

CANADA / JUDGMENT

R. v. Lai

2021 BCCA 105

COURT

British Columbia Court of Appeal

DECIDED

9 March 2021

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2021 BCCA 105 R. v. Lai

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Lai,

2021 BCCA 105

Date: 20210309

Docket: CA45808

Between:

Regina

Respondent

And

Alan Teck Meng Lai

Appellant

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Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

May 28, 2018 (R. v. Lai, 2018 BCSC 1838, Vancouver Docket 26899A).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

L.A. Chu

Place and Date of Hearing:

Vancouver, British Columbia

July 14, 2020

Written Submissions Received:

July 22, 27, and 31, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 9, 2021

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Madam Justice Newbury

Dissenting Reasons by:

The Honourable Mr. Justice Butler (p. 53, para. 157)

Summary:

Majority (per Willcock and Newbury JJ.A): The appellant challenges his conviction for sexual assault and administering a stupefying drug. He argues the judge erred in dismissing a stay application that alleged a violation of his right to be tried within a reasonable time. Held: Appeal dismissed. The trial judge erred in concluding that the appellant's decision to re-elect a trial in the Supreme Court was an exceptional circumstance. However, when considering the

transitional exception, the judge did not err in concluding the delay was justified by the parties' reasonable reliance on the law as it existed pre-Jordan.

Dissent (per Butler J.A.): The trial judge erred in law in his consideration of the transitional exception in Jordan. He erred by significantly understating the delay when considering the transitional exceptional circumstance, and by failing to undertake a full Morin analysis. As a result of these errors, no deference is owed to his conclusion that the delay would have been seen as reasonable under the law as it stood pre-Jordan. The appeal should be allowed. The conviction should be set aside and a judicial stay of proceedings entered.

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Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] Alan Teck Meng Lai was charged, on August 9, 2013, with a number of sexual offences alone or as a party with a co-accused, Raymond Law. He was alleged to have committed offences against four complainants.
- [2] When his trial commenced, on February 20, 2017, certain charges had been stayed. Those that remained were sexual assault causing bodily harm contrary to s. 272(1)(c) of the Criminal Code, R.S.C. 1985, c. C-46, and administering a stupefying or overpowering drug (GHB) to enable him to commit sexual assault contrary to s. 246(b). He was charged with having committed these offences against S.K. on November 28, 2012, and against K.P. on June 11, 2013.
- [3] On November 28, 2017, he applied for a judicial stay of proceedings based on an alleged violation of his right to be tried within a reasonable time, as guaranteed by s. 11(b) of the Canadian Charter of Rights and Freedoms. The application was heard February 13-15, 2018, and dismissed on April 3, 2018, for reasons indexed as R. v. Lai, 2018 BCSC 867 ("Reasons").
- [4] On May 28, 2018, he was found guilty of Count 3 and guilty of the included offence of sexual assault on Count 4 (the charges relating to the complainant K.P.), but not guilty of Counts 1 and 2 (the charges relating to the complainant S.K.). He appeals his conviction on the grounds the judge erred when he dismissed the stay application by attributing two lengthy delays to discrete, exceptional events, and by excluding those periods from the presumptive ceiling of 30 months from charge to end of trial.

The Judgment at Trial

- [5] When he dismissed the application for a judicial stay, the trial judge estimated that 57 months would elapse between the initial charge and judgment.
- [6] The chronology leading to the application for a stay is set out in detail at paras. 31-55 of the Reasons. I will not repeat the description or analysis of the events leading to the application, but summarize the chronology as follows:

August 9, 2013

The appellant was charged on an information with the co-accused, Mr. Law, and arrested.

August 27, 2013

Both accused were released on strict conditions.

June 20, 2014

Provincial Court trial dates of November 9, 2015-December 17, 2015 were reserved.

February 4, 2015

Crown counsel, learning Mr. Law's new counsel was considering a re-election, urged both counsel to exercise their right to re-elect as soon as possible.

September 30, 2015

The appellant re-elected to have his trial in Supreme Court.

November 3, 2015

Crown filed a direct indictment with 17 counts. The counts against the appellant at that point dealt with three complainants, two of whom were also involved in Mr. Law's counts.

November 25, 2015

Supreme Court trial dates of January 23-March 10, 2017 were confirmed. The appellant's counsel was unavailable for dates offered in September 2016, but there was some uncertainty with respect to the court's capacity to complete the trial in October-November 2016.

Late 2016

Mr. Law retained new counsel who was unavailable for the early 2017 trial date. Mr. Law applied for and obtained an adjournment of the trial.

November 23, 2016

Crown issued separate indictments to save the January-March 2017 dates for the appellant's trial.

December 13, 2016

Counsel were advised the judge required 10 days of the scheduled trial time for another trial and were asked whether the trial should be reassigned. Both counsel were of the view the trial could be completed in the time remaining.

December 13, 2016-February 6, 2017

Counsel were advised that five additional days of trial time would be required to conclude the judge's other trial.

February 6-7, 2017

The appellant applied for severance of counts.

February 14, 2017

The severance application was dismissed.

February 20-March 10, 2017

The trial proceeded. An issue with respect to measurement of GHB arose.

April 19-21, 2017

The trial continued. Crown called additional evidence regarding the measurement of GHB on voir dire.

May 24, 2017

The judge ruled on the voir dire, and defence made a disclosure application relating to the instrument used to analyze the GHB in urine.

May 26, 2017

The disclosure application continued; the order was granted.

June 27-29, 2017

The Crown's similar fact application in relation to evidence of complainants was heard.

November 24, 2017

The judge ruled on the similar fact application. Defence counsel gave notice of intention to seek a stay due to s. 11(b) Charter breach arising from delay.

December 6, 2017

The judge heard submissions on the timing of s. 11(b) application.

December 13, 2017

The judge ruled the delay application should proceed before continuation (for reasons later given, indexed as *R. v. Lai*, 2017 BCSC 2350).

February 13-15, 2018

The judge heard argument on delay.

April 3, 2018

The judge dismissed the Charter delay application.

- [7] In calculating the net delay that would likely occur, the trial judge estimated he would need four weeks following the conclusion of the trial to render a verdict (under the then-common misapprehension, since resolved, that the time to judgment was included in the presumptive ceiling established in *R. v. Jordan*, 2016 SCC 27). He expected that if the trial were allowed to proceed and final submissions concluded by April 13, a decision would be rendered on or before May 11, 2018, bringing the total period from charge to verdict to approximately 57 months (Reasons at para. 183).
- [8] The Crown conceded that the entire period of 10 months and 11 days from the laying of the information (August 9, 2013) to the arraignment (June 19, 2014) should count towards the 30-month ceiling for cases in a superior court or cases tried in the provincial court after a preliminary inquiry (Reasons at para. 184).
- [9] The Crown also conceded that the 11-month period from the securing of the Provincial Court trial dates (June 20, 2014) to the first available trial date (which was May 19, 2015) should count towards the ceiling. However, the Crown argued that the delay from the first available date (May 19, 2015) to the first scheduled Provincial Court trial date (November 9, 2015)--a period of five months and 19 days--was defence-induced.
- [10] The trial judge rejected that submission (Reasons at paras. 186-87). As such, the entire 27-month period from the information (August 9, 2013) to the first scheduled Provincial Court trial date (November 9, 2015) was included in the calculation of delay toward the presumptive ceiling.
- [11] Turning to the delay occasioned by the appellant's re-election on September 30, 2015, the judge held that re-election is a legitimate procedural step available to an accused that the *Jordan* framework "explicitly does not characterize as defence delay" (Reasons at para. 188). In this case, the re-election was not "illegitimate defence conduct" (Reasons at para. 190). However, the judge reasoned that "a re-election that causes the loss of a scheduled trial date is a discrete, exceptional circumstance that must lead to the deduction of the time between then and when the trial is rescheduled" (Reasons at para. 190).
- [12] The judge did not challenge the general assertion that the appellant was "eager to get to trial" but found that "this particular strategic move was at least, in the short term, inconsistent with that desire" (Reasons at para. 191). He continued:
- [192] The evidence put forward on behalf of Mr. Lai does not satisfy me that the re-election in this case was compelled by the state of disclosure. There is an absence of contemporaneous communication suggesting that was the situation, and the more logical responses if that had been the pressing problem - an application for disclosure or to adjourn the Provincial Court trial - were not attempted. If there was a relationship between the choice of a Supreme Court trial and the state of disclosure, it was not spelled out by the material or the inferences available from counsel's submissions, to the extent that I can make any findings

concerning it. It is also illusory to add the time that would have been required to conduct a limited preliminary inquiry that Mr. Lai's counsel envisioned when the defence was on notice since February that a direct indictment would be sought in the event of re-election, as indeed it was.

[13] Insofar as the length of delay occasioned by the re-election is concerned, he concluded:

[194] We do not need to speculate about how much earlier a Supreme Court trial date could have been held if the re-election had been more timely. We know for certain that if it had been done in February 2015, it would have been possible to get the same dates as then existed in Provincial Court. I am not suggesting that the re-election had to have been done by then, only that the fact that no delay would have resulted if it had shows the extent to which a later re-election affected the available Supreme Court trial dates. In these circumstances, it is appropriate to deduct the entire intervening period between the expected end of the Provincial Court trial that had been scheduled and the first dates that his counsel was available in Supreme Court.

[14] The Provincial Court trial had been scheduled for six weeks, and therefore would have ended on December 17, 2015. Judgment might have been expected by January 15, 2016. The judge continued:

[196] I would then deduct the period between January 15th - the expected verdict of the provincial trial - and the first date of the scheduled Supreme Court trial as being the direct consequences of the discrete exceptional event that prevented the Crown from concluding the prosecution in Provincial Court, as had been scheduled.

The judge calculated that period as 12 months and 2 days (January 15, 2016-January 17, 2017).

[15] Further, the judge held the delay in starting the trial due to the allocation of the first 10 days to another trial, and the further reduction in the time allocated for the trial, was not delay expressly waived by the defence. It was, however, delay occasioned by discrete events the Crown could not have foreseen or avoided. In so finding, the judge placed some weight upon defence counsel's rejection of his offer to have this case reassigned if counsel considered it unlikely that the trial could be completed in the remaining time (Reasons at paras. 197-98).

[16] The judge then turned to the delays in completing the trial resulting, in particular, from the severance application, the similar fact application and the measurement problem. Of these, he found only the GHB measurement problem to have occasioned delay that should be excluded from the time counted toward the presumptive ceiling as a discrete event (Reasons at para. 204). He found the units of measurement issue that arose at trial was the kind of "inadvertent oversight" envisioned in *R. v. Cody*, 2017 SCC 31. To hold this problem should have been foreseen by Crown counsel before trial would be to impose a standard of perfection.

- [17] What, then, was the effect of not having the additional weeks of time available for the trial and the need to address the unanticipated measurement issue? The judge reasoned:
- [205] I conclude that the effect of these discrete events was to prevent the trial from completing when it otherwise would have on March 10, 2017. The subsequent continuation dates are what could be obtained in light of competing counsel and court calendars to provide the amount of additional time that, with the benefit of hindsight, likely would have been required to complete it.
- [206] The fact that the last scheduled continuation date would be on the 33rd day of trial, (the 36th day if the three days of this application are included), indicates the downstream effects of not having had seven weeks to complete it because of the mutual underestimate, and of having the proceedings sidetracked by the units of measurement issue. Subject to what I will say about the effect of the delay in providing my similar fact ruling, the period between March 10th and the anticipated end of the trial should be deducted as the effect of discrete events.
- [18] After making allowance for days lost due to scheduling issues and the delay application itself, he deducted a total of 12 months and 27 days to account for the delay occasioned by the underestimate of time required for trial and the need to address the unforeseen measurement issue (Reasons at para. 212).
- [19] In summary, from the total time expected to lapse of 57 months, the judge deducted two delays which he attributed to discrete, exceptional events, totalling 24 months and 29 days:
- a) the period of January 15, 2016-January 17, 2017 (12 months and two days), as delay occasioned by re-election (the "first excluded period"); and
 - b) the period of March 10, 2017-April 7, 2018 (12 months and 27 days), as delay occasioned by the underestimated trial length and the measurement issue (the "second excluded period").
- [20] Subtracting 24 months and 29 days from 57 months left 32 months and one day of net delay, which the judge rounded to 32 months. This resulting net delay of 32 months still exceeded the Jordan ceiling. The judge also considered whether the complexity of the case constituted an exceptional circumstance, thereby justifying the delay. After weighing all material factors, he concluded this was not a case such as envisioned in Jordan, "where the factors of complexity in themselves excuse exceeding the presumptive ceiling" (Reasons at para. 221; emphasis in original).
- [21] Finally, because the Jordan decision came down midway through this case, the judge had to consider the transitional exceptional circumstance (Jordan at para. 96). Turning to transitional questions, he addressed the conduct of the police, Crown counsel and defence counsel in relation to the significant delays in the case, and in particular in relation to slow and piecemeal disclosure. He addressed that conduct in light of expectations under the framework from *R. v. Morin*, [1992] 1 S.C.R. 771 (Reasons at para. 240):

- [240] Balancing these factors, and more importantly assessing how the parties would have expected them to be balanced, once this case got out of its disclosure morass (which I repeat was the product of an inadequate response to the volume and pace of what was received from the police, rather than repeated mistakes or complacency by the prosecutor), it proceeded with reasonable efficiency, despite the prevailing amount of institutional delay in each court and the defence decision to re-elect. I think the parties were quite unlikely to have contemplated the possibility of a successful s. 11(b) application being made in relation to it during the significant pre-Jordan period that it encompassed.
- [241] Thus I conclude that the amount of time that this case took was justified by the parties' reasonable reliance on the state of the law as it then existed.

Grounds of Appeal

- [22] The appellant submits the trial judge erred in deducting from the relevant period of delay the period between the expected conclusion of the Provincial Court trial and the earliest scheduled date of the Supreme Court trial. He says re-election is expressly contemplated in the Criminal Code and has the effect of raising the ceiling from 18 to 30 months and cannot be regarded as an exceptional circumstance.
- [23] Further, he says it was an error to attribute all, except six days, of the time between the end of the initially scheduled trial and the anticipated end of the trial, to the erroneous time estimate and the GHB measurement error. First, he says these were not exceptional circumstances. Second, he says, the judge erred in failing to identify the delay resulting directly from the erroneous time estimate and the measurement error. He says institutional delay prolonged the delay caused directly by the events the judge considered to be exceptional, and the net delay was longer than the period addressed by the judge in his Morin analysis.

Argument

The First Excluded Period

- [24] The appellant contends it was an error to characterize the delay arising from his re-election as a discrete, exceptional event. This delay was 12 months and two days (rounded to 12 months).
- [25] Prior to September 19, 2019, s. 561(1)(b) of the Criminal Code provided that an accused who elected a mode of trial other than trial by a provincial court judge might re-elect to be tried by provincial court judge, as of right, at any time before the fifteenth day following the completion of the preliminary inquiry. Section 561(2) provided that an accused who elected to be tried by a provincial court judge might re-elect another mode of trial, as of right, not later than 14 days before the day first appointed for the trial.

- [26] The accused's right to "re-elect down" under s. 561(1) has since been extended to include the period 60 days following the completion of the preliminary inquiry. The option to "re-elect up", as of right, under s. 561(2) has been limited to the period ending not later than 60 days before the day first appointed for the trial. That being the case, the appellant says a re-election as of right, as contemplated by Parliament, cannot be regarded as either unforeseeable or exceptional. Re-elections that are not re-elections as of right (i.e., "elections up" that come on the eve of trial, or "elections down" long after preliminary inquiries) that might be regarded as exceptional, require the consent of the prosecutor. This consent can be conditional, as the Court noted in *Jordan*, upon the accused waiving the delay "stemming from the re-election" (at para. 62).
- [27] The appellant notes his re-election had the effect of increasing the ceiling from 18 to 30 months, and gave the Crown and the judicial system at least an additional 12 months to conclude the prosecution, after preferring a direct indictment. He contends that applying a 30-month ceiling, and characterizing the delay stemming from a legitimate re-election as a discrete, exceptional circumstance, "risks imposing a form of 'double punishment' on an accused". The appellant cites *R. v. Eremenko*, 2018 BCSC 1138 where the court (at para. 75) recognized that an accused should not in that manner be "doubly penalized" for the re-election.
- [28] The appellant also relies on the following statements in *R. v. Nasery*, 2017 ABQB 564:
- [60] Extending the time required to complete the trial by converting what had previously been a one-stage process into a two-stage process triggered the corresponding *Jordan* presumptive ceiling associated with a trial in superior court.
- [61] While the re-election brought about a change in process to reach final resolution on the merits, such change was fully recognized by the new presumptive ceiling that became operative as a result.
- [29] The respondent Crown says the appellant's re-election was characterized correctly as a discrete, exceptional event. As the judge found, it was outside of the Crown's control, and the Crown did everything possible to mitigate the delay. The Crown invites us to afford these findings deference.
- [30] The Crown places some weight upon the fact the trial judge did not accept the appellant's explanation that his re-election was in response to the state of disclosure, and the fact that other avenues available to the appellant, such as an application for disclosure or to adjourn the Provincial Court trial dates, were not pursued. The Crown notes the judge found the appellant's "strategic" decision to re-elect at this stage of the proceeding was inconsistent with his desire for a timely trial.
- [31] The Crown says the appellant's submission, that regarding delay caused by re-election as exceptional "doubly punishes" an accused, is founded upon the mistaken view that the ceiling is an aspirational target, a view rejected in *Jordan*.

- [32] The Crown seeks to distinguish the authorities cited by the appellant. Eremenko is said to be distinguishable on the grounds that the Crown in that case failed to mitigate delay caused by re-election two months prior to trial. Nasery is said to be distinguished on the basis the accused's re-election was triggered by the advice of recently retained new counsel. In both cases, the Crown notes, Provincial Court trial dates were converted to preliminary inquiries.
- [33] Further, however, the Crown contends this Court should decide the delay occasioned by the re-election should have been characterized as defence delay. The Crown says the appellant's re-election was not a defence action "legitimately taken to respond to the charges" (Jordan at para. 66).

The Second Excluded Period

- [34] The appellant says delay caused by discrete, exceptional events should only be deducted from the calculation of delay if the Crown establishes the events were unavoidable, and not reasonably foreseeable, and could not be reasonably mitigated by the Crown and the justice system. Only the time that results directly from the discrete event should be deducted (citing Jordan at paras. 73 and 75; Cody at para. 55).
- [35] When the trial commenced on February 6, 2017, the case was 42 months old. The Crown had not closed its case by March 10, 2017, the date originally set for its conclusion. The appellant says the delay that followed (March 10, 2017-April 7, 2018) was a result not only of an erroneous trial estimate and the need to address the measurement issue, but other unrelated events as well, in particular the Crown's unwillingness to use available days and the lengthy reservation of judgments.
- [36] Insofar as the time estimates for trial are concerned, the appellant submits that while counsel consented to the removal of some days from the schedule, the judge removed additional days without consulting counsel. Had that not occurred, while there still would have remained insufficient time to complete the case in March 2017, the similar fact argument would have occurred earlier, and the conclusion of the trial would have been moved ahead substantially.
- [37] Insofar as the other causes of delay are concerned, counsel says the GHB measurement issue was finally addressed over five days in April and May 2017. Thereafter, the case did not advance in a timely manner, despite the fact 46 months had elapsed since the charge in August 2013. In the circumstances, he says, all parties were obliged to act expeditiously.
- [38] The Crown's application to have the evidence of each complainant admitted as similar fact evidence was heard on June 27-28, 2017. Judgment on that issue was reserved, ultimately to November 24, 2017. The application that followed, in relation to the order of proceedings, was addressed on December 6 and 13, 2017. That further delayed the re-commencement of the trial to February 13, 2018.

- [39] The appellant contends that the trial would have concluded by December 9, 2017, four months earlier than the date used by the trial judge for his calculation, if it had not been delayed pending ruling on the similar fact application, and to address the order of proceedings. The appellant says the judge accepted his submission that the time required to render rulings should count towards the ceiling, but failed to consider the extent to which reserved rulings delayed the completion of the trial (citing *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Jurkus*, 2017 ONSC 1025 (rev'd on other grounds, 2018 ONCA 489); Reasons at paras. 65, 183, 209).
- [40] Further, the appellant says the Crown declined an invitation to call witnesses pending the ruling on the severance application between February 10 and February 20, 2017, and declined to use an available court date on February 24, both of which proposals were agreeable to the appellant.
- [41] The appellant says if the Crown had used the additional trial time offered, and dates had not been removed from the block of time reserved, the trial would have concluded by April 2017 at the latest. The year of delay that followed was foreseeable and avoidable and not directly caused by the exceptional circumstances identified by the judge, and ought not to have been deducted.
- [42] In response to the appellant's submission that only delay caused directly by the discrete, exceptional event should be deducted from the ceiling, the Crown refers this Court to *R. v. Norton*, 2019 BCSC 1078 at para. 36. It contends that in the absence of a finding that the Crown or the system could reasonably have mitigated a portion of the delay occasioned by the discrete, exceptional event, the entire period of "cascading delay" caused by the discrete event ought to be subtracted from the total delay.
- [43] The Crown says the trial judge's removal of additional dates from the schedule without express prior consent of the parties cannot be distinguished from the other 13 trial dates removed by agreement. There was what the judge referred to as "collective over-optimism about what lay ahead" (Reasons at para. 201). The judge was operating on the understanding that there was ample remaining trial time to complete the trial, and defence counsel expressed no objection to the removal of dates from the schedule.
- [44] Crown counsel submits that the GHB measurement issue was dealt with in a thorough and comprehensive manner that required detailed rulings. She submits it is unlikely the Crown's similar fact application could have proceeded any earlier than it did.
- [45] The Crown minimizes the impact of the long wait for judgment on the similar fact application, arguing that the continuation had long been set for December and would have happened, but for the appellant's "strategic decision to proceed with his s. 11(b) Charter application during the December 2017 continuation dates". She notes the trial judge considered issues with respect to steps taken in the interval between the last day of argument on June 25, 2017, and the first scheduled continuation date on December 6, 2017, to be "somewhat of a red herring". The continuation dates had been scheduled in April, and

the "timing of the decision within the intervening period did not affect them" (Reasons at para. 209).

- [46] The Crown says there were legitimate reasons for seeking to move the delay application to the end of the case, including notice issues. She notes, in relation to the argument with respect to the order of proceedings that unfolded in December 2017:
- [95] The trial judge was left with little choice but to accede to the appellant's position, given defence counsel's advice (as summarized by the trial judge) that "[defence counsel] was not in a position to proceed with the defence case or final submissions ... because he had been waiting for the similar fact ruling before advising Mr. Lai on the next appropriate step. In other words, counsel was only in a position to make this application in the current group of dates": [Reasons at para. 53].
- [47] Insofar as Crown's conduct in the interval between the first stage of the trial and its conclusion are concerned, Crown counsel submits the trial judge concluded that the Crown acted reasonably to mitigate delay caused by the discrete events (Reasons at para. 207).
- [48] Finally, in relation to this issue, Crown counsel urges us to re-calculate the periods of delay by re-characterizing the delay occasioned by reserved judgments. The Supreme Court of Canada's decision in *R. v. K.G.K.*, 2020 SCC 7 at paras. 24, 41, 44, 47-49, the Crown submits, calls for us to exclude judicial reserve time in the presumptive Jordan ceilings. In this case, that would remove from the relevant delay a period of eight weeks which the trial judge required to render his similar fact ruling.

Transitional Exceptional Circumstance

- [49] Finally, the appellant says we are not bound by the trial judge's consideration of the transitional or discretionary factors that should be weighed in a case where the delay in part preceded the judgment in Jordan. He argues the judge considered the transitional factors on the basis that the relevant delay exceeded the ceiling by only two months. If the delay exceeds the ceiling by a much greater margin, he submits, the analysis of these factors warrants a different conclusion.
- [50] The appellant says our analysis should not be determined solely or predominantly by the serious nature of the offences. Appellate courts, the appellant notes, have stayed several serious sexual assault charges in which the total delay was 30 months or less than 30 months pre-Jordan (citing *R. v. Williamson*, 2016 SCC 28 at para. 34; *R. v. Godin*, 2009 SCC 26; *R. v. R.D.*, 2008 BCCA 339; and *R. v. Scott*, 2015 SKCA 144), as well as sexual assault charges post-Jordan (citing *D.M.S. v. R.*, 2016 NBCA 71 and *R. v. D.A.*, 2018 ONCA 96).
- [51] The Crown, in response, says that after adjusting the calculation of the relevant delay in light of *K.G.K.*, by excluding time taken by the judge to render reserved judgments, "it is questionable whether the net delay did in fact exceed the 30-month presumptive ceiling".

- [52] However, if the ceiling was exceeded, the Crown says the judge found, as a fact, that despite unsatisfactory, slow and late disclosure by the Crown, the case otherwise proceeded with "reasonable efficiency" (Reasons at para. 240).
- [53] Further, although the trial judge did not find the case was sufficiently complex so as to constitute an exceptional circumstance justifying delay, he did find this was "quite an involved and challenging case" with "some very complex elements" (Reasons at para. 217).
- [54] The Crown notes that the trial judge found that the prosecutor made concrete efforts to expedite the appellant's trial, including: writing to the appellant about securing Supreme Court trial dates when the prospect of a re-election was first raised in February 2015; filing a direct indictment after the appellant's re-election; and severing the appellant from his co-accused to preserve his trial dates.

Discussion and Analysis

Standard of Review

- [55] Both parties refer us to the standard of review described by Justice Fenlon in *R. v. K.N.*, 2018 BCCA 246, as follows:
- [13] The Crown's appeal is brought under s. 676(1)(c) of the Criminal Code. That provision gives the Crown the right to appeal an order staying proceedings on an indictment or quashing an indictment. The decision of a judge to impose a judicial stay for unreasonable delay involves a question of law subject to a correctness standard of review: *R. v. Widdifield*, 2014 BCCA 170 at para. 76, citing *R. v. Conway*, [1989] 1 S.C.R. 1659 at 1676. The characterization and allocation of various periods of delay is also reviewable on a correctness standard: *R. v. Horner*, 2012 BCCA 7 at para. 70. The underlying findings of fact, however, are reviewed on a standard of palpable and overriding error: *Horner* at para. 70; *R. v. Schertzer*, 2009 ONCA 742 at para. 71, leave to appeal ref'd [2010] SCCA No. 3.
- [56] This Court has now, in *R. v. Virk*, 2021 BCCA 58, restated and clarified the standard of review to be applied on s. 11(b) decisions. Justice Fenlon, for the Court at paras. 23-24, summarizes the applicable standard:
- [23] In summary on this issue, I conclude that neither *Pipping* nor *S.C.W.* marks a departure from this Court's established jurisprudence on the standard of review to be applied to s. 11(b) decisions. That standard will vary depending on the nature of the error identified, recognizing that there are different steps in the analysis:
1. Findings of underlying facts--who did what, when and the context surrounding those events;
 2. Attribution of responsibility--who or what caused the delay, including discretionary decisions such as whether conduct was legitimate, whether a case was complex, or whether there was reasonable reliance on the law as it stood pre-Jordan; and

3. Allocation of periods of delay--categorizing periods of delay as either defence delay or as an exceptional circumstance; and
 4. The ultimate decision of whether to impose a stay for unreasonable delay.
- [24] Underlying findings of fact and attribution of responsibility are reviewed on a deferential standard of palpable and overriding error. Discretionary decisions are reviewed on a deferential standard and will be interfered with only if there has been a misdirection in law, a palpable or overriding error of fact, or a clearly wrong decision that resulted in an injustice: *R. v. Roberts*, 2020 BCCA 307 at paras. 82-84; *K.G.K.* at para. 81. The allocation of periods of delay is reviewed on a standard of correctness. The ultimate decision of a judge to impose a judicial stay for unreasonable delay is a question of law and is likewise subject to a correctness standard: *Yusuf approving Pauls* at para. 40; *Millar* at para. 88.
- [57] There is no suggestion that the judge's findings in the case at bar were affected by a palpable and overriding error. For reasons that follow, I am of the view that no error in law has been made out in relation to the second excluded period. Nor, in my view, has the appellant established that the judge erred in law in his treatment of the short period by which he found the delay to have exceeded the presumptive ceiling.
- [58] In my view, the appeal hinges upon whether the judge erroneously characterized the delay occasioned by the re-election and, if so, whether a stay should be ordered after consideration of the transitional issues identified in *Jordan*.
- [59] I address more extensively below the deference we should afford to the trial judge's conclusion that the amount of time that this case took was justified by the parties' reasonable reliance on the state of the law as it existed before *Jordan*.

The Second Excluded Period

- [60] When the trial judge considered the arguments with respect to the long delay between the anticipated conclusion of the Supreme Court trial and the eventual verdict, he carefully reviewed the sequence of events, and made findings that undermine the appellant's argument in relation to delay. His findings are capable of supporting the conclusion that all of the delay after the trial commenced occurred as a result of two factors: the parties' collective underestimate of the time required for the trial, and the need to address a previously unidentified issue with respect to measurement of GHB. Those were questions of attribution with respect to which deference is owed.
- [61] There was no error, in my view, with respect to the attribution of that delay to those causes. Nor is there an error in the manner in which it is characterized as exceptional. There is no doubt that when both parties and the court are mistaken with respect to how much time will be required to complete a trial, and the trial does not finish as anticipated, the resulting delay may be characterized as an exceptional circumstance. Such delay does not reflect an unwillingness to take all necessary steps to bring the case to a prompt conclusion. In *Jordan*,

the majority noted:

- [74] Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling. Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a timely solution. For this reason, 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.
- [62] These realities were recognized by this Court in *R. v. Singh*, 2016 BCCA 427, and *R. v. Rai*, 2019 BCCA 377, and by the Ontario Court of Appeal in *R. v. Pauls*, 2020 ONCA 220, where Simmons J.A. wrote:
- [56] At para. 73 of *Jordan*, the Supreme Court of Canada observed that trials "are not well-oiled machines". Accordingly, even where parties have made a good faith effort to establish realistic time estimates, if the trial goes longer than expected, it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.
- [63] In this case, the trial judge attributed the underestimate to mutual over-optimism. He excluded from his calculation only the delay which he attributed to the removal of days from the trial schedule with the agreement of all parties. He noted that he reallocated the first 10 days of trial to another matter with the express agreement of defence counsel, and noted that the same was true of three days allocated to the other trial following discussion at a pretrial conference on February 1st. He said those days were removed from the trial calendar when the consensus among counsel was that the reallocation would not affect the completion of the trial. He rejected the submission that the process was "out of the hands of the defence." He found, at para. 201:
- [201] Our collective over-optimism about what lay ahead could not have been foreseen or avoided.
- [64] In my view, that finding precludes the appellant from arguing that the judge erred in law in finding the underestimate of time required for trial to be an exceptional circumstance. It was not an error to find that the apparent acquiescence of counsel to the removal of a few days from the trial calendar could be weighed in determining whether the delay that resulted was an exceptional circumstance. It reflects the fact the inability to complete the trial in the time allotted was unforeseen by everyone. Acquiescence was considered in *Rai*, where this Court wrote:
- [162] [D]elay caused by a co-accused can be considered an exceptional circumstance. This is especially so where [the accused] did not, at the time, complain of the delay or seek severance, and appeared to acquiesce in the way the proceedings unfolded: *R. v. Brissett*, 2019 ONCA 11 at paras. 13-17.

- [65] Nor, in my view, was it an error in law for the trial judge to conclude that the need to address an evidentiary issue identified in the course of the trial, but reasonably unanticipated by a party, is an exceptional circumstance of the sort identified in *Cody*. The Court in *Cody* explained:
- [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).

[Emphasis in original.]

- [66] The trial judge was, of course, very familiar with the circumstances in which the issue with respect to the measurement of GHB arose at trial. He was familiar with the expert evidence, the nature of the error (which he described as an error in records that are "part of the template generated by the instrument" (Reasons at para. 204)) and the manner in which it was addressed. In my view, there is no basis upon which we can interfere with his conclusion that the delay was, in fact, caused by an inadvertent oversight that was reasonably unforeseeable and reasonably unavoidable, an exceptional circumstance recognized in *Jordan* and *Cody*.
- [67] Finally, insofar as the delay in concluding the trial is concerned, I accept the Crown's argument that the trial judge considered all of the incidents the appellant says contributed to delay in the interval between April and December 2017, but concluded those incidents were "red herrings" because the December date was set in April, after it was impossible to conclude the trial as anticipated, and none of the intervening events caused additional delay.
- [68] In my view, the judge's finding that the Crown acted reasonably to attempt to mitigate both the underestimated trial length and the units of measurement issues once they became apparent, is an answer to the argument that additional days might have been used in some fashion to complete the case more expeditiously.

The First Excluded Period

- [69] The characterization of the 12-month delay caused by the appellant's re-election is more problematic. As I read the Reasons, the trial judge made the following findings with respect to the re-election:
- a) The re-election was a legitimate procedural step available to the accused that the *Jordan* framework explicitly does not characterize as defence delay (at para. 188).

- b) However, in this case, the re-election caused delay the Crown could not prevent (at para. 189). The Crown did all it could to mitigate its effects: first, by "seeking to replace the lost trial dates with the same ones in Supreme Court"; and second, "directly indicting the accused to prevent further delay from a preliminary inquiry" (at para. 191).
 - c) There was neither illegitimate defence conduct in relation to a re-election, nor conduct by the Crown that caused the need for the re-election. The Crown did not participate in the accused's decision to do so "as part of a consensual trial plan" (at para. 190).
 - d) The appellant's re-election was not compelled by the state of disclosure (at para. 192). It was, rather, a "particular strategic move" that was, "at least, in the short term", inconsistent with the desire to get to trial (at para. 191).
 - e) "[A] re-election that causes the loss of a scheduled trial date is a discrete exceptional circumstance that must lead to the deduction of the time between then and when the trial is rescheduled" (at para. 190).
 - f) If the appellant had re-elected in February 2015, it would have been possible to get the November 9, 2015 to December 17, 2015 trial dates (the same dates as then reserved for the Provincial Court trial) (at para. 194).
 - g) The appellant was not obliged to re-elect by February 2015, but "the fact that no delay would have resulted if it had shows the extent to which a later re-election affected the available Supreme Court trial dates" (at para. 194).
- [70] I would not accede to the Crown's argument that this Court should allocate the 12-month delay caused by the re-election to the defence. In my view, while the trial judge concluded that the appellant was not compelled to re-elect by the Crown's late and slow disclosure, but did so for strategic reasons that were not explained, he expressly did not find the re-election to be illegitimate, despite the invitation to do so. For that reason, the judge turned to the question whether the re-election could be characterized as an exceptional circumstance.
- [71] He concluded that, even where the delay could not be allocated to the defence, a re-election that causes the loss of a scheduled trial date is a discrete, exceptional circumstance "that must lead to the deduction of the time between then and when the trial is rescheduled" (at para. 190). He deducted from his calculation of the relevant delay the entire intervening period between the expected conclusion of the scheduled Provincial Court trial and the first date upon which the trial in the Supreme Court could commence.
- [72] Whether the re-election in this case was properly considered to be an exceptional circumstance turns on a question of law subject to a correctness standard: whether the trial judge was correct to characterize a re-election as of right after a provincial court trial date has been set that causes the loss of that trial date to amount to a discrete, exceptional circumstance.
- [73] In *R. v. R.K.K.*, 2020 BCSC 45, G.C. Weatherill J., citing the trial judgment in this case, wrote:

- [37] A re-election is a legitimate procedural step available to an accused. However, it would be inconsistent with the values expressed in *Jordan* to include in delay calculation the effect of an accused's decision not to take advantage of an imminently scheduled trial date in the court in which he had originally elected to be tried. Doing so would place responsibility upon the Crown for a delay that it could not have prevented. Re-election that causes the loss of a scheduled trial date is not to be used to "buttress" the defence case for unreasonable delay (*R. v. Herman*, 2017 BCSC 215 at para. 86). Rather, it ought to be considered as a discrete event, or exceptional circumstance, and therefore results in the deduction of the time period between the re-election and when the trial is rescheduled: *R. v. Lai* at paras. 188-190 (see also: *Truong* at paras. 60-62 and *Herman*, at paras. 83-88).
- [74] G.C. Weatherill J. regarded this case to stand for the proposition that re-election as of right, while it is a legitimate measure that is open to an accused, should be regarded as an exceptional circumstance where it causes the loss of a scheduled trial date.
- [75] Despite the fact the judge in the case at bar said he could not conclude the appellant should have exercised his right to re-elect in February 2015, when the Crown urged his counsel to do so, he calculated the excluded delay on the basis that a November 2015 Supreme Court trial date had been available at that time. There was apparently no evidence with respect to how long that trial date remained available, what other dates might have been available in the interim between February and September 2015, and no determination by the judge that the re-election ought to have been made on any particular date between the setting of the Provincial Court trial date in June 2014, and the re-election in September 2015.
- [76] The evidence supported the conclusion that if the appellant had re-elected by February 2015, a Supreme Court trial could have concluded by mid-December 2015. It did not support any conclusion with respect to delay arising from a re-election at any date after February 2015, but before September 2015.
- [77] There is, therefore, not only an issue with respect to whether the re-election should be characterized as an exceptional circumstance, but also with respect to how delay occasioned by the re-election, if it was an exceptional circumstance, should be determined.
- [78] Is a re-election as of right after a trial date has been set always an exceptional circumstance? We may be assisted in defining what is exceptional by considering what is not exceptional. Moldaver, Karakatsanis and Brown JJ. for the majority in *Jordan* made it clear (at paras. 52-53) that the presumptive ceiling took into account "the significant role that process now plays in our criminal justice system". It did so, in part, by setting the ceiling at a level above the starting point set out in *Morin*, which accounted only for institutional delay.
- [79] The question in this case, in my opinion, turns upon the extent to which the process of re-election was or must have been taken into account in setting the ceiling.

- [80] The Court's treatment of defence delay in Jordan is illustrative of how account should be taken of procedures explicitly contemplated by the Criminal Code. The Court identified defence delay as that resulting from:
- a) informed, clear and unequivocal waiver; or
 - b) the accused's acts that directly cause delay or are aimed at causing delay (at paras. 61, 63).
- [81] However, "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay" (Jordan at para. 65). After referring to defence actions that are not frivolous, the Court reasoned:
- [65] We have already accounted for procedural requirements in setting the ceiling. And a deduction [for defence actions legitimately taken] 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.
- [82] Legitimate defence actions, those accounted for as part of the process, are accounted for in the Jordan ceiling. That is a departure from the Morin approach, which attributed to the defence all delay arising from steps voluntarily taken by the defence (including bona fide applications and re-elections).
- [83] Such legitimate steps should not, as a matter of course, be regarded as exceptional, even if they occasion delay the Crown cannot avoid. Can it be said that when the Supreme Court of Canada set the 30-month ceiling for trials in the superior courts or after preliminary inquiries, the Court considered that many such trials would be cases where the accused had "re-elected up"? If so, was there any assumption as to when the re-election would occur (other than when the re-election can be made as of right)?
- [84] The Court in Jordan provided a very limited definition of exceptional circumstances:
- [69] 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. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.
- [Emphasis in original.]
- [85] In my opinion, the simple fact that a circumstance lies outside the Crown's control does not make the circumstance exceptional. That fact is a necessary but not sufficient condition. If it were sufficient, all legitimate defence actions that are outside the Crown's control would be regarded as exceptional. Many legitimate defence actions that cause delay are part of the trial process, must have been considered in setting the ceiling, and should not be characterized as exceptional.

- [86] Counsel suggest this is a case of first instance, but have referred us to conflicting superior court decisions on whether a re-election, particularly re-election close to the scheduled trial date, should be considered an exceptional circumstance.
- [87] In *Nasery*, Gates J. considered a s. 11(b) application brought by an accused charged with robbery on November 26, 2014. On March 13, 2015, he elected to be tried in the Provincial Court, and the trial was set for two weeks commencing February 22, 2016. On May 27, 2015, he re-elected trial in the Court of Queen's Bench with a jury. The trial dates in the Provincial Court were saved for a preliminary inquiry. On June 16, 2015, the Crown preferred a direct indictment. On the delay application, the accused argued that an 18-month ceiling should be applied in a one-step process, even in the superior court. Following careful consideration of the jurisprudence, Gates J. rejected that submission. The Crown, in turn, argued that the re-election amounted to defence delay or an exceptional circumstance. The trial judge rejected that argument as well:
- [59] The Crown says that the combined effect of a change in counsel and the subsequent change in trial strategy, including the mode of trial, delayed the process for 76 days, and that this delay is properly attributed to *Nasery*.
- [60] With respect, I am unable to accede to this argument. While *Nasery's* re-election to trial by judge and jury extended the overall time required to complete the trial, I am not persuaded that this can properly be characterized as Defence delay in considering an alleged breach of s. 11(b) of the Charter. I am satisfied that *Nasery's* decision to re-elect was a legitimate decision, doubtless taken on the advice of his then recently retained new counsel. Extending the time required to complete the trial by converting what had previously been a one-stage process into a two-stage process triggered the corresponding Jordan presumptive ceiling associated with a trial in superior court.
- [61] However, no time was "lost", either through the change in counsel or the change in the mode of trial, given that the dates originally set for the Provincial Court trial were converted to dates for the Preliminary Inquiry. While the re-election brought about a change in process to reach final resolution on the merits, such change was fully recognized by the new presumptive ceiling that became operative as a result. However, as previously indicated, I am not persuaded that any time was "lost" during this period of transition from one counsel to another and from one mode of trial to another. There is nothing in the record before me to lead me to conclude that *Nasery's* re-election created any illegitimate Defence delay that should be deducted from the total delay under scrutiny in this instance.

[Emphasis added.]

- [88] The judgment in that case certainly hinged upon the fact the re-election was made only two months after the first election, and appears to have been inconsequential insofar as progress of the case through the judicial system is concerned. However, the comments with respect to recognition of re-election in the presumptive ceiling bear some consideration.

- [89] In Eremenko, the accused were charged with possession of cocaine for the purposes of trafficking. When they sought a s. 11(b) stay, the Crown took the position that a period of 18 months and 17 days' delay should be attributed to the applicants arising from their re-election to Supreme Court. Charges had been laid in July 2014. In September 2014, a Provincial Court trial was set for August 10-21, 2015. On June 5, 2015, the accused re-elected to a Supreme Court trial. This appears to have been a re-election as of right. Jenkins J. noted, in addressing the Crown's submission:
- [25] In making this argument the Crown recognizes that the Jordan framework does account for the effect of this re-election by raising the ceiling from 18 to 30 months. To account for this, they concede that 12 months should be deducted from the total 18 month delay leaving six months and 17 days attributable to defence.
- [90] While Jenkins J. says the Crown described the delay as "attributable to the defence", it is clear that the Crown's principal argument was that the late re-election was an exceptional circumstance. He characterized the argument as follows:
- [39] The Crown argues that a late re-election by a co-accused was a discrete exceptional event outside of the control of the Crown, citing *R v. Truong*, 2017 BCSC 736 at paras. 60-62. The Crown submits the re-[e]lections by Mr. Rezaei and Ms. Eremenko 8 months and 6 days after the arraignment were late.
- [91] He later addressed the argument:
- [74] The transcripts show the Crown was specifically asked if they were content with this decision to which the Crown responded "that's fine". No comments or questions were made regarding delay, nor was consent to the re-election conditioned on the waiver of delay.
- [75] The increase in allowable delay moves from 18 to 30 months in the Jordan framework. It cannot be said that the defence should be doubly penalized for their decision.
- [92] A "re-election up" made more than 14 days before trial would not have required consent in 2015. The Crown's position was, therefore, immaterial. In my view, however, it is correct to say that the fact the re-election raises the ceiling should be taken into account when considering whether a re-election should be considered to be an exceptional circumstance.
- [93] In *R. v. Truong*, 2017 BCSC 736, Kent J. considered a s. 11(b) application brought by an accused charged with seven offences arising from the discovery of a methamphetamine lab and a loaded firearm. The accused had been charged on October 1, 2013. After much delay, on March 7, 2014, her trial in the Provincial Court was set for February 3-26, 2015. At a pretrial conference on January 16, 2015, her co-accused re-elected a trial in Supreme Court by judge alone, as of right. The accused followed suit, and the parties agreed to use the first three days of the previously scheduled Provincial Court trial dates for a preliminary inquiry. On March 4, 2015, the period of January 18-February 5, 2016 was secured for the Supreme Court trial. On the application for a stay, Kent J. considered whether the re-election ought to be considered to be an exceptional circumstance. He concluded:

- [60] There is no doubt that the co-accused's late re-election was a discrete event and outside the control of the Crown in the sense that it was both unforeseen and unavoidable. That re-election occurred just 18 days before the Provincial Court trial was set to commence. Ms. Truong did not apply for severance of the charges at that time. Rather, albeit reluctantly, she also re-elected to trial before a single judge in the Supreme Court.
- [61] The Crown took steps to mitigate the delay arising from the re-election by conducting a preliminary inquiry on short notice and setting trial dates at the first possible opportunity. As the Court discussed in *Jordan* at para. 70, the Crown is not required to demonstrate that any steps it took to mitigate delay were "ultimately successful - rather, just that it took reasonable steps in an attempt to avoid the delay."
- [62] One can only speculate how much earlier a Supreme Court trial date could have been obtained had the re-elections taken place at an earlier date. No evidence has been tendered to explain why the re-election occurred and why it was made so close to the trial date in the Provincial Court. In my view, it would be fair and appropriate to assign at least three months' delay to the late re-election even though it was a re-election as of right. This deduction effectively reduces the amount of time from the date of charge to the anticipated date of trial from 45 to 42 months.
- [Emphasis added.]
- [94] In *R. v. Herman*, 2017 BCSC 215, Davies J. considered a s. 11(b) application brought in December 2016 by an accused who had been charged with possession of 48 pounds of marijuana and 5 kilograms of hashish for the purposes of trafficking. He was charged on July 18, 2013, and initially elected to have the trial heard in the Provincial Court on August 7-8, 2014. The trial was adjourned to June 24-25, 2015. On June 11, 2015, less than 14 days before trial, his counsel filed a notice of re-election which required the consent of the Crown. The Crown consented. Despite that fact, Davies J. considered the "late" re-election to be an exceptional event.
- [95] In *R. v. Lee*, 2017 ONSC 4862, an accused facing child pornography charges elected a provincial court trial in October 2014. The trial was set to commence July 6, 2015. On June 15, 2015, less than a month but more than 14 days before the trial, he re-elected a trial in the superior court. By agreement, a discovery preliminary inquiry proceeded on July 8, 2015. The Crown argued that some portion of the eight months and ten days between the setting of the first provincial court trial date and the preliminary inquiry should be attributed to defence delay (a more limited allowance than made in the case at bar). Forestell J. wrote:
- [18] I have considered the step taken by the defence in re-electing and the manner in which that step was taken. There is no dispute that the defence had the right to re-elect. The issue with respect to this period of delay is not the re-election but its timing.
- [19] The stated reason for the re-election was to explore the evidence related to the Charter issues.

- [20] The context for the re-election was that the scheduled trial date was less than one month away and the defence had been provided with only one search warrant and Information to Obtain. The defence had made an early and detailed request for disclosure that requested, *inter alia*, "the Information to obtain the search warrant(s) in this matter." In light of the failure to disclose a second warrant, the defence reasonably believed the second search to be warrantless and reasonably believed that the exploration of the resulting Charter issues was necessary[.] Where, as in this case, there is late disclosure of an important item, the defence cannot be held accountable for the ensuing delay. In this case it was only during the cross-examination on the discovery preliminary inquiry that it came to light that a second search warrant existed. The discovery preliminary inquiry was adjourned for the disclosure to be provided.
- [21] I find that, in these circumstances, the delay caused by the timing of the re-election was not directly or solely caused by the accused. I further find that the action taken by the defence to re-elect at a late date in order to explore the Charter issues through a discovery preliminary inquiry process was legitimate conduct and that the timing was reasonable. To be clear, this would not always be the case. If counsel have no reason for the timing of the re-election that occasions delay and the actions of the Crown play no role in the timing, some portion of the resulting delay may well be deducted. That is not the situation before me. I would not deduct any portion of the 8.5 months as defence delay.
- [Emphasis added.]
- [96] The case is of little assistance to us, given the trial judge's express rejection, in the case at bar, of the appellant's submission that the re-election was driven by disclosure issues. It is of assistance to the Crown insofar as the reasoning supports the view (like that taken by Kent J. in *Truong*) that where there is no apparent reason for a late re-election, some delay may be excluded from the period counted toward the ceiling.
- [97] In *R. v. J.H.T.*, 2016 BCSC 2382, some portion of the delay attributed to a re-election was attributed to the defence as delay "directly caused by the acts of the defence" without close analysis of the basis for doing so (at para. 135).
- [98] When we address the question of how to assess the delay caused by a re-election as of right, it is important to bear in mind the objectives of the Supreme Court of Canada in setting aside the approach adopted in *Morin* and establishing the framework described in *Jordan*: clarity and predictability.
- [99] I agree with the view expressed by Forestell J. in *Lee*, that when we consider what steps taken by the defence may be regarded as exceptional, we should generally look not only at the nature of the step taken, but also at the manner in which that step is taken. Some steps may be exceptional by nature, and some may be exercised exceptionally. Re-election cannot be said to be generally unanticipated by the Crown. To the contrary, it must generally be regarded as a routine option, made available to an accused as of right, by the Criminal Code, and not exceptional by nature.

- [100] For that reason, I am of the view that the judge erred in accepting (at para. 190 of the Reasons), as a general rule, that a re-election that causes the loss of a scheduled trial date is a discrete, exceptional circumstance that must lead to the deduction of some of the resultant delay in completion of the trial. That rule would apply in every case where an accused re-elects after the setting of a provincial court trial. In my opinion, to use the expression employed by Kent J. in *Truong*, at least some re-elections must have been "built into" the 30-month presumptive ceiling for trials in the superior courts.
- [101] Some steps that may legitimately be taken by defendants as of right are regarded as exceptional events where they delay the process. In *R. v. Tsega*, 2019 ONCA 111, Hourigan J.A. notes, in the course of addressing time spent pursuing extraordinary remedies:
- [83] With regard to defence applications, where they are frivolous or made in bad faith, they will generally constitute defence delay. Where they are brought in good faith, they constitute an exceptional circumstance because they would be outside of the control of the Crown, unless in opposing such an application or an appeal therefrom the Crown is acting in bad faith, taking a frivolous position, or responding in a dilatory manner.
- [102] In my view, the exercise of the right to re-elect may be distinguished from the certiorari applications considered in *Tsega* for two reasons, both of which suggest that it is "built-in" to the ceiling: the right to re-elect may only be exercised as of right up to 60 days before trial, and it has the effect of raising the presumptive ceiling.
- [103] A case proceeding in provincial court in a manner consistent with the framework established in *Jordan* is presumed to be capable of completion within 18 months. Anything beyond that is presumptively unreasonable. If late re-election as of right is not regarded as an exceptional event, the superior court trial of an accused who re-elects on the last permissible date will have to be set in the superior court on a date that permits its completion within 14 months from the date of re-election. Does that schedule impose an unrealistic expectation upon the Crown or the justice system? The Supreme Court in *Jordan* presumed that superior court trials can be set for hearing after a preliminary inquiry, and completed within 30 months from the charge. In my view, given the Attorney General's ability to prefer a direct indictment pursuant to s. 577 of the Criminal Code, it stands to reason that the framework may be adequate to accommodate "late re-elections".
- [104] Where it is not, and where the Crown can establish either that the re-election precluded the completion of the trial within the ceiling, or where the re-election was part of a clear pattern of delay, the use of the right may be considered to be exceptional. In my view, the approach that should be taken in addressing this question is that described at para. 82 in *Tsega*, where the court, considering whether the delay occasioned by the Crown in pursuit of extraordinary remedies and appeals therefrom fits within the definition of a discrete event, noted:

- [82] ... In my view, the best approach is to mirror the analysis undertaken when examining defence delay. The application judge's role in that analysis is not to second-guess the defence's decision to pursue actions designed to make full answer and defence. Rather, the application judge shall intervene only where the defence is not fulfilling its Jordan imposed obligations because it is engaging in deliberate and calculated tactics aimed at causing delay: Jordan, at paras. 63-65....
- [105] In summary, in my view, re-elections made as of right pursuant to s. 561 of the Criminal Code, those that do not require the consent of the Crown, are not per se exceptional circumstances. They are accounted for in the 30-month ceiling for trials in the superior courts. Unless a finding can be made that the re-election is illegitimately taken, for example as part of a deliberate effort to delay a trial, the delay, if any, occasioned by a re-election should not be excluded when determining whether a case exceeds the ceiling.
- [106] For that reason, I am of the view that the judge erred in this case in concluding that the delay from January 15, 2016 to January 17, 2017 should not be considered in his analysis of delay. I would consider the total delay to be the 56-month period from the laying of the charge on August 9, 2013 to the conclusion of submissions on April 9, 2018 (rather than the verdict, so as to exclude the period during which judgment was reserved), and the net delay, after excluding the 13-month delay that followed the commencement of the trial, to be 43 months.
- [107] That period is significantly in excess of the presumptive ceiling, and warrants reconsideration of the extent to which transitional factors weigh against the granting of a stay.

Transitional Exceptional Circumstance

Principles of Appellate Review

- [108] Our consideration of the applicability of the transitional exception must give appropriate weight to the trial judge's findings with respect to the reasonableness of the conduct of the Crown and the accused, and the nature and extent of the prejudice arising from the pre-Jordan delay.
- [109] For some time after the judgment in Jordan, appellate courts reviewed stays ordered by judges in cases where all delay occurred during the old regime. The appellate courts in such cases had the benefit of trial judges' assessments of the Morin criteria applied to all delay. If the charge had been stayed in the first instance, it was unlikely the Crown would be able to rely upon the transitional exception to reinstate the charge. The transitional exception, intended to avoid judgment of past conduct by new standards, would not ordinarily assist a party whose conduct had been found to be wanting under the old standard. As the Court noted in Cody:

- [74] 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.
- [110] On the other hand, if the charge had not been stayed after assessment under the Morin framework, but the delay exceeded the new, relatively inflexible Jordan ceiling, the transitional exception could be called upon in aid of the prosecution on appeal. Jordan itself was such a case, but the exception did not assist the prosecution. Despite the fact the trial judge, after consideration of the Morin factors, had refused to stay the charges, and the fact his judgment was affirmed by this Court, charges were stayed by the Supreme Court of Canada, which concluded the delay was unreasonable and the Crown could not have thought otherwise. The Court said:
- [128] We recognize that the Crown was operating without notice of this change in the law within a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating. Therefore, it cannot be said that the Crown's reliance on the previous state of the law was reasonable.
- [111] In Jordan, as in the case at bar, the Crown initially demonstrated some complacency in moving the case forward but, after the expiry of 31 months, made a good faith effort to conclude the case expeditiously, however:
- [131] While the Crown did make some efforts to bring the matter to trial more quickly, these efforts were too little and too late. The previous state of the law cannot reasonably support the Crown's conduct. And the systemic delay problems that existed in the Surrey Provincial Court at the time cannot justify the delay either. As discussed, much of the institutional delay could have been avoided had the Crown proceeded on the basis of a more reasonable plan.
- [112] The Supreme Court set aside the trial judge's conclusion that the delay was reasonable under the Morin framework, at least in part because it concluded the trial judge had erred in giving institutional delay less weight than delay within the Crown's control under the Morin framework. That was reflected in the trial judge's conclusion (R. v. Jordan, 2012 BCSC 1735 at para. 143) that the stay application should be dismissed because the charges were serious, the delays were primarily institutional, the prejudice was not substantial in relation to the s. 11(b) interests, and the accused's approach was passive.
- [113] Jordan may be regarded as a case where a new framework was described, in a case where the Court was of the view charges should have been stayed under the pre-existing framework. This is reflected in the dissenting opinion of Cromwell J. that, even under a Morin analysis, this was not a "close case":

- [244] The time to the end of trial greatly exceeds what would be a reasonable time to prosecute a case of this nature. While there are societal interests in the trial on the merits of the serious drug crimes alleged against Mr. Jordan, these cannot make reasonable the grossly excessive time that it took society to bring him to trial.
- [114] In *Jordan*, the Court, describing the prospective application of the new framework, at para. 98, suggested the analysis in transitional cases will have a deferential aspect:
- [98] [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. The analysis must always be contextual. We rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case.
- [115] The Court adopted a passage from the dissenting opinion of Lamer J. (as he then was) in *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 948, and emphasized the following comment on the application of a transitional analysis:

This is not to say that different criteria ought to apply during the transitional period, that is, the period prior to the rendering of this judgment, but rather that the behaviour of the accused and the authorities must be evaluated in its proper context. In other words, it would be inaccurate to give effect to behaviour which occurred prior to this judgment against a standard the parameters of which were unknown to all. [Emphasis added in *Jordan*.]

- [116] In the companion case to *Jordan*, *R. v. Williamson*, 2016 SCC 28, the trial judge had found there had been approximately eight months of inherent delay, one month of delay attributable to the Crown, and 26 months of institutional delay. The only resulting prejudice to the accused was that inferred based on the length of the delay alone. The charges were sexual offences, described as "grave". The judge declined to enter a stay. The Ontario Court of Appeal, applying the correctness standard that was then the settled standard by which a ruling on a delay application should be judged, held that the trial judge erred in refusing a stay.
- [117] The Supreme Court of Canada held:
- [30] Ultimately, we agree with the Court of Appeal that, while the s. 11(b) question in this case is "very difficult" (para. 64), looking at the big picture, the previous state of the law cannot justify the nearly three years it took to bring Mr. Williamson to trial on relatively straightforward charges. As the Court of Appeal observed, while the crimes committed by Mr. Williamson are very serious, "the balance weighs in favour of [his] interests in a trial within a reasonable time, over the societal interest in a trial on the merits" (para. 68). Although Mr. Williamson did not suffer significant prejudice, the case was simple, the Crown did little to combat the substantial institutional delay that plagued the prosecution, and Mr. Williamson was reasonably proactive in attempting to move the matter along. Not even the absence of significant prejudice to Mr. Williamson's Charter-protected interests can

stretch the bounds of reasonableness this far.

[Emphasis added.]

[118] The Court, in Cody, later noted, at para. 70:

[70] 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

[119] There is, in Williamson, an examination (at paras. 26-30) of the Morin criteria, but there is no express consideration of parties' reasonable reliance on the law as it previously existed. It is implicit in the judgments in Jordan and Williamson that, where charges clearly ought to have been stayed on a Morin analysis, the Crown cannot say it did not contemplate the result the law, properly applied, would have effected.

[120] Cody was also a case where all delay preceded the judgment in Jordan and the trial judge had conducted a Morin analysis. The Court (at para. 68) noted that the transitional exceptional circumstance assessment involves a qualitative exercise. After citing passages from paras. 96 and 97 of the judgment in Jordan, the Court paraphrased the test stated therein:

[68] 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.

[121] In appeals brought from rulings that post date the judgment in Jordan, the question on appeals in transitional cases takes on a different aspect. A trial judge is called upon to look at the conduct of the parties in the pre-Jordan period, and consider that conduct in light of the parties' reasonable reliance on the law as it previously existed. An appellate court is required to determine whether the judge has erred in doing so. Jurisprudence defining the approach that should be taken on appeals in transitional cases should be seen in that light.

[122] For some time following Jordan and Williamson, there was uncertainty with respect to the weight that ought to be attached, in a transitional case, to the complexity of the case, the actual prejudice occasioned by delay and the seriousness of the charge. That uncertainty has largely been resolved. It is appropriate for a trial judge addressing a transitional case to weigh the following factors which are not weighed in the same manner in the post-Jordan framework: the extent to which complexity of a case contributed to delay (even in a case whose complexity does not rise to the level where the Jordan ceiling should be relaxed: *R. v. Pyrek*, 2017 ONCA 476; *R. v. Picard*, 2017 ONCA 692); the nature and extent of the actual prejudice; the seriousness of the offence; and local institutional delays. The parties' general level of diligence may also be weighed (Cody at para. 70).

[123] As the Court noted in Cody:

- [69] 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).
- [124] The contextual analysis requires consideration of the factors that Jordan sought to replace because they were "too unpredictable, too confusing, and too complex" (Jordan at para. 38). Yet, at least for the transitional period, those factors continue to play a role in the analysis, as the Court noted in Cody:
- [69] 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).
- [125] In *R. v. K.J.M.*, 2019 SCC 55, the Court considered whether the Jordan ceiling or another, lower ceiling ought to be applied in cases involving young offenders. While its analysis focused upon that discrete point, the Court restated its views on the transitional exception generally. Moldaver J., for the Court, described the application of the Morin factors:
- [111] In a transitional case such as this, this inquiry must be approached contextually, in a manner that is sensitive to the parties' reliance on the previous state of the law (see Jordan, at para. 99). In particular, it must take into account how much of the delay pre-dated Jordan, as well as how that delay would have been treated under the pre-Jordan jurisprudence. These considerations shape what can reasonably be expected in terms of timeliness in a transitional case. In short, today's standards should not be rigidly applied to yesterday's events.
- [112] In a transitional case such as this, this high tolerance for institutional delay is a component of the reasonable time requirements of the case (see Jordan, at paras. 100-1).
- [115] The seriousness of the offence played an important role under the pre-Jordan framework (see Cody, at para. 70). As the seriousness of a matter increases, so too does society's interest in seeing the matter proceed to trial (see Morin, at p. 787).
- [116] Prejudice was an "important if not determinative factor" under the pre-Jordan framework (Jordan, at para. 34). While some prejudice might be inferred from both the length of the delay itself (see Morin, at p. 807) and the appellant's young age, inferring prejudice can be a fraught exercise (see Jordan, at para. 33).
- [117] Here, the seriousness of the offences and the absence of any demonstrated prejudice are relevant in that they help to explain why, in this transitional case, the Crown had good reason to believe the delay in this case would not have been found to be unreasonable. Had the law been different -- had Jordan been decided before this trial commenced -- the Crown

no doubt would have acted differently and made greater efforts to move the case through the system quickly. But it would be unfair to put today's head on yesterday's shoulders. Just as the standard for defence initiative in a transitional case must be adapted to account for the pre-Jordan jurisprudence, so too must the standard for what can reasonably be expected of the Crown in a transitional case.

[Emphasis added.]

[126] The Supreme Court of Canada recently again considered the transitional exception in *R. v. Thanabalasingham*, 2020 SCC 18.

[127] The trial judge in that case (*R. v. Thanabalasingham*, 2017 QCCS 1271) had engaged in a lengthy review of the jurisprudence, commencing with the following summary:

[30] The analysis must be contextual and flexible (*Jordan*, par. 96-98). The Court must balance all the circumstances of the case including factors that were relevant under the previous state of the law as laid out in *R. v. Morin*, [1992] 1 SCR 771: the length of the delay, prejudice to the accused, the seriousness of the charge, the complexity of the case, the conduct of the defence, and whether the Crown sought to expedite the proceedings (*Jordan*, par. 128-131; *R. v. Williamson*, [2016] 1 SCR 741, par. 25-30; *R. v. Manasseri*, 2016 ONCA 703, par. 324-379; *R. v. Huard*, 2016 QCCA 1701, par. 24-31; *R. v. Béliveau*, 2016 QCCA 1549, par. 99-138; *R. v. Palma*, 2016 QCCS 6543; *R. v. Louati*, 2016 QCCS 3411).

[128] He found there had been a "startling" delay, including institutional delay of 43 months, and concluded (at para. 32) "the delay in this case is just as unreasonable under the previous framework as it is under the new framework (*R. v. Huard*, 2016 QCCA 1701, par. 26)". The accused had been detained since the start of the proceedings and suffered actual prejudice. Despite the fact the accused was charged with murder, there was no indication the case was complex. Defence counsel had been co-operative and reasonable. Insofar as the seriousness of the offence was concerned, the judge took note of the fact that other murder charges had been stayed for similar delay, referring to *R. v. Regan*, 2016 ABQB 561; *R. v. Picard*, 2016 ONSC 7061; and *R. v. Manasseri*, 2016 ONCA 703. While account should be taken of the criminal justice system's limited resources, he concluded:

[41] [T]ransitional exceptional circumstances cannot be invoked to excuse every institutional delay in every case. Here, the delay is too long and it is unjustified. [T]he delay vastly exceeds the presumptive ceiling of 30 months. The institutional delay also greatly surpasses the *Morin* guidelines. Reliance on previous law cannot justify the nearly five years it took to bring the accused to trial. The accused awaited trial in custody for an unreasonable amount of time while being presumed innocent of the charge against him. The case is not complex. The charge is very serious but this factor cannot alone justify the delay. The Crown failed to be proactive and even contributed to the delay.

- [129] On appeal, a divided court in *R. v. Thanabalasingham*, 2019 QCCA 1765, upheld the stay in terms that afforded significant deference to the trial judge's analysis of the transitional factors. Vauclair J.A., at paras. 133-34, relying on the court's prior judgment in *R. v. Rice*, 2018 QCCA 198, deferred to the trial judge's assessment of the complexity of the case. He concluded, at para. 150, that the decision on the application of the transitional exception of the experienced judge, familiar with the problems in his district and the particulars of the case, warranted deference.
- [130] The Crown appeal to the Supreme Court of Canada was dismissed. The Court did not expressly address the standard of review. The Court concluded the trial judge could not be said to have erred; the case was one that certainly would have qualified for a stay under the old regime. The decision was therefore correct:
- [8] With respect to the transitional exceptional circumstance, we cannot say that the trial judge erred in concluding that the Crown failed to establish that the exception applied. As this Court said in *Cody*, the Crown will "rarely, if ever, be successful in justifying the delay as a transitional exceptional circumstance under the Jordan framework" if the case would have warranted a stay under *R. v. Morin*, [1992] 1 S.C.R. 771 (para. 74). In our view, this case would certainly have qualified for a stay under the previous framework.
- [131] Its judgment in another recent case, however, *K.G.K.*, suggests the trial judge's transitional analysis will be assessed on a standard of reasonableness. Moldaver J., again for the Court, held:
- [81] Most significantly, the trial judge's pre-Jordan assessment of the requisite balance between the need for timeliness, trial fairness considerations, and the practical constraints he faced was reasonable at the time.
- [132] The cases cited by the trial judge in *Thanabalasingham* (Regan; Picard; and Manasseri) are instructive.
- [133] In *Regan*, the net delay of 38½ months was significantly in excess of the Jordan ceiling, but because most occurred before the judgment in *Jordan*, the transitional exception was considered. The trial judge concluded that neither a Jordan nor a Morin analysis could "justify, explain, or diminish the net period of 38½ months of delay". The stay he ordered was set aside on appeal: 2018 ABCA 55. The Alberta Court of Appeal, while describing the deference owed to the trial judge's assessment of the transitional factors, held he had erred in law by not engaging in a thorough Morin analysis and not giving sufficient weight to factors, including the seriousness of the charge, that would have been significant in that analysis:
- [116] Trial judges are best-positioned to decide whether the transitional exception applies, and their assessment is generally owed deference. But where, as here, the trial judge makes legal errors when determining whether the delay was unreasonable, an appellate court is left to conduct its own balancing of the relevant factors: Picard at para 137. We defer to the

trial judge's findings that were untainted by legal error, but we conclude that these proceedings would not have been stayed under a proper application of the transitional exception.

- [134] Picard was also a murder case. A s. 11(b) application was brought shortly before the commencement of the trial. The trial judge, applying the Jordan framework, calculated the delay from the laying of the charge to the anticipated end of the trial at 48 months. None of the delay had been waived, but some had been occasioned by defence conduct. The net delay, after taking that into account, was 40 months. After rejecting the Crown's submission that the complexity of the prosecution was such that the Jordan ceiling should not apply, the judge concluded that the delay was not justified under the transitional exceptional circumstance of Jordan, and a stay should issue.
- [135] On appeal, (*R. v. Picard*, 2017 ONCA 692) the court found the trial judge had erred in her calculation of the institutional delay, and failed to adequately assess the complexity of the case (by failing to recognize that complexity should factor into a Morin analysis, even if the case is not so complex as to make the Jordan ceiling inapplicable) and the seriousness of the offence (which, for a period after *Williamson*, was thought to be of little significance in the transitional analysis). It was necessary, therefore, for the court to reassess the Morin factors. After doing so, Rouleau J.A., for the court, held at para. 131:
- [131] [E]ven with the addition of seven months of Crown delay the Crown could reasonably conclude that on the analysis set out in *Morin*, a trial in the fall of 2016 would not violate Mr. Picard's s. 11(b) rights. [It] appears that no s. 11(b) application was initially planned. The application was brought just prior to the commencement of trial. It was, no doubt, motivated in large part by the release that summer of the Jordan decision.
- [136] Given, in particular, the complexity and the seriousness of the offence, he held:
- [136] I have concluded that applying the Morin framework, a court would not, weighing the length of the delay, the reasons for the delay, the significant prejudice to the accused and the societal interest, consider the overall delay to be unreasonable.
- [137] Turning to the ultimate question, he addressed the deference afforded to a trial judge's assessment of the transitional exception as follows:
- [137] I turn now to the final step of the Jordan analysis: whether, in all the circumstances, the delay is justified by the transitional exceptional circumstance. I accept that, as recognized in *Jordan*, trial judges are generally in the best position to determine whether exceptional circumstances exist. However, in this case, given the clear legal errors made by the trial judge in assessing whether a transitional exceptional circumstance arose, her resulting conclusion that the delay was unreasonable is owed no deference.
- [138] *Manasseri* was a case where two s. 11(b) applications had been dismissed in the trial court before the judgment in *Jordan*. The Court of Appeal concluded the first application judge had erred in his Morin analysis, and stayed the manslaughter charge against one of the

co-accused. Watt J.A., for the court, found the transitional exceptional circumstance did not apply. In his view, the total delay of 68 months should have been found to be unreasonable under a Morin analysis. The Crown had not demonstrated that the time the case had taken was justified based on the parties' reasonable reliance on the law as it previously existed.

[139] This Court, in Rai, heard an appeal from a judgment dismissing an application for a stay where a trial concluded more than 62 months after charges had been laid. The trial had commenced more than a year after the decision in Jordan was released, but most of the post-Jordan delay was attributed to the defence. The net delay the trial judge needed to consider was 50 months (a presumptively unreasonable delay by Jordan standards). After accounting for the time lost due to two adjournments of the trial sought by the appellant's co-accused, there remained 31 months to be accounted for. The appellant sought to characterize all 31 months as institutional delay.

[140] The court addressed the transitional exception in the manner suggested by Jordan, looking to "the good sense of trial judges to determine the reasonableness of the delay in the circumstances" (at para. 172).

[141] The court held the judge:

- a) had not ignored repeated mistakes or missteps by the Crown (at para. 173);
- b) had not ignored the prejudice inherent in delay (at para. 178);
- c) had appropriately considered institutional delay (at para. 181) and "was not wrong in his understanding that, under the Morin framework and depending on the circumstances, delay caused by a co-accused could be considered neutral" (at para. 182); and
- d) took into account the complexity of the case, the steps the Crown took to minimize delay, and the lack of actual prejudice to the appellant (at para. 184).

[142] The court addressed the trial judge's analysis as follows:

[185] We agree with this approach and conclusion given the analytical factors considered relevant in the Morin framework. Under Morin, the timelines for institutional delay were guidelines, "neither a limitation period nor a fixed ceiling": Morin at 795-96. That institutional delay exceeded the guidelines was a factor taken into account in the overall balancing required to determine the reasonableness of the delay. In both R. v. McNeice, 2013 BCCA 97 and R. v. Ralph, 2014 ONCA 3, for example, delay was found to be reasonable under the Morin framework despite slightly exceeding the guidelines (McNeice at para. 37; Ralph at para. 17).

[186] We see no error in the judge's conclusion that the one-month delay beyond the 30-month ceiling under the Jordan framework could be justified as a transitional exceptional circumstance.

- [143] In *Millar*, a case where the net delay exceeded the presumptive ceiling by two months, after appropriate adjustment, Fitch J.A. for the court noted:
- [97] In my view, the Crown has shown that it placed reasonable reliance on the state of the law prior to *Jordan* and cannot be faulted for failing to take additional steps in an effort to expedite this proceeding.
- [98] Prejudice was an important, sometimes determinative, consideration under the *Morin* framework. The appellant did not testify on the s. 11(b) application and did not assert any post-arrest prejudice beyond the existence of the charge and the requirement to report to a bail supervisor, which was relaxed on October 16, 2014. It was reasonable for the Crown to infer, including from the appellant's conduct throughout the proceeding, that he was not prejudiced by delay, but eager to take advantage of any opportunity to delay the proceedings. In these circumstances, it was reasonable for the Crown in the pre-*Jordan* period to regard the delay in the prosecution of this serious case to be reasonable in the absence of any showing of prejudice.
- [99] With respect to the post-*Jordan* delay (a period of about three months), the analysis focuses on the extent to which the Crown had sufficient time to adapt (*Jordan* at para. 96; *Cody* at para. 71). In the case at bar, the Crown had virtually no time to adapt to *Jordan* and did everything that was reasonably within its power to expedite what then remained of the proceeding.
- [144] The trial judge's assessment of the pre-*Jordan* delay in this case must be undertaken in the manner suggested by Frankel J.A. in *R. v. Roberts*, 2020 BCCA 307, having regard to the law as it stood before *Jordan*, the conduct of the parties, the seriousness of the offence, and the absence of prejudice, as follows:
- [143] Whether the transitional exceptional circumstance applies "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": *Jordan* at para. 96.

Application of Those Principles

- [145] In the case at bar, as in *Rai*, the parties could be considered to have been operating under the *Morin* framework for most of the periods of delay at issue. The pre-*Jordan* delay was a period of 35 months, from August 2013 to July 2016. The post-*Jordan* delay, from July 2016 to April 2018, was a period of 21 months.
- [146] As I have noted, most of the post-*Jordan* delay was attributed to exceptional circumstances that arose at trial. The relevant post-*Jordan* delay in this case was the period of seven months between the judgment in *Jordan* and the start of the trial. With respect to the Crown's ability to adapt after the *Jordan* decision in July 2016, it appears that little could be done to advance the January 2017 trial date. The trial judge faulted no one for the inability

to set the trial for hearing in the fall of 2016. He held that by the time the trial began, the parties had fully embraced the Jordan approach (at para. 235). In my view, the critical question in relation to the transitional circumstances is whether the trial judge erred in concluding the pre-Jordan delay was reasonable by the standards of Morin.

- [147] The trial judge considered this to be a case that warranted a six-month "intake period". In Morin, the Court indicated that a period of 18 months of "purely systemic delay" in a two-step case from the charge to a superior court trial would be considered to be reasonable. The trial should therefore have been set to commence in the Supreme Court, under the Morin framework, by at most 24 months from the laying of the charge: by early August 2015.
- [148] Following the re-election, the appellant's Supreme Court trial in this case was set for January through March 2017. On that schedule, and before the exceptional circumstances arose, it was expected that the trial would be completed in March 2017, 19 months outside the Morin guidelines.
- [149] Despite that fact, the trial judge found that the parties would not then have anticipated that delay would lead to a stay of proceedings. That conclusion followed an extensive review of the process, including these findings:
- a) The period from the laying of the charges (August 9, 2013) to the reserving of the Provincial Court trial dates (June 20, 2014) exceeded any reasonable intake period as part of the inherent time requirements under Morin (at para. 224).
 - b) Crown disclosure proceeded at a "completely unsatisfactory pace". The inability of the police to manage their disclosure to the Crown was a contributing factor. Their need to arrest the accused before seeking charge approval for public safety concerns might partially explain that shortcoming, but did not account for the more than 10 months that ensued (at paras. 226-27).
 - c) The assigned prosecutor was "overwhelmed by the scale of the task and the level of police assistance, [but] not indifferent to her responsibilities under the existing law" (at para. 227).
 - d) The Crown was unable to execute the plan for managing the complexity of the disclosure and "should have put more effort, resources, and skill into timely disclosure, and bears the responsibility for police shortcomings in the delay analysis" (at para. 228).
 - e) Four or five of the ten months of the total pre-arraignment period would have been expected to be attributed to the Crown for this reason under the Morin analysis (at para. 228).
 - f) Some delay arose from the fact the Crown laid joint charges. Under Morin, delay caused by joint charges was dealt with in a more benign way than under Jordan (at para. 229).
 - g) The Crown would reasonably have had in mind that the previous law would have moderated the delay somewhat by reference to the case's meaningful complexity (at para. 230).

- h) As of the date of the judgment in Jordan, "the case would already have been seen by the parties under the Morin guidelines as being at risk of a s. 11(b) problem in the near future" (at para. 231).
- i) Thereafter, the prosecutor was proactive, encouraging re-election as early as possible, seeking to replace the Provincial Court trial dates with the same ones in the Supreme Court and preferring a direct indictment (at para. 231).
- j) The parties would likely have regarded the re-election as a neutral factor in the process, or as part of the inherent time requirements (at para. 232).
- k) When the appellant's co-accused obtained an adjournment, Crown promptly separately indicted the accused (at para. 234).

[150] The trial judge held:

[236] Prejudice to Mr. Lai would have been entitled to a meaningful weight under the previous legal regime, to the certain knowledge of the parties. His affidavit sets out a fairly harsh and intrusive set of bail conditions, and the Crown is correct to concede that they would have caused him prejudice, which has obviously accumulated as the case grows older.

[237] I think the weight of this factor in the analysis of reasonable reliance on the law at that time, should be moderated by two points, however. First, I find it very difficult to accept that a relaxation of at least some of these conditions could not have been achieved, either on a bail review or an application to me as the trial judge, regardless of the Crown's position opposing it or Mr. Lai's position at his bail hearing that he would accept restrictive ones. I think his hardship has been increased to a degree by the absence of such an application. Second, however eager he may have been to see this situation ended, he ultimately chose a route to trial that to his knowledge would have cost him something approaching another year or more under the same harsh conditions. So, while prejudice is important here, it is not decisive in the weighing process.

[238] Finally, there is the issue of the seriousness of the offences. In considering how it weighed in the reasonable reliance of the parties, it is not that helpful to compare it to homicides, such as the first-degree murder in Regan. The question is what the parties would reasonably have made of this case's own seriousness.

[239] While stays of proceedings for delay in sexual assault cases of this notable degree of seriousness were not unknown under Morin, I think the parties would have reasonably expected them to be a fairly rare occurrence, unlikely to arise in the absence of a really appalling delay period or some combination of significant Crown negligence or blatant disregard for the usual urgency that should attach to serious criminal prosecutions.

- [151] Having reviewed at length the jurisprudence in relation to the transitional analysis, including a recitation of the Morin framework and a summary of the analysis in *R. v. Rice*, 2018 QCCA 198, and *R. v. Regan*, 2018 ABCA 55, and being intimately familiar with the pre-Jordan delay, he concluded (as I have noted above, but repeat here for ease of reference):
- [240] Balancing these factors, and more importantly assessing how the parties would have expected them to be balanced, once this case got out of its disclosure morass (which I repeat was the product of an inadequate response to the volume and pace of what was received from the police, rather than repeated mistakes or complacency by the prosecutor), it proceeded with reasonable efficiency, despite the prevailing amount of institutional delay in each court and the defence decision to re-elect. I think the parties were quite unlikely to have contemplated the possibility of a successful s. 11(b) application being made in relation to it during the significant pre-Jordan period that it encompassed.
- [152] In my opinion, here, as in *Rai*, it cannot be said that the trial judge ignored the errors made by the Crown, or the prejudice suffered by the accused. We should defer to the judge's assessment of the weight to be afforded to that prejudice, and to his assessment of the complexity of the case (*Millar* at para. 88).
- [153] I would not adopt the trial judge's view that the parties would not have expected a s. 11(b) application to succeed "in the absence of a really appalling delay period or some combination of significant Crown negligence or blatant disregard for the usual urgency that should attach to serious criminal prosecutions" (at para. 239). Further, as noted, I am of the view that he erred in concluding that the re-election in this case was an exceptional circumstance. However, I cannot say that he erred in concluding that the time the case had taken to get to trial was justified based on the parties' reasonable reliance on the law as it previously existed. In my view, that conclusion was founded upon consideration of the relevant criteria and was not affected by the error in the assessment of the extent to which the Jordan ceiling was exceeded.
- [154] In coming to that conclusion, I am conscious of the view expressed by Vauclair J.A. in *Rice* (at para. 219 of the unofficial English translation) to the effect that the transitional exception will not ordinarily assist the Crown in cases where there has been significant Crown delay:
- [219] Where the prosecution is diligent, courts are more apt to recognize transitional exceptional circumstances: see, in particular, *Duplessis c. R.*, 2017 QCCS 606; *Palma c. R.*, 2016 QCCS 6543; *Paul c. R.*, 2016 QCCS 6838; *Corriveau c. R.*, 2016 QCCS 5799; *Namazzade v. R.*, 2017 QCCQ 5861; *D'Urso c. R.*, 2017 QCCQ 4706, para. 225.
- [220] In these circumstances, transitional exceptional circumstances should not serve to justify delays exceeding those which would have been reasonable by roughly two years following a generous assessment under the previously applicable framework.

Conclusion

[155] In my view, this is a close case, but, in all the circumstances, I cannot say the trial judge erred in concluding the delay was justified by the transitional exceptional circumstance. As I have noted, it is settled that trial judges are generally in the best position to determine whether exceptional circumstances exist, and the conclusion of the trial judge that the delay was reasonable in this case is owed some deference. In my opinion, a stay of proceedings in this case is not necessary to promote the long-term functionality of the justice system.

[156] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Newbury"

Reasons for Judgment of the Honourable Mr. Justice Butler:

Introduction

[157] I have had the opportunity to read in draft form the reasons of my colleague, Justice Willcock. While I agree with his conclusions on the two excluded periods, I am respectfully unable to agree with his disposition of the appeal. In my view, the resulting net delay of 43 months cannot be justified by the transitional exceptional circumstance.

[158] The delay in this case exceeds the presumptive Jordan ceiling by a significant amount. However, the trial judge's transition analysis was incorrectly based on a net delay of 32 months. I do not believe we should defer to that analysis, as it was premised on a far shorter period of delay.

[159] In addition, I find that the judge erred in two respects. First, he failed to undertake a substantial Morin analysis as required in these circumstances. Second, his error on the first excluded period led him to significantly understate the delay when considering the transitional exceptional circumstance. I am of the view that error also led him to conclude that the parties would regard the entire delay occasioned by the appellant's re-election as a "neutral" factor, or as part of the inherent time requirements of the case, that would be seen as separate from institutional delay.

[160] For the reasons that follow, I conclude that the delay in this case is not justified based on the parties' reliance on the previous state of the law. In particular, it was not reasonable for the parties to expect the entire Supreme Court stage of the proceedings from the appellant's re-election to the scheduled start of the trial (totalling 16 months) to be defence delay or inherent time requirements and not attributable, at least in part, to institutional delay. In balancing the length of the delay, the reasons for the delay, the prejudice to the accused, and the seriousness of the offence, I find that the Morin factors would have weighed in

favour of a stay and that the delay may not be justified as a transitional exceptional circumstance.

Discussion and Analysis

Standard of Review

- [161] In *R. v. Virk*, 2021 BCCA 58, this Court restated and clarified the standard of review to be applied on s. 11(b) decisions, including a judge's classification of periods of delay in a transition case. Justice Fenlon, writing for the Court, held that the attribution of delay--that is, deciding who or what caused a period of delay--is distinct from the allocation of delay. Allocation involves the application of legal principles to the facts found concerning the cause of delay, in order to categorize the period of delay within the Jordan or Morin framework: *Virk* at para. 13. While attribution will often effectively determine allocation, that is not always so, and different standards of review apply to each step. In attributing delay, the judge is making a finding of fact or drawing an inference and is owed deference on appeal. By contrast, allocation is a question of law reviewable on a correctness standard.
- [162] At para. 56 above, my colleague has set out paras. 23-24 from *Virk* in which Justice Fenlon describes the four steps in a s. 11(b) analysis and the standard of review applicable to each. She concluded with the observation that the ultimate decision of whether to impose a judicial stay is a question of law:
- [24] The allocation of periods of delay is reviewed on a standard of correctness. The ultimate decision of a judge to impose a judicial stay for unreasonable delay is a question of law and is likewise subject to a correctness standard: *Yusuf* approving *Pauls* at para. 40; *Millar* at para. 88.
- [Emphasis added.]
- [163] It is worthwhile to set out the referenced passage in the Supreme Court of Canada's recent decision in *R. v. Yusuf*, 2021 SCC 2, in which the Court expressly approved the standard of review applied by the Ontario Court of Appeal (cited there as *R. v. Pauls*, 2020 ONCA 220):
- [40] The *Yusuf* respondents challenged the continuing applicability of the pre-Jordan standard of review in the post-Jordan world. However, several post-Jordan decisions of this court have held the standard of review on a s. 11(b) application is well-established. Deference is owed to a trial judge's underlying findings of fact. Characterizations of periods of delay and the ultimate decision concerning whether there has been unreasonable delay are reviewable on a standard of correctness: *R. v. Jurkus*, 2018 ONCA 489, 363 C.C.C. (3d) 246, at para. 25, leave to appeal refused, [2018] S.C.C.A. No. 325; *R. v. Albinowski*, 2018 ONCA 1084, 371 C.C.C. (3d) 190, at para. 27; *R. v. Bulhosen*, 2019 ONCA 600, 377 C.C.C. (3d) 309, at para. 73. Given these decisions, I decline the *Yusuf* respondents' invitation to revisit the standard of review.

[Emphasis added.]

[164] While Virk makes it clear that deference is owed to the attribution of responsibility, including for whether there was reasonable reliance on the law as it stood pre-Jordan, no deference is owed where the judge makes legal errors in assessing the transitional exceptional circumstance. In Picard, the Ontario Court of Appeal held that in considering the transition exception, the trial judge effectively ignored the complexity of the case, a relevant consideration under Morin. The judge further mischaracterized several elements of the delay which significantly overstated the amount of institutional delay: at para. 102. The Court concluded that these errors were such that on review it owed no deference to her transition analysis:

[137] I turn now to the final step of the Jordan analysis: whether, in all the circumstances, the delay is justified by the transitional exceptional circumstance. I accept that, as recognized in Jordan, trial judges are generally in the best position to determine whether exceptional circumstances exist. However, in this case, given the clear legal errors made by the trial judge in assessing whether a transitional exceptional circumstance arose, her resulting conclusion that the delay was unreasonable is owed no deference.

[Emphasis added.]

The Court conducted its own Morin analysis and concluded that a court would not, in that case, consider the overall delay to be unreasonable: at para. 136.

[165] In Regan, the Alberta Court of Appeal similarly held that the trial judge erred in law by not engaging in a thorough Morin analysis:

[116] Trial judges are best-positioned to decide whether the transitional exception applies, and their assessment is generally owed deference. But where, as here, the trial judge makes legal errors when determining whether the delay was unreasonable, an appellate court is left to conduct its own balancing of the relevant factors: Picard at para 137. We defer to the trial judge's findings that were untainted by legal error, but we conclude that these proceedings would not have been stayed under a proper application of the transitional exception.

[Emphasis added.]

[166] My colleague's conclusion that the judge did not err in finding that the delay was justified as a transitional exceptional circumstance is premised largely on the deference he affords to the judge's assessment of the parties' reliance on the law as it existed pre-Jordan. I am of the view that we need not defer to that assessment given the two errors made by the judge: first, in concluding that the delay occasioned by the accused's re election was a discrete exceptional circumstance, which caused him to significantly understate the length of delay over the presumptive Jordan ceiling (by 11 months); and second, his failure to undertake a substantial Morin analysis in the first place. As a result of these errors, this Court should conduct its own Morin analysis while giving deference only to those findings of the judge that are untainted by error.

[167] As I will explain below, I am of the view that the judge failed to actually attribute the periods of delay in the pre-Jordan time period. When that attribution is done in reliance on the law as it stood pre-Jordan, it is evident that the delay in that time period was well in excess of the Morin guidelines. Accordingly, I would not defer to the judge's characterization of delay in the Supreme Court stage of the proceedings. Further, I would not defer to his ultimate determination of whether the delay would have been seen as reasonable under the pre-Jordan framework. That determination, which requires balancing the relevant Morin factors with due sensitivity to the manner in which that previous framework was applied, is a question of law reviewable on a standard of correctness.

Morin Analysis

[168] As I have indicated, I am of the view that the judge erred by failing to conduct a full Morin analysis and that this Court should conduct its own analysis. Accordingly, I will first outline the analysis required under Morin; second, consider the judge's attribution of delay and attempt to determine the total length of Crown and institutional delay in the pre-Jordan stage of the proceedings; and third, explain how I would balance the resulting delay against the relevant factors under the pre-Jordan framework.

[169] Where a delay exceeds the presumptive 30-month ceiling, the Crown must satisfy the court that the delay is justified based on the parties' reasonable reliance on the law as it previously existed: Jordan at para. 96. The Court noted the importance of prejudice and the seriousness of the offence under the Morin regime:

[96] 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.

[170] In Cody, the Court elaborated as follows:

[68] 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.

[171] Under Morin, the reasonableness of the delay was determined by balancing the following factors (at 787-778):

1. The length of the delay;
2. Waiver of time periods;

3. The reasons for the delay, including the inherent time requirements of the case, the actions of the accused and the Crown, limits on institutional resources, and other reasons; and
4. Prejudice to the accused.

After subtracting periods of delay that have been waived, the final step under Morin asks whether the resulting delay is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanation for the delay, and prejudice to the accused: at 778.

[172] The Morin guidelines set 8-10 months as a guide for institutional delay in provincial court proceedings and an additional 6-8 months for tolerable institutional delay in the superior court: Morin at 798-799. Thus, under Morin, a total of 14-18 months "was the measure for proceedings involving both the provincial court and the superior court": Jordan at para. 52.

[173] In Jordan, the Court departed from the Morin framework in part because it was unpredictable, confusing and unduly complex: at para. 37. But regardless of the problems with the pre-Jordan framework, when considering the transitional exceptional circumstance in the circumstances of this case, the judge should have conducted a Morin analysis to quantify the relevant periods of delay as "inherent requirements"; "institutional delay"; "defence delay"; and "Crown delay". In my view, the judge's analysis was inadequate as he failed to clearly identify those periods of delay as required, making it difficult to identify or quantify the period of institutional delay in excess of the Morin guidelines.

[174] However, I will attempt to parse the factual findings the judge did make--and which are owed deference on review--in conducting my own Morin analysis.

Timeline

[175] I will first briefly re-state the relevant timeline:

- August 9, 2013: the appellant was charged.
- June 20, 2014: Provincial Court trial dates reserved for November 9-December 17, 2015.
- September 30, 2015: the appellant re-elected to have his trial in Supreme Court.
- November 25, 2015: Supreme Court trial dates confirmed.
- July 8, 2016: Jordan is released by the Supreme Court of Canada.
- January 23-March 10, 2017: originally scheduled Supreme Court trial.

[176] When Jordan was released, it had been 35 months since the appellant was charged. However, I would characterize the 41 months between the appellant's charge and the scheduled commencement of the Supreme Court trial as pre-Jordan delay. This is because, when Jordan was released, the trial date was already set. The Morin analysis considered the period from the appellant's charge through the conclusion of the trial. This could have been no less than 43 months as of the scheduling of the trial in November 2015; in other words, once the trial was scheduled, that 43 months was locked in as the (minimum) amount of

delay. My colleague agrees at para. 146 that with respect to the Crown's ability to adapt after the Jordan decision, little could be done to advance the January 2017 trial date at that point.

[177] Under Morin, the trial itself was attributed to inherent time requirements. For our purposes then, what is relevant is the 41 months between the appellant's charge and the scheduled start of the trial--and which portion of that period is attributable to Crown and/or institutional delay on one hand versus inherent time requirements or defence delay on the other, which do not count against the Morin guidelines.

[178] As we have found, the subsequent trial delays arose after Jordan was released and in any event were properly excluded by the judge. These are not relevant to the Morin analysis.

The Length of Delay

[179] At para. 224, the judge acknowledged delays in the early stages of the proceedings attributable to the Crown and/or institutional delay:

[224] There is no question that the period from the laying of the charges to the reserving of the Provincial Court trial dates exceeds any reasonable intake period as part of the inherent time requirements under Morin. It would also have been found to include an element of Crown delay. This situation would have been known to the parties.

Here, the judge appeared to classify the period from the laying of the charges (in August 2013) to the reserving of trial dates (in June 2014) as the "intake period". He noted, rightly, that a reasonable intake period is included in the inherent time requirements of a case. However, in this case, 10 months to schedule the trial exceeded what was reasonable.

[180] The judge then discussed various issues with Crown disclosure. He noted that the pace at which disclosure proceeded was "completely unsatisfactory" and expressed sympathy for the prosecutor, who was "overwhelmed by the scale of the task" though not indifferent to her responsibilities under the existing law: at para. 227. He concluded that the police and Crown office needed to put more effort, resources, and skill into timely disclosure and that:

[228] the Crown bears the responsibility for police shortcomings in the delay analysis. The attribution of Crown delay to some of what would otherwise have been inherent delay, as the intake period, would likely have been the consequence of that failure, in the parties' expectations under the existing law. Perhaps four or five of the 10 months of the total pre-arraignment period would have been expected to be attributed to the Crown for this reason.

[Emphasis added.]

[181] This is an important finding: roughly half of the intake period--four to five months--was attributable to Crown delay, and the parties would have expected that to be the case under the existing law.

[182] However, the judge then stated that this delay would be moderated somewhat by reference to the case's meaningful complexity and the joint charges against Mr. Lai and Mr. Law, and the parties would reasonably have had that in mind. How this impacted the four to five months of delay he just attributed to the Crown is unclear. The balancing required under Morin, which includes the complexity of the case, is to be done after determining the total length of the delay.

[183] The judge then appeared to consider the delay between the arraignment and the first offered trial date:

[231] As institutional delay, eleven months to a first offered trial date, when added to the excessive intake period, clearly created a situation in which the case would already have been seen by the parties under the Morin guidelines as being at risk of a s. 11(b) problem in the near future. That awareness likely accounts for the prosecutor's proactive efforts, as she explicitly expressed it "with delay in mind", to pursue the possibility of a re-election as early as possible and to seek to replace the Provincial Court trial dates with the exact same ones in Supreme Court, followed by a direct indictment as soon as the re-election was confirmed. This approach reflected delay as a serious looming issue and was a practical and ultimately effective one.

[Emphasis added.]

[184] The judge's reference to "eleven months to a first offered trial date" appears to be the period between June 2014, when trial dates were scheduled, and the first trial dates offered for a six-week trial in Provincial Court beginning on May 19, 2015. The judge apparently classified this entire 11 months "as institutional delay" in addition to the "excessive intake period".

[185] At this point, we may summarize the judge's findings as follows:

Date

Event

Month

Attributed Delay

Provincial Court proceedings

August 9, 2013

Appellant is charged

0

June 20, 2014

Provincial Court trial dates reserved (for November 9-December 17, 2015).

10

4-5 months (Crown delay)

May 2015

First offered trial date

21

11 months (institutional delay)

November 2015

Provincial Court trial scheduled to begin

27

n/a

Total delay found by the judge:

15-16 months (Crown plus institutional delay)

[186] Until the appellant's re-election in September 2015, the proceedings remained in Provincial Court. The Morin guidelines for institutional delay in provincial courts allowed for 8-10 months. The judge found 11 months of institutional delay and four to five months of Crown delay between the appellant's charge and the first offered trial date in May 2015, for a total of 15-16 months. This explains the judge's reference in para. 231 (quoted above) that the parties would have seen the case as "being at risk of a s. 11(b) problem in the near future". That is an understatement. The delay was double that which was acceptable for provincial court proceedings, and was already running up against the 14-18-month timeline for two-stage proceedings despite remaining, at this point, entirely in Provincial Court.

[187] The judge's attribution of Crown and institutional delay is owed deference on review. I find that his assessment of 11 months of institutional delay should not be disturbed, taking into account two countervailing factors. First, it is unreasonable to suggest that the parties would have been ready for trial immediately after it was scheduled in June 2014. Institutional delay "starts to run when the parties are ready for trial but the system cannot accommodate them": Morin at 794-795. In Picard, the trial judge erred to treat the entire 8-month period between the scheduling of the trial and its commencement as institutional delay. The Court of Appeal substituted five months as a reasonable period of inherent time requirements to prepare for and be available for trial, with the remaining three months until the start of the trial attributed to institutional delay.

- [188] Second, however, the judge only considered the 11 months between the scheduling of the trial and the first available trial date (in May 2015). The trial was in fact scheduled for November, six months later, due to the calendar of Mr. Law's counsel. But Mr. Lai's counsel "was available on the court's first available dates" in May and could have had a trial earlier than November: Reasons at para. 82.
- [189] I find that 11 months is a reasonable estimate of institutional delay in the 17-month period between the arraignment and the scheduled start of the Provincial Court trial (or viewed differently, the 15-month period between the arraignment and the appellant's re-election two months prior to the scheduled trial). This allows for time for the parties to prepare for and be available for the original trial but also adds some time in the period between the first available date and the originally scheduled Provincial Court trial, given that Mr. Lai was indeed available on those first offered dates.
- [190] In summary, then, I would accept the trial judge's finding of 15-16 months of Crown plus institutional delay in the Provincial Court stage of the proceedings: namely, the 25-month period from the appellant's charge to his re-election in September 2015. This is well in excess of the applicable guidelines for delay in provincial court proceedings of 8-10 months.

The Appellant's Re-Election

- [191] The judge addressed the delay following the appellant's re-election as follows:
- [232] While re-election certainly had the potential of being attributed as defence delay at that time, I think it would more likely have been regarded by the parties and treated as a neutral factor in the process, or as part of the inherent time requirements of the case. Regardless of its precise characterization, it would have been seen as separate from institutional delay.

[Emphasis added.]

- [192] In his transition analysis, these inherent time requirements occasioned by the appellant's re-election, the four to five month "intake period", and the 11-month institutional delay referenced above are the only periods the judge attempted to classify under the Morin framework. I note that at para. 240, the judge discussed the "prevailing amount of institutional delay in each court" (emphasis added), and yet he did not attribute any institutional delay to the entire Supreme Court stage of the proceedings. His findings may now be summarized as follows:

Date

Event

Month

Attributed Delay

Provincial Court proceedings

August 9, 2013

Appellant is charged

0

June 20, 2014

Provincial Court trial dates reserved (for November 9-December 17, 2015).

10

4-5 months (Crown delay)

May 2015

First offered trial date

21

11 months (institutional delay)

Supreme Court proceedings

September 30, 2015

The appellant re-elects to have trial in Supreme Court

25

"Neutral" or inherent time requirements.

November 25, 2015

Supreme Court trial dates scheduled (for January 23-March 10, 2017)

27

July 8, 2016

Jordan is released

35

January 2017

Trial scheduled to begin (actually begins in February 2017)

41

[193] In my view, the judge erred to attribute the entirety of the Supreme Court proceedings following the appellant's re-election to inherent time requirements. This is inconsistent with the longer Morin guidelines for two-stage proceedings, and with courts' treatment of

delay in other two-stage cases under the Morin framework. It appears that the judge's exclusion of the period following the appellant's re-election as a discrete exceptional circumstance led to this error in his treatment of the same period for the purposes of his transition analysis. Regardless, on the basis of the pre-Jordan jurisprudence it would not have been reasonable for the parties to expect the entire 16-month period between the appellant's re-election and the scheduled start of the trial to be attributable to inherent delay or to delay consequent on defence actions.

[194] The parties would have known that the Morin guidelines allowed for eight to ten months of institutional delay in provincial court proceedings and an additional six to eight months in superior courts. In Morin, the Court addressed "two-stage" trials at 793:

Another inherent delay that must be taken into account is whether a case must proceed through a preliminary inquiry. Clearly a longer time must be allowed for cases that must proceed through a "two-stage" trial process than for cases which do not require a preliminary hearing. Equally, a two-stage process will involve additional inherent delays such as further pre-trial meetings and added court dates. An additional period for inherent time requirements must be allowed for this second stage. This period will be shorter than in the case of the one-stage trial process because many of the intake procedures will not have to be duplicated.

[Emphasis added.]

[195] In this case, there was no preliminary inquiry because of the Crown's direct indictment. I agree with the judge that the Crown made laudable efforts to speed up the process, including urging the appellant to re-elect as soon as possible and advising that in the case of a re-election the Crown would seek a direct indictment: Reasons at paras. 52, 233. But as the Court noted in Morin, the rationale behind the longer guidelines for superior court proceedings is that a longer time must be allowed for cases that must proceed through a "two-stage" trial process than for those which do not require a preliminary hearing or take place entirely in provincial court.

[196] It is not reasonable, given the higher ceiling for a "two-stage trial process", for the Crown to have reasonably expected the entire Supreme Court stage of the proceedings (16 months from the appellant's re-election to the scheduled start of the trial), which did not include a preliminary hearing, to be inherent time requirements. The higher ceiling would be sufficient to accommodate late re-elections in most cases, by allowing for an additional 6-8 months of institutional delay plus additional inherent time requirements that would not count against the Morin clock. But in this case, when the appellant re-elected, Crown and institutional delay already totalled 15-16 months. This meant that any further delay that could not be characterized as inherent time requirements or attributable to the defence would be institutional delay, which would bring the total delay over the Morin guidelines.

[197] My colleague acknowledges this at paras. 147-148, in which he states that under the Morin framework, the trial should have been set to commence in the Supreme Court by at most 24 months from the laying of the charge (given the judge's finding of a six-month "intake" period, added to the 18 months of tolerable institutional delay). He notes that when the Supreme Court trial was in fact scheduled for January through March 2017, the trial would be completed 19 months outside the Morin guidelines.

[198] However, my colleague also says that under Morin, "all delay arising from steps voluntarily taken by the defence (including bona fide applications and re-elections)" were attributed to the defence. With respect, I think this overstates the principle to be taken from Morin. There, the Court stated that defence delay includes at 793-794:

all actions taken by the accused which may have caused delay. In this section I am concerned with actions of the accused which are voluntarily undertaken. Actions which could be included in this category include change of venue motions, attacks on wiretap packets, adjournments which do not amount to waiver, attacks on search warrants, etc. I do not wish to be interpreted as advocating that the accused sacrifice all preliminary procedures and strategy, but simply point out that if the accused chooses to take such action, this will be taken into account in determining what length of delay is reasonable.

[Emphasis added.]

[199] At 794, the Court gives two examples of delay actions that need to be "taken into account" in determining defence delay, including a reference to *R. v. Bennett* (1991), 3 O.R. (3d) 193:

A further example is provided in *Bennett*, supra, where the accused made an election at his scheduled Provincial Court trial to be tried in the then District Court. This converted a scheduled trial into a preliminary inquiry. While the type of action of the accused in both these cases was unquestionably bona fide, each action contributed to the delay and must therefore be taken into consideration in determining whether the overall delay suffered by the accused was reasonable.

[Emphasis added.]

[200] As I understand Morin, the need to take defence actions into account does not mean, in the case of a re-election (or other bona fide steps), that all of the subsequent delay will be deemed to be separate from institutional delay. That would be contrary to the whole point of Morin, which was to identify institutional delay from other delay. I think it is important that the Court referred to *Bennett*, a case where the accused re-elected as late as possible--on the first day of the scheduled provincial court trial. Justice Arbour (as she then was) held as follows:

[62] As indicated earlier, I would be inclined to consider the delay subsequent to the date set for trial in the Provincial Court as delay attributable to the accused, in view of the election for a preliminary inquiry rather than a trial on the date set for trial. I am hesitant to do so, however, absent any evidence that an earlier election would have resulted in a preliminary inquiry being held sooner than the scheduled trial date. Local practices seem to vary in

terms of the timing of arraignment and election. In general, the accused should bear the responsibility for delays occasioned by a late election or a last minute re-election. This would not be the case, however, if, for some reason, the system required or favoured a delayed election. Again, much will turn on the evidence in a given case.

[Emphasis added.]

[201] In those circumstances, it was clear that the delay that arose from the very late re-election would not be considered institutional delay. However, it does not follow that in a Morin analysis all time that passes after a re-election is automatically defence delay or inherent delay. A court should do what the Court did in Bennett, and look at the circumstances to take into account how much of the delay could be attributed to inherent or institutional delay. In Bennett, the accused re-elected in June 1990 and received a re-scheduled trial date merely five months later, in November 1990. The total delay was only 13.5 months from the laying of the charge. This case is very different. The trial was re-scheduled for 16 months after the appellant's re-election. It stands to reason that at least some part of this additional time has to be attributable to institutional delay. The total delay in our case also far exceeds that which was at issue in Bennett. The question, then, is how much of the 16-month delay should have been attributed to institutional delay versus defence delay and/or inherent time requirements.

[202] The judge in the case at bar noted that he did not consider the delay following the appellant's re-election to be defence delay: at para. 214, where he found, out of 57 total months of delay, defence delay to be "none" (albeit in the context of his Jordan analysis). While he mused that the delay might have been considered as "neutral or part of the inherent time requirements", he did not answer the question that Morin poses: how much of the period should be allocated to inherent time requirements versus institutional delay.

[203] As the Court noted in Morin, inherent time requirements will be shorter in a two-stage trial because "many of the intake procedures will not have to be duplicated". The Court elsewhere suggests in Morin that inherent time requirements are primarily composed of the intake period at 792:

As well as the complexity of a case, there are inherent requirements which are common to almost all cases. The respondent has described such activities as "intake requirements". Whatever one wishes to call these requirements, they consist of activities such as retention of counsel, bail hearings, police and administration paperwork, disclosure, etc. All of these activities may or may not be necessary in a particular case but each takes some amount of time. As the number and complexity of these activities increase, so does the amount of delay that is reasonable. Equally, the fewer the activities which are necessary and the simpler the form each activity takes, the shorter should be the delay. The respondent suggests that this court should set an administrative guideline for such an "intake period". We decline to do so on the basis of the record that is before us. The length of time necessary will be influenced by local practices and conditions and should reflect that fact. No doubt the intake period in a particular region will tend to be the same for

most offences.

[Emphasis added.]

[204] In *Williamson*, the Supreme Court of Canada upheld the Court of Appeal's finding that seven months was a reasonable period for the case to be prepared and tried. The Court explicitly classified this delay category as "intake/inherent time requirements", compared to 25 months of institutional delay: at paras. 64, 69.

[205] The overlap between 'inherent time requirements' and 'intake' was confirmed by Justice Cromwell concurring in *Jordan*, who noted that in *Morin*, "this Court specifically declined to create an administrative guideline for the 'inherent' or 'intake' time requirements of a case": at para. 259. The trial judge in *Jordan* found the inherent time requirements of the case to be 10.5 months out of a total delay of 49.5 months (with 32.5 months attributable to institutional delay, 19 of which occurred at the Provincial Court and 13.5 months at the British Columbia Supreme Court): at paras. 12, 14-15.

[206] Of course, inherent time requirements also include the time it takes for "counsel to prepare for trial and for the trial to be conducted once it begins": *Morin* at 792. As Justice Lamer later described in *Mills*, the inquiry into the inherent time requirements of a case will necessarily require judges to rely on their practical experience and good sense. This requires an objective and realistic assessment of the period which would normally be required, taking into account the number of charges, the number of accused, the complexity and volume and similar objective elements, for the preparation and completion of the case: at p. 932.

[207] In *Picard*, the Court noted the following in the context of Ontario jurisprudence:

97 The range as to what length of time is appropriately classified as inherent varies widely in the case law from a few days to up to 13 months, depending on factors such as the complexity of the case and length of the proposed preliminary inquiry: see, for example, *R. v. Khan*, 2011 ONCA 173, 270 C.C.C. (3d) 1 (Ont. C.A.), where five months and 10 days was allowed; *Schertzer*, where 13 months was allowed; and *R. v. Ralph*, 2014 ONCA 3, 313 O.A.C. 384 (Ont. C.A.), where four months was allowed.

[Emphasis added.]

[208] I find this range to be consistent with this Court's jurisprudence both before and after the release of *Jordan*: see, e.g., *R. v. McNeice*, 2013 BCCA 97 in which this Court upheld the trial judge's finding of 7.5 months of inherent delay (out of a total delay of 39.5 months): at para. 36; *R. v. Nwanebu*, 2014 BCCA 387, in which the trial judge attributed two months to inherent time requirements (out of a 50-month total delay; new trial ordered on other grounds); *R. v. Sanghera*, 2014 BCCA 249, in which the trial judge found 9.5 months of inherent time requirements, including a six-month intake period, two months for trial preparation, and five weeks for the trial itself: at para. 46; and *R. v. Reinbrecht*, 2019 BCCA 28, in which the trial judge found six months of inherent delay and three months of

institutional delay in Provincial Court and 11.5 months of inherent delay (including a preliminary inquiry) and eight months of institutional delay in the Supreme Court: at para. 38.

- [209] In summary, inherent time requirements are rarely held to be over 12 months, even in complex cases such as Williamson (seven months of inherent delay) or Jordan (10.5 months of inherent delay) with lengthy overall delays. In the case at bar, the judge determined that five to six months was a reasonable intake period at the Provincial Court stage. The inherent time requirements after the appellant's re-election would likely have been seen as shorter, as many of these intake procedures would not have to be duplicated after the appellant re-elected: Morin at 793.
- [210] On this basis, it is simply not reasonable for the parties to have expected the entire 16-month period between the appellant's re-election and the scheduled commencement of his Supreme Court trial to be inherent time requirements or necessary to prepare for trial. Under Morin, the judge should have considered how much of that time was institutional delay as opposed to inherent or defence delay. That analysis had to take into account the fact that the Morin analysis allowed an extra 6-8 months of institutional delay for a two-stage trial, in addition to whatever additional inherent time requirements would accrue and which would not count against the Morin guidelines. To repeat, institutional delay starts to run when the parties are ready for trial but the system cannot accommodate them: Morin at 794-795; Picard at para. 78. It is unreasonable that the parties would not have been ready for and available for trial significantly earlier than 16 months after the appellant's re-election.
- [211] Applying these principles and considerations to the circumstances, I would allocate the two months from September to November 2015 to inherent delay, covering the Crown's direct indictment on November 3 through the scheduling of Supreme Court trial dates. The court could have offered trial dates in September 2016, but Mr. Lai's counsel was unavailable; however, there was no indication of whether dates later in the fall of 2016 could have been provided by the court: Reasons at para. 54. I have already allowed the parties a number of months to prepare at the Provincial Court stage of the proceedings but, to give the benefit of the doubt to the Crown's position, I would add another three to five months of time to prepare for and be available for trial after the appellant's re-election. I would also deduct the one month that we know the defence was not available in September 2015. This leaves eight to 10 months of institutional delay following the appellant's re-election, which I believe to be a conservative estimate.

Summary of Length of Delay

- [212] By the time of the appellant's re-election, the judge had already found 15-16 months of Crown and institutional delay at the Provincial Court stage of the proceedings, well over the 8-10 month Morin guidelines. I would add eight to 10 months of additional institutional delay in the 16 months between the appellant's re-election and the scheduled start of his

Supreme Court trial. This puts the total Crown plus institutional delay at 23-26 months, well in excess of the 14-18 month Morin guidelines for proceedings in superior courts. In summary, I would conclude that it was not reasonable for the parties to have expected the entirety of the time taken for the Supreme Court proceedings between re-election and trial to be attributable to inherent time requirements. This would not have been justified by the circumstances of the case and the applicable law at the time.

[213] I would summarize my findings of delay as follows:

Date

Event

Month

Inherent Time Requirements

Crown and institutional delay

Provincial Court proceedings

August 9, 2013

Appellant is charged

0

June 20, 2014

Provincial Court trial dates reserved (for November 9-December 17, 2015).

10

5-6 months

4-5 months

Supreme Court proceedings

September 30, 2015

The appellant re-elects to have trial in Supreme Court

25

4 months

11 months

November 25, 2015

Supreme Court trial dates scheduled (for January 23-March 10, 2017)

27

2 months

January 2017

Trial scheduled to begin (actually begins in February 2017)

41

6-8 months

8-10 months

Totals:

17-20 months inherent time requirements

23-26 months institutional delay

Balancing

[214] It is now necessary to assess this delay against the pre-Jordan framework, with due sensitivity to the manner in which the previous framework was applied: Jordan at para. 96; K.J.M. at para. 111. Under Morin, courts were to determine whether the length of institutional delay was unreasonable, having regard to the interests s. 11(b) seeks to protect, the reasons for the delay, and the prejudice to the accused: Morin at 788. Under the Morin framework, prejudice and the seriousness of the offence often played a decisive role in determining whether the delay was unreasonable: Jordan at para. 97.

[215] This was confirmed in Cody, in which the Court noted that its decision in Williamson should not be read as discounting the important role of prejudice and the nature of the offence as transitional considerations. The Court distinguished Williamson and held that its facts were unusual, as it involved a straightforward case and an accused person who made repeated efforts to expedite the proceedings, in contrast with the Crown's indifference. The net delay in that case was 34 months, which the Court held was unreasonable "despite the seriousness of the offence [sexual abuse of a child] and the absence of prejudice" to the appellant: Cody at para. 70. The Court further stated that the parties' general level of diligence may be a relevant transitional consideration.

[216] In Thanabalasingham, the Court considered a net delay (45 months) similar to the net delay in this case (43 months). The Court noted that this was well-beyond the 30-month presumptive ceiling and that the accused suffered actual as well as inferred prejudice. Despite the seriousness of the offence (first-degree murder), the trial judge did not err to conclude that the delay could not be justified as a transitional exceptional circumstance: at para. 8.

[217] In this case, there is no question that the offence is serious. I agree with the judge that what matters is what the parties would reasonably have thought of the seriousness of the offences: at para. 238. However, like my colleague, I disagree with his subsequent conclusion at para. 239:

[239] While stays of proceedings for delay in sexual assault cases of this notable degree of seriousness were not unknown under Morin, I think the parties would have reasonably expected them to be a fairly rare occurrence, unlikely to arise in the absence of a really appalling delay period or some combination of significant Crown negligence or blatant disregard for the usual urgency that should attach to serious criminal prosecutions.

[Emphasis added.]

[218] First, I note that after adjusting for the judge's errors in excluding the delay occasioned by the appellant's re-election, the 43-month net delay may indeed qualify as a "really appalling delay period". Under Morin, institutional delay of 23-26 months would be considered significantly excessive. Second, I note, as the majority of the Supreme Court of Canada did in Williamson, that "many appellate courts across the country, including this one, have stayed serious charges even where the total delay (minus defence delay) was less than that in this appeal": at para. 34; see, e.g., R. v. Godin, 2009 SCC 26 (charges of sexual assault, unlawful confinement and threatening death, when the total delay, comprised of largely Crown and institutional delay, was roughly 30 months); R. v. D. (R.), 2008 BCCA 339 (charges against the father of the alleged victim of sexual assault and touching a person under the age of 14 for a sexual purpose, with a total delay of 28.5 months); R. v. MacPherson, 2015 ABCA 139 (charges relating to two armed robberies, with a total delay of 20.5 months); R. v. Scott, 2015 SKCA 144 (charges of sexual assault and sexual interference involving a child, with a total delay (excluding defence delay) of 31 months); R. v. MacMunn, 2008 ONCA 520 (charges of accessing, possessing and making child pornography, with a total delay of 27.5 months).

[219] In Williamson, the total delay from the charge to the end of the scheduled trial was 35.5 months: at para. 66. In this case, the net delay even after accounting for the second excluded period was 43 months, significantly longer than even that in Williamson. There, a stay was granted for a similar offence, with a shorter delay period and in the absence of prejudice to the appellant.

[220] Next, prejudice to the appellant would have been entitled to meaningful weight under the pre-Jordan regime, to the certain knowledge of the parties. The judge recognized that the appellant suffered prejudice as a result of "a fairly harsh and intrusive set of bail conditions" but found that the prejudice was mitigated because a relaxation of the bail conditions might have been achieved and the re-election prolonged the period of time he was subject to those conditions. Nevertheless, he found that prejudice was important. He did so without referring to the most significant element of the prejudice suffered by the appellant--that which can be inferred from lengthy delay in awaiting trial.

- [221] On the reasons for the delay and the diligence of the parties, it is worthwhile repeating the concerns that caused the delays prior to the re-election: excessive delay at the intake period; the "completely unsatisfactory" way in which disclosure proceeded; and the prosecutor was overwhelmed by the scale of the task. To the extent that the case proceeded with "reasonable efficiency" once the case got out of its disclosure morass, I find this to be too little, too late. In *Jordan*, the Court noted:
- [131] While the Crown did make some efforts to bring the matter to trial more quickly, these efforts were too little and too late. The previous state of the law cannot reasonably support the Crown's conduct. And the systemic delay problems that existed in the Surrey Provincial Court at the time cannot justify the delay either. As discussed, much of the institutional delay could have been avoided had the Crown proceeded on the basis of a more reasonable plan.
- [222] The same may be said of this case. The Crown needed a more reasonable plan to deal with intake, disclosure, and the pre-trial steps over the first 25 months after the initial charge.
- [223] In summary, I would balance the relevant factors differently from the trial judge. The prejudice to the appellant, reasons for the delay, and length of the delay all weigh in favour of a stay. While the seriousness of the offence does not, courts before and after *Jordan* have stayed proceedings in sexual assault, murder, and other serious cases based on significantly less delay. As this Court noted in *R. v. Harrison*, 2009 SCC 34, "Charter protections must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences": at para. 40.

Conclusion

- [224] Where a balancing of factors under the *Morin* analysis 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: *Cody* at para. 74. I do not find this case to be any different.
- [225] While I agree that appropriate deference must be shown to the trial judge's factual findings, his transition analysis was premised on a net delay of 32 months. We have concluded that the judge was wrong to exclude the delay occasioned by the appellant's re-election, raising the net delay in this case to 43 months. Counsel has not referred us, nor have I located, any cases in which a net delay of 13 months over the presumptive ceiling was justified based on the parties' reliance on the pre-*Jordan* state of the law.
- [226] I disagree with my colleague that the judge's conclusions on the parties' reliance on the previous law was not affected by his error in assessing the extent to which the *Jordan* ceiling was exceeded. The *Morin* analysis explicitly sought to balance prejudice, seriousness of the offence, and the reasons for delay against the length of the delay. All else being equal, prejudice or other factors may weigh against a stay when considered against a delay that only slightly exceeds the *Morin* guidelines (as the judge erroneously did) but may be less tolerable as the length of delay extends further over the applicable ceiling. While I

acknowledge that ex post facto calculations like this may be artificial, the judge recognized that delay was a "serious looming issue" even before accounting for the 16-month delay between the appellant's re-election and the scheduled Supreme Court trial. As discussed, I do not think the parties would have reasonably attributed the entirety of the Supreme Court stage of the proceedings to inherent delay; in other words, to expect that none of it would count against the Morin clock given the higher ceiling for two-stage proceedings designed to accommodate additional delay.

[227] Despite the high degree of deference afforded to the judge's factual findings and those attributing delay, the judge's errors in concluding that the appellant's re-election was a discrete exceptional circumstance and in failing to undertake a full Morin analysis led him to attribute the entirety of the 16-month period from the appellant's re-election to the scheduled start of the Supreme Court trial to inherent time requirements. I am of the view that no deference is owed to that conclusion and accordingly no deference is owed to his view that the parties' reliance on the law as it stood pre-Jordan was reasonable. Having carried out a Morin analysis, I would conclude that the total institutional delay was 23-26 months, well in excess of the Morin guidelines. I would also conclude that the delay cannot be justified as a transitional exceptional circumstance. I would allow the appeal and stay the appellant's conviction.

"The Honourable Mr. Justice Butler"

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