
CANADA / JUDGMENT

R. v. Roberts

2020 BCCA 307

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 307 R. v. Roberts

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Roberts,

2020 BCCA 307

Date: 20201106

Docket: CA46009

Between:

Regina

Respondent

And

Kirk Dennis Roberts

Appellant

Before:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated October 15, 2018 (R. v. Roberts, New Westminster Docket X080178).

Counsel for the Appellant

(via videoconference):

I. Donaldson, Q.C.

Counsel for the Respondent

(via videoconference):

S.A. Hulko

Place and Date of Hearing:

Vancouver, British Columbia

May 29, 2020

Written Submissions Filed:

June 9 & 19, September 18, & October 2 & 9, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 6, 2020

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Fisher

Summary:

The appellant was convicted of participating in defrauding a bank of more than \$6 million. He challenges that conviction solely on the basis that the trial judge erred in dismissing his application for a stay based on a violation of his Charter s. 11(b) right to be tried within a reasonable time. The judge found the delay was justified by the case's complexity. The appellant applies to adduce the judge's reasons for sentence as fresh evidence. Held: Application to adduce fresh evidence and appeal dismissed. The judge erred by engaging in a quantitative analysis, not a qualitative analysis, to conclude that the case was complex. Though the case had many of the hallmarks of complexity, a qualitative analysis demonstrates that it was relatively straightforward in terms of its issues and evidence. Additionally, it was not demonstrated that these hallmarks caused the delay. The judge mischaracterized the delay caused by the co-accused's successful application to adjourn the preliminary inquiry, brought one week before the inquiry was to start. That adjournment should be characterized as delay waived by the appellant since he did not to oppose the application even though he had successfully opposed a similar application a week earlier. The application to adduce the reasons for sentence is dismissed as the appellant's degree of participation in the offence and his level of moral culpability are irrelevant to considering the

seriousness of the offence under the transitional exceptional circumstance. Considering the parties' conduct, the seriousness of the offence, the lack of prejudice, and the law pre-Jordan, the delay in the case is justified under the transitional exceptional circumstance.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] Kirk Dennis Roberts appeals his conviction for fraud solely on the basis that the trial judge, Justice Shergill of the Supreme Court of British Columbia, erred in dismissing his application for a stay of proceedings based on a violation of his right to be tried within a reasonable time guaranteed by s. 11(b) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. The total time from the laying of the charge until the anticipated end of the verdict-phase of the trial was 1,443 days (approximately 47.5 months). In support of his appeal, Mr. Roberts seeks to adduce as fresh evidence the trial judge's reasons for sentence, pronounced approximately six months after she dismissed the stay application.
- [2] The trial judge heard the stay application prior to the date set for the start of a jury trial. The record on that application consisted of: (a) admissions, to which were attached emails, letters, and transcripts of some of the court appearances that preceded the application; (b) a synopsis of the Crown's case; (c) an affidavit sworn by Mr. Roberts; and (d) Mr. Roberts's direct and cross-examination. Applying the framework set out in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, and *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, both of which were decided after the charge was laid, the trial judge determined the delay to be five months over the 30-month presumptive ceiling set in *Jordan* for superior court trials. However, the judge found that delay justified by the case-complexity exception set out in *Jordan*. In light of that finding, the judge did not find it necessary to consider whether the *Jordan* transitional exceptional circumstance applied. After the stay application was dismissed, Mr. Roberts re-elected to be tried by a judge sitting without a jury, made lengthy admissions, elected not to call evidence, and invited the judge to find him guilty.
- [3] For the reasons that follow, I would dismiss Mr. Roberts's fresh evidence application and his appeal. Although I have found that the judge erred in finding the delay to be justified based on case-complexity, I would uphold her dismissal of Mr. Roberts's stay application under the transitional exceptional circumstance.

Nature of the Offence

- [4] The charge relates to a fraud Mr. Roberts and Matthew Gregory McAmmond Brooks perpetrated on Scotiabank in connection with the operations of Aggressive Road Builders ("ARB"), a roadbuilding company. Mr. Brooks was the president of ARB; Mr. Roberts was its general manager. The majority of ARB's work was with municipalities in the Lower Mainland and Fraser Valley areas of British Columbia.

- [5] In the fall of 2006, Mr. Brooks approached Scotiabank to obtain a \$7 million line of credit for ARB. He and Mr. Roberts met with Debbie Scott. In assessing ARB's credit application Ms. Scott requested information with respect to ARB's accounts receivable. Acting on Mr. Brooks's instructions, Mr. Roberts provided information that overstated the true amount of the receivables. Relying on that misinformation, Ms. Scott recommended that ARB be granted a \$7 million operating line of credit. In early 2007, the bank approved the line of credit and opened a business account for ARB to which funds could be transferred from the line of credit. Ms. Scott assumed management of ARB's accounts.
- [6] The covenants with respect to the line of credit required ARB to provide Scotiabank with financial information on a regular basis, including monthly statements with respect to accounts payable and accounts receivable. The bank relied on this information to determine, on a monthly basis, whether to adjust the line of credit. Mr. Roberts was responsible for providing that information. He knew ARB's actual accounts receivable were much lower than what he was reporting.
- [7] By June 2007, ARB's business account was overdrawn by more than \$600,000; there were no funds in the line of credit to cover the overdraft. During the next ten months, the business account was overdrawn on a regular basis. As a result, Scotiabank transferred the management of ARB's accounts to Cheryl Conn, who specialized in managing problematic commercial accounts.
- [8] In early May 2008, Ms. Conn delivered demand notices to ARB, giving the company ten days to pay out the \$7 million line of credit. Later that month Scotiabank agreed to extend the time for repayment if ARB allowed the bank to appoint a monitor to review the company's financial affairs. Following a meeting with Ms. Conn and Jervis Rodrigues of Deloitte and Touche Restructuring Inc. ("Deloitte"), Mr. Brooks agreed to Deloitte being appointed as monitor.
- [9] In May and June of 2008, Deloitte personnel attended at ARB's offices in an effort to examine the company's books and records. Melinda McKie, vice-president of Deloitte, reviewed some of the books and records ARB provided along with records provided by Scotiabank. It appeared to her that some of the accounts receivable ARB was reporting as still outstanding had been paid.
- [10] On July 3, 2008, Mr. Brooks met with Ms. Conn, Jameel Sethi (Ms. Conn's supervisor), and Mr. Rodrigues. Mr. Brooks was asked to provide a schedule setting out ARB's current accounts receivable. Mr. Brooks telephoned Mr. Roberts and asked him to provide that information. About an hour later, Mr. Roberts provided a schedule showing ARB's current accounts receivable to be \$3.4 million. This was substantially less than the approximately \$21 million set out in the last monthly interim financial report sent to Scotiabank. When asked about the discrepancy, Mr. Brooks admitted he had caused the accounts receivable to be inflated.

- [11] In August 2008, Scotiabank petitioned ARB and Mr. Brooks into bankruptcy. The net loss to Scotiabank arising from the bankruptcy was just over \$6 million, not including interest.

The Investigation

- [12] On February 20, 2009, Scotiabank reported an allegation of fraud to the commercial crime section of the Royal Canadian Mounted Police.
- [13] The police investigation included over 20 witness interviews and the examination of municipal records relating to contracts with ARB. The municipal records were obtained by means of seven production orders. As well, the police examined thousands of pages of other documents such as faxes, emails, and invoices. Forensic examination of four computer hard drives resulted in the extraction of over 17,000 documents and over 2,600 emails. Investigators reviewed those documents and emails to determine their relevance to the investigation. In total, over 14,300 physical pages were reviewed and analyzed for evidentiary value.
- [14] A forensic accountant examined the financial records and witness statements obtained by the police. On May 2, 2012, that accountant provided a 165-page report, which included 146 pages of detailed schedules. On November 5, 2014, he provided a 21-page supplemental report dealing with documents obtained after he prepared his original report. Based on comparing the documents ARB provided to Scotiabank with municipal records, the forensic accountant determined the accounts receivable ARB reported exceeded its actual accounts receivable by amounts ranging from \$3.74 million to \$13.15 million.
- [15] On August 29, 2014, the police provided the Crown with a report to crown counsel and a supplementary report to crown counsel. Those reports totalled 288 pages. The reports were accompanied by an electronic document inventory containing over 1,000 documents, consisting of approximately 15,800 pages of disclosure.

Timeline of Court Proceedings

- [16] What follows does not include every appearance by Mr. Brooks and Mr. Roberts. Initially, the appearances in the Provincial Court of British Columbia were not before a judge and, as a result, were not recorded. On some occasions, Mr. Roberts did not personally attend court. On those occasions, counsel appeared for him as "designated counsel", as provided for in s. 650.01 of the Criminal Code, R.S.C. 1985, c. C-46. Mr. Roberts was, therefore, effectively present at all times.
- [17] On November 21, 2014, an information was sworn in the Provincial Court registry in Surrey, British Columbia, charging Mr. Brooks and Mr. Roberts with one count of fraud over \$5,000, contrary to s. 380(1)(a) of the Criminal Code. Summonses were issued for Mr. Brooks and Mr. Roberts. J. Brian McKinley assumed carriage of the case for the Crown.

- [18] Mr. Roberts made his first appearance in Provincial Court on January 2, 2015. By that time, he had retained E. David Crossin, Q.C., as counsel. Mr. Brooks did not appear and it could not be established that he had been served with a summons. The case was adjourned to January 16, 2015, and on that day it was adjourned again to February 13, 2015.
- [19] On January 29, 2015, the police provided the Crown with a disclosure package. The Crown provided a copy of that package to Mr. Crossin on February 12, 2015.
- [20] Mr. Brooks made his first appearance on February 13, 2015. The case was adjourned to February 27, 2015, to allow Mr. Brooks time to retain counsel and to give Mr. Crossin time to review the disclosure package.
- [21] On February 27, 2015, Mr. Brooks did not appear. William Jessop, a lawyer who attended for Mr. Brooks, did not have a s. 650.01 designation. Mr. Brooks's non-appearance was noted and the Crown's application for a bench warrant was adjourned. The case was adjourned to March 26, 2015, to fix a date. On March 26, 2015, Mr. Brooks appeared without counsel. The case was adjourned to April 9, 2015. It was then adjourned to April 23, 2015.
- [22] On April 21, 2015, Mr. Crossin wrote Mr. Jessop to enquire whether Mr. Brooks had retained him. In part, Mr. Crossin stated:

In the event you have been retained, I would appreciate discussing matters with you prior to the appearance on April 23, 2015. This matter has languished far too long and we would very much like to move it along.

- [23] On April 23, 2015, Mr. Brooks appeared without counsel. The case was adjourned to May 14, 2015, for arraignment.
- [24] On May 12, 2015, Mr. Crossin emailed Mr. McKinley, in part, to enquire whether Mr. Brooks had retained counsel or had applied for legal aid. With respect to the upcoming May 14, 2015 appearance, Mr. Crossin said he had the following "comments and concerns":

Firstly, if Mr. Brooks is without counsel, I would like to try and arrange for him to consult with duty counsel either that day or relatively quickly in order to be advised concerning the nature of an election. There are issues that he ought to be thinking about concerning election. An election is not an unimportant step and I would not be comfortable with him stumbling through that issue without some advice.

Secondly, we would have to concern ourselves with how much time we will require if for instance it is to be a Provincial Court trial. While we have not discussed this, I am of the view that the case would likely lend itself to admissions. Having said that, again, I think we should hesitate to schedule a trial on the assumption there will be admissions in circumstances where Brooks is unrepresented.

- [25] Mr. McKinley replied that day by email. He indicated he shared some of Mr. Crossin's concerns but had no information as to whether Mr. Brooks had retained counsel or applied for legal aid. Mr. McKinley said that if Mr. Brooks did not have counsel, then he intended to schedule dates on the basis Mr. Brooks would not be making admissions.
- [26] At the May 14, 2015 appearance, outside the courtroom, Mr. Brooks said he had recently met with and was in the process of retaining a lawyer. Mr. McKinley offered to provide Mr. Brooks with the disclosure package but Mr. Brooks would not take it. Subsequently, it was learned that the lawyer Mr. Brooks mentioned had ceased practicing law in mid-January 2015.
- [27] On May 22, 2015, Mark T.K. Berry appeared for Mr. Brooks and stated Mr. Brooks required more time to retain Kelly Merrigan. The case was adjourned to June 19, 2015, for arraignment.
- [28] On June 19, 2015, Mr. Berry appeared and stated Mr. Brooks required more time to finalize Mr. Merrigan's retainer. The case was adjourned to June 29, 2015, for arraignment. Mr. McKinley provided Mr. Berry with the disclosure package for Mr. Brooks.
- [29] On June 29, 2015, Mr. McKinley requested the case be transferred to a courtroom in which a Provincial Court judge was sitting so the proceedings would be recorded. Mr. Brooks appeared without counsel and elected to be tried by a Provincial Court judge. Mr. Roberts elected to be tried in the Supreme Court by a judge and jury. By reason of Mr. Roberts's election, the judge directed there be a preliminary inquiry. Mr. McKinley stated that, absent admissions, the Crown would be calling 26 witnesses. He estimated eight days would be required. Counsel who attended on behalf of Mr. Crossin estimated five to eight days. The judge adjourned the case to a judicial case manager to fix a date for an eight-day preliminary inquiry. A preliminary inquiry was scheduled for February 23 to March 3, 2016, with a pre-hearing conference on January 11, 2016. Outside the courtroom, Mr. Brooks told Mr. McKinley he had received the disclosure package from Mr. Berry.
- [30] On July 23, 2015, Mr. Berry returned Mr. Brooks's disclosure package to Mr. McKinley. Mr. Berry advised Mr. McKinley that he did not have current contact information for Mr. Brooks.
- [31] Just prior to the January 11, 2016 pre-hearing conference, Mr. McKinley provided Mr. Brooks with the disclosure package. When the case was called, Mr. McKinley stated he and Mr. Crossin were of the view that, with respect to Mr. Roberts, the preliminary inquiry could be shortened to two or three days. This was on the basis Mr. Crossin would be making admissions and wished to hear from only five witnesses. However, because Mr. Brooks did not have counsel, Mr. McKinley said he intended to call 15 or 16 witnesses and, therefore, five or six days were needed. In the result, the preliminary inquiry was shortened to six days, beginning February 23, 2016. The case was adjourned to January 26, 2016, for a pre-hearing conference.

- [32] On January 12, 2016, Mr. McKinley notified Mr. Sethi and 10 other witnesses that they would not be required for the preliminary inquiry. Mr. McKinley did this on the basis of the admissions he and Mr. Crossin had discussed. Mr. McKinley intended to call Ms. Conn and Mr. Rodrigues to testify about the July 3, 2008 meeting with Mr. Brooks.
- [33] On January 13, 2016, Mr. McKinley's legal assistant emailed Mr. Sethi confirming that he was not required for the preliminary inquiry. Mr. Sethi was told he would be contacted prior to a trial date being set. He was asked to provide the Crown with the dates of any holidays he had planned in 2016.
- [34] The January 26, 2016 pre-hearing conference was adjourned to February 10, 2016, because Mr. Brooks had not retained counsel.
- [35] On January 27, 2016, Mr. Sethi sent an email to Mr. McKinley's legal assistant that included the following:

I am planning to travel as things stand currently from March 10th to April 4th 2016 and then May 5th to 9th 2016 both times away from Canada. Plans may change and I will try to update you. I may possibly be away for winter from Dec 1st 2016 to March 31st, 2017 but these plans are at discussion stage only.

- [36] On February 10, 2016, Paul E. Del Rossi appeared on behalf of Mr. Brooks and applied to adjourn the preliminary inquiry set to begin in two weeks. Mr. McKinley and Mr. Crossin opposed the adjournment. A judge dismissed the application. Outside the courtroom, counsel discussed the possibility of making admissions to shorten the preliminary inquiry. A judicial case manager advised them that if the preliminary inquiry did not proceed in February, then it could be rescheduled for two days in late June.
- [37] Mr. McKinley attempted to find out whether the Crown's witnesses would be available. He determined Ms. Conn would not be available during the last week of June.
- [38] On February 17, 2016, Mr. Del Rossi again applied to adjourn the preliminary inquiry, this time before a different judge. Neither Mr. McKinley nor Mr. Crossin opposed the application, which the judge granted without reasons. The inquiry was then rescheduled for June 29 and 30, 2016. At this time, Mr. McKinley believed Mr. Sethi and Mr. Rodrigues would be available to testify about the July 3, 2008 meeting with Mr. Brooks.
- [39] Outside the courtroom, Mr. Del Rossi advised Mr. McKinley that Mr. Brooks had expressed an intention to plead guilty prior to the preliminary inquiry. Mr. Del Rossi needed time to discuss the matter with Mr. Brooks and to take instructions.
- [40] On February 18, 2016, Mr. Rodrigues and Camille Fitzgerald, a Scotiabank employee who processed documents, advised Mr. McKinley that they would not be available on June 29 and 30, 2016. That day, Mr. McKinley sent a letter to Mr. Crossin and Mr. Del Rossi advising them of Mr. Rodrigues's and Ms. Fitzgerald's unavailability and providing the names of the six witnesses the Crown intended to call at the preliminary inquiry, one of whom was Mr. Sethi.

- [41] On April 29, 2016, Mr. McKinley's legal assistant advised Mr. Sethi by email that he was required as a witness in June. A copy of the subpoena issued for Mr. Sethi was attached to the email and he was told personal service of it would be arranged. Mr. Sethi replied on May 2, 2016, stating he would not be available in June as he had a trip planned with members of his family.
- [42] On May 9, 2016, Mr. McKinley wrote to Mr. Crossin and Mr. Del Rossi advising them Mr. Sethi was not available in June and that, therefore, none of the Crown witnesses in relation to the July 3, 2008 meeting would be available for the preliminary inquiry. Mr. McKinley asked Mr. Crossin and Mr. Del Rossi whether, for the purposes of the preliminary inquiry, they were prepared to make admissions concerning that meeting.
- [43] In a telephone conversation on May 10, 2016, Mr. Crossin told Mr. McKinley he required the Crown to call at least one of the persons present at the July 3, 2008 meeting. Mr. McKinley said there was a possibility that Mr. Brooks would plead guilty before the preliminary inquiry, in which case the Crown might call him as a witness.
- [44] Mr. McKinley arranged for the case to be spoken to on June 9, 2016. He applied to adjourn the preliminary inquiry on the basis that none of the Crown's "three key witnesses" were available. Counsel who attended on behalf of Mr. Del Rossi stated his instructions were to consent to the adjournment. Counsel who attended on behalf of Mr. Crossin said her instructions were the same. The adjournment was granted.
- [45] On June 22, 2016, the preliminary inquiry was rescheduled for January 30 and 31, 2017, those being the earliest court dates available.
- [46] On July 8, 2016, the Supreme Court of Canada released its judgment in Jordan.
- [47] On December 12, 2016, the Deputy Attorney General of British Columbia consented to a direct indictment charging Mr. Brooks and Mr. Roberts with fraud being filed in the Supreme Court of British Columbia. That indictment was filed in the New Westminster registry on December 22, 2016. Summonses were issued for Mr. Brooks and Mr. Roberts.
- [48] Mr. Brooks and Mr. Roberts made their first appearance before a Supreme Court judge on January 5, 2017. Mr. McKinley stated it was his understanding that Mr. Brooks intended to plead guilty in Provincial Court. He said the direct indictment had been preferred "to speed things along for Mr. Roberts" and that dates had been obtained for a four-week jury trial to commence on November 20, 2017, for Mr. Roberts and, if necessary, Mr. Brooks. Mr. McKinley further stated trial dates were available starting October 2, 2017, but those dates were not available to Mr. Crossin. The judge reserved the suggested trial dates and adjourned the case two weeks to formally fix those dates.
- [49] On January 19, 2017, Mr. Brooks pleaded guilty in Provincial Court. Later that day, Mr. Roberts appeared in the Supreme Court and his trial was set for four weeks commencing on November 20, 2017, with jury selection on November 2, 2017.

- [50] On May 21, 2017, the 30-month presumptive ceiling for Mr. Roberts's charge was reached. As that day was a Sunday, the effective date was May 22, 2017, being 913 days from when the charge was laid.
- [51] On September 22, 2017, Mr. Roberts filed an application for a stay based on delay together with an affidavit he swore that day. The application was scheduled to be heard on September 29, 2017.
- [52] On September 29, 2017, Mr. Roberts's case was called before Justice Sewell, who had been assigned as the trial judge. Mr. McKinley was unable to attend due to an unforeseen family emergency. Counsel who appeared that day for the Crown sought to have the application rescheduled. Counsel who attended on behalf of Mr. Crossin agreed the application could not proceed. Justice Sewell adjourned the application generally, with a direction that a new date be arranged through the registry. What was not known at that time was that Mr. Crossin had been appointed to the Supreme Court of British Columbia that morning.
- [53] On October 17, 2017--being the date previously set for a pre-trial conference--Ian Donaldson, Q.C., appeared on behalf of Mr. Roberts before Sewell J. and applied to adjourn the trial. Mr. Donaldson submitted Mr. Roberts needed to retain "senior" and "experienced" counsel because the matter was "a case of some complexity". Although Mr. McKinley opposed the adjournment, he acknowledged it was unlikely Mr. Roberts would be able to obtain counsel for a trial just over a month away. Justice Sewell granted the application and adjourned the case to fix a new trial date.
- [54] On November 23, 2017, the matter came before another judge. At that time, September 10, 2018, was the first date available in New Westminster for a five-week jury trial. Without fixing a trial date, the judge reserved those days and adjourned the case to December 7, 2017.
- [55] On December 7, 2017, the registry advised Mr. Donaldson and Mr. McKinley that Sewell J. was scheduled to start a civil trial in mid-September 2018, but was available to conduct Mr. Roberts's trial in the spring and summer of that year. As Mr. Donaldson was not available during the spring and summer the tentative trial date remained September 10, 2018. This necessitated the appointment of a new trial judge.
- [56] Mr. Donaldson and Mr. McKinley reached an agreement that reduced the time required for the trial to three weeks. On the afternoon of December 7, 2017, a judge set the trial to start on September 10, 2018, for three weeks. The case was adjourned to January 11, 2018, to fix a date for Mr. Roberts's delay application.
- [57] On January 11, 2018, Mr. Donaldson applied to adjourn the September 10, 2018 trial date; the Crown consented. The adjournment was granted on the basis that Mr. Roberts waived the resulting delay. The trial was rescheduled to start on October 15, 2018, with the delay application to be heard on March 9, 2018.

[58] On January 29, 2018, the Crown filed a new indictment charging only Mr. Roberts. Along with that indictment, the Crown filed a "synopsis" setting out an overview of its case, a list of potential Crown witnesses, and the admissions it was seeking from Mr. Roberts.

[50] The synopsis lists 21 persons as potential Crown witnesses, along with an estimate of the time required for their respective direct examinations. The longest estimates related to Mr. Brooks (3 hours), Ms. Conn (2.5 hours), and the forensic accountant (2 hours). The remaining witnesses were:

Ms. Scott

1.5 hours

Ms. McKie

1 hour

Mr. Rodrigues

1 hour

Ms. Fitzgerald

40 minutes

An officer who examined computer hard drives

40 minutes

Two officers involved in the investigation

30 minutes each

Seven municipal employees (to produce records used to establish ARB's actual accounts receivable)

30 minutes each

Two former ARB bookkeepers

30 and 40 minutes respectively

Two officers who seized computer hard drives

10 minutes each

[59] The synopsis indicated the Crown was seeking admissions in relation to: (a) examination of computer hard drives; (b) forensic accounting; and (c) evidence from the municipalities.

[60] For reasons not disclosed in the material filed on this appeal, the delay application did not proceed on March 9, 2018, but was heard on July 24 and 25, 2018.

Trial Judge's Decision

(2018 BCSC 2300)

- [61] Applying the framework set out in *Jordan and Cody*, the trial judge first determined whether the 30-month presumptive ceiling had been exceeded by:
- (a) "calculating the total delay from the charge to the actual or anticipated end of the trial" (*Jordan* at para. 60; *Cody* at para. 21); and
 - (b) subtracting "delay waived by the defence" and "delay caused solely by the conduct of the defence" (*Jordan* at paras. 61, 63; *Cody* at para. 26).
- [62] The trial judge determined the total delay to be "47.5 months (or 3 years, 11 months, and 12 days)" [being 1,443 days]: at para. 2. She attributed 50 days to defence delay: the 15 days between October 2 and 17, 2017, when Mr. Crossin was not available; and the 35 days between September 10 and October 15, 2018, which Mr. Roberts explicitly waived. The judge rejected the Crown's argument that Mr. Roberts had implicitly waived the delay occasioned by Mr. Brooks's application to adjourn the preliminary inquiry from February 23 to June 29, 2016, and by the Crown's application to adjourn the preliminary inquiry from June 29, 2016, to January 30, 2017. She held that in agreeing to those adjournments Mr. Roberts had "acquiesc[ed] to the inevitable": at paras. 36, 51. In the result, the judge determined the "net delay" to be "46 months (or three years and 297 days)" [being 1,393 days]: para. 69.
- [63] As the net delay exceeded the 30-month presumptive ceiling, the judge turned to whether any time should be deducted from the 46 months on the basis that it fell into the category of "exceptional circumstances", described in *Jordan* as follows:
- [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.
- [71] It is obviously impossible to identify in advance all circumstances that may qualify as "exceptional" for the purposes of adjudicating a s. 11(b) application. Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

[*Italic emphasis in original.*]

- [64] The judge held the delay occasioned by Mr. Crossin's appointment to the bench was a discrete event. As a result, she deducted the period from November 20, 2017 (the first trial date) until September 10, 2018 (the second trial date) [being 294 days]. This resulted in an "adjusted delay" of "36 months (or three years and 3 days" [being 1,099 days]: at para. 78.

- [65] The judge deducted a further 27 days--being the period between February 27 and March 26, 2015--as a discrete event attributable to adjournments sought by Mr. Brooks to retain counsel. This reduced the delay to "approximately 35 months (or two years and 341 days)" [being 1,072 days]: at para. 82.
- [66] The judge then turned to whether the "particularly complex case" exceptional circumstance set out in Jordan justified exceeding the ceiling by five months. She agreed with the Crown that many of the "hallmarks" of a complex case were present. In particular, she referred to the following:
- (a) the event in issue occurred six to seven years prior to the laying of the information;
 - (b) the allegation concerned a \$7-million fraud alleged to have been committed over 18 months by two accused against a financial institution;
 - (c) initially, without admissions, the Crown's case involved 26 witnesses, including a forensic accountant who prepared a 165-page report (including 146 pages of detailed schedules) and a further 21-page supplemental report;
 - (d) the report of crown counsel and supplementary report totalled 288 pages and were accompanied by an electronic document inventory that housed 1,173 documents, consisting of 15,800 pages of disclosure;
 - (e) the investigation involved the execution of seven production orders and the seizure of a significant number of paper documents, including municipal records relating to contracts with ARB;
 - (f) disclosure issues delayed the proceedings on several occasions; the police did not provide the Crown with a disclosure package until two months after the charge was laid; and the case was adjourned on January 16 and February 13, 2015, in order for Mr. Crossin to obtain and review disclosure; and
 - (g) Mr. Brooks's involvement complicated the proceedings; delays occurred to allow him to obtain legal advice and to retain counsel; and once Mr. Brooks retained Mr. Del Rossi the preliminary inquiry was adjourned to accommodate Mr. Del Rossi's and Mr. Crossin's schedules.
- [67] The judge considered it was both reasonable and in the interests of justice for the Crown to proceed jointly against Mr. Brooks and Mr. Roberts.
- [68] The judge was satisfied the Crown had done what it could to move the matter along while balancing the rights of the two accused. Further, she opined that although it may not have been successful or perfect, the Crown did have a "concrete plan to minimize delay occasioned by the complexity of having a co-accused": at para. 107. The judge stated that the Crown:
- (a) attempted to assist Mr. Brooks in retaining counsel;

- (b) did not oppose Mr. Brooks's repeated adjournment requests in order to retain counsel;
- (c) once Mr. Brooks retained counsel, worked with defence counsel to secure admissions to expedite the preliminary inquiry and the ultimate trial; and
- (d) following the release of Jordan, took further steps to minimize additional delay by preferring a direct indictment.

[69] Last, the judge referred to something Mr. Donaldson said in applying to adjourn the trial:

[108] Finally, with respect to case complexity, I note that Mr. Roberts' position that this case is not complex is somewhat contradictory to the position taken by defence counsel at the application to adjourn the [November 20, 2017 trial date]. In addition to contending that Mr. Roberts required senior counsel to represent him (no doubt because of the complexity of this case), Mr. Donaldson made the following submission on October 17, 2017:

It's a case of some vintage, it's a case of some complexity, it's set for four weeks for trial with jury selection in two weeks. It's going to be really difficult for him to find somebody experienced who's able to devote every minute from now until December on Mr. Roberts' case and nothing else.

[70] In expressing her ultimate conclusion that the charge should not be stayed, the judge stated:

[109] Having regard to all of the evidence and submissions of counsel, I find that this case's complexity gives rise to exceptional circumstances such that the time this case has taken was justified. I find the delay to be reasonable and would not grant a stay of proceedings.

V. Result

[111] Although this case has taken more than 30 months to conclude, I find that the additional time is justified given the exceptional circumstances that arise from the complexity of the case. The Crown has rebutted the presumption of unreasonable delay.

[71] Having concluded the delay was not unreasonable under the Jordan framework, the judge did not find it necessary to consider whether the delay was justified by the transitional exceptional circumstance provided for in Jordan for cases in the system when Jordan was decided.

Issues on Appeal

[72] Mr. Roberts challenges the trial judge's conclusion that complexity justified exceeding the 30-month presumptive ceiling by five months. In the "Errors in Judgment" section of his factum, he says the judge erred by:

- i) misdirecting herself on the issue of complexity by failing to require particular complexity to justify the delay exceeding the presumptive ceiling;
- ii) placing undue weight on the volume of disclosure as an indicator of complexity;

- iii) misdirect[ing] herself on the legal test by failing to require the Crown to show that the particular complexity of the prosecution justified (in a causal sense) the delay;
- iv) finding that the Crown took reasonable measures to prevent delay; and
- v) [taking] counsel's remarks at an adjournment application out of context.

[*Italic emphasis in original.*]

- [73] Mr. Roberts further submits that if complexity does not justify the delay, then the Crown cannot justify the delay as a transitional exceptional circumstance. In support of that submission, Mr. Roberts seeks to rely on several passages in the trial judge's reasons for sentence. The Crown objects on the basis that those reasons are not part of the record of the delay application. At Mr. Roberts's request, the Court permitted the parties to file further submissions on that issue.
- [74] The Court raised another issue after the hearing, namely, the trial judge's characterization of the delay occasioned by Mr. Brooks's successful application on February 17, 2016, to adjourn the preliminary inquiry. The parties filed submissions on that issue.

Analysis

Standards of Review

- [75] It is necessary to discuss what standard of review applies to the trial judge's determination concerning the delay occasioned by Mr. Brooks's February 17, 2016 adjournment application and her determination that the "particularly complex case" exceptional circumstance justified exceeding the 30-month presumptive ceiling.
- [76] Mr. Roberts's position is that the judge's characterization of the adjournment delay is a factual finding that cannot be disturbed absent palpable and overriding error. He relies on *R. v. Pipping*, 2020 BCCA 104, 386 C.C.C. (3d) 431, leave to appeal ref'd [2020] S.C.C.A. No. 179. In that case, Justice Garson said this:
- [92] The post-Jordan s. 11(b) framework invokes different standards of review at three different stages: (1) findings of fact relevant to defence conduct; (2) the characterization of delay and the attribution of responsibility; and (3) the determination of whether the total delay is unreasonable and the decision to impose a stay.
- [93] At the first stage, the findings of fact of a trial judge that are relevant to defence conduct are afforded deference on review, and subject to a standard of palpable and overriding error: *R. v. Horner*, 2012 BCCA 7 at para. 70; *R. v. K.N.*, 2018 BCCA 246 at para. 13.

- [94] At the second stage, first instance judges are uniquely positioned to gauge responsibility for delay: *Jordan* at para. 65. The determination of whether defence conduct is legitimate or illegitimate is highly discretionary, and appellate courts must show a high level of deference on review: *Cody* at para. 31; *R. v. S.C.W.*, 2018 BCCA 346, leave ref'd (2019) SCC Docket 38403, at para. 38.
- [95] At the third stage, the ultimate determination of whether the total delay is unreasonable and the decision to impose a stay is a question of law subject to a correctness standard: *K.N.* at para. 13; *R. v. Christhurajah*, 2019 BCCA 210 at para. 113.
- [94] To the extent that recent cases of this court suggest that a correctness standard also applies to the second stage, they rely on jurisprudence that, in my view, has been overtaken by *Jordan* and *Cody*: see, for example, *K.N.*, *Christhurajah*, and *R. v. Millar*, 2019 BCCA 298.

[Emphasis added.]

- [77] With respect to complexity, Mr. Roberts's position is that the standard of review is correctness. He accepts that while individual findings of fact may require deference, there is no need to defer to a trial judge's overall assessment of whether the complexity of a case justifies exceeding the *Jordan* presumptive ceilings.
- [78] The Crown's position is that the judge's characterization of the adjournment delay is subject to the correctness standard of review. It submits that in so far as *Pipping* holds that the characterization of delay is entitled to deference, it is inconsistent with previous decisions of this Court, including *R. v. Millar*, 2019 BCCA 298, [2020] 1 C.T.C. 182, wherein Justice Fitch stated:
- [76] The standard of review applicable to this ground of appeal was recently addressed in *R. v. Christhurajah*, 2019 BCCA 210 at paras. 110-113, and *R. v. K.N.*, 2018 BCCA 246. In *K.N.*, Justice Fenlon, writing for the Court, said this:
- [13] 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.

[Emphasis added.]

- [79] The Crown further says that the Supreme Court of Canada's recent judgment in *R. v. Thanabalasingham*, 2020 SCC 18, 447 D.L.R. (4th) 310, supports the view that the correctness standard applies to the characterization of delay. It points to para. 6 of those reasons, wherein the Court stated:

In view of this conclusion, we need not address the issue of defence delay. In particular, it is unnecessary to consider how the calculation of defence delay may have been impacted by efforts made by the court and the Crown to move the original trial date forward from February 12, 2018. Even if Gagnon J.A. was correct in attributing a year of delay to the defence for its inability to take up an earlier trial date, the resulting delay would still have been 45 months, as indicated.

[Emphasis added.]

[80] As for complexity, the Crown says this is a factual determination entitled to deference, i.e., it is to be assessed on the palpable and overriding error standard. The Crown says to succeed on a challenge to a complexity finding an appellant must establish the finding is unreasonable.

[81] For the purposes of this appeal, I do not need to resolve what may be a conflict between Pipping and several of this Court's prior decisions. In particular, I do not need to resolve what standard of review applies to the trial judge's characterization of the adjournment delay. This is because, even if that characterization is one to which the more deferential palpable and overriding error standard applies, it cannot be sustained.

[82] Turning to complexity, the starting point is Jordan, wherein the majority stated:

[71] Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. This list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

[78] A typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance. However, if an inordinate amount of trial or preparation time is needed as a result of the nature of the evidence or the issues such that the time the case has taken is justified, the complexity of the case will qualify as presenting an exceptional circumstance.

[79] It bears reiterating that such determinations fall well within the trial judge's expertise.

[Emphasis added.]

And in Cody, the Court said:

[64] When determining whether a case's complexity is sufficient to justify its length, trial judges should consider whether the net delay is reasonable in view of the case's overall complexity. This is a determination that falls well within the expertise of a trial judge (Jordan, at para. 79).

[Emphasis added.]

These statements signal that appellate deference is owed to complexity findings.

[83] Also pertinent is the following from the judgment of Fitch J.A. in Millar:

[88] Finally, I am of the view that the judge erred in principle in her approach to the assessment of case complexity. Ordinarily, a trial judge's assessment of the complexity of the case should be afforded appellate deference. In the case at bar, the judge found that the case was not so complex that it should have required 46 months, but sufficiently complex to require more than 30 months. She took this into account in her overall assessment of the reasonableness of the delay. On its face, I see no error in principle in the judge's approach and if there was evidence that the complexity of the prosecution gave rise to delay, I would have deferred to her conclusion. The difficulty in this case arises from the fact that there was no evidence that case complexity resulted in any appreciable measure of delay. The Crown acknowledged as much in oral argument. As this Court explained in [R. v. Christhurajah, 2019 BCCA 210, 376 C.C.C. (3d) 423], there must generally be some evidence capable of supporting a conclusion that the delay is attributable to case complexity (at para. 109).

[Emphasis added.]

See also: R. v. Reinbrecht, 2019 BCCA 28 at para. 71: "[T]he judge's finding with respect to the complexity of this case, having presided over 32 days of trial, is entitled to deference"; R. v. Bulhosen, 2019 ONCA 600 at para. 6, 377 C.C.C. (3d) 309, leave to appeal ref'd [2019] S.C.C.A. 423: "The application judge correctly applied the principles in Jordan and his assessment of the complexity of the case is entitled to deference"; and R. v. Wilson, 2019 ABCA 502 at para. 8, 383 C.C.C. (3d) 399: "Absent an error of law, appellate courts show deference to a trial judge's conclusions about the complexity of the case".

[84] Absent an error in principle, a complexity determination is entitled to the degree of deference owed to findings of fact. That deference was described by Justice Fish in R. v. Clark, 2005 SCC 2 at para. 9, [2005] 1 S.C.R. 6, as follows:

Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm: [citations omitted].

See also: R. v. Wright, 2019 BCCA 284 at para. 62.

Determining Whether Complexity Is an Exceptional Circumstance

[85] In Jordan, the majority said this with respect to determining whether case complexity justifies exceeding the presumptive ceilings:

[77] As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration. Particularly complex cases are cases that, because of the nature of the evidence or the nature of the issues, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large

number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large number of significant issues in dispute.

Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.

[*Italic emphasis in original; underlining emphasis added.*]

[86] While the Jordan majority used the expression "particularly complex" to describe cases for which additional time will be justified, it also used the expression "exceptionally complex": at para. 127. This latter expression was also used by the majority in *R. v. Williamson*, 2016 SCC 28 at para. 23, [2016] 1 S.C.R. 741, decided the same day as Jordan. The adverbs "particularly" and "exceptionally" reflect the fact that the complexity-exception bar is a high one and that the cases that reach it will be the exception, not the rule. This is further evinced by the fact that the presumptive ceilings were set taking into account the increase in the complexity of criminal trials that has occurred since the early 1990s, and the time the defence requires to prepare and present its case: Jordan at paras. 53, 65, 83; Cody at paras. 29, 63; *R. v. K.J.M.*, 2019 SCC 55 at para. 45, 381 C.C.C. (3d) 293. Indeed, the minority judges in Jordan opined that "[f]or the vast majority of cases, the ceilings are so high that they risk being meaningless": at para. 276.

[87] "[C]ase complexity requires a qualitative, not quantitative, assessment": Cody at para. 64. Where a presumptive ceiling is exceeded, the Crown must show how the factors it relies on resulted in time in excess of the presumptive ceiling being needed to complete the case: *R. v. Christurajah*, 2019 BCCA 210 at para. 109, 376 C.C.C. (3d) 423; Millar at para. 88; *R. v. Lemioer*, 2019 SKCA 95 at para. 71, 380 C.C.C. (3d) 307.

Does Complexity Justify Exceeding the 30-Month Ceiling in this Case?

[88] As I will explain, I am of the view the trial judge made palpable and overriding errors in finding that complexity justified the delay in this case. This is because she failed to consider whether the hallmarks of complexity she referred to actually gave rise to an appreciable measure of delay. With respect, her findings are based on a "quantitative" as opposed to "qualitative" analysis.

[89] In part, the judge said this:

[102] I agree with Crown counsel that many of the hallmarks of complexity noted in Jordan, and in the authorities submitted, are present in this proceeding. The charges relate to events that occurred six to seven years prior to the swearing of the information. They involve a time period of 18 months, in which it is alleged that two accused worked together to commit a \$7 million fraud against a financial institution. The initial Crown case included 26 witnesses without admissions, with an expert forensic accountant who prepared a 165-page expert report (including 146 pages of detailed schedules) and a further 21-page

supplemental report. The report to Crown counsel and supplementary report to Crown counsel totalled 288 pages, and were accompanied by an electronic document inventory that housed 1,173 documents. These documents consisted of approximately 15,800 pages of disclosure.

- [103] During the course of the investigation, investigators executed seven production orders and seized a significant amount of physical paper documents. These included seizure of municipal records relating to contracts between the municipalities and ARB.

While the above statements are factually correct, there is no evidence any of the factors mentioned delayed the progress of the case.

- [90] The method by which the commercial fraud in this case was perpetrated was unsophisticated. As set out in the synopsis the Crown filed with the direct indictment, it involved no more than repeatedly overstating ARB's accounts receivable from municipalities with which the company did business. The Crown intended to prove the falsity of the financial information Scotiabank was given through the evidence of a forensic accountant who compared the municipal accounts receivable in the documents Mr. Brooks and Mr. Roberts gave Scotiabank with what the municipal records showed was owing to ARB. Given this was largely a "paper case", the fact that the charge related to events that predated the laying of the information by several years was a negligible factor in terms of complexity.

- [91] Whether the number of witnesses the Crown initially intended to call at a preliminary inquiry--26--was an indicator of case complexity was not something that could be determined without regard to the nature of the evidence those witnesses were being called to give. It is apparent from the synopsis that many of the witnesses were being called solely to establish the provenance of documents and records. This is reflected in the fact that the direct examinations of some of those witnesses were estimated to be in the range of 10 to 40 minutes. The evidence of the witnesses from Scotiabank and Deloitte who dealt directly with Mr. Brooks and/or Mr. Roberts would have been straightforward and the forensic accountant's evidence would have been, at best, moderately complex. Of all the witnesses, the most contentious and, therefore, the one likely to be in the witness box for the longest time, was Mr. Brooks. However, it is apparent Mr. Brooks was being called to testify as to his own and Mr. Roberts's participation in providing false information to Scotiabank. Such testimony can hardly be described as complex, although it is likely his credibility would have been vigorously challenged.

- [92] Although the reports to Crown counsel were accompanied by 15,800 pages of disclosure, that number was not on its own an indicator of complexity. "While voluminous disclosure is a hallmark of particularly complex cases, its presence is not automatically demonstrative of complexity": Cody at para. 65. Nothing in the record indicates the volume and nature of the disclosure affected the progress of this case. While forensic accounting evidence can be highly complex--e.g., unravelling financial transactions and tracing money through multiple corporations--that is not what this case was about. As just stated, at best, the forensic

accounting evidence here would have been modestly complex. In addition, it is important to recall that the police are obligated to disclose the "fruits of the investigation" to the Crown, which the Crown, in turn, is obligated to disclose to the accused: *R. v. McNeil*, 2009 SCC 3 at paras. 17-24, [2009] 1 S.C.R. 66. At the end of the day, much of what has been disclosed may have no impact on how a case is prosecuted or defended. As Justice Vauclair noted in *R. c. Rice*, 2018 QCCA 198 at para. 183, 44 C.R. (7th) 83, "[l]a complexité de l'enquête policière ne reflète pas nécessairement le degré de difficulté du procès" ["The complexity of the police investigation does not necessarily reflect the degree to which the trial will be difficult."].

[93] With respect to disclosure, the judge also said this:

[104] On several occasions, disclosure issues delayed the proceeding. Though the information was sworn in November 2014, it was not until January 29, 2015, that RCMP investigators provided Crown counsel with an approved defence disclosure package. The proceedings were adjourned on January 16, 2015, and February 13, 2015, in order to allow counsel for Mr. Roberts to obtain and review disclosure.

[94] Mr. Crossin received the disclosure package on February 12, 2015. That was approximately 12 weeks after the charge was laid and six weeks after Mr. Roberts made his first appearance in response to a summons. The following day the case was adjourned for two weeks for two reasons: (1) to allow Mr. Brooks time to retain counsel; and (2) to give Mr. Crossin time to review the disclosure. There were no other disclosure-related adjournments and no applications for further disclosure. Disclosure, therefore, ceased to be a factor approximately three months after the charge was laid. Accordingly, it cannot be said to have, in the words of Justice Leurer in *Lemioer* at para. 71, "impacted the march of the case from charge to completion of the trial".

[95] The judge next referred to the fact that Mr. Brooks's involvement had "complicated the proceedings": at para. 105. She noted there had been numerous adjournments to allow Mr. Brooks to retain counsel and that once he did so "the preliminary inquiry was adjourned to accommodate the schedules of multiple counsel": at para. 105. She opined that it was reasonable and in the interests of justice for the Crown to proceed jointly against Mr. Brooks and Mr. Roberts: at para. 106.

[96] While it is no doubt true that cases involving more than one accused will often require additional time, the possibility that such time may be required was taken into account by the Supreme Court of Canada in setting the presumptive ceilings. That the Supreme Court expects trials in most multiple-accused cases to be completed within the presumptive ceilings is evinced by *Jordan* itself. What follows is taken from the Supreme Court of Canada's judgment in *Jordan*, augmented by the trial decision and this Court's decision: 2012 BCSC 1735; 2014 BCCA 241, 357 B.C.A.C. 137.

[97] Barrett Jordan was the subject of a nine-month dial-a-dope investigation. He was responsible for the telephone line on which orders were placed. On six occasions, undercover officers placed orders on that line and received drugs from Mr. Jordan's "employees". On December

17, 2008, the police executed a search warrant at Mr. Jordan's residence and seized drugs and cash. Mr. Jordan was first charged with drug-related offences on December 18, 2008. Early in 2009, a new 14-count information was sworn in which Mr. Jordan was charged together with nine co-accused. In May of 2009, a date for a four-day preliminary inquiry in May of 2010 was set. That date was selected having regard to defence counsel's schedules. At the start of the preliminary inquiry, five accused remained. The preliminary inquiry could not be completed because the Crown needed more time to present the "mountain of evidence" it had in respect of Mr. Jordan. Continuation dates were obtained in 2010 and 2011. On April 8, 2011, Kristina Gaudet and Fred Poehlmann were committed to stand trial without defence submissions. The matter was adjourned to May 9, 2011, for Mr. Jordan's counsel's submissions. On May 18, 2011, Mr. Jordan was committed to stand trial. This was two and one-half years after he had been charged.

- [98] Mr. Jordan, Ms. Gaudet, and Mr. Poehlmann appeared in the Supreme Court of British Columbia on May 19, 2011. The Crown indicated there was a possibility it would sever Ms. Gaudet and Mr. Poehlmann and prosecute them in separate two-day trials. Counsel estimated six weeks would be required for Mr. Jordan's judge-alone trial; it was scheduled for the first available six-week block, beginning September 10, 2012. On July 12, 2011, new counsel for the Crown wrote to Mr. Jordan's counsel indicating that the Crown's case would take two, at most three, weeks and offering to seek earlier trial dates. On July 13, 2011, the September 10, 2011 trial date (for six weeks) was also set for Ms. Gaudet. Mr. Jordan's counsel did not respond to the Crown's offer.
- [99] At a pre-trial conference on July 25, 2012, counsel for Mr. Jordan and Ms. Gaudet indicated their clients would be applying for a stay based on delay. That application was set for September 10 and 11, 2012. The trial was rescheduled for two weeks, to commence (if necessary) on September 17, 2012. In August 2012, Mr. Jordan retained new counsel. That counsel was available to argue the stay application but was not available on the dates set for the trial. This resulted in the trial being rescheduled to commence on January 21, 2013, for two weeks.
- [100] The trial judge heard Mr. Jordan's stay application on September 10 and 11, 2012. It was argued on the basis of the then unreasonable-delay framework set out in *R. v. Morin*, [1992] 1 S.C.R. 771, and on the basis that the trial was anticipated to end on February 1, 2013.
- [101] The trial judge dismissed the stay application on November 23, 2012, but the trial did not proceed in January 2013. On June 7, 2013, Mr. Jordan invited the trial judge to convict him of five drug-related charges on the basis of an agreed statement of facts. This Court upheld the trial judge's dismissal of the stay application, but that decision was later reversed by both the majority and minority in the Supreme Court of Canada. (Note: The statement in para. 12 of the Supreme Court of Canada's judgment in *Jordan* that "[the trial] eventually concluded in February 2013" is incorrect but had no bearing on the decision.)

- [102] In Jordan, the majority applied its new framework on the basis that the trial would have ended on February 1, 2013, i.e., a total delay of 49.5 months. From that period, it deducted five and one-half months, resulting in a net delay of 44 months. In holding that complexity did not justify exceeding the presumptive ceiling by 14 months, the majority stated:
- [125] There is nothing in the record to indicate that any discrete, exceptional circumstances arose. And although particularly complex cases may present an exceptional circumstance, this is not one of those cases. In terms of the legal issues, while Mr. Jordan was initially charged along with nine other co-accused, this number quickly dropped as the case progressed. At the time of trial, only one co-accused remained on the indictment with Mr. Jordan. Further, none of the alleged offences involved novel or complex points of law. Relatively few pre-trial applications were scheduled. In short, the legal issues in Mr. Jordan's case were not particularly complex.
- [126] As for the evidence, it was substantial but it was relatively straightforward. It consisted of surveillance evidence by police officers, undercover buys by police officers, a small amount of expert evidence regarding how dial-a-dope operations are conducted, and a search warrant for Mr. Jordan's apartment. There was nothing particularly complex about this evidence.
- [127] In the end, while the case against Mr. Jordan may have been moderately complex given the amount of evidence and the number of co-accused, it was not so exceptionally complex that it would justify a delay of 44 months (excluding defence delay).
- [Emphasis added.]
- [103] Mr. Roberts's case was, at best, moderately complex. It is the type of case that in the post-Jordan era should be completed within the presumptive ceilings, absent defence delay or discrete exceptional events. I say this because:
- (a) the only co-accused was dealt with prior to the trial date being fixed;
 - (b) the legal and factual issues were neither novel nor complex;
 - (c) defence counsel requested only two weeks to review disclosure;
 - (d) other than the delay application, no pre- or mid-trial applications were scheduled, e.g., there were no disclosure applications, voir dres, or other challenges to the admissibility of evidence;
 - (e) the testimony of most of the Crown's witnesses would have been straightforward; and
 - (f) the testimony of the Crown's only expert witness would have been, at best, moderately complex.
- [104] Before concluding this section of these reasons there is one additional point raised by Mr. Roberts that needs to be addressed, namely, the trial judge's reference to the fact that Mr. Donaldson, in seeking an adjournment of the trial on October 17, 2017, referred to the

matter as "a case of some complexity": at para. 108. Mr. Roberts submits the judge treated those remarks as suggesting the complexity of the case justified delay above the presumptive ceiling. For its part, the Crown says the judge properly weighed Mr. Donaldson's comments, but did not view them as a concession. The Crown notes that in *R. v. Singh*, 2016 BCCA 427 at para. 92, 344 C.C.C. (3d) 516, this Court, in finding a case to be particularly complex, referred to a similar comment made by counsel who appeared for Mr. Singh shortly before the trial was to begin to apply for an adjournment because Mr. Singh had just discharged his previous counsel. Mr. Singh's new counsel had said, "there's no time to reasonably prepare for such a complex matter given the amount of disclosure."

[105] It is not clear to me that either the judge in the present case or this Court in *Singh* did other than refer to the respective comments in passing. I do not see the comments in either case as having been treated as a "factor" in determining whether the complexity-exception bar had been met.

[106] Comments of this nature when made by counsel seeking an eleventh-hour adjournment have to be considered in their context. They are almost always more advocacy than a statement of fact, i.e., they are said to persuade. Rarely, if ever, will it be appropriate to give any weight to them in deciding a Charter s. 11(b) application. Mr. Donaldson made his comments two and one-half weeks after Mr. Roberts found himself without counsel, a little more than two weeks before jury selection, and a little over a month before the start of a four-week trial. As well, they were said in reply, in response to the Crown's opposition to an adjournment. There can be no doubt Mr. Donaldson was not then in a position to express a considered opinion on where on the complexity spectrum this case truly lay.

Does the Transitional Exceptional Circumstance Apply?

[107] Having concluded that the trial judge erred in holding complexity justified exceeding the 30-month presumptive ceiling, what must now be determined is whether the transitional exceptional circumstance justifies that delay. However, before turning to that question it is necessary to determine whether the judge properly characterized and allocated the 18-week [127-day] delay occasioned by Mr. Brooks's application to adjourn the preliminary inquiry. It is also necessary to decide whether Mr. Roberts can rely on the judge's reasons for sentence.

The February 17, 2016 Adjournment Application

[108] As I will explain, proceeding on the assumption that the trial judge's characterization of the February 17, 2017 adjournment is entitled to deference, I am of the view she erred in declining to treat the resulting 18-week delay as having been implicitly waived by Mr. Roberts.

[109] The judge held Mr. Roberts had "acquiesce[ed] to the inevitable" or, in the words of Justice Ross in *R. v. Giles*, 2017 BCSC 73 at para. 8, 374 C.R.R. (2d) 157, which the judge quoted in para. 29 of her reasons, he had "no real choice or option". In this regard, the judge said this:

[36] On the evidence before me, I am unable to conclude that defence counsel's failure to oppose the second adjournment sought by Mr. Brooks constitutes defence waiver. The comments made by counsel for Mr. Roberts during the hearing of the two adjournment applications make it clear that defence counsel was acquiescing to the inevitable, as Madam Justice Ross put it in *Giles*. He was stuck between a rock - attending a preliminary inquiry where an unrepresented co-accused would cause further delays - and a hard place - having the preliminary inquiry delayed by four months. In the circumstances, counsel for Mr. Roberts did not have any real option other than to proceed as he did. By acquiescing to the inevitable, he cannot be said to have implicitly waived the four-month delay of the preliminary inquiry to afford Mr. Brooks his right to counsel.

However, the circumstances relating to this adjournment do not support this conclusion.

[110] Mr. Del Rossi first applied for an adjournment on behalf of Mr. Brooks on February 10, 2017. He told the judge he had just been retained and was not available on the dates set for the preliminary inquiry, but was available in the early summer. Mr. Del Rossi said he would speak to Mr. McKinley about admissions to shorten the preliminary inquiry and that Mr. Brooks would waive any delay resulting from an adjournment.

[111] Mr. McKinley opposed the application, noting that Mr. Brooks had had months to retain counsel. He said the Crown had notified its witnesses and was prepared to proceed. Mr. Crossin made the following submission:

Your Honour, I'm opposed to the adjournment, but this kind of situation puts my client in a difficult position because the fact of the matter is up until now Mr. Brooks has been self-represented and that has inherent challenges moving these matters forward. I think the fact that he has counsel is a positive thing for all concerned, a positive development.

If Your Honour is inclined to grant this adjournment, I've had some discussions with both my learned friend and the Crown, and we think that this preliminary hearing can be done, with counsel, with admissions, in two or three days as opposed to six days or so, and I would certainly make myself available to do that at the earliest opportunity, so those are my submissions.

[112] In refusing to grant the adjournment, the judge said this:

This is an application by Mr. Brooks for an adjournment of the preliminary inquiry which is scheduled to commence in a few weeks on February 23rd. It is currently set for six days. As I recall, Mr. Brooks was before the court just a few weeks ago and indicated that he hoped to be getting counsel and the matter was put over to today's date. He has now retained counsel and that counsel indicates he is not available on the dates scheduled and also has not had an opportunity to review all of the disclosure in this matter.

The dates were set in June of 2015 to commence in February. I should state for the record that Mr. Brooks, through his counsel, indicates that he is prepared to waive any delay caused by any adjournment that might be granted at his request.

Crown is opposed to the adjournment. It has several witnesses who have been notified. Mr. Brooks apparently had counsel but set the dates himself back in June, and indicated at all times he was going to represent himself until recently, so Crown says it has taken months and months and that delay should not be countenanced by the delay in Mr. Brooks obtaining counsel.

Mr. Crossin, who acts for the co-accused, is also opposed. His client has been waiting a considerable amount of time for this. His calendar is set, and to get the calendars of all three counsel to work can be challenging. I do acknowledge that the dates might be shortened, that it might not require six days if counsel get together and admissions are made.

In the circumstances, I have to balance the possible prejudice to Mr. Brooks of having his counsel proceed, perhaps unprepared, or [having] to change other trial dates. I have to balance that with the interests of the court in having the matter resolved at the earliest convenient date and the interests of Mr. Roberts who would like to get this matter dealt with.

Under the circumstances, given the significant amount of time that has passed since the dates were set and the very late retention of counsel, while I acknowledge that there may be some prejudice to Mr. Brooks I am satisfied that the interest of justice requires that the matter proceed on the 23rd and I deny the application for an adjournment.

[113] When Mr. Del Rossi applied again on February 17, 2016, he told the judge the earlier application had been opposed and refused, but did not mention the reasons given for that refusal. He said that "we", meaning all counsel, were proposing that if an adjournment were granted, then the preliminary inquiry could, by reason of admissions, be shortened from six days to two in June, to be followed later by one day. Mr. McKinley said that in light of the admissions that would be made he was "agreeable to a short adjournment to June". Mr. Crossin said the following:

Yes, my position has changed somewhat as well as a result of this. I'm not opposed to the adjournment. I should tell you that my reasoning is that Mr. Brooks has been without counsel, this has not gone smoothly. I think the fact that he now has counsel is going to, at the end of the day, save us a lot of time, so that's the position I'm taking.

[114] Immediately following Mr. Crossin's remarks, the judge said this:

Thank you very much. All right. The adjournment is granted. You'll go to the [judicial case managers] to arrange a new date?

[115] It is apparent from the February 17, 2016 transcript that the judge sitting that day dealt with the adjournment application on the basis that it was, in essence, a joint application. Accordingly, it is not surprising that the judge granted the application without reasons.

- [116] It cannot be said Mr. Roberts had no real option other than to agree to the adjournment. As matters stood on February 17, 2016, opposing an adjournment would not have been an exercise in futility; it was far from certain that a contested application would have been successful. With reference to the first judge's reasons, Mr. Roberts could have made a compelling argument that the preliminary inquiry should proceed as scheduled. As the first judge was aware that fewer days would be required if an adjournment were granted, there was no material change in circumstances. In addition, it is apparent Mr. Roberts agreed to the adjournment because he was of the view that he would benefit from Mr. Brooks having counsel, as it would streamline the preliminary inquiry.
- [117] Mr. Roberts was not between a rock and a hard place. The preliminary inquiry had been set taking into account that Mr. Brooks would be self-represented. The trial judge's statement that Mr. Roberts was concerned Mr. Brooks would cause further delays if he continued to be self-represented is not supported by the record and fails to have regard to the fact that a judge would control the proceedings. It is clear Mr. Roberts was in a position to proceed on the dates that had been set seven months earlier regardless of whether Mr. Brooks had counsel.
- [118] The delay occasioned by the February 17, 2016 adjournment of the preliminary inquiry should be characterized as delay implicitly waived by Mr. Roberts. When those 127 days are deducted, the total delay under the Jordan framework is 945 days, or 32 days above the presumptive ceiling.

Can Mr. Roberts Rely on the Reasons for Sentence?

- [119] Mr. Roberts asks this Court to consider the trial judge's reasons for sentence with respect to one of the factors relevant to determining whether delay above the presumptive ceilings can be justified as a transitional exceptional circumstance, namely, the seriousness of the offence. Those reasons were pronounced approximately six months after the judge dismissed the stay application and are indexed as 2019 BCSC 338.
- [120] In his supplemental submissions, Mr. Roberts says he "seeks to rely upon the trial judge's assessment of the entire record, after his [stay] application was dismissed, to illustrate that although the fraud charge was substantial and significant, his role in the events was relatively modest." Mr. Roberts accepts that what he is asking does not fall within any of the established categories under which fresh or new evidence is admitted on an appeal, but says it would do no violence to the principle that appeals are decided on the record on which the order appealed from was made to consider the trial judge's finding with respect to his degree of participation in the offence. In the alternative, in the event an application is required, Mr. Roberts applies pursuant to s. 683(1)(d) of the Criminal Code to adduce as fresh evidence "the balance of the record before the trial court, including the reasons for sentence." That provision provides:

For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,

- (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

[121] The Crown's position is that this appeal should be determined solely on the record that was before the trial judge on the delay application. The Crown points out that the judge's reasons for sentence are based on a different record, one that Mr. Roberts has not provided to this Court for review and consideration. The Crown further says the passages in the reasons Mr. Roberts seeks to rely on are not relevant to a transitional exceptional circumstances analysis as they relate to the sentencing principle of proportionality, not the seriousness of the fraud with which he was charged.

[122] I begin by noting that although Mr. Roberts has applied to adduce "the balance of the record before the trial court, including the reasons for sentence", he has provided this Court only with the reasons for sentence. We do not have available "the balance" of the sentencing hearing record. As reflected in those reasons, that record consists of, at least, admissions, a pre-sentence report, letters of reference, the submissions of counsel, and the sentencing reasons with respect to Mr. Brooks. Mr. Roberts's failure to provide the complete record may well be reason enough to refuse to allow him to rely on the sentencing reasons in this case. However, I would refuse to allow him to do so on a more substantive basis, namely, what he asks this Court to consider is not relevant to the issue at hand.

[123] The passages Mr. Roberts seeks to rely on appear in the section of the sentencing reasons headed "Mitigating Factors". Under various subheadings, the trial judge said the following:

4. Legitimate business and not a scam

[104] Crown counsel admits that this was not a sham business. The business had revenues of approximately \$20 million per year. The balance sheets and income statements for the company were all real; the Accounts Receivable and the shareholder loan balance were the only untrue items. Mr. Roberts' participation in the fraud was that he did as he was told by Mr. Brooks.

[105] As noted by [the judge who sentenced Mr. Brooks], Mr. Brooks genuinely believed that, given enough time, he could pay back the loan over time to Scotiabank.

[106] I find that Mr. Roberts in turn genuinely believed that, given enough time, Mr. Brooks could and would pay back the loan to Scotiabank.

5. Moral Blameworthiness

[107] While Mr. Roberts' actions are without question, reprehensible and inexcusable, his degree of moral blameworthiness is limited. He did not act wilfully or deliberately to defraud.

[108] He was not the mastermind or the directing mind in this fraud. Mr. Roberts' involvement in the fraud was following orders to send certain documents and reports to Scotiabank. All representations made to Scotiabank by Mr. Roberts were based on Mr. Brooks' instructions. He conducted calculations with numbers provided to him that were inaccurate. He had limited knowledge and understanding of the depth of the problem.

[109] In his grossly misdirected loyalty to Mr. Brooks, Mr. Roberts thought that he was doing some good by keeping the business alive.

6. Limited benefit from the fraud

[110] This was not a crime motivated by greed. Aside from keeping his job, Mr. Roberts did not directly benefit from the fraud. None of the \$7 million went to Mr. Roberts or for his personal use or benefit.

[124] These passages speak, in a post-conviction context, to Mr. Roberts's degree of participation in the offence and his level of moral culpability, all of which are relevant to determining a fit sentence. However, when the issue is whether a case should be stayed prior to a trial on the merits, the seriousness of the offence is determined objectively, having regard to the factual allegations and the relative seriousness of the charges. This is evinced by the following from Justice Moldaver's judgment in K.J.M.:

[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). In this case, the charges were undoubtedly serious. Aggravated assault under s. 268 of the Criminal Code is an indictable offence that qualifies as a "violent offence" under s. 2(1) of the [Youth Criminal Justice Act, S.C. 2002, c. 1], and when an adult sentence is sought it carries a maximum punishment of 14 years' imprisonment (s. 268(2)). Possession of a weapon for a dangerous purpose contrary to s. 88(1) of the Criminal Code is also a serious offence. When an adult sentence is sought, it carries a maximum punishment of ten years' imprisonment when prosecuted by indictment (see s. 88(2)(a)). And the specific incident in question was itself serious: the victim, another young person, suffered "devastating injuries" as a result of the stabbing.

[Emphasis added.]

[125] Accordingly, I would dismiss Mr. Robert's application to adduce the sentencing reasons.

Does the Transitional Exceptional Circumstance Apply?

[126] As discussed above, under the Jordan framework the delay in this case exceeds the 30-month presumptive ceiling by 32 days. What must now be determined is whether that delay is justified because the case was in the system when Jordan was decided.

- [127] The majority in *Jordan* recognized that because its decision represented a sea change in the law that applied retroactively, it was necessary to provide a transitional approach for cases in the system when that judgment was released. In discussing that approach in *Cody*, the Court stated:
- [68] The Crown may rely on the transitional exceptional circumstance if it can show that "the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed" (*Jordan*, at para. 96). Put another way, the Crown may show that it cannot be faulted for failing to take further steps, because it would have understood the delay to be reasonable given its expectations prior to *Jordan* and the way delay and the other factors such as the seriousness of the offence and prejudice would have been assessed under *Morin*.
- [69] To be clear, it is presumed that the Crown and defence relied on the previous law until *Jordan* was released. In this regard, the exceptionality of the "transitional exceptional circumstance" does not lie in the rarity of its application, but rather in its temporary justification of delay that exceeds the ceiling based on the parties' reasonable reliance on the law as it previously existed (*Jordan*, at para. 96). The transitional exceptional circumstance should be considered in cases that were in the system before *Jordan*. The determination of whether delay in excess of the presumptive ceiling is justified on the basis of reliance on the law as it previously existed must be undertaken contextually and with due "sensitiv[ity] to the manner in which the previous framework was applied" (*Jordan*, at paras. 96 and 98). Under the *Morin* framework, prejudice and seriousness of the offence "often played a decisive role in whether delay was unreasonable" (*Jordan*, at para. 96). Additionally, some jurisdictions are plagued with significant and notorious institutional delays, which was considered under *Morin* as well (*Jordan*, at para. 97; *Morin*, at pp. 799-800). For cases currently in the system, these considerations can inform whether any excess delay may be justified as reasonable (*Jordan*, at para. 96).
- [128] In *Jordan*, the majority summarized the *Morin* framework as follows:
- [30] The *Morin* framework requires courts to balance four factors in determining whether a breach of s. 11(b) has occurred: (1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay; and (4) prejudice to the accused's interests in liberty, security of the person, and a fair trial. Prejudice can be either actual or inferred from the length of the delay. Institutional delay in particular is assessed against a set of guidelines developed by this Court in *Morin*: eight to ten months in the provincial court, and a further six to eight months after committal for trial in the superior court. The *Morin* guidelines reflect the fact that resources are finite and there must accordingly be some tolerance for institutional delay. Institutional delay within or close to the guidelines has generally been considered to be reasonable.

- [129] Institutional delay "starts to run when the parties are ready for trial but the system cannot accommodate them"; the guidelines are "not to be treated as a limitation period or inflexible": Morin at 794-96. Mr. Roberts does not argue that institutional delay was a factor in this case. His arguments focus on the conduct of the Crown and Mr. Brooks. Mr. Roberts says he is not responsible for Mr. Brooks's "machinations and dilatory efforts to retain counsel". He further says that while it may have been reasonable and in the interests of justice for the Crown to proceed against both of them, Mr. Brooks's "foot dragging" prejudiced him.
- [130] Prior to the release of Jordan, the Crown would have had good reason to believe that the delay in this case would not have been found to be unreasonable. To begin, the pre-Jordan legal regime generally treated delay attributable to a co-accused as "neutral": R. v. Farewell, 2008 BCCA 9 at paras. 89, 96, 229 C.C.C. (3d) 17; R. v. L.G., 2007 ONCA 654 at paras. 62-63, 228 C.C.C. (3d) 194. This is reflected in R. v. Vassell, 2016 SCC 26, [2016] 1 S.C.R. 625, which was decided shortly before Jordan was released, in which Moldaver J. stated, [i]n many cases, delay caused by proceeding against multiple co-accused must be accepted as a fact of life and must be considered in deciding what constitutes a reasonable time for trial": at para. 6. Although in Vassell the delay caused by the co-accused was not treated as neutral, that was because Mr. Vassell had been proactive throughout in seeking to have his case tried as soon as possible, including seeking early dates. As discussed below, the same cannot be said of Mr. Roberts.
- [131] Seriousness of the offence and prejudice were often the decisive factors in determining whether delay was unreasonable under the Morin framework. In the present case, pre-Jordan, the Crown would have been entitled to view these factors as weighing in favour of the delay being reasonable.
- [132] There can be no question that the offence with which Mr. Roberts was charged falls at the more serious end of the spectrum. The maximum penalty for fraud over \$5,000 is 14 years' imprisonment: Criminal Code, s. 380(1)(a). Further, the specific allegation against Mr. Roberts was that he participated in perpetrating a multi-million-dollar fraud against a financial institution over an extended period. Society clearly has a strong interest in charges of this nature being determined on their merits. For completeness, I should note that s. 380(1.1) of the Criminal Code, which provides a minimum two-year sentence for fraud over \$1 million, does not apply here as it was enacted after the fraud in this case was committed: R. v. Poulin, 2019 SCC 47 at para. 60, 379 C.C.C. (3d) 513.
- [133] As for prejudice, the right to be tried within a reasonable time "protects the individual from impairment of the right to liberty, security of the person, and the ability to make full answer and defence": Morin at 801. In the present case, prior to Mr. Roberts filing his stay application--approximately 14 months after Jordan was released--the Crown would have had no reason to believe Mr. Jordan was suffering prejudice beyond that normally associated with an outstanding charge. Of particular note is that Mr. Roberts was not arrested, held in pre-trial custody, or subject to any conditions. However, in the affidavit Mr.

Roberts filed in support of his stay application, he asserts he was significantly prejudiced by the delay in bringing the charge against him to trial. He sets this out under the following headings: "Stigmatization"; "Loss of Privacy"; "Stress and Anxiety"; and "Loss of Memory". He deposes the delay: (a) affected his family; (b) caused him a great deal of stress and anxiety and led to his becoming addicted to pain medication; (c) affected his business; (d) prevented him from entering the United States of America; and (e) resulted in him and his family having to endure a number of "death threats" from Mr. Brooks and his associates. He further says it is difficult for him to remember the events in issue with any degree of precision.

- [134] Although at the hearing of his stay application Mr. Roberts was cross-examined on his affidavit, the trial judge did not find it necessary to make any findings with respect to the credibility and reliability of his assertions. Accordingly, to the extent it is necessary, it falls to this Court to make that determination.
- [135] While Mr. Roberts did not have a legal obligation to assert his Charter s. 11(b) right, his actions and inactions are relevant in assessing the degree of prejudice, if any, he suffered as a result of delay: Morin at 802. Both his pre- and post-Jordan actions are, on their face, inconsistent with a desire for a timely trial and inconsistent with the statement in his affidavit that the charge caused him to "suffer[] a great deal of stress and anxiety [that] worsens as time goes on." Not only did Mr. Roberts consent to an 18-week postponement of the preliminary inquiry in February of 2016, but in early December of 2017--after he filed his affidavit-- he chose not to avail himself of the opportunity to have the trial proceed before Sewell J. during the spring and summer of 2018. If, in September of 2017, Mr. Roberts considered himself to be continuing to suffer considerable prejudice, then I would have expected him to seek out counsel available on the earliest available trial dates. Indeed, on January 11, 2018, only a few weeks after the September 10, 2018 trial date was set, Mr. Roberts postponed the trial for a further month.
- [136] The extreme prejudice asserted by Mr. Roberts in his affidavit does not bear scrutiny. His cross-examination discloses what I consider to be an attempt by him to exaggerate the effect of the delay in his affidavit.
- [137] Mr. Roberts's assertions in his affidavit that the charge caused his wife, children, parents, and in-laws to suffer stress and anxiety, even if true, are irrelevant, as the adverse effect a charge may have on an accused's family members does not constitute prejudice in an unreasonable-delay analysis: R. v. Smith, [1989] 2 S.C.R. 1120 at 1138; R. v. Widdifield, 2014 BCCA 170 at para. 108, 354 B.C.A.C. 237.
- [138] With respect to the statement in his affidavit he was twice denied entry into the United States of America, in cross-examination Mr. Roberts stated that when he was first denied entry in later 2015, American officials told him he was not permitted to enter the United States because of the charge. Notwithstanding what he was told, Mr. Roberts tried to cross the border approximately a year later. This time he was photographed and fingerprinted

and told he could be arrested if he tried to cross again. Based on Mr. Roberts's testimony, at best the existence of the charge affected his ability to pick up mail or holiday in the United States, or to fly through American airspace to holiday somewhere else. Those types of travel restrictions are entitled to little weight in terms of prejudice: Widdifield at para. 111.

- [139] Mr. Roberts's assertion in his affidavit that it is "very difficult" for him to remember events that occurred in 2007 and 2008 was intended to support his position that his fair trial rights were prejudiced by the delay. However, given that this was a "paper case", had the matter gone to trial the critical issue would have been whether he knew the accounts receivable information he was providing Scotiabank was false. I do not accept that, on that issue, faded memory would have been an impediment to his making full answer and defence.
- [140] What is particularly concerning is the paragraph in the affidavit in which Mr. Roberts states he and his family were subject to "death threats" from Mr. Brooks and his associates. Mr. Roberts deposed to having received threatening calls and notes, to having observed cars parked outside his house, and to having had to call the police on two occasions. It is obvious this paragraph was intended to leave the impression that having his life and the lives of his immediate family member threatened was a significant stressor that Mr. Roberts had to deal with as a consequence of the charge being laid. However, cross-examination brought out that those threats predated the laying of the charge in late 2014. More specifically, they occurred in 2012 and 2013, after Mr. Roberts fired Mr. Brooks from a paving company Mr. Roberts owned. In other words, the threats were unrelated to any delay in bringing Mr. Roberts to trial.
- [141] The record in this case does not support finding that Mr. Roberts, by reason of delay, suffered prejudice beyond that suffered by most accused. More importantly, what prejudice he did suffer did not outweigh society's interest in seeing the matter proceed to trial. Given the state of the law pre-Jordan, the Crown cannot be faulted for the manner in which it dealt with this case prior to Jordan.
- [142] I am also of the view that the Crown took reasonable steps post-Jordan to mitigate delay. As previously mentioned, Jordan brought about a sea change in the law affecting all participants in the criminal justice system. Following the release of Jordan, the Crown (i.e., the British Columbia Prosecution Service) had to consider how to respond not only with respect in Mr. Roberts's case but also with respect to every provincial prosecution then in the system. Given those circumstances, the time taken to file the direct indictment was reasonable. But for matters beyond the Crown's control, including defence counsel's availability, if Mr. Roberts's trial had commenced on the first date set on the direct indictment (i.e., November 17, 2017), then it would have concluded on December 15, 2017, approximately ten-and-one-half months earlier than it was scheduled to end when the stay application was dismissed.

[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. Having regard to the law as it stood pre-Jordan, the conduct of the parties, the seriousness of the offence, and the absence of prejudice, I have concluded that a 32-day delay above the 30-month presumptive ceiling is justified in this case.

A Concluding Comment

[144] In applying the Jordan framework, the trial judge held the entire delay occasioned by Mr. Crossin's appointment was a discrete exceptional event. As a result, she deducted the 294 days from November 20, 2017 (the first trial date), until September 10, 2018 (the second trial date). In doing so, she referred to Cody at para. 49, where the Supreme Court of Canada accepted Mr. Cody's concession that a four-and-one-half-month delay brought about by his counsel's appointment to the bench qualified as an unavoidable discrete event.

[145] In Cody, the delay arose from the need to reschedule a Charter application to exclude evidence. That application was initially set to commence on November 5, 2012. Mr. Cody's counsel was appointed to the bench in September and Mr. Cody retained new counsel in October. The change of counsel resulted in the application being postponed until March 26, 2013, being the earliest date mutually convenient to both counsel: see R. v. Cody, 2014 NLTD(G) 161 at paras, 92-93, 359 Nfld. & P.E.I. R. 123.

[146] Mr. Roberts and the Crown agree that the 294 days should be deducted. I also agree. However, I do not want to be taken as agreeing that all of that period should be characterized as delay arising from a discrete exceptional event. I say this because Mr. Roberts did not accept earlier trial dates offered to him that would have provided his counsel with time to prepare. Following the unexpected loss of the November 20, 2017 trial date, the trial could have gone ahead before Sewell J. in the spring and summer of 2018. It did not proceed then solely due to Mr. Donaldson's unavailability. I do not fault Mr. Donaldson for this. However, given that both the court and Crown were ready to proceed during that period, it is arguable that a portion of the 294 days should be characterized as defence delay: see R. v. Balogh, 2020 BCCA 96 at para. 29, 2020 D.T.C. 5031.

Disposition

[147] I would dismiss Mr. Roberts's application to adduce fresh evidence and his appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Madam Justice Fisher"

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