Citation: R v Gowenlock, 2019 MBCA 5 Date: 20190129
Docket: AR17-30-08834

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Freda M. Steel
Madam Justice Barbara M. Hamilton

B E T W E E N:

	)	***D. Manning***
	)	*for the Appellant*
HER MAJESTY THE QUEEN	)	
	)	***J. A. Hyman*** *and*
Respondent	)	***E. D. Atkin***
	)	*for the Respondent*
- and -	)	
	)	***D. G. Guénette***
JENNIFER DIANE HILL	)	*for the Intervener*
	)	*Attorney General of*
(Accused)	)	*Manitoba*
	)	
- and -	)	***B. S. Newman***
	)	*for the Intervener*
ALAN JAY KARL GOWENLOCK	)	*Criminal Defence*
	)	*Lawyers Association of*
Appellant	)	*Manitoba*
	)	
- and -	)	***W. S. Gange*** *and*
	)	***J. G. Collins***
ATTORNEY GENERAL OF MANITOBA and CRIMINAL DEFENCE LAWYERS ASSOCIATION OF MANITOBA	)	*as amicus curiae*
	)	
	)	*Appeal heard:*
	)	***October 5, 2018***
Interveners	)	
	)	*Judgment delivered:*
	)	***January 29, 2019***

CHARTIER CJM

Introduction and Issues

[1] The issue at the heart of this appeal is whether the rule-making power found in the *Criminal Code* (the *Code*) authorises a court to make rules that would allow a judge of that court to award costs personally against counsel.

[2] Pursuant to the *Criminal Proceedings Rules of the Manitoba Court of Queen's Bench*, SI/2016-34 (the *Criminal Proceedings Rules*), r 2.03, the pre-trial judge ordered $1,000 in costs personally against counsel for the accused after he failed to respect timelines set out in a pre-trial conference memorandum. These rules were made pursuant to the rule-making powers found in sections 482-482.1 of the *Code*.

[3] The appellant, who is counsel for the accused, now appeals.

[4] The issues are:

a) Do sections 482 and/or 482.1 of the *Code* authorise a court to make rules that would allow a judge to award costs personally against counsel who fail, without reasonable excuse, to comply with valid court-ordered timelines?

b) If so, what standard of conduct must be shown before a judge can award costs personally against counsel? Must it be a common law standard or is the plain meaning of the rule sufficient?

c) What are the principles and procedures to follow when a court is considering awarding costs?

d) Should the pre-trial judge have ordered costs personally against the appellant, in the circumstances of this case?

[5] This appeal is a case of first impression and raises numerous questions where initial pronouncements in this area of the law will be made. Since the Crown took no position on the merits of the appeal, I concluded that, in the exceptional circumstances of this case, it was in the interests of justice for *amicus* to be appointed in order for the Court to receive the benefit of complete and balanced submissions.

Whether this Court Has the Jurisdiction to Hear the Appeal

[6] A preliminary issue was raised: whether this Court has the jurisdiction to hear this appeal.

[7] The right to appeal to our Court is statutorily created. In criminal matters, our jurisdiction to hear an appeal is set out in the *Code* (see *R v Deschamps*, 2003 MBCA 116 at paras 27-29). With respect to appealing an award of costs, section 676.1 of the *Code* provides the following:

> **Appeal re costs**
> **676.1** A party who is ordered to pay costs may, with leave of the court of appeal or a judge of a court of appeal, appeal the order or the amount of costs ordered.

[8] It is argued that the term "party" under section 676.1 is limited to either the accused or the Crown, and does not include the appellant, who is counsel for the accused.

[9] I disagree.

[10] Section 12 of the *Interpretation Act*, RSC 1985, c I-21 allows for a large and remedial interpretation of section 676.1. The *Code* is not "party" oriented; its objective is just results. I note that there is a right of appeal where there are costs ordered personally against counsel pursuant to a court's inherent jurisdiction (see *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26) and in civil proceedings (see section 90(2) of *The Court of Queen's Bench Act*, CCSM c C280).

[11] In my view, it is only just that the term "party" be given a broad interpretation to include "counsel for the party" in order to provide a right of appeal to all those affected by an order of costs. Moreover, a more restrictive interpretation would have the effect of limiting the appellant's route to appeal to only direct appeals (with leave) to the Supreme Court of Canada under section 40(1) of the *Supreme Court Act*, RSC 1985, c S-26.

[12] I am aware that, generally, third-party appeals of interlocutory proceedings are not permitted (see *R v Bernardo* (1994), 95 CCC (3d) 437 (Ont CA), leave to appeal to SCC refused, 1995WL1733632). The term "third party" generally supposes that they are not involved in the initial proceedings. Typically, the only route for a third party is to seek leave to appeal to the Supreme Court of Canada under section 40(1) (e.g., *R v Mills*, [1999] 3 SCR 668 at para 31). However, in my view, "counsel for a party" is not a third party. "Counsel for a party" is more akin to the extended family of a "party" since the lawyer, as an officer of the court, is already within the court's jurisdiction.

[13] I am strengthened in the view that the term "party" under section 676.1 may be a party other than the accused or the Crown, who are not third parties, by the case of *R v Ontario (Review Board)*, 2009 ONCA 16. In that case, the Ontario Court of Appeal, after granting leave to appeal pursuant to section 676.1, granted an appeal on costs to an intervener.

[14] In the result, I would conclude that the term "party" under section 676.1 is not limited to either the accused or the Crown. It includes "counsel for a party". Therefore, in my view, this Court has the jurisdiction to consider whether leave to appeal should be granted pursuant to section 676.1.

Whether to Grant Leave to Appeal

[15] I now turn to whether leave to appeal should be granted in the circumstances.

[16] In *R v Baker*, 2012 MBCA 76, Hamilton JA, sitting alone as a chambers judge, used the following test for granting leave under section 676.1 (at para 22):

> To summarize, the test that I am applying in this application for leave is that the Crown must demonstrate that the ground of appeal raises a question of law that, in turn, raises an arguable case of substance that is of significance to the administration of justice.

[17] No one disputes that leave should be granted if the conclusion was that this Court had jurisdiction. I can quickly conclude that the grounds raised (questions about the authority to make certain rules and applicable standards)

are questions of law. In addition, the appellant presents an arguable case of substance that is of significance to the administration of justice.

[18] As a result, I would grant leave to the appellant to appeal the order of costs awarded personally against him.

The Factual Background

[19] After the accused was committed to stand trial, a pre-trial conference was scheduled. It was held on May 25, 2016. The appellant appeared and advised the pre-trial judge that he intended to bring a motion for leave to cross-examine the affiant relating to a search warrant and then move to exclude the seized evidence pursuant to section 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). As a result, the pre-trial judge set the following schedule:

- March 20, 2017: Filing of the accused's notice of motion, brief and supporting affidavit for the motion for leave to cross-examine;

- April 5, 2017: Filing of the Crown's brief on the motion for leave to cross-examine;

- April 19, 2017: Hearing of the motion for leave to cross-examine;

- April 28, 2017: Filing of the accused's brief on the motion to exclude the evidence;

- May 15, 2017: Filing of the Crown's brief on the motion to exclude the evidence;

- May 29-30, 2017: Hearing of the motion to exclude evidence; and

- June 26-27, 2017: Hearing of the trial.

[20] This case management schedule was set out in a pre-trial conference memorandum that was forwarded to counsel on May 27, 2016.

[21] The appellant did not file any material by March 20, 2017. On March 22, 2017, the Crown emailed him to determine whether he was still intending to proceed with the motion for leave to cross-examine. On March 29, 2017, the appellant wrote to the pre-trial judge setting out his version of events. He advised that he "had somehow incorrectly put the dates into [his] 'Google calendar' and not [his] 'Outlook calendar', which is the only one [he] actually use[s]." He also wrote, "This is the only time this has ever happened to me."

[22] As a result of the missed filing date and of the accused's continued intention to proceed with the motion, another pre-trial conference was convened. On the day of that conference, and after hearing from the parties, the pre-trial judge found the appellant's explanation for the missed deadline to be "unacceptable." New deadlines were set and, in an attempt to preserve the previously scheduled hearing dates, the Crown offered to respond to any brief within a few days, as opposed to the usual two weeks.

[23] The pre-trial judge then raised, on his own motion, the possibility of awarding costs personally against the appellant. He advised the appellant that the amount he had in mind was $1,000. He did not give him the option to adduce evidence or to consult with counsel. He asked for submissions from the appellant. The appellant explained that he had misdiarised the matter. He accepted that his conduct amounted to "inadvertent negligence" and appreciated that his "mistake ha[d] caused a lot of inconvenience for everybody".

[24] After hearing from the appellant, the pre-trial judge referenced a prior occasion where the appellant had missed a deadline. The pre-trial judge found the appellant's conduct to be unacceptable and ordered costs of $1,000 against him personally, with 90 days to pay. The costs were paid within the 90 days.

The Applicable Legislation

[25] The relevant provisions of the *Criminal Proceedings Rules* follow:

> **Application of rules**
> **1.02** These rules are enacted under subsection 482(1) of the Code and apply to proceedings that are within the jurisdiction of the Court.
>
> **General principle**
> **1.03(1)** These rules are intended to provide for the just determination of every proceeding and must be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.
>
> **Matters not provided for**
> **1.03(2)** If matters are not provided for in these rules, the practice must be determined by analogy to them.

. . .

Application of Code provisions
1.04 The interpretation sections of the Code apply to these rules, except if these rules provide otherwise.

Dispensing with compliance
2.01 A judge may dispense with compliance with a rule only if it is, and to the extent that it is, necessary in the interests of justice.

Dismissal of motion or application
2.02 If an applicant has failed to comply with the rules respecting the filing of a document in support of a motion or application, the motion or application must not be heard unless the presiding judge grants leave, after taking into account all the circumstances of the case, including

(a) the nature of the applicant's non-compliance with these rules;

(b) any explanation advanced for failing to comply with these rules;

(c) the apparent merits of the motion or application as reflected in any materials filed and any submissions made in the proceeding;

(d) any notice given to the other parties about the issues raised in the motion or application and the right of those parties to have a reasonable opportunity to respond to the issues raised by the applicant; and

(e) the history of the proceedings and the need for an expeditious determination of pre-trial motions and applications and the orderly conduct of trial proceedings.

Costs ordered if non-compliance
2.03(1) The Court may order costs, payable by counsel personally, if counsel has failed, without reasonable excuse, to comply with these rules, having regard to the factors set out in rule 2.02.

Costs payable to government
2.03(2) If the Court orders that counsel pay costs for non-compliance, they are payable to the Minister of Finance for Manitoba.

Deemed undertaking by counsel and prosecutor
3.01 Counsel for the accused and the prosecutor assigned to a case are each deemed to undertake to comply with all time limits that are set by a pre-trial judge, case management judge or another judge.

Computation of time
3.02 Unless the context requires otherwise, the computation of a time limit prescribed by these rules or imposed by a judge is to be done in the following manner:

(a) if there is a reference to a number of clear days or "at least" a number of days between two events, both the day on which the first event happens and the day on which the second event happens are excluded;

(b) if a period of less than seven days is prescribed, any holidays that fall during that period are excluded; and

(c) if the time for the doing of an act expires on a holiday, the act may be done on the next day that is not a holiday.

General powers of Court
3.03(1) The Court may, by order, extend or abridge any time limit prescribed by these rules or imposed by a judge, on any terms that it considers just.

Application to extend time
3.03(2) An application for an order extending a time limit may be made before or after the expiry of the time limit.

[26] The relevant provisions of the *Code* follow:

Power to make rules
482(1) Every superior court of criminal jurisdiction and every court of appeal may make rules of court not inconsistent with this

or any other Act of Parliament, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal.

Power to make rules
482(2) The following courts may, subject to the approval of the lieutenant governor in council of the relevant province, make rules of court not inconsistent with this Act or any other Act of Parliament that are applicable to any prosecution, proceeding, including a preliminary inquiry or proceedings within the meaning of Part XXVII, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to the prosecution, proceeding, action or appeal:

(a) every court of criminal jurisdiction for a province;

(b) every appeal court within the meaning of section 812 that is not a court referred to in subsection (1);

. . .

(g) the Provincial Court of Manitoba;

Purpose of rules
482(3) Rules under subsection (1) or (2) may be made

(a) generally to regulate the duties of the officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of the law;

. . .

(c) to regulate the pleading, practice and procedure in criminal matters, including pre-hearing conferences held under section 625.1, proceedings with respect to judicial interim release and preliminary inquiries and, in the case of rules under subsection (1), proceedings with respect to *mandamus*, *certiorari*, *habeas corpus*, prohibition and *procedendo* and proceedings on an appeal under section 830; and

. . .

Power to make rules respecting case management
482.1(1) A court referred to in subsection 482(1) or (2) may make rules for case management, including rules

(a) for the determination of any matter that would assist the court in effective and efficient case management;

(b) permitting personnel of the court to deal with administrative matters relating to proceedings out of court if the accused is represented by counsel; and

(c) establishing case management schedules.

Compliance with directions
482.1(2) The parties to a case shall comply with any direction made in accordance with a rule made under subsection (1).

Analysis

a) Do Sections 482 and/or 482.1 of the Code Authorise a Court to Make Rules That Would Allow a Judge to Award Costs Personally Against Counsel Who Fail, Without Reasonable Excuse, to Comply With Valid Court-Ordered Timelines?

[27] As was helpfully itemised in Clayton C Ruby et al, *Sentencing*, 9th ed (Toronto: LexisNexis, 2017) at ch 21, there are three possible sources of authority to award costs against counsel in criminal proceedings:

1) under the inherent jurisdiction or ancillary powers of the court to control its own process (see *Jodoin*);

2) under section 24(1) of the *Charter* as a remedy for the infringement of a *Charter* right (see *R v 974649 Ontario Inc*, 2001 SCC 81); or

3) when authorised by statute.

[28] It is trite law that both statutory and superior courts have an inherent jurisdiction to manage and control the proceedings before them to prevent an abuse of process. This inherent jurisdiction to manage proceedings in order to prevent abuse provides a court with the authority to exercise control over counsel when necessary to protect its process (see *R v Cunningham*, 2010 SCC 10 at para 18).

[29] Prior to *Jodoin*, it was unclear whether costs could be awarded against defence counsel under the court's inherent jurisdiction to protect and control its process. With *Jodoin*, that ambiguity is no longer present. The power over counsel to protect the court's process allows judges to award costs against lawyers personally (see *Jodoin* at para 20). However, this discretion must be exercised with restraint (see *Jodoin* at paras 16-17).

[30] As stated above, a court may also award costs personally against counsel as a remedy for the infringement of a *Charter* right. In *974649 Ontario Inc*, such costs were awarded against the Crown who failed to meet the standards of disclosure established in *R v Stinchcombe*, [1991] 3 SCR 326.

[31] The third source of authority to award costs against counsel in a criminal proceeding is when authorised by statute. In the case at bar, that authority would be the *Criminal Proceedings Rules* made pursuant to the two rule-making provisions in the *Code* (see sections 482-482.1).

[32] Section 482.1 is more specific than section 482. It is also more recent. It was enacted in 2002. It gives courts the explicit power to make case management rules "for the determination of any matter that would assist the court in effective and efficient case management" and "establishing case management schedules."

[33] Section 482 of the *Code* gives courts the general power to make rules of court. Section 482(1), which applies to superior courts of criminal jurisdiction, states that these rules cannot be inconsistent with the *Code* or any other Act of Parliament and that they apply "to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal."

[34] Section 482(3) of the *Code* sets out the purpose of section 482 rules and includes "generally to regulate the duties of the officers of the court" and "to regulate the pleading, practice and procedure in criminal matters, including pre-hearing conferences held under section 625.1." This purpose was described by the Court in the unofficial English translation of *Duhamel c R*, 2006 QCCA 1081, in part, as indicating that "they deal with the practical management and administration of the criminal courts, sittings of the court, and the duties of the officers of the court" (at para 14).

[35] Section 482's predecessor was first introduced in 1892 as section 533 in the *Criminal Code, 1892*, SC 1892, c 29. While the original provision has undergone many numerical changes, along with some modifications in wording over the years, there are three constants that have remained since the rule-making power was first introduced. First, the rules must not be inconsistent with any statute of Canada. Second, the purpose of

the rules is to regulate the "pleading, practice and procedure" in the criminal courts. Third, the rule-making power has always recognised that a valid purpose is to regulate the duties of officers of the court (see sections 533(b)-(c) of the *Criminal Code, 1892*).

[36] In addition to recognising these constants, it is also important to note that sections 482-482.1 do not state that rules enacted under these provisions can alter substantive law. Contrast this with section 92 of *The Court of Queen's Bench Act* that states that the rules committee of the Court may "make rules, whether or not the rules alter substantive law, with respect to the practice and procedure of the court".

[37] In the case at hand, the *Criminal Proceedings Rules* were adopted by the members of the Court of Queen's Bench; were made pursuant to sections 482(1), 482(3), 482.1 of the *Code*; published in the Canada Gazette; and made into regulation. They have been in force since October 1, 2016. The specific rule of the new *Criminal Proceedings Rules* that authorises a judge to award costs against counsel personally is r 2.03. That rule, which refers to the factors in r 2.02, allows a judge to order costs personally against counsel who fail, without reasonable excuse, to comply with court-imposed timelines (the costs-awarding rules).

[38] The main issue on this appeal is whether sections 482 and/or 482.1 give a court the power to make rules allowing it to order costs personally against counsel. As noted by Ruby et al at para 21.7, decisions from other provinces are not unanimous. For the most part, they are also dated. Moreover, there is no Supreme Court of Canada pronouncement exactly on point.

[39] The critical question is whether the costs-awarding rules are substantive or procedural in nature. This distinction is important because sections 482-482.1 do not authorise courts to make rules that alter substantive law. They only empower a court to make rules that are procedural in nature.

[40] The distinction between a rule that makes substantive law and a rule directed to practice and procedure is not always clear. Our Court, in *CAE Aircraft Ltd v Canadian Commercial Corp*, 1989 CarswellMan 338 (CA), adopted the following distinction (at para 22):

> The distinction between substantive law and procedural law is identified in *Halsbury's Laws of England* (4th Ed.), vol. 37, para. 10:
>
> > The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties … The function of practice and procedure is to provide the machinery or the manner in which legal rights or status and legal duties may be enforced or recognised by a court of law or other recognised or properly constituted tribunal.
>
> [emphasis added]

[41] Perell J, in "The Authority of the Superior Court of Justice, the Legislature and the Civil Rules Committee to Make Rules of Civil Procedure" (2006) 31 Adv Q 185, wrote on the difference between a rule that affects substantive law or rights and a rule directed to practice and procedure. He writes about the distinction between the machinery (the practice and procedure) and the product (the substantive law) (at p 208):

> The substantive law defines or creates legal rights or status or imposes and defines the nature and extent of legal duties; in contrast, practice and procedure provides the machinery for a court or tribunal to enforce or recognize the rights, status or duties or the substantive law [footnote omitted]. In the old English case of *Poyser v. Minors* [(1881), 7 Q.B.D. 329 at 333], Lush L.J. described the difference between substantive and procedural law by saying that practice and procedure "denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product".
>
> [emphasis added]

[42] The first consideration in determining whether the costs-awarding rules are substantive or procedural in nature is to examine their central point, essence or focus (see *Canadian Reform Conservative Alliance Party Portage-Lisgar Constituency Association v Harms et al*, 2003 MBCA 112 at paras 17, 21). As stated above, section 482(3) provides courts with the general power to make rules to regulate the duties of counsel, as well as the practice and procedure in pre-hearing conferences. Sections 482.1(1)(a) and (c) give courts the specific powers to make rules to assist the court in effective and efficient case management and to establish case management schedules.

[43] In the absence of Hansard, to assist in understanding the central point, essence or focus of the *Criminal Proceedings Rules*, it is helpful to examine the practice direction that was issued by the Chief Justice of the Court of Queen's Bench shortly after they came into force. Practice directions, while not having the force of law, are "high judicial pronouncements" (*R v Sharpe*, 1999 BCCA 668 at para 12) that offer important guidance on

general matters of practice and procedure. See *Sharpe*, where Finch JA (as he then was), in the course of allowing limited access to records, states (*ibid*):

> A practice directive does not have the force of law. It is, in this case, an informational statement published by the Chief Justice for the guidance and assistance of the registry staff, the legal profession and the public. However, although not bearing the force of law, this directive accurately reflects, in a summary way, high judicial pronouncements on the obligation to balance the presumption in favour of access, openness and judicial accountability against other important rights and interests including, as in this case, the fair trial interests of an accused, and the privacy interests of innocent persons.
>
> [emphasis added]

[44] As noted above, the *Criminal Proceedings Rules* came into force on October 1, 2016. On October 20, 2016, a practice direction, which references the new *Criminal Proceedings Rules*, was issued and reads, in part, as follows (see Manitoba, Court of Queen's Bench, "Practice Direction: Re: Scheduling of Resolution Conferences, Pre-Trial Conferences, Pre-Trial Applications and *Voir Dires*, and Trial Dates in Criminal Matters" (20 October 2016), online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1152/practice_direction_-_scheduling_practices_in_criminal_matters_oct_2016.pdf>):

> Concerns about delay in criminal proceedings at all levels of court, now more than ever, require a meaningful and focused response on the part of all participants in the criminal justice system. The constitutional obligations that flow from the *Charter* right to a trial within a reasonable time have been given an even greater clarity by the Supreme Court of Canada in its judgment of *R. v. Jordan*, 2016 SCC 27.
>
> . . .

> The new practices that follow from this direction are meant to be a purposeful response to the issue of delay in criminal proceedings and flow from what the Supreme Court of Canada in *R. v. Jordan* stipulated as the new time imperatives and "presumptive ceiling" that should guide the Court, Crown and defence.
>
> The new practices set out in this direction build upon previous initiatives (some quite recent) which were similarly put in place to address the issue of delay. As a reminder, some of those previous initiatives included:
>
> . . .
>
> - In 2012, the commencement of work (now completed and in effect) on new criminal rules intended to streamline and render more rigorous all stages of the criminal proceeding and the summary conviction appeal appearing in the Court of Queen's Bench.

[45] The practice direction refers to *R v Jordan*, 2016 SCC 27. *Jordan* represents a significant shift from the previous approach. In *Jordan*, the Supreme Court of Canada decried the culture of complacency towards delay within the criminal justice system (see para 4). It found that the system had to change and that the system had to stop rewarding wrong behaviour (see para 40). It encouraged courts and counsel to take measures to address inefficient practices and to change courtroom culture (see para 41). It also stated, "broader structural and procedural changes . . . are required to maintain the public's confidence by delivering justice in a timely manner" (at para 141).

[46] The message that the *status quo* was no longer acceptable was reinforced by the Supreme Court of Canada's follow-up decision in *R v Cody*, 2017 SCC 31, where it stated that "change is necessary" (at para 1).

[47] The practice direction establishes that the underlying purpose behind the new *Criminal Proceedings Rules* was to address the issue of systemic delay and to advance efficiencies by "render[ing] more rigorous all stages of the criminal proceeding" to ensure that criminal proceedings progress in a timely fashion. It is clear to me that the purpose of the costs-awarding rules relates to compliance. It serves to change the culture of complacency and to break bad habits in order to improve the criminal justice system.

[48] I return to the procedural versus substantive issue or, put another way, the distinction between the machinery (the procedure) and the product (the substantive). The new *Criminal Proceedings Rules* offer the Court the necessary tools to change the culture of complacency by providing a judge with the option of awarding costs against counsel for unjustified non-compliance with valid court-ordered timelines. I regard the use of costs to be part of the machinery of the Court to regulate practices and assist the Court with its case management responsibilities.

[49] In my opinion, when the award of costs is used to provide a court with the necessary tools to regulate the duties of counsel to comply with court-ordered timelines (the machinery) to best ensure that it can try an accused within a reasonable time (the product), it is procedural in nature. I find support for this conclusion in *Somers v Fournier* (2002), 214 DLR (4th) 611 (Ont CA). Although a civil case, the Ontario Court of Appeal makes the point that costs are an essential tool to make the machinery run effectively (at para 18):

> Viewed from a multi-purpose perspective, therefore, costs are "a means by which the ends of justice are attained" (*Sutt v. Sutt* [*Sutt v Sutt* (1968), [1969] 2 DLR (3d) 33 (Ont CA)], at p. 175, *per*

> Schroeder J.A. (paraphrased)). They are an essential tool designed, in the words of La Forest J. in *Tolofson* [*Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022], to "make the machinery of the forum court run smoothly" and to aid Ontario courts in "administer(ing) (their) machinery as distinguished from (their) product" (at pp. 318 and 321).
>
> [emphasis added]

[50] In the post-*Charter* and now the post-*Jordan* era, costs awards are a necessary instrument for courts to regulate their own processes. I adopt the words of Hall JA in *Henry v British Columbia (Attorney General)*, 2014 BCCA 15, rev'd on other grounds, 2015 SCC 24, when he described costs awards "as a summary type of process integral to the criminal trial process that can afford a speedy remedy for perceived prosecutorial lapses" (at para 27).

[51] This interpretation is also in line with the modern view of the use of costs in the post-*Charter* and now the post-*Jordan* era. As was observed by the Supreme Court of Canada in *974649 Ontario Inc*, costs awards have attained more prominence as an effective measure in criminal proceedings since the advent of the *Charter* (see para 80) and that (at para 81):

> Such awards, while not without a compensatory element, are integrally connected to the court's control of its trial process, and intended as a means of disciplining and discouraging flagrant and unjustified incidents of non-disclosure.
>
> [emphasis added]

[52] The effect of removing the costs-award measure from a judge's toolbox would be to confine the judge's options, in situations of unjustified non-compliance with valid court-ordered timelines by defence counsel, to

either: a) admonishing counsel; b) citing them for contempt; or c) reporting counsel to the law society. As explained by Gascon J in *Jodoin*, the courts should not have to rely on law societies or contempt of court proceedings to sanction the non-compliant conduct that is witnessed. The imposition of a reasonable one-time costs award is less serious than the alternatives (see paras 20-24). In my view, in situations where timelines have not been respected, without reasonable excuse, the award of costs offers an efficient way to address counsel's lapse.

[53] An argument arose as to whether the costs-awarding option was limited to non-compliance with valid court-ordered timelines under rr 2.02-2.03, or whether it was available to address non-compliance with any of the *Criminal Proceedings Rules*.

[54] Rule 2.02 applies to situations of non-compliance with filing timelines where "an applicant has failed to comply with the rules respecting the filing of a document in support of a motion or application". It also sets out the factors to be considered in such situations. These factors include the "need for an expeditious determination of pre-trial motions" and the "orderly conduct of trial proceedings." Rule 2.03 states that an award of costs may be ordered against counsel personally if they fail, without reasonable excuse, to comply with "these rules, having regard to the factors set out in rule 2.02."

[55] One of the basic principles of statutory interpretation is that there is a presumption of an orderly and meaningful arrangement. See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) (at para 8.21):

> ***Presumption of orderly and meaningful arrangement.*** It is presumed that in preparing the material that is to be enacted into law the legislature seeks an orderly and economical arrangement. . . . Related concepts and provisions are grouped together in a meaningful way. The sequencing of words, phrases, clauses and larger units reflect a rational plan.
>
> [emphasis added]

[56] The fact that rr 2.02-2.03 are found in the same section of the *Criminal Proceedings Rules* is not insignificant. In my view, this sequencing reflects a rational plan to group and read them together in a meaningful and consequential way. Moreover, the fact that r 2.03 later speaks of "having regard to the factors set out in rule 2.02", supports the view that r 2.03 should be read in a limited fashion. For these reasons, I am of the view that the costs-awarding tool under r 2.03 can only be used in situations of unjustified non-compliance with court-ordered timelines.

[57] I recognise that there are more remedial tools available to the court in cases of non-compliance with court-ordered timelines by the Crown. They could include judicial stays and exclusions of evidence. For obvious reasons, a judge should not impose punitive consequences against an accused for the conduct of defence counsel.

[58] I am aware that a number of pre-*Charter* cases have expressed the view that the awarding of costs in criminal matters relates to substantive, not procedural law, and that rules enacted under section 482 of the *Code*, or its predecessor, cannot create a substantive right that is otherwise non-existent. See, for example, *Attorney-General et al v Cronier* (1981), 63 CCC (2d) 437 (Qc CA) and the other cases referenced therein.

[59] Those cases are, in my view, easily distinguishable. A review of those cases shows that they concern fact situations involving prerogative remedies to quash decisions of lower courts or administrative tribunals acting without jurisdiction, such as *certiorari* and *habeas corpus*, as specifically listed in section 482(3)(c) of the *Code*. That is not the case here. This case deals with issues that involve the purpose of making rules to regulate the duties of officers of the court (see section 482(3)(a)).

[60] In addition, the aforesaid pre-*Charter* cases have been overtaken by the *Jordan* framework and the need to change the "culture of complacency" (at para 4). Moreover, their relevance is questionable given the 2002 addition of section 482.1 to the *Code* (the power to make rules respecting case management). Finally, I note that other cases have held otherwise. See, for example, *R v Caron*, 2009 ABCA 34, aff'd 2011 SCC 5, where Ritter JA wrote, "The award of costs is a matter of procedure" (at para 34 in French and at para 99 in English). See also the article by Perell J, where he writes (at p 208): "It may be noted that costs are a matter of procedure and not substantive law."

[61] Given my conclusion that the costs-awarding rules are procedural in nature, I now turn to the first question raised: whether sections 482 and/or 482.1 authorise a court to make rules that would allow it to award costs personally against counsel who fail, without reasonable excuse, to comply with valid court-ordered timelines.

[62] It is important to note that the costs-awarding rules in the *Criminal Proceedings Rules* are not directed to common law contempt or abuse of process situations. Moreover, they do not affect the accused's right to make

full answer and defence, nor do they hinder defence counsel from courageously bringing forward arguments. Finally, no one argued that the costs-awarding rules were inconsistent with the *Code* or any other Act of Parliament.

[63] In my view, the rule-making powers found in sections 482-482.1 are broad enough to provide the court with the procedural authority to make costs-awarding rules in order to exercise control over counsel, when necessary, in order to assist in effective and efficient case management and to protect its process.

[64] In fact, the superior courts of Nova Scotia have adopted rules pursuant to section 482, allowing them to award costs personally against counsel. These courts adopted civil rules (see the *Nova Scotia Civil Procedure Rules*). They govern proceedings in that province's Court of Appeal and Supreme Court and were made by the judges of those courts under the authority of the *Judicature Act*, RSNS 1989, c 240 These courts then passed a rule saying that the aforesaid civil rules are adopted and are "made under subsections 482(1) and (3) of the Code" (see r 91.02(2)).

[65] Rule 77.12 of those *Civil Procedure Rules* applies to criminal proceedings by virtue of r 91.02(2). It states:

> **Award of costs in other circumstances**
> **77.12(1)** A judge may award, assess, and provide for payment of costs for any act or omission of a person in relation to a proceeding or an order.
>
> **77.12(2)** A judge who determines that expenses are caused by the improper or negligent conduct of counsel may order any of the following:

> (a) counsel not recover fees from the client;
>
> (b) counsel reimburse the client for costs the client is ordered to pay to another party as a result of counsel's conduct;
>
> (c) counsel personally pay costs.
>
> [emphasis added]

[66] In *R v Liberatore*, 2010 NSCA 26, MacDonald CJNS, sitting alone as a chambers judge, made a $500 costs award against defence counsel due to the unnecessary delay and disruption caused by defence counsel missing the deadline to file a factum, after being granted an extension of time to file his factum. As a result of defence counsel's inaction, the accused's appeal was dismissed. MacDonald CJNS explains what happened next (at paras 7-9):

> This, in turn, prompted the appellant's instant request to have the dismissal reviewed by a panel of this court, which, as noted, initially requires leave from me as Chief Justice. In support of his leave motion, [defence counsel] simply falls on his proverbial sword stating that the failure to file the factum was totally his fault and because of that, his client should not lose his right to what he asserts is a meritable appeal. In explaining his failure, [defence counsel] offers this in his supporting affidavit:
>
> 4. While I have no excuse, I simply got overwhelmed by the pressure of my other commitments and my family responsibilities and thus failed to file this factum.
>
> For its part, the Crown takes no position on this motion.
>
> Upon reviewing the material filed on the leave motion, I opted to hear further submissions from counsel. This hearing was completed on March 18, at which time I reserved judgment.

[67] After allowing defence counsel to make further submissions, and noting that r 77.12 applied by virtue of r 91.02(2), MacDonald CJNS made the $500 costs award against defence counsel personally.

[68] For all of these reasons, I am of the opinion that the *Criminal Proceedings Rules* made pursuant to sections 482-482.1 provide a judge of the Court of Queen's Bench with the necessary statutory authority to award costs personally against counsel who fail, without reasonable excuse, to comply with valid court-ordered timelines.

b) What Standard of Conduct Must Be Shown Before a Judge Can Award Costs Personally Against Counsel? Must it Be a Common Law Standard or is the Plain Meaning of the Rule Sufficient?

[69] The standard of conduct to be applied when determining whether to award costs against counsel will vary depending on the purpose for the costs award.

[70] In circumstances involving a court's inherent jurisdiction to award costs in common law contempt or abuse of process situations, the standard of conduct is whether "the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice" (*Jodoin* at para 29). The conduct generally contains elements of bad faith (see *Jodoin* at paras 33, 42).

[71] Where costs are awarded personally against counsel as a remedy for the infringement of a *Charter* right, the standard is lower. The impugned conduct must be "a marked and unacceptable departure from the reasonable standards expected" of counsel (*974649 Ontario Inc* at para 87). As explained

by Ruby et al, "Neither bad faith nor wilful misconduct is required" (at para 21.29). The "marked and unacceptable departure from the reasonable standards expected" test has also been accepted in additional cases where costs were at issue in a non-*Charter* and/or statutory context. See *R v Fercan Developments Inc*, 2016 ONCA 269 at paras 70-71, which was a decision dealing with forfeiture under the *Controlled Drugs and Substances Act*, SC 1996, c 19 (see also the supplementary reasons in 2016 ONCA 440 which dealt with costs); and *R v Melrose*, 2016 BCCA 292 at paras 36-37, leave to appeal to SCC refused, 37363 (13 April 2017).

[72] With respect to the case at hand and the costs-awarding rules, the question is whether one of the common law standards should apply or whether the plain meaning of the provision determines the standard. It would be helpful at this point to set out once again r 2.03(1), which reads as follows:

> **Costs ordered if non-compliance**
> **2.03(1)** The Court may order costs, payable by counsel personally, if counsel has failed, without reasonable excuse, to comply with these rules, having regard to the factors set out in rule 2.02.

[73] On a plain reading of the provision, a judge has a discretion to award costs against counsel personally if they fail, without reasonable excuse, to comply with valid court-ordered timelines. Court rules are subject to ordinary principles of statutory interpretation (see *Evans v Jensen*, 2011 BCCA 279). The modern principle of statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the

intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21).

[74] As explained above at para 47 herein, the object of the costs-awarding rules is to change the culture of complacency and break bad habits to improve efficiency. While their purpose does include some punitive and compensatory elements, the primary purpose relates to compliance: to rehabilitate behaviour by deterring unjustified non-compliance with court-ordered timelines. Their purpose is similar to *Charter*-infringement situations (once again, see *974649 Ontario Inc* at para 81, cited herein at para 51).

[75] Contrast this with contempt and abuse of process situations where, as stated in *Jodoin*, the objective is to punish. Gascon J stated that awards of costs made against counsel personally in criminal cases are purely punitive and do not include the compensatory aspect costs have in civil cases (see para 31).

[76] In the case at hand, it is useful to be reminded that the conduct that may lead to an award of costs under the *Criminal Proceedings Rules* involves conduct that has a low level of stigma attached to it. There is no contempt, abuse of process, bad faith, wilful misconduct or other similarly serious and reprehensible behaviour that would typically call for a standard of conduct akin to gross negligence. All that is required, before a judge could consider awarding costs against counsel personally, is that they fail to comply with the court-ordered timelines without reasonable excuse.

[77] In accordance with the modern principle of statutory interpretation, which includes context and purpose, it would appear that a lower standard of conduct applies and that it is enough that the act described in the costs-

awarding rules (unjustified non-compliance) has occurred. I use the verb "appear" because what is left to be determined is whether the jurisprudence in regard to costs awards made personally against counsel in criminal proceedings requires a higher standard than the plain meaning of r 2.03.

[78] As recently stated in *Jodoin*, the power to award costs against counsel personally, whatever the source, is to be used sparingly. Gascon J wrote (at para 1):

> Although the courts have the power to maintain respect for their authority and to preserve the integrity of the administration of justice, the appropriateness of imposing such a sanction in a criminal proceeding must be assessed in light of the special role played by defence lawyers and the rights of the accused persons they represent. In such cases, the courts must be cautious in exercising this discretion.

[79] The case law is clear. The discretion to exercise this power must be exercised with restraint. This is especially so in the criminal context in order to ensure that any costs award against defence counsel does not in any way affect the accused's right to make full answer and defence. The ordering of costs against counsel personally is also an extraordinary measure. See, for example, *Liberatore*, where MacDonald CJNS stated (at para 20):

> I realize that ordering costs against counsel personally is an extraordinary remedy, particularly in the criminal law context. However, the facts of this case are extraordinary and such relief is not unprecedented. For example, see **R. v. Smith** [1999] M.J. No. 15, affirmed by the Man. C.A. in [2000] M.J. No. 75. See also **R. v. Chapman** (2006), 204 C.C.C. (3d) 457 (O.C.A.).

[80] In my view, the conduct that is sought to be addressed and discouraged by the *Criminal Proceedings Rules* (unjustified non-compliance with court-ordered timelines) is akin to costs awards in *Charter*-infringement situations (unjustified incidents of non-disclosure by the Crown). As a result, I would adopt a lower standard of conduct than in *Jodoin*. I would opt for the standard set by the Supreme Court of Canada for *Charter*-infringement cases in *974649 Ontario Inc*: the impugned conduct must be "a marked and unacceptable departure from the reasonable standards expected" (at para 87) of counsel, which, for all intents and purposes, is the same as the "reasonable excuse" standard found in r 2.03(1).

[81] As explained in The Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg: Law Society of Manitoba, 2011, lawyers and the quality of the service they provide must command the confidence and respect of the public and this can only be achieved if they maintain a reputation for "high standards of legal skill and care" (at p 5). In my view, it is reasonable to expect counsel to comply with valid court-ordered timelines. When counsel unjustifiably fail to comply with such orders, the conduct should generally be viewed as being a marked and unacceptable departure from the reasonable standards expected of counsel.

[82] I find support for this conclusion in *R v Logan*, 2002 CarswellOnt 1592 (CA), where the Crown's failure to disclose interview notes of a witness, in the absence of an "adequate explanation" (at para 4), was held to meet the marked and unacceptable departure standard. The Court stated that (*ibid*):

> In these circumstances, disclosure of the notes of the eyewitness interview should have been automatic and, in our view, no adequate explanation has been provided for the omission. In all

> the circumstances, this omission and failure to disclose constituted "a marked and unacceptable departure from the reasonable standards expected of the prosecution".
>
> [emphasis added]

[83] Understandably, the opposite is true. When a reasonable explanation for the non-compliance is given, the conduct would not amount to a marked and unacceptable departure from the reasonable standards expected of counsel. Ruby et al provides the following appellate decisions as cases in point, respectively, *R v Bhatti*, 2006 BCCA 16; and *R v Singh*, 2016 ONCA 108, and states (at para 21.25):

> For example, where a senior prosecutor mistakenly thought that his junior had disclosed certain relevant taxi cab records, that mere mistake would not support an award of costs. Similarly, where the Crown inadvertently failed to disclose inculpatory evidence because of staffing problems, the Ontario Court of Appeal overturned a costs award. [footnotes omitted]

c) What Are the Principles and Procedures to Follow When a Court is Considering Awarding Costs?

[84] Court rules play an important part in criminal proceedings. They govern the conduct of the trial process. They allow for timeframes to be set to ensure that a matter proceeds expeditiously. They are meant to be followed and, as a result, they are meant to be taken seriously. When they are not, consequences should normally ensue, unless a reasonable explanation for the non-compliance is provided to the court. Unfortunately, consequences have not typically ensued and standards of conduct have slipped.

[85] The three members of the panel hearing this appeal have amongst us approximately 25 years of trial court experience in criminal proceedings. Our collective trial court experience is that valid court-ordered timelines were often not respected. Since the non-compliance did not rise to a level of conduct involving bad faith or similarly egregious conduct or did not involve a *Charter*-right infringement, judges did not have, before the advent of these rules, the option to award costs against counsel personally. The only realistic route they had was to simply admonish counsel and adjourn the matter. This has led to the culture of complacency and the tolerance of delays that *Jordan* now seeks to change.

[86] The primary purpose of these costs-awarding rules relates to compliance and preserving public confidence in the criminal justice system. They aim to change that culture of complacency and break bad habits to improve efficiency. No one group is to blame for this culture of complacency. The entire criminal justice system is to blame, including us, the judiciary, who have come to tolerate delay and accept preventable adjournments. As the Supreme Court of Canada explained in *Jordan*, these unacceptable delays undermine public confidence in the administration of justice (at para 40):

> As we have observed, a culture of complacency towards delay has emerged in the criminal justice system (see, e.g., Alberta Justice and Solicitor General, Criminal Justice Division, "Injecting a Sense of Urgency: A new approach to delivering justice in serious and violent criminal cases", report by G. Lepp (April 2013) (online), at p. 17; Cowper [BC Justice Reform Initiative, *A Criminal Justice System for the 21st Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond*, by D Geoffrey Cowper (Victoria: The Initative, 2012)], at p. 4; P. J. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008), at p. 15; Canada, Department of Justice, "The Final Report on Early Case

> Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System" (2006) (online), at pp. 5-6). Unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay. This culture of delay "causes great harm to public confidence in the justice system" (LeSage and Code, at p. 16). It "rewards the wrong behaviour, frustrates the well-intentioned, makes frequent users of the system cynical and disillusioned, and frustrates the rehabilitative goals of the system" (Cowper, at p. 48).
>
> [emphasis added]

[87] In Manitoba, the Court of Queen's Bench decided, after consulting with stakeholders, to adopt creative new *Criminal Proceedings Rules* to improve efficiency within the criminal justice system. One of the innovative measures, rr 2.02-2.03, allows a trial judge to order costs personally against counsel who fail, without reasonable excuse, to comply with court-imposed timelines.

[88] This appeal offers this Court the opportunity to provide certainty, clarity and guidance for the development and application of principles and procedures in regard to the costs-awarding rules. It is worth re-emphasising that the discretion to exercise the power to award costs against counsel personally must be exercised with restraint and that this is especially so in the criminal context. Courts must ensure that any costs award against defence counsel does not in any way affect the accused's right to make full answer and defence. Courts must also be aware that unjustified non-compliance with valid court-ordered timelines causes delays and that these delays prejudice the accused and undermine public confidence in the criminal justice system.

[89] In *Jodoin*, the Supreme Court of Canada set out the process to be followed when a judge is considering awarding costs against a lawyer personally (see paras 35-38). I see no reason why the procedure set out in *Jodoin* should not be followed for non-compliance of rules situations.

[90] It is important to differentiate between the liability phase and the consequence phase. The first issue for the judge to decide is whether there is a reasonable excuse for the non-compliance (the liability phase). The process used to make this determination must contain the fundamental procedural safeguards such as the right to notice, the right to a hearing and the ability to make representations. The notice should include what the possible consequences might be (see *Jodoin* at para 36). The applicable standard of proof will be on a balance of probabilities (see *Jodoin* at para 37).

[91] If it is determined that the non-compliance was unjustified, the judge will then proceed to the consequence phase and, using the factors set out in r 2.02, determine the amount of the costs to be ordered against counsel personally. In exceptional circumstances, the judge may decide that, despite the unjustified non-compliance, an award of costs is unwarranted.

[92] It is also important to clarify the role of the opposite party, in this case the Crown, with respect to the process to be followed. The opposite party would generally have no role in this process other than to be present and called upon as required by the judge for background. The opposite party does not take on an adversarial role *vis-à-vis* counsel. It is not the prosecutor of the alleged non-compliance.

[93] At noted below at para 100 of these reasons, a suggested straightforward, flexible procedure is set out.

[94] In *Jodoin*, the Supreme Court of Canada made clear that, at the liability phase, when a court is considering whether to make an award of costs personally against counsel, it should "confine itself to the facts of the case before it and to refrain from indirectly putting [counsel's] disciplinary record, or indeed his or her career, on trial" (at para 33). However, I do not read this to mean that this restriction applies at the consequence phase. At this stage, the judge will have already found that there was an unjustified non-compliance with court-ordered timelines. In my view, information about previous findings of non-compliance against counsel is a relevant consideration at the consequence phase, in the same way it is at a criminal sentencing hearing or at the penalty stage of a disciplinary hearing (see *Guttman v Law Society of Manitoba*, 2010 MBCA 66 at para 78).

[95] Since the costs-awarding rules are silent on the quantum of any costs award, this appeal would also be an opportune time to bring a certain degree of predictability to the question of the expected amount of costs awards, should they be ordered.

[96] As mentioned at para 76 above, the behaviour that may lead to an award of costs under these rules is not accompanied by the same level of stigma typically attaching to conduct involving bad faith, contempt or abuse of process. Courts must appreciate that the fault element attached to the non-compliance with timelines will, at first, be low in this province because it is recognised that such conduct is the product of a collective systemic failing that had been, in large part, tolerated. However, that has to change.

[97] Since the purpose of these rules is to break bad habits that were cultivated over time, it must be recognised that it will take time to reverse this

behavioural pattern. In the same way that this reversal will be gradual, so must the amount of the costs award and any award of costs, for a first transgression, typically should be low.

[98] There is another reason for the costs award to start off at a low amount. In Manitoba, most accuseds are defended by counsel through the Legal Aid system. As explained by counsel for the Criminal Defence Lawyers Association of Manitoba, certificates from Legal Aid do not permit the same level of billing that civil files tend to attract. This lower level of compensation requires defence counsel to carry significant caseloads. In turn, this high volume of cases increases the chance of error. Courts must be aware of this reality to ensure that any costs award does not either discourage counsel from accepting work that is compensated through Legal Aid or in any way hinder counsel's ability to properly defend an accused.

[99] As a result, and with these two realities in mind (collective systemic failings and Legal Aid stresses), it is my view that generally any costs awarded under these rules should, at first, start off at a low amount and be in the range of $100 to $150 for a first transgression and increase incrementally for each subsequent finding of unjustified non-compliance.

[100] As a result, I have identified the following flexible procedure for a court to follow when considering, on its own motion or on a party's motion, whether to order costs personally against counsel who fail, without reasonable excuse, to comply with valid court-imposed timelines:

a) Right to Notice: Counsel should be given notice that they are facing a possible award of costs against them personally for the alleged non-compliance. Counsel should also be advised of the

possible consequences. The notice should contain sufficient information about the alleged non-compliance, including the nature of the evidence. The notice should be given far enough in advance to enable counsel to prepare adequately.

b) Right to be Heard: Should counsel not wish to waive the process, they should have an opportunity to make submissions and to adduce any relevant evidence at both the liability and the consequence phases. Preferably, this issue of a possible award of costs should be argued only after the proceeding has been resolved on its merits.

c) Standard of Proof and Role of Opposite Party: As stated in *Jodoin*, the applicable standard of proof with respect to a determination on the issues of the reasonable excuse and costs is a balance of probabilities (see para 37). The opposite party, in this case the Crown, would generally have no role in this process other than to be present and called upon as required by the judge for background. The opposite party is not the prosecutor of the alleged non-compliance.

d) Matters to be Considered at the Liability Phase: At this stage, the judge decides whether there is a reasonable excuse for the non-compliance. Once the judge has taken into account the factors set out in r 2.02, he or she shall consider any evidence adduced and the submissions of counsel and determine whether there was non-compliance and, if so, whether it was without reasonable excuse. In so doing, judges will confine themselves

to the facts of the case before them. While prior non-compliant conduct is a relevant consideration at the consequence phase, it has no relevance at the liability phase.

e) Matters to be Considered at the Consequence Phase: At this stage, save exceptional circumstances, the judge will set the amount of the costs award. Once the judge has taken into account the factors set out in r 2.02, as well as any previous finding of non-compliance, he or she shall consider any evidence adduced and the submissions of counsel and determine the amount of the costs award. Typically, information about any prior finding would be obtained by asking counsel. The judge will, after giving counsel an opportunity to be heard on whether any time is required to pay, set the date when the award of costs is to be paid. In exceptional circumstances, the judge may decide that, despite the unjustified non-compliance, an award of costs is unwarranted.

[101] This appeal also provides this Court with the opportunity to clarify the procedure to follow should counsel wish to appeal the award of costs issued personally against them.

[102] As previously mentioned, any counsel who has been the subject of a costs award under these rules may, with leave, appeal to this Court pursuant to section 676.1 of the *Code*. Typically, the leave application and appeal will be heard at the same time. However, it must be recognised, as was the case in this appeal, that the responding party would generally have no interest in

the issue under appeal. As a result, as long as the Crown or the accused is given notice of the appeal, such appeals may proceed in the future with no respondent(s). While no responding parties is rare, there is precedent (see, for example, *St Jean v Armstrong*, 2017 ONCA 145).

d) Should the Pre-Trial Judge Have Ordered Costs Personally Against the Appellant, in the Circumstances of this Case?

[103] The final issue is whether the judge should have ordered costs against the appellant in the circumstances of this case.

[104] The pre-trial judge made the award of costs on April 6, 2017. Approximately one month later, on May 12, 2017, the Supreme Court of Canada rendered its judgment in *Jodoin*. Even though the pre-trial judge did not have the benefit of the *Jodoin* principles and procedures, he did follow many of the procedural requirements found therein. Unfortunately, he did, nonetheless, improperly consider facts at the liability phase relating to a prior pre-trial experience with the appellant and failed to give him the opportunity to prepare adequately or to adduce evidence (see *Jodoin* at paras 33, 36). In the circumstances, his decision cannot be allowed to stand.

[105] Normally, I would send the matter back to the pre-trial judge to allow him to consider the issue afresh using the new procedure set out above. However, given that this was a case of first impression, the principles and procedures were in need of clarification, and given the amount of time that has passed, I am of the view that it would serve no useful purpose to do so in the circumstances.

[106] Since this matter is not being returned to the pre-trial judge, I make one final comment with respect to his decision to exercise his discretion and to award costs personally against the appellant. *Jordan* principles are causing criminal trial courts to be more attentive to timeframes. The costs-awarding rules provide judges with a new option when facing unjustified non-compliance. This power must be exercised with restraint (see *Jodoin* at paras 16-17). Awarding such costs is not something the judiciary takes lightly. It is never a pleasant task. In the case at hand, the pre-trial judge tried to change courtroom habits in order to address the "culture of complacency" (at para 4) decried by the Supreme Court of Canada in *Jordan* and for his attempt, as opposed to the manner in which he proceeded; he should not be faulted.

[107] In the result, I would grant leave to appeal, allow the appeal and order that the $1,000 costs award be returned to the appellant without delay.

Chartier CJM

I agree: Steel JA

I agree: Hamilton JA