel raised the possibility of a s. 11(b) *Charter* application, alleging a breach of Mr. Cody's right to a trial within a reasonable time. On June 26, 2014, the court confirmed its original ruling dismissing Mr. Cody's *Charter* application to exclude evidence.

[14] Mr. Cody's counsel then brought a recusal application alleging reasonable apprehension of bias. It was dismissed on September 10, 2014. Trial dates were set for January 26, 2015, but Mr. Cody's s. 11(b) *Charter* application was heard in late November 2014 and granted on December 19, 2014.

III. Judgments Below

- A. *Supreme Court of Newfoundland and Labrador — Trial Division (Burrage J.), 2014 NLTD(G) 161, 359 Nfld. & P.E.I.R. 123*

[15] Because the trial judge's decision pre-dated the release of this Court's reasons in *Jordan*, the trial judge applied the former *Morin* framework. He observed that the total delay from when Mr. Cody was charged to his scheduled trial date amounted to approximately 60.5 months. He allocated approximately 13 months to defence waiver, 17.5 months to inherent time requirements of the case, and 6 months to actions of Mr. Cody. This left a total of approximately 19 months of Crown and institutional delay which exceeded the *Morin* guideline of 16-18 months for a case tried in superior court.¹

[16] Turning to the issue of prejudice, the trial judge found that Mr. Cody had suffered "real and substantial actual prejudice" (para. 191). In particular, Mr. Cody was subject to bail conditions that affected his liberty, he experienced mental distress and anxiety, and he lost his employment because of restrictions on his ability to travel. The trial judge also inferred that there could be prejudice to Mr. Cody's fair trial interests because of the passage of time. Moreover, he found that nothing in Mr. Cody's conduct suggested he was deliberately delaying the proceedings. Stressing the importance of a global assessment, the trial judge concluded that the prejudice suffered by Mr. Cody because of the delay outweighed society's interest in a trial on the merits. Accordingly, he held that Mr. Cody's right under s. 11(b) had been breached and ordered a stay of proceedings.

¹ Although it is unclear how it factored into his analysis, the trial judge separately allocated approximately 4.5 months of delay resulting from the appointment of Mr. Cody's former counsel to the bench as "other" delay.

B. *Supreme Court of Newfoundland and Labrador — Court of Appeal (Welsh, White (dissenting) and Hoegg JJ.A.), 2016 NLCA 57, 365 C.R.R. (2d) 111*

[17] While the Crown's appeal from the trial judge's stay order was under reserve, this Court released its decision in *Jordan*. Written submissions on its significance were then filed by Mr. Cody and the Crown at the Court of Appeal.

[18] The majority allowed the appeal. Applying the *Jordan* framework, it found a number of exceptional circumstances relating primarily to disclosure, the unexpected *McNeil* issue and the error in the agreed statement of facts. After accounting for these deductions, it quantified the net delay as approximately 16 months, well below the presumptive ceiling. Accordingly, it set aside the stay of proceedings and remitted the matter for trial.

[19] The dissenting judge would have upheld the stay of proceedings. Viewing the matter globally, he noted that the five years it took for a five-day trial was contrary to the s. 11(b) promise of trial within a reasonable time. He disagreed with the majority on the attribution of several periods of delay to exceptional circumstances, and he held that the transitional exceptional circumstance was not intended to justify delay that would have been unreasonable under the *Morin* framework. Ultimately, after considering defence delay and exceptional circumstances, he tallied the delay at over 39 months, which significantly exceeded the presumptive ceiling and warranted a stay.

IV. Analysis

A. *The Jordan Framework*

[20] The new framework established in *Jordan* for analyzing whether an accused person's right to a trial within a reasonable time has been breached centres on two presumptive ceilings: 18 months for cases tried in provincial courts and 30 months for cases tried in superior courts (*Jordan*, at para. 46).

[21] The first step under this framework entails “calculating the total delay from the charge to the actual or anticipated end of trial” (*Jordan*, at para. 60). In this case, an information was sworn against Mr. Cody on January 12, 2010, and his trial was scheduled to conclude on January 30, 2015. This makes the total delay approximately 60.5 months.

[22] After the total delay is calculated, “delay attributable to the defence must be subtracted” (*Jordan*, at para. 60). The result, or net delay, must then be compared to the applicable presumptive ceiling. The analysis then “depends upon whether the remaining delay — that is, the delay which was not caused by the defence — is *above* or *below* the presumptive ceiling” (*Jordan*, at para. 67 (emphasis in original)).

[23] If the net delay falls below the ceiling:

...then the onus is on the defence to show 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. [Emphasis in original.]

(*Jordan*, at para. 48)

[24] If the net 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.

(*Jordan*, at para. 47)

[25] Where charges pre-date *Jordan* and the delay remains presumptively unreasonable after deducting defence delay and accounting for and considering exceptional circumstances, the Crown may nevertheless demonstrate that the transitional exceptional circumstance justifies the delay (*Jordan*, at paras. 95-96).

B. *Defence Delay*

[26] Defence delay is divided into two components: (1) “delay waived by the defence”; and (2) “delay that is caused solely by the conduct of the defence” (*Jordan*, at paras. 61 and 63).

(1) Waiver

[27] A waiver of delay by the defence may be explicit or implicit, but must be informed, clear and unequivocal (*Jordan*, at para. 61). In this case, it is undisputed that Mr. Cody expressly waived 13 months of delay. Accounting for this reduces the net delay to approximately 47.5 months.

(2) Delay Caused by Defence Conduct

(a) *Deducting Delay*

[28] In broad terms, the second component is concerned with defence conduct and is intended to prevent the defence from benefitting from “its own delay-causing action or inaction” (*Jordan*, at para. 113). It applies to any situation where the defence conduct has “solely or directly” caused the delay (*Jordan*, at para. 66).

[29] However, 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).

[30] The only deductible defence delay under this component 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. As we said in *Jordan*, the most straightforward example is “[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests” (*Jordan*, at para. 63). Similarly, where the court and Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted (*Jordan*, at para. 64). These examples were, however, just that — examples. They were not stated in *Jordan*, nor should they be taken now, as exhaustively defining deductible defence delay. Again, as was made clear in *Jordan*, it remains “open to trial judges to find that other defence actions or conduct have caused delay” warranting a deduction (para. 64).

[31] The determination of whether defence conduct is legitimate is “by no means an exact science” and is something that “first instance judges are uniquely positioned to gauge” (*Jordan*, at para. 65). It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.

[32] Defence conduct encompasses both substance and procedure — the decision to take a step, *as well as the manner in which it is conducted*, may attract

scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.

[33] As well, inaction may amount to defence conduct that is not legitimate (*Jordan*, at paras. 113 and 121). Illegitimacy may extend to omissions as well as acts (see, for example in another context, *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 37). Accused persons must bear in mind that a corollary of the s. 11(b) right “to be tried within a reasonable time” is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to “actively advanc[e] their clients’ right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and . . . us[e] court time efficiently” (*Jordan*, at para. 138).

[34] This understanding of illegitimate defence conduct should not be taken as diminishing an accused person’s right to make full answer and defence. Defence counsel may still pursue all available substantive and procedural means to defend their clients. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count towards the *Jordan* ceiling. In this regard, while we recognize the potential tension between the right to make full answer and defence and

the right to be tried within a reasonable time — and the need to balance both — in our view, neither right is diminished by the deduction of delay caused by illegitimate defence conduct.

[35] We stress that illegitimacy in this context does not necessarily amount to professional or ethical misconduct on the part of defence counsel. A finding of illegitimate defence conduct need not be tantamount to a finding of professional misconduct. Instead, legitimacy takes its meaning from the culture change demanded in *Jordan*. All justice system participants — defence counsel included — must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11(b) of the *Charter*.

(b) *Preventing Delay*

[36] To effect real change, it is necessary to do more than engage in a retrospective accounting of delay. It is not enough to “pick up the pieces once the delay has transpired” (*Jordan*, at para. 35). A proactive approach is required that prevents unnecessary delay by targeting its root causes. All participants in the criminal justice system share this responsibility (*Jordan*, at para. 137).

[37] We reiterate the important role trial judges play in curtailing unnecessary delay and “changing courtroom culture” (*Jordan*, at para. 114). As this Court observed in *Jordan*, the role of the courts in effecting real change involves

implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials. [para. 139]

In scheduling, for example, a court may deny an adjournment request on the basis that it would result in unacceptably long delay, even where it would be deductible as defence delay.

[38] In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion.

[39] Trial judges should also be active in suggesting ways to improve efficiency in the conduct of legitimate applications and motions, such as proceeding on a documentary record alone. This responsibility is shared with counsel.

(c) *Application*

[40] In this case, we would deduct two periods of time as defence delay. First, it was undisputed throughout the proceedings that the delay resulting from Mr. Cody's first change of counsel should be deducted as defence delay.

[41] The second period arises from Mr. Cody's recusal application alleging reasonable apprehension of bias. The trial judge found that this application did not further Mr. Cody's right to full answer and defence and attributed the resulting 2.5 months of delay equally to the Crown and defence. On appeal, the Court of Appeal was unanimous in finding that the recusal application was meritless, frivolous or illegitimate.

[42] These latter characterizations are well founded on the record, and we agree with them. The recusal application is a clear example of frivolous and illegitimate defence conduct that directly causes delay. Indeed, it was the sort of application that, henceforward, ought to be summarily dismissed.

[43] After accounting for these two deductions, the net delay is approximately 44 months. Beyond that, the trial judge found that there was "nothing in Cody's

conduct to suggest that he [was] deliberately delaying matters so as to avoid a speedy trial” (para. 175). This finding is entitled to deference and we would not interfere.

C. *Exceptional Circumstances*

[44] Because the net delay of approximately 44 months exceeds the 30-month ceiling, it is presumptively unreasonable, and it falls to the Crown to demonstrate exceptional circumstances (*Jordan*, at para. 68).

[45] Exceptional circumstances were described in *Jordan* as follows:

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. [Emphasis deleted; para. 69.]

[46] Exceptional circumstances generally fall into two categories: discrete events and particularly complex cases (*Jordan*, at para. 71). In addition, transitional considerations may be taken into account as a third form of exceptional circumstances where, as here, the case was already in the system when *Jordan* was decided (*Jordan*, at paras. 94-98).

[47] In this case, the Crown relies on each form of exceptional circumstance to argue that the delay in this case falls below the presumptive ceiling. Alternatively, the Crown asserts that any excess delay is justified as reasonable.

(1) Discrete Events

[48] The exceptional circumstances analysis begins with discrete events. Like defence delay, discrete events result in quantitative deductions of particular periods of time. The delay caused by discrete exceptional events or circumstances that are reasonably unforeseeable or unavoidable is deducted to the extent it could not be reasonably mitigated by the Crown and the justice system (*Jordan*, at paras. 73 and 75).

[49] Mr. Cody concedes that his former counsel's appointment to the bench qualifies as an unavoidable discrete event, and that the 4.5 months of resultant delay should be deducted. This leaves a net delay of approximately 39.5 months.

[50] Beyond this, there are three specific time periods in this case which the Crown submits engage the discrete events category of exceptional circumstances.

(a) *Undertaking Dispute (July 8 to October 18, 2010)*

[51] The Crown says that the dispute over defence counsel's refusal to sign a disclosure undertaking was a discrete event. Requiring disclosure undertakings has been standard practice for decades, it says, and counsel's refusal to sign was unforeseeable.

[52] Even had this event been reasonably unforeseeable, it was incumbent upon the Crown to take immediate steps to resolve the undertaking dispute. Instead, resolution required three further court appearances, the filing of a series of superior court applications, and 3.5 months of accrued delay. We defer to the trial judge's finding that "it was the Crown's refusal to release the disclosure that pushed the delay beyond what might otherwise be viewed as reasonable" (para. 187). The Crown cannot satisfy the second prong of the test for exceptional circumstances. Accordingly, this period cannot be deducted.

(b) *McNeil Disclosure (May 6 to October 8, 2013)*

[53] The next disputed period is the five months of delay flowing from the McNeil disclosure issue that came to light on May 3, 2013, on the eve of the defence's scheduled Charter application to exclude evidence.

[54] We agree with the Crown that the emergence of this new disclosure obligation qualified as a discrete event, and would deduct a portion of the delay that followed. It was reasonably unavoidable and unforeseeable, and the Crown acted responsibly in making prompt disclosure, following up as the matter proceeded, and seeking the next earliest available dates. The Crown may have been able to take additional steps, such as disavowing any reliance on the officer's evidence or tendering it through an agreed statement of facts. However, the requirement is that of reasonableness: the Crown need not exhaust every conceivable option for redressing the event in question to satisfy the reasonable diligence requirement.

[55] That said, we would not deduct the entire five months for this event. Two months, specifically the time it took for the Crown and defence to be prepared to proceed (until late June 2013) should be deducted. However, the court was unable to accommodate them until September — that portion of delay was therefore a product of systemic limitations in the court system and not of the discrete event (Jordan, at para. 81) and therefore those months should not be deducted. Then, because defence counsel was unavailable in September, the matter was put over until October 2013. As this one month of delay was caused by defence counsel's unavailability (Jordan, at para. 64), and not by the preparation time necessary to respond to the charges (Jordan, at para. 65), it should be deducted.

[56] Accounting for each of these periods, we would deduct three months of delay in connection with the McNeil discrete event, reducing the net delay to approximately 36.5 months.

(c) *Error in Agreed Statement of Facts (January 30 to September 10, 2014)*

[57] The final period we are urged to consider as a discrete event is the delay resulting from the error in the agreed statement of facts. We have already deducted the 2.5 months taken for the recusal application that flowed from this error as defence delay. The Crown submits that the remaining five months of delay should be deducted based on a discrete exceptional event or circumstance.

[58] In principle, an inadvertent oversight may well qualify as a discrete event. The first prong of the test for exceptional circumstances requires only that the event at issue be *reasonably* unforeseeable or *reasonably* unavoidable. It does not impose a standard of perfection upon the Crown. As this Court observed in *Jordan*, “[t]rials are not well-oiled machines” (para. 73). Mistakes happen. Indeed, they are an inevitable reality of a human criminal justice system and can lead to exceptional and reasonably unavoidable delay that should be deducted for the purpose of s. 11(b).

[59] The question under the second prong of the test is whether the Crown took reasonable steps to remediate the error and minimize delay. The Crown “is not required to show that the steps it took were ultimately successful — rather, just that it took reasonable steps in an attempt to avoid the delay” (*Jordan*, at para. 70). Upon discovering the error, the Crown promptly notified defence counsel and the court and maintained that the error was immaterial. Nevertheless, 7.5 months of delay ensued.

[60] These events illustrate the failings of the pre-*Jordan* culture under which the parties operated. We expect that an issue of this nature could, and should, be resolved in short order — perhaps even in a single day. For example, the source of the error could be identified and examined to confirm that it was inadvertent and innocuous. The summary dismissal procedure described above could then be applied to dispose of any further baseless applications. For progress to be realized, parties and courts must be vigilant to prevent proceedings from being derailed by discrete and relatively minor diversions of this nature, which will inevitably continue to arise.

[61] On the record before us, we are unable to conclude that the exceptional circumstances criteria were met in this case. Because the trial judge did not turn his mind to the issue of whether the error was reasonably unavoidable, his findings are not helpful in this regard. In any event, the deduction of this entire period would not reduce the net delay to below the ceiling.

(d) *Conclusion*

[62] In sum, after accounting for discrete events, the net delay in this case of approximately 36.5 months remains above the ceiling and presumptively unreasonable. We therefore turn to consider whether the time this case took was justified based on case complexity or transitional considerations.

(2) Particularly Complex Cases

[63] The second category of exceptional circumstances is concerned with particularly complex cases. The presumptive ceilings set in *Jordan* already reflect the “increased complexity of criminal cases since *Morin*”, including the emergence of “new offences, procedures, obligations on the Crown and police, and legal tests” (*Jordan*, at paras. 42 and 53). However, particularly complex cases may still justifiably exceed the presumptive ceilings.

[64] Unlike defence delay and discrete events, case complexity requires a qualitative, not quantitative, assessment. Complexity is an exceptional circumstance

only where the case as a whole is particularly complex. Complexity cannot be used to deduct specific periods of delay. Instead, once any applicable quantitative deductions are made, and where the net delay still 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).² A particularly complex case is one that "because of the nature of the evidence or the nature of the issues, require[s] an inordinate amount of trial or preparation time" (*Jordan*, at para. 77 (emphasis deleted)). When determining whether a case's complexity is sufficient to justify its length, trial judges should consider whether the net delay is reasonable in view of the case's overall complexity. This is a determination that falls well within the expertise of a trial judge (*Jordan*, at para. 79).

[65] In this case, the Crown argues that four months of delay should be deducted as an exceptional circumstance based on the complexity as demonstrated by the voluminous disclosure. The majority of the Court of Appeal agreed. This approach, however, is inconsistent with a qualitative assessment of case complexity. The delay caused by a single isolated step that has features of complexity should not have been deducted. While voluminous disclosure is a hallmark of particularly complex cases, its presence is not automatically demonstrative of complexity.³ The question is whether *the case* is sufficiently complex "such that the delay is justified" (*Jordan*, at para. 77). Here, there was extensive disclosure. However, the balance of

² To be clear, once a period of delay has been deducted as defence delay or a discrete event, it should not be double-counted by taking it into account when assessing case complexity.

³ This does not preclude the possibility that a discrete exceptional event or circumstance related to disclosure could qualify as a "discrete event" within the *Jordan* framework.

the proceedings appear to have been relatively straightforward. In our view, even after accounting for the voluminous disclosure, this does not qualify as a particularly complex case.

[66] Nevertheless, as the charges in this case arose before this Court's decision in *Jordan*, it remains to be seen whether the transitional exceptional circumstance may justify the delay.

D. *The Transitional Exceptional Circumstance*

[67] The new framework in *Jordan* applies to cases already in the system (*Jordan*, at para. 95). However, in some cases, the transitional exceptional circumstance may justify a presumptively unreasonable delay where the charges were brought prior to the release of *Jordan* (*Jordan*, at para. 96). This should be the final step in the analysis, taken only where, as here, the deduction of discrete events does not reduce the delay below the presumptive ceiling and excess delay cannot be justified based on case complexity.

[68] Like case complexity, the transitional exceptional circumstance assessment involves a qualitative exercise. It recognizes “the fact that the parties’ behaviour cannot be judged strictly, against a standard of which they had no notice” and that “change takes time” (*Jordan*, at paras. 96-97). The Crown may rely on the transitional exceptional circumstance if it can show that “the time the case has taken is justified based on the parties’ reasonable reliance on the law as it previously

existed” (*Jordan*, at para. 96). Put another way, the Crown may show that it cannot be faulted for failing to take further steps, because it would have understood the delay to be reasonable given its expectations prior to *Jordan* and the way delay and the other factors such as the seriousness of the offence and prejudice would have been assessed under *Morin*.

[69] To be clear, it is presumed that the Crown and defence relied on the previous law until *Jordan* was released. In this regard, the exceptionality of the “transitional exceptional circumstance” does not lie in the rarity of its application, but rather in its temporary justification of delay that exceeds the ceiling based on the parties’ reasonable reliance on the law as it previously existed (*Jordan*, at para. 96). The transitional exceptional circumstance should be considered in cases that were in the system before *Jordan*. The determination of whether delay in excess of the presumptive ceiling is justified on the basis of reliance on the law as it previously existed must be undertaken contextually and with due “sensitiv[ity] to the manner in which the previous framework was applied” (*Jordan*, at paras. 96 and 98). Under the *Morin* framework, prejudice and seriousness of the offence “often played a decisive role in whether delay was unreasonable” (*Jordan*, at para. 96). Additionally, some jurisdictions are plagued with significant and notorious institutional delays, which was considered under *Morin* as well (*Jordan*, at para. 97; *Morin*, at pp. 799-800). For cases currently in the system, these considerations can inform whether any excess delay may be justified as reasonable (*Jordan*, at para. 96).

[70] It is important to clarify one aspect of these considerations. This Court's decision in *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741, should not be read as discounting the important role that the seriousness of the offence and prejudice play under the transitional exceptional circumstance. The facts of *Williamson* were unusual, in that it involved a straightforward case and an accused person who made repeated efforts to expedite the proceedings, which efforts stood in contrast with the Crown's indifference (paras. 26-29). Therefore, despite the seriousness of the offence and the absence of prejudice, the delay exceeding the ceiling could not be justified under the transitional exceptional circumstance. This highlights that the parties' general level of diligence may also be an important transitional consideration. But the bottom line is that all of these factors should be taken into consideration as appropriate in the circumstances.

[71] When considering the transitional exceptional circumstance, trial judges should be mindful of what portion of the proceedings took place before or after *Jordan* was released. For aspects of the case that pre-dated *Jordan*, the focus should be on reliance on factors that were relevant under the *Morin* framework, including the seriousness of the offence and prejudice. For delay that accrues after *Jordan* was released, the focus should instead be on the extent to which the parties and the courts had sufficient time to adapt (*Jordan*, at para. 96).

[72] In this case, the entire proceedings at trial pre-dated the release of *Jordan*. The Crown must therefore show that the 36.5 months of net delay was justified in light of its reliance on the previous state of the law under *Morin*.

[73] The charges in this case were serious. In our view, however, this consideration is overcome by the trial judge's findings of "real and substantial actual prejudice" (para. 191). The trial judge also made an express finding that Mr. Cody's conduct was not "inconsistent with the desire for a timely trial" (para. 175).

[74] In light of these findings, the Crown cannot show that the 36.5 months of net delay in this case was justified based on its reliance on the previous state of the law. To the contrary, the trial judge's findings under the previous law strengthen the case for a stay of proceedings. Where a balancing of the factors under the *Morin* analysis, such as seriousness of the offence and prejudice, would have weighed in favour of a stay, we expect that the Crown will rarely, if ever, be successful in justifying the delay as a transitional exceptional circumstance under the *Jordan* framework. We therefore find that the delay in this case was unreasonable.

V. Conclusion

[75] We would allow the appeal and restore the order made by the trial judge for a stay of proceedings.

Appeal allowed.

Solicitors for the appellant: Spiteri & Ursulak, Ottawa; Addario Law Group, Toronto.

Solicitor for the respondent: Public Prosecution Service of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener Attorney General of Alberta: Attorney General of Alberta, Calgary.

Solicitor for the intervener the Director of Criminal and Penal Prosecutions: Director of Criminal and Penal Prosecutions, Québec.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Addario Law Group, Toronto.