Citation: R v KGK, 2019 MBCA 9 Date: 20190207
Docket: AR17-30-08881

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron

B E T W E E N :

	)	***K. L. Bueti***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
	)	***M. A. Conner****,*
Respondent	)	***R. D. Lagimodière*** *and*
	)	***C. P. R. Murray***
- and -	)	*for the Respondent*
	)	
K. G. K.	)	*Appeal heard:*
	)	***June 13, 2018***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***February 7, 2019***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the complainant(s) or witness(es) (see section 486.4 of the *Criminal Code*).

HAMILTON JA (dissenting):

[1] The accused appeals his convictions, after a trial by a judge alone, for sexual interference and invitation to sexual touching arising from complaints made by his stepdaughter.

[2] He also appeals the dismissal of his motion seeking a stay for breach of his right to a trial within a reasonable period of time pursuant to section 11(*b*) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) (see *R v KGK*, 2017 MBQB 96).

[3] This ground of appeal raises the important question of whether the nine months taken by the trial judge to render his decision to convict is part of the total delay to be assessed in the context of the analytic framework of presumptive ceilings established in *R v Jordan*, 2016 SCC 27.

[4] A different judge heard the accused's delay motion (the motion judge). He concluded that the time taken by a judge to render a decision (decision-making time) does not fall under the *Jordan* framework and that, pursuant to *R v Rahey*, [1987] 1 SCR 588 (*Rahey SCC*), the appropriate test to determine whether a judge's decision-making time breaches section 11(*b*) of the *Charter* is whether, in the context of the particular case, the time taken is "shocking, inordinate and unconscionable". In this case, the motion judge concluded that the decision-making time of nine months, while "comparatively long" (at para 95), did not meet this threshold.

[5] The accused's other grounds of appeal concern the trial judge's ruling that the accused's statement to the police was voluntary, how the trial judge analysed the accused's evidence compared to the stepdaughter's evidence and the adequacy of the trial judge's reasons. If his convictions are upheld, the accused seeks leave to appeal, and if granted, he appeals the five-year sentence imposed by the trial judge.

[6] My colleagues conclude that a judge's decision-making time is not part of the total delay calculation under the *Jordan* framework and that the motion judge did not err in dismissing the accused's motion for delay. They also conclude that the trial judge did not otherwise err, as asserted by the accused. They dismiss his conviction appeal and deny leave on his sentence appeal.

[7] I am of the view that a judge's decision-making time is part of the calculation of total delay under the *Jordan* framework. I would allow the appeal on the basis that the motion judge erred in not granting the accused the remedy of a stay of proceedings for breach of his section 11(*b*) right under the *Charter*. As a result, the accused's other grounds of appeal are moot and I do not address them.

Background

The Jordan Framework

[8] *Jordan* is at the heart of this appeal. The majority's new analytic framework calls upon all actors in the criminal justice system, including judges, to address the problem of delay arising from the "culture of complacency" (at para 4) in the system to ensure "[t]imely justice" (at para 1) and "[a]n efficient criminal justice system" (at para 3).

[9] In *R v Cody*, 2017 SCC 31, a unanimous Court underscored *Jordan*'s message and summarised the *Jordan* framework as follows (at paras 20-25):

> The new framework established in *Jordan* for analyzing whether an accused person's right to a trial within a reasonable time has been breached centres on two presumptive ceilings: 18 months for cases tried in provincial courts and 30 months for cases tried in superior courts (*Jordan*, at para. 46).
>
> The first step under this framework entails "calculating the total delay from the charge to the actual or anticipated end of trial" (*Jordan*, at para. 60). . . .
>
> After the total delay is calculated, "delay attributable to the defence must be subtracted" (*Jordan*, at para. 60). The result, or net delay, must then be compared to the applicable presumptive

> ceiling. The analysis then "depends upon whether the remaining delay — that is, the delay which was not caused by the defence — is *above* or *below* the presumptive ceiling" (*Jordan*, at para. 67 (emphasis in original)).
>
> If the net delay falls below the ceiling,
>
> > then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. (Emphasis in original.)
>
> (*Jordan*, at para. 48)
>
> If the net delay exceeds the ceiling,
>
> > then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.
>
> (*Jordan*, at para. 47)
>
> Where charges pre-date *Jordan* and the delay remains presumptively unreasonable after deducting defence delay and accounting for and considering exceptional circumstances, the Crown may nevertheless demonstrate that the transitional exceptional circumstance justifies the delay (*Jordan*, at paras. 95-96).

[10] Exceptional circumstances lie outside of the Crown's control and must meet two criteria: (1) they must be "reasonably unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise" (*Jordan* at para 69). They need not be "rare or entirely uncommon" (*ibid*).

[11] Furthermore, the Crown cannot sit back and wait until the presumptive ceiling is breached and then point to a past difficulty. Rather, the Crown must show that it took "reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling" (at para 70). However, such steps need not ultimately be successful.

[12] There is no exhaustive list of exceptional circumstances. However, they fall generally within two categories: discrete events and particularly complex cases. As explained in *Jordan* (at para 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.
>
> [emphasis added]

[13] The transitional exceptional circumstance applies to a case already within the system if the Crown can demonstrate that the parties reasonably relied on the law as it previously existed under the framework established in *R v Morin*, [1992] 1 SCR 771 (see *Jordan* at para 96).

Reasons of the Motion Judge

[14] The motion judge concluded that:

1. impugned judicial delay in the context of judicial decision-making and judicial reserves, ought not to be assessed or evaluated under the *Jordan* framework;

2. judicial delay in decision-making may in some circumstances—however exceptional—violate an accused's constitutional right to be tried within a reasonable time. The applicable analytic approach is based on *Rahey SCC*: is the delay in preparing a decision "shocking, inordinate and unconscionable";

3. the 33-month delay between the date of the charge and the completion of the evidence was not unreasonable based on the transitional exception under *Jordan*; and

4. on the facts of this case, the nine-month judicial delay is not so sufficiently "shocking, inordinate and unconscionable" as to violate the accused's section 11(*b*) *Charter* rights and to warrant the exceptional *Charter* remedy of a judicial stay of proceedings.

See para 104.

[15] In his written decision, the motion judge noted that the majority in *Jordan* did not specifically refer to a judge's decision-making time in their judgment. He was of the view that a stricter test than assessing a judge's decision-making time under the *Jordan* framework was necessary, given that an accused's constitutional right to a trial within a reasonable period of time under section 11(*b*) must be balanced with the constitutional principle of judicial independence. He stated that this "tension" between these two constitutional principles "cannot be resolved by a simple reference to a presumptive ceiling" (at para 6) and called for a "high threshold" before judicial delay becomes unreasonable (at para 77).

[16] He distinguished between the "professional/ethical issue of judicial delay and judicial delay which is constitutionally violative" (at para 61).

[17] The motion judge was concerned that including decision-making time in the presumptive ceilings might leave judges with only mere days to render a decision and agreed with the Crown that this is not what the Supreme Court of Canada intended when it established "the identifiable, predictable and certain timelines discussed in ***Jordan***" (at para 55).

[18] He expressed concern about other practical difficulties, such as further delay for recusal motions to have another judge hear the delay motion, such as what occurred in this case, and the unavailability of relevant information for the Crown to respond to assertions of a judge's delay. He noted that, "judges do not become witnesses nor do they file affidavits" (at para 59) and that "a judge's full efforts and time cannot be dedicated to or dictated by a single case" (at para 76).

[19] The motion judge concluded that the *Rahey SCC* test of "shocking, inordinate and unconscionable" allows for an analysis "unencumbered by the now-discarded ***Morin*** factors which were not in play in ***Rahey***" (at para 69).

[20] For his analysis under the *Jordan* framework for the time period from the date of the charge to the date of submissions, the motion judge made no finding with respect to the Crown's assertion of defence delay for the two months and three weeks when defence counsel was not available for trial. Rather, he assumed without deciding, that the net delay was 33 months and one week. He noted that there were no discrete event exceptional circumstances and the case was not complex (see para 82).

[21] Given that the net delay exceeded the presumptive ceiling of 30 months, the motion judge addressed the transitional exceptional circumstance relied upon by the Crown. He noted that, under the *Morin* framework, a judge's decision-making time was typically part of the inherent time requirements of a case (see paras 30, 32).

[22] The motion judge found that, "reasonable efforts were made by the parties in the context of what had been the prevailing legal framework and culture during the period in which ***R. v. Morin*** was the constitutional reference point" (at para 85). He noted that prejudice and the seriousness of the offence were particularly relevant, concluding that the "charges are serious [and that] no obvious prejudice has been established by the [accused]" (at para 88) other than inherent prejudice (*ibid*).

[23] The motion judge assessed the accused's prejudice in the context of the "late filing" (at para 88) of his delay motion, noting that the accused did not raise the issue of delay until it was identified in connection with the delay by the trial judge in rendering the decision and then only the day before the accused was convicted.

The Facts in This Case

[24] The accused was charged on April 11, 2013 and granted judicial interim release under strict bail conditions on April 15, 2013.

[25] On September 6, 2013, the preliminary hearing date was set (five months after the charge). The preliminary hearing took place on October 14, 2014 (18 months after the charge). After the committal on some

of the counts, the matter was adjourned to January 29, 2015 to set the dates for a two-week trial (21 months and two weeks after the charge).

[26] In setting trial dates, the Crown and the defence counsel were unavailable for dates in late September and early October 2015. Defence counsel was unavailable October 19 to October 30, 2015 and December 7 to 18, 2015 when the Crown was available.

[27] The trial started on January 11, 2016 (33 months after the charge) and was adjourned several times during the next 10 days as a result of discussions between counsel and witness availability.

[28] The trial included a two-day *voir dire* to determine the admissibility of the accused's statement. Two police officers and the accused testified during the *voir dire*. Counsel made submissions the next day on January 19, 2016. The trial judge gave his decision on the *voir dire* on January 20, 2016. The Crown's *voir dire* evidence was applied to the trial.

[29] The trial judge heard counsels' closing arguments on January 21, 2016 (33 months and 10 days after the charge).

[30] The trial judge reserved his decision.

[31] In June 2016, defence counsel made a discrete enquiry of the trial judge during a pre-trial conference on another matter as to when the decision could be expected. Defence counsel advised the Crown counsel that the trial judge had advised her that the decision would be forthcoming. Based on that information, the Crown did not take further steps to ascertain the status of the decision.

[32] The Supreme Court of Canada released *Jordan* on July 8, 2016.

[33] On September 14, 2016, the Director of Prosecutions Information Management for Manitoba Prosecutions sent a letter to the Associate Chief Justice of the Court of Queen's Bench (General Division), expressing concern about the delay.

[34] On September 26, 2016, the Associate Chief Justice replied that counsel would be contacted in the near future to schedule a date for the decision. On September 30, 2016, the date of October 25, 2016 was set for the trial judge to deliver his decision.

[35] The accused moved for a stay of proceedings on October 24, 2016, on the grounds that the total delay from the date of the charge to the end of the trial falls outside the presumptive ceiling of 30 months established in *Jordan* and that exceptional circumstances are not present to successfully rebut the presumption of unreasonable delay.

[36] On October 25, 2016, the trial judge delivered his oral reasons acquitting the accused of some counts and convicting him of others (nine months after reserving the decision and 42 months and two weeks after the charge).

[37] On January 9, 2017, the accused argued his motion that the trial judge recuse himself from hearing the delay motion. The next day the trial judge recused himself.

[38] On February 10, 2017, the motion judge heard submissions on the delay motion.

[39] On May 29, 2017, the motion judge dismissed the delay motion.

Position of the Accused

[40] The accused's primary position is that the total time of 42 months and two weeks from the date of the charge to the delivery of the trial judge's decision, infringed his section 11(*b*) right to be tried within a reasonable time and that the motion judge erred in not granting him a stay of proceedings for such breach.

[41] The accused asserts that the 42 months and two weeks must be assessed in the context of the *Jordan* framework and that it is presumptively unreasonable given that it exceeds the presumptive ceiling of 30 months. Furthermore, he argues that the Crown has not established defence delay by waiver, or otherwise, or any exceptional circumstances, including the transitional exceptional circumstance using the *Morin* framework.

[42] The accused says that even without the nine months of decision-making time, the total delay is 33 months and two weeks, which still exceeds the presumptive ceiling and that this delay would have resulted in a stay under the *Morin* framework. He relies on *R v Junkin*, 2011 MBQB 170; and *R v Vandermeulen (M)*, 2015 MBCA 84.

[43] Furthermore, if the nine months of decision-making time does not fall under the *Jordan* framework, the accused submits that the nine months for a decision in a case that is not complex is unreasonable for the purposes of section 11(*b*) and that the motion judge erred in law in applying a test of "shocking, inordinate and unconscionable". He relies on *Rahey SCC*; and *R v MacDougall*, [1998] 3 SCR 45.

[44] At the appeal hearing, he also argued, for the first time, that the time from the date of the charge to the date of sentencing (50 months and two weeks) and the three and one-half months for the motion judge to provide his written decision must be considered.

Position of the Crown

[45] The Crown's position is that the motion judge correctly concluded that a judge's decision-making time does not fall under the *Jordan* framework and that he correctly stated and applied the applicable test to assess the nine months at issue here. It argues that this approach appropriately balances the constitutional principles of judicial independence and the right to a fair trial.

[46] Furthermore, the Crown asserts that it would be unfair to hold the Crown accountable for judicial delay, arguing that it cannot control what a judge does and rarely has information to explain a judge's decision-making time.

[47] The Crown relies on the fact that the Supreme Court of Canada did not specifically address how to treat a judge's decision-making time in *Jordan*; *R v Williamson*, 2016 SCC 28 (released at the same time as *Jordan*); or in *Cody*. The Crown also relies on *R v Ashraf*, 2016 ONCJ 584; *R v Lavoie*, 2017 ABQB 66; the judgment of Slatter JA in *R v Mamouni*, 2017 ABCA 347; and subsequent decisions adopting the analysis of the motion judge (see, for example, *R v Hammer*, 2017 BCPC 377).

[48] The Crown acknowledges that the nine months taken by the trial judge to render his decision in this case is a comparatively long time, and perhaps undue, but says that the delay did not prejudice the trial process, as

was the case in *Rahey* and *Junkin*, nor did the accused suffer egregious prejudice.

[49] As for the other time periods in this case, the Crown asserts a period of defence delay for the time when defence counsel was not available for trial dates, resulting in a net delay of 30 months and two weeks, and relies on the transitional exceptional circumstance. It argues that 19 days over the presumptive ceiling did not result in a stay (see *R v Schenkels*, 2017 MBCA 62 at para 62) and that the motion judge's approach to analysing the transitional exceptional circumstance in the context of the full 33 months and one week delay is also entitled to deference.

[50] Finally, in response to the accused's new arguments at the appeal hearing, the Crown says that the time period for sentencing and waiting for the decision of the motion judge were not properly raised in this appeal, as they were not part of the issues before the motion judge by way of the accused's notice of motion (see *Schenkels* at paras 41-42).

The Issues and Standard of Review

[51] A judge deciding a delay motion must make findings of fact and apply the correct legal principles to the facts. Different standards of review arise depending on the issue.

[52] In *Schenkels*, this Court held that the standard of review analysis in *Vandermeulen*, which dealt with principles under *Morin*, remains relevant to appeals that engage principles under *Jordan*. Also see *R v Johnston*, 2018 MBCA 8 at para 25; and *R v Tummillo*, 2018 MBCA 95.

[53] A judge's findings of fact are entitled to deference unless the judge made a palpable and overriding error. Whether or not the judge has stated and applied the applicable legal principles raises a question of law for which the standard of review is correctness. The judge's application of the correct legal principles to the facts to assess, characterise and allocate various periods of time, are reviewed on the standard of correctness.

[54] Barring an error of the type just explained, the judge's ultimate conclusion on the reasonableness of the delay is entitled to deference unless it is not reasonable.

[55] The overarching issue is whether the motion judge stated and applied the correct legal principles when assessing the trial judge's nine months of decision-making time for the purpose of the accused's delay motion under section 11(*b*).

[56] More specifically, the question is whether the motion judge erred in law by concluding that a judge's decision-making time is not to be considered under the *Jordan* framework. The standard of review for the question is correctness. If the answer to this question is yes, a fresh analysis under the *Jordan* framework is required, relying, when appropriate, on the motion judge's findings of fact.

[57] If the answer to the question is no, further questions arise with respect to whether the motion judge erred in how he articulated and applied the applicable test to assess the trial judge's nine months of decision-making time and how he applied the *Jordan* framework to the time period from the date of the charge to the completion of the submissions.

[58] As will be seen, I conclude that the motion judge erred in law by not including the trial judge's nine months of decision-making time in his analysis under the *Jordan* framework. Therefore, I engage in a fresh analysis under the *Jordan* framework.

Analysis

A Judge's Decision-Making Time—Post Jordan Commentary

[59] The question of whether a judge's decision-making time falls under the *Jordan* framework has been raised, or touched upon, in several post-*Jordan* appellate court cases. Recent articles and commentary have highlighted the question (see, for example, Steve Coughlan, "Patterns in the *Jordan* Case Law One Year after *Cody*" (2018) 42 CR (7th) 342; and Assistant Crown Attorney Oliver Fitzgerald, "*Jordan* and Classifying Decision Delay: A Need for Guidance" (2017) 40 CR (7th) 72).

[60] This Court has not addressed the question. However, in *Tummillo*, Cameron JA, for the Court, recognised that, pre-*Jordan*, a judge's decision-making time for pre-trial motions was considered to be part of a case's inherent time requirements (see para 55).

[61] The Ontario Court of Appeal has not decided the question (see *R v Jurkus*, 2018 ONCA 489; and *R v MacIsaac*, 2018 ONCA 650). *MacIsaac* addressed how to compute time under the *Jordan* framework in the context of a retrial. Huscroft JA, in *MacIsaac*, recognised that, pre-*Jordan*, a judge's decision-making time was considered to be part of a case's inherent time requirements, and noted that in some cases, judicial delay in rendering a decision has been held to be unreasonable to warrant a stay of proceedings

(see para 35). In this regard, he cited *Rahey SCC*. In *obiter*, he rejected the Crown's argument that the two months of decision-making time was a discrete exceptional event (see para 48).

[62] *Mamouni*, leave to appeal to SCC refused, 38091 (27 September 2018), resulted in a split Court on the question. Slatter JA concluded that decision-making time does not fall within the presumptive ceiling. Watson JA was of the other view. Crighton JA declined to answer the question to resolve the appeal.

[63] At issue in *Mamouni* was the two months of decision-making time taken by the trial judge to produce a lengthy written decision convicting the accused. The total time from the swearing of the information until the conviction was 60 months and three days. There was also one month and 19 days attributable to an evidentiary decision.

[64] Slatter JA was of the view that decision-making time should not be considered "delay" (at para 71), and opined that the presumptive ceilings barely accommodate enough time for the efficient hearing of complex pre-trial motions and processes. He opined that decision-making time is "a normal part of the criminal trial process, and it is artificial to call them 'extraordinary'" (at para 89) (which I read as exceptional in keeping with *Jordan*). He agreed with the reasoning of the motion judge in this case that the presumptive ceilings do not properly resolve the tension between section 11(*b*) rights and judicial independence and the idea that judges should not have to rush judgments.

[65] Watson JA considered the culture of complacency that preceded and engendered *Jordan*, described the "bright line rules" (at para 54) created by

the *Jordan* framework and concluded that the decision-making time falls within those bright lines (see para 55), but that exceptional circumstances may be warranted in certain cases. He viewed the two periods of decision-making (an evidentiary decision and the final decision) in this case to be exceptional circumstances based on complexity and therefore, deducted those periods from the total delay.

[66] The Québec Court of Appeal decided that a judge's decision-making time should not be included with respect to a decision on the merits because of *Jordan*'s concurrent use of the terms "end of trial" and "anticipated end of trial" and on the basis that the Supreme Court of Canada could not have expected a verdict to be delivered immediately upon the last date set for an anticipated trial. However, the Québec Court of Appeal decided that a judge's interlocutory decision should be included in the *Jordan* ceilings, but that such decisions might qualify as either a discrete exceptional event or as evidence of a particularly complex case (see the unofficial English translation in *R c Rice*, 2018 QCCA 198; and *Agostini c R*, 2018 QCCA 373). See also *Demers c R*, 2018 QCCA 617, which held that the trial judge had erred in that case by including, in the total delay, the two months and three weeks he had taken to come to a verdict and the four months to sentence the accused person.

[67] In *R v Brown*, 2018 NSCA 62, the Nova Scotia Court of Appeal recognised that a judge's interlocutory decision-making time counted as inherent delay pre-*Jordan*, but stated that there were compelling reasons to exclude this time from the *Jordan* ceilings, citing Slatter JA's assessment in *Mamouni* and the motion judge's decision in this case. With respect to a judge's decision-making time on the merits of the case, the Nova Scotia Court

of Appeal accepted the parties' agreement that the end of trial corresponded to the last day that evidence was heard.

[68] Two New Brunswick Court of Appeal decisions have included the judge's final decision-making time in the calculation of total delay under *Jordan* (see *DMS v R*, 2016 NBCA 71; and *Lecompte v R*, 2018 NBCA 33).

[69] In *R v SCW*, 2018 BCCA 346, the British Columbia Court of Appeal approved, without discussing, lower court decisions which calculated the total period of delay from the date of the charge to the verdict, which also included the time taken by the trial judge to come to the decision to convict.

[70] In *SCW*, the sentencing time period was the issue. Fenlon JA, for the Court, opined that "pre- and post-conviction delay should be considered discretely" (at para 25) (emphasis added), explaining that the *Jordan* majority "limited its analysis to the period between charge and end of trial" (at para 26) (emphasis added), and that it would be unworkable for a judge to have to try to determine an anticipated sentencing date when "[t]here are any number of scenarios (such as dangerous offender proceedings) which could affect a reasonable date for sentencing and which would not be known before the verdict" (at para 28) (emphasis added). I note that in *SCW*, decision-making time regarding the verdict or conviction was a non-issue, as the accused pleaded guilty.

[71] Finally, in *R v King*, 2018 NLCA 66, the Court of Appeal of Newfoundland and Labrador unanimously dismissed the Crown's appeal of the stay of proceedings for delay. However, the appeal judges differed on how to treat the five months taken by the trial judge to decide two interlocutory motions. Barry JA concluded that this five months was an

inherent time requirement of the case and is not to be considered an exceptional circumstance available to the Crown to justify the reasonableness of the total delay, "unless the time taken is unreasonable in the opinion of the trial judge" (at para 139). Hoegg JA (O'Brien JA concurring), in *obiter*, stated that she was "disinclined to the notion that the time a judge takes to decide pre-trial applications should be included in the 30-month presumptive ceiling" (at para 180).

Discussion

[72] This is a transitional case under *Jordan*. As such, a judge must first apply the *Jordan* framework to determine whether the net delay is under or over the presumptive ceiling. If the net delay exceeds the presumptive ceiling, the Crown may assert that the transitional exceptional circumstance applies. In that case, the delay is assessed in the context of the pre-*Jordan* (*Morin*) framework.

[73] The applicable presumptive ceiling here is 30 months.

[74] The fundamental question for the analysis under the *Jordan* framework is whether the trial judge's nine months of decision-making time is part of the calculation of total delay.

[75] What makes this question difficult is that *Jordan* does not specifically refer to a judge's decision-making time. Nonetheless, in my view, when I read the majority's decision in the context of its stated purpose to address the culture of complacency and pre-*Jordan* section 11(*b*) jurisprudence, including *Rahey SCC*, I conclude that a judge's decision-

making time is to be included in the calculation of total delay for the purposes of applying the *Jordan* framework.

Pre-*Jordan* Section 11(*b*) Jurisprudence

[76] The following Supreme Court of Canada cases provide the jurisprudential context for considering the majority's decision in *Jordan*: *Rahey SCC*; *R v Conway*, [1989] 1 SCR 1659; *R v Askov*, [1990] 2 SCR 1199; *Morin*; *MacDougall*; *R v Godin*, 2009 SCC 26; and *R v Vassell*, 2016 SCC 26. Four common themes emerge from these cases:

1. section 11(*b*) protection extends until, at least, a decision or verdict is rendered;

2. section 11(*b*) requires a court to assess the reasonability of the overall lapse of time involved, rather than considering the reasonableness of individual time periods;

3. there are inherent time requirements to all cases, which must be factored into the section 11(*b*) analysis; and

4. the judiciary has a responsibility in ensuring that accused persons are tried within a reasonable period of time.

Rahey

[77] In *Rahey*, the accused moved for a directed verdict after the Crown closed its case. The provincial court magistrate rendered a decision dismissing the directed verdict motion 11 months after the motion was made and 27 months after the charges were sworn.

[78] The accused applied to the superior court for a stay of proceedings, alleging unreasonable delay. Glube CJTD noted that directed verdict motions are often dealt with in an hour, or a day at most, and that the delay in this case was unexplained and "shocking, inordinate and unconscionable" (*Re Rahey and The Queen* (1983), 9 CCC (3d) 385 at 399 (NSSC (TD)) (*Rahey TD*)).

[79] On appeal, MacKeigan CJNS, for the Court, agreed that the magistrate "took inordinate time to decide the nonsuit motion" and "was disgracefully slow" (*Re Rahey and The Queen* (1984), 13 CCC (3d) 297 at 305 (NSSC (AD)) (*Rahey AD*)).

[80] The Supreme Court of Canada unanimously determined that the accused's section 11(*b*) rights were violated, despite four separate sets of reasons and a 2-2-2-2 split. The reasons differed mainly with respect to the extent to which prejudice is a relevant factor when assessing an alleged violation of section 11(*b*). All call for a consideration of all of the circumstances, including any explanation given by the judge, in determining whether there has been a breach of section 11(*b*) of the *Charter*.

[81] Importantly, four members of the Court (eight judges taking part in the decision) explicitly held that the right to be tried within a reasonable period of time is not terminated upon the commencement of a trial, but rather continues until a decision in the trial is rendered and that the relevant time period for section 11(*b*) purposes includes the decision-making time of a judge. Lamer J (Dickson CJC concurring) stated (at para 40):

> The stigma of being an accused does not end when the person is brought to trial but rather when the trial is at an end and the decision is rendered. The computation cannot end as of the

> moment the trial begins, but rather must continue until the end of the saga, all of which must be within a reasonable time.

[82] Lamer J concluded that the overall lapse of time had to be assessed, including the time taken by the trial judge (at para 47):

> The time elapsed from the moment of the charge until the closing of the Crown's case was, though lengthy, not in violation of the accused's rights under s. 11(*b*) given "the time requirements inherent in the nature of the case". However, when the unjustified additional lapse of time caused thereafter by the trial judge is inserted into the overall period of time, this accused's rights under s. 11(*b*) have, in my respectful view, been clearly infringed.

[83] La Forest J reasoned that decision-making time must be included in the assessment based on courts being "custodians" of *Charter* principles (at para 95):

> [T]he courts, as custodians of the principles enshrined in the *Charter*, must themselves be subject to *Charter* scrutiny in the administration of their duties. In my view, the fact that the delay in this case was caused by the judge himself makes it all the more unacceptable both to the accused and to society in general. It would be cold comfort to an accused to be brought promptly to trial if the trial itself might be indefinitely prolonged by the judge. The question of delay must be open to assessment at all stages of a criminal proceeding, from the laying of the charge to the rendering of judgment at trial.

[84] Wilson J (Estey J concurring) and Le Dain J (Beetz J concurring) did not specifically discuss the issue of whether section 11(*b*) protection extends until the judge's decision is given. However, their reasons indicate their implicit acceptance of that view. Wilson J agreed with Lamer J that the accused was not tried within a reasonable time and specifically stated that

defence waiver could not be deemed where defence counsel consented to judge-generated adjournments (see para 67). Le Dain J included "the conduct of the court" as a factor to be considered when determining a section 11(*b*) motion (at para 55).

Conway

[85] In the context of assessing delay related to a third trial, the Supreme Court of Canada, in *Conway*, confirmed the balancing of factors approach from *Rahey SCC* and that overall delay is to be assessed, keeping in mind the inherent time requirements of the case "to process the charge" (at p 1674). The Court did not explicitly indicate that decision-making time should be included in the overall period of time. L'Heureux-Dubé J, for the majority, assumed, without deciding, that the views expressed in *Rahey SCC* in regard to decision-making time, supported the parties' assumption that section 11(*b*) protection extended to include final adjudication of a charge, post appeal (see p 1671). Therefore, *Conway* did not change course from *Rahey SCC* that decision-making time is included in the time under review.

Askov

[86] In the well-known decision *Askov*, Cory J, for the majority, confirmed the following factors are to be considered when determining whether there has been an infringement of section 11(*b*): 1) the length of delay; 2) the explanations for delay; 3) waiver; and 4) prejudice to the accused. Importantly for this appeal, he reiterated that a court should take into account the inherent time requirements of the case (see p 1223) and also suggested that "actions or the lack of actions" by a judge would count against the Crown (*ibid*). However, he did not explain why actions or inaction of judges should

be weighed against the Crown. The explanation came later in *MacDougall*, which I comment on below.

Morin

[87] *Morin* became the leading section 11(*b*) case for 25 years until *Jordan*. In *Morin*, Sopinka J, for the majority, definitively refined the approach to be used when determining whether there has been an infringement of section 11(*b*). According to this approach, the factors are: 1) the length of the delay; 2) waiver of time periods; 3) the reasons for the delay, including a) inherent time requirements of the case, b) actions of the accused, c) actions of the Crown, d) limits on institutional resources and e) other reasons for delay; and 4) prejudice to the accused (see pp 787-88).

[88] Under the *Morin* framework, eight to 10 months is reasonable for institutional delay in the provincial court, although deviations of several months in either direction could be justified by the presence or absence of prejudice. The Court confirmed a further six to eight months is reasonable for institutional delay between committal and trial in the superior court, as established in *Askov*.

[89] In *Morin*, the majority also emphasised that although the accused and society share an interest in prompt trials, there is also a strong societal interest in bringing accused persons to trial that must be considered, and that as the seriousness of the offence increases, so does the societal demand that the accused be brought to trial (see pp 786-87).

[90] Sopinka J specifically indicated that, "Leaving aside the question of delay on appeal, the period to be scrutinized [under section 11(*b*)] is the time

elapsed from the date of the charge to the end of the trial" (at p 788) (emphasis added). In support of this statement, he relied on the case of *R v Kalanj*, [1989] 1 SCR 1594, which referenced La Forest J's statement in *Rahey SCC* that, "The question of delay must be open to assessment . . . from the laying of the charge to *the rendering of judgment at trial*" (at p 1608) (italics added). The clear implication to be drawn from Sopinka J's remarks is that the section 11(*b*) protection extends until the rendering of judgment at trial and not just until the time period during which all the evidence is heard.

[91] In considering the reasons for delay, Sopinka J noted that there will be an acceptable amount of inherent delay in every case, indicating that a judge will have to consider the complexity of the case to ascertain how much time would be an acceptable amount of time for trial preparation and "for the trial to be conducted once it begins" (at p 792) (emphasis added). In this discussion, Sopinka J did not specifically consider whether a judge's decision-making time would be considered part of the inherent delay of the case.

[92] However, in considering other reasons for delay, Sopinka J addressed actions of trial judges (at p 800):

> There may be reasons for delay other than those mentioned above, each of which should be taken into consideration. As I have been at pains to emphasize, an investigation of unreasonable delay must take into account all reasons for the delay in an attempt to delineate what is truly reasonable for the case before the court. *One such factor which does not fit particularly well into any other category of delay is that of actions by trial judges. An extreme example is provided by Rahey, supra. In that case it was the trial court judge who caused a substantial amount of the delay. Nineteen adjournments over the course of 11 months were instigated by the judge during the course of the trial. Such delay is not institutional*

> *in the strict sense. Nevertheless, such delay cannot be relied upon by the Crown to justify the period under consideration.*
>
> [italics added]

[93] What is unclear in this discussion is whether Sopinka J viewed the entire time during which the magistrate adjourned the case in *Rahey* to be other delay attributable to the Crown, or whether part of the adjourned time could be considered acceptable inherent delay, as part of the time needed to decide the issues in the case. The other judges in *Morin* also did not consider this point. This issue was resolved in *MacDougall*.

MacDougall

[94] *MacDougall* is a sentencing case, where the judge fell ill three months into an indefinite adjournment waiting for a pre-sentence report. The judge eventually retired and 13 months after the accused pled guilty, the Crown asked for another judge to be assigned to sentence the accused. The Supreme Court of Canada overturned the stay granted to the accused. The issues before the Court were whether the section 11(*b*) right to be tried within a reasonable period of time included the right to be sentenced within a reasonable time and how a court should assess the time elapsed due to judicial illness.

[95] McLachlin J, writing for the Court, concluded that the right to be tried within a reasonable period of time included the right to be sentenced within a reasonable time. In so doing, she relied upon the reasons of Lamer and La Forest JJ in *Rahey SCC*, stating (at para 19):

> The next question is whether the phrase "tried within a reasonable time" in s. 11(*b*) is capable of extending to sentencing. A purposive reading suggests that "s. 11(*b*) protects against an overlong subjection to a pending criminal case and aims to relieve against the stress and anxiety which continue until the outcome of the case is final": *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 610 (emphasis added), *per* Lamer J., Dickson C.J. concurring. In the same case La Forest J., with whom McIntyre J. concurred, stated that "tried" means not "brought to trial", but "adjudicated" (p. 632). Since the "outcome" of a criminal case is not known until the conclusion of sentencing, and since sentencing involves adjudication, it seems reasonable to conclude that "tried" as used in s. 11(*b*) extends to sentencing.

[96] McLachlin J also noted that pre-*Charter* jurisprudence accepted that sentencing was part of the trial process, indicated that *Charter* rights should be given a generous and purposive interpretation, and referred to Sopinka J's reasons in *Conway* that, "'(j)ugé' means 'judged' or 'sentenced' and connotes a sense of adjudication which goes beyond the mere trial itself" (at para 23; see also paras 20-22, 24).

[97] Her comments with respect to inherent time requirements of a case, how judicial illness is to be accounted for in the *Morin* analysis and when the Crown may become responsible for the delay, are particularly pertinent (at paras 44-47):

> The period of time attributable to inherent time requirements is the period of time that would normally be required to process a case, assuming the availability of adequate institutional resources. The period of time attributable to inherent time requirements is neutral and does not count against the Crown or the accused in the s. 11(*b*) reasonableness assessment.
>
> . . .

> [T]he inherent time requirements of a case are not limited to commonplace delays which occur in every situation, but may include delay due to extraordinary and unforeseeable events: *Allen, supra* [*R v Allen* (1996), 110 CCC (3d) 331 (Ont CA)].
>
> A trial judge falling ill may be such an event. Judges being human, it is inevitable that they will occasionally fall ill. Where this occurs and where it is not reasonable for the Crown to immediately apply to have the judge replaced (see below), the delay due to the judge's illness may be regarded as part of the inherent time required to complete the case. At the point, however, where it is reasonable for the Crown to apply to have the judge replaced, the inherent delay due to the judge's illness changes to Crown delay.
>
> The inherent time requirements of sentencing include the time required to prepare pre-sentence material, subpoena necessary witnesses and schedule the sentencing proceeding. They may also include a judge's illness up to the point when it is reasonable for the Crown to apply to have the judge removed and replaced. The reasonableness of the inherent time requirements of sentencing must be assessed on a case by case basis.
>
> [emphasis added]

[98] As I read McLachlin J's comments, a reasonable amount of time of the resulting delay for extraordinary or unforeseeable events will be considered as part of the inherent time requirements and will be treated as neutral under the *Morin* analysis. However, once the delay has extended to the point at which it would be reasonable for the Crown to take steps to intervene, any delay in taking such steps will be counted against the Crown.

[99] In my view, the resulting implication from *MacDougall* is that the inherent time requirements of a case will also include reasonable time periods for any judge (not just an ill one) to come to a decision. The further implication is that if a reasonable time period for a healthy judge's decision-making has been exceeded (whether regarding conviction or sentencing), and

it would be reasonable for the Crown to take steps to intervene, then any delay in taking such steps would be analysed as other reasons for the delay and should be counted against the Crown.

[100] Thus, the inherent time periods discussed in *Morin* include a reasonable period of time for any judge to come to a decision and such time period will be treated as neutral under the *Morin* analysis.

[101] McLachlin J explained that the Crown bears the responsibility beyond the reasonable amount of time to wait for a decision because it is the Crown that bears the responsibility of bringing accused persons to trial, and that responsibility "extends to a duty to ensure that the trial proceedings, once engaged, are not unduly delayed" (at para 49). She discussed the Crown's duty and the competing factor of judicial independence (at paras 50-52):

> The Crown's duty to ensure that trial proceedings are not delayed may require the Crown to apply to have a judge removed and replaced when a judge falls ill in the course of a trial. There is no set time period after the onset of illness when the Crown must apply to have the judge removed and replaced. Whether and when the Crown should act depends on what is reasonable in the circumstances of the case.
>
> It can safely be said that the Crown should bring an application to replace the judge when it is clear that the judge will not recover or return to judicial duties. However, where the expectation is that a judge seized of the case will recover and return, the matter is more difficult. In such a case, the Crown must balance two factors. On the one hand, the Crown must consider the fact that a judge who has heard evidence in a case is seized of the case. This means that the task of deciding all the issues on the case, including sentencing, falls to that judge and no other. The removal of a judge from an unconcluded case has the potential to interfere with the independence of the judiciary and the right of an accused to a fair trial. Absent compelling reasons, it would be improper for Crown counsel to apply to remove a judge seized of the case. To do so

> might create a perception that the Crown was interfering with the right of the judge to independently judge all the issues in the case. It might also create a perception of unfairness to the accused. . . .
>
> In summary, where the trial judge falls ill and is expected to return, the Crown must balance two competing factors: (1) the need to proceed with the utmost care and caution when considering the removal of a judge seized with a case in order to protect judicial independence and fairness to the accused, and (2) the need to protect the accused's s. 11(*b*) rights and prevent undue prejudice to the accused. The practical question is whether the apprehension of a violation of the accused's s. 11(*b*) rights has reached the stage where it outweighs the general rule that the judge seized of a case should conclude it. Where the apprehension of a s. 11(*b*) violation outweighs this general rule, the Crown has a duty to apply to remove and replace the seized judge. If the Crown fails to do so, any resulting delay will be counted against the Crown in the s. 11(*b*) assessment.

[102] While her comments are in the context of a judge falling ill, they illustrate that the Crown has a duty to ensure that trial proceedings are not delayed even in cases where the judge is not ill, but has unreasonably delayed making a decision. In such circumstances, the Crown will have to proceed with utmost caution in deciding how to handle the undue delay by a judge, bearing in mind both judicial independence and the accused's right to a trial within a reasonable period of time.

[103] Ultimately, the Court, in *MacDougall*, determined that the Crown's decision to wait nine months for the judge's recovery was reasonable in the circumstances, given that the Crown had no indication that the judge would not recover and had to "proceed cautiously" (at para 67) in moving to replace the judge, and that the delay was post-conviction when the accused's interests were more attenuated. This time period was therefore considered inherent delay, which left only a three-month period of delay to be considered. As the

accused had not been prejudiced by the delay, the Court concluded that the delay was not unreasonable pursuant to section 11(*b*). See paras 67-71.

Godin and Vassell

[104] Prior to *Jordan*, the Supreme Court of Canada considered section 11(*b*) in *Godin*; and *Vassell*. A judge's decision-making time was not at issue in either of those cases. However, in both cases, the Court encouraged trial courts "not to lose sight of the forest for the trees" when engaging in the *Morin* analysis (*Godin* at para 18; see also *Vassell* at para 3) and ultimately determined that, where the accused was not responsible for any significant delay in the case, both a 30-month wait for the scheduled start of a straightforward sexual assault trial (see *Godin*) and a three-year wait for a three-day trial of a drug offence (see *Vassell*) were unreasonable.

Summary of Pre-*Jordan* Section 11(*b*) Jurisprudence

[105] To summarise, leading into *Jordan*, the Supreme Court of Canada had determined that:

1. the section 11(*b*) protection extends to a decision or verdict, as well as sentencing, and that the entire time period, from the charge until the decision and sentencing, should be considered under the *Morin* analysis;

2. there are inherent time requirements to all cases which should be treated as neutral and recognised that part of the inherent time requirements of the case will include a reasonable period of time for

a judge to consider and render a decision, whether on a motion, conviction or sentencing;

3. the Crown and the judiciary have responsibility in ensuring accused persons are tried within a reasonable period of time;

4. at a certain point in time, the Crown has to take steps to intervene if a judge takes too much time making a decision. This determination must balance judicial independence with the accused's right to be tried within a reasonable time; and

5. the time period under review should be viewed holistically, and a court should not "lose sight of the forest for the trees" (*Godin* at para 18).

Jordan

[106] As already explained, *Jordan* replaced the *Morin* framework and introduced the framework of presumptive ceilings "set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry)" (at para 46) (emphasis added). Although this language may suggest that these ceilings relate only to the start of a trial, Moldaver, Karakatsanis and Brown JJ (Abella and Côté JJ concurring) further explained (at para 49):

> For cases going to trial in the provincial court, the presumptive ceiling is 18 months from the charge to the actual or anticipated end of trial. For cases going to trial in the superior court, the

> presumptive ceiling is 30 months from the charge to the actual or anticipated end of trial.
>
> [emphasis added]

[107] Thus, the majority intended the ceilings to include the total time elapsed, from the charge to the end of trial. Other comments in *Jordan*, particularly when read in the context of the pre-*Jordan* section 11(*b*) jurisprudence, lead me to conclude that this means that the presumptive ceilings include a judge's decision-making time leading to conviction.

[108] When addressing the facts in *Jordan*, the majority noted that the "trial was adjourned, and it eventually concluded . . . with his conviction" and that "[t]he total delay from Mr. Jordan's charges to the conclusion of the trial was 49.5 months" (at para 12) (emphasis added). However, the background of the case shows that the section 11(*b*) motion was made in advance of the scheduled trial dates, so the trial judge arrived at the 49.5-month total by using the last scheduled day of the trial dates (see *R v Jordan*, 2014 BCCA 241 (*Jordan BCCA*) at para 18). Once the trial judge dismissed the section 11(*b*) motion, "An Agreed Statement of Facts was filed and the judge was invited to convict Mr. Jordan of five drug-related offences" (*Jordan BCCA* at para 4). The trial judge did include two weeks of decision-making time by the preliminary inquiry judge as inherent delay and counted that in the overall 49.5 months of elapsed time (see *R v Jordan*, 2012 BCSC 1735 at para 78).

[109] In *Jordan*, the majority explains that the time for sentencing is not before the Court and indicates that what is before the Court is the time up to when a conviction is entered (at para 49, n 2):

> This Court has held that s. 11(*b*) applies to sentencing proceedings (*R. v. MacDougall*, [1998] 3 S.C.R. 45). Some sentencing proceedings require significant time, for example, dangerous offender applications or situations in which expert reports are required, or extensive evidence is tendered. The issue of delay in sentencing, however, is not before us, and we make no comment about how this ceiling should apply to s. 11(*b*) applications brought after a conviction is entered, or whether additional time should be added to the ceiling in such cases.
>
> [emphasis added]

[110] By specifically raising the matter of sentencing and carving out an exception for sentencing, the majority is acknowledging the pre-*Jordan* jurisprudence that extended section 11(*b*) protection beyond conviction to sentencing. I think it is noteworthy that the majority did not see the need to make a similar comment regarding a judge's decision-making time, whether for interlocutory matters or for the final decision leading up to conviction.

[111] Importantly, the starting point for the majority when establishing the presumptive ceilings was the *Morin* guidelines for institutional delay (see paras 52-53). The majority then included "additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case" (at para 53). This time includes the "inherent time requirements of the case" (*ibid*), which at the time of *Jordan*, included a judge's decision-making time.

[112] In this regard, Cromwell J's minority opinion, which favoured the continuation of the *Morin* framework, is consistent with decision-making time being part of the inherent time requirements of a trial. He made several statements which indicate that the inherent time requirements of a case include the time period required to "conclude" the trial (at paras 164, 173) and "the

time to resolve legal issues" (at para 176). He specifically indicated that a case's inherent time requirements consist of "the length of time required for that type of case to be prepared, heard and decided" (at para 184) (emphasis added).

[113] Perhaps most compellingly, the majority calls for all participants in the justice system, including judges, to leave behind a culture of complacency towards delay (see para 4) and adopt a culture of achieving reasonably prompt justice. The *Jordan* framework requires the courts to be more accountable (see para 114).

Conclusion Re Whether Decision-Making Time Falls Under the Jordan Framework

[114] I agree with the Crown that the time period attributable to sentencing and the delay motion is not before this Court (see *Schenkels* at paras 41-42).

[115] I disagree with the Crown that the trial judge's nine-month decision-making time does not fall under the *Jordan* framework.

[116] I conclude that the decision-making time of a trial judge, whether for interlocutory matters or the final verdict, is part of the time period to be considered in assessing whether the total delay is above or below the presumptive ceiling. In my view, this conclusion reflects: 1) the commentary of the majority in *Jordan*; 2) the pre-*Jordan* section 11(*b*) jurisprudence, which included decision-making time for a verdict as inherent time; 3) the approach of the *Jordan* framework to include inherent time requirements of a case within the presumptive ceilings; and 4) the clear message to all players

in the justice system, including judges, to address the culture of complacency with respect to delay.

[117] While I agree with Slatter JA in *Mamouni* that decision-making time is not unexpected or extraordinary, I differ from him as to the effect of that. In my view, the very fact that a judge's decision-making time is commonplace, underscores that it is part of the inherent time requirements of a case and included in the presumptive ceilings unless the Crown can demonstrate exceptional circumstances in accordance with the *Jordan* framework.

[118] I also agree with Slatter JA that a judge's decision-making time is not necessarily delay in the traditional sense of the word. Rather, it simply falls within the defined term total delay used by the majority in *Jordan*. However, the time beyond that which is reasonably required to consider and decide the case can be characterised as delay.

[119] Whether the decision-making time is considered as inherent requirements or as delay, or as a combination, I am of the view that both periods fall within the presumptive ceilings under *Jordan*. In the event of a complex case or a discrete event, the exceptional circumstance attenuates the "bright line" of the presumptive ceiling (see *Mamouni* at para 55).

[120] The motion judge focussed a great deal on the tension between judicial independence and the right to trial within a reasonable period of time, as did Slatter JA in *Mamouni*. They also focussed on trial judges having enough time to reach a thoughtful and well-reasoned decision. They expressed concern for trial judges being pressured to render their decisions too soon if the presumptive ceiling was fast approaching.

[121] I understand those concerns and the inclusion of decision-making time in the presumptive ceilings may, from time to time, put added pressure on the work of a trial judge. Trial judges often do their work under the pressure of other workload and time constraints in a particular case, whether it be, for example, an interlocutory ruling in a jury trial or preparing final jury instructions. Trial judges are under an ethical obligation to release their decisions as soon as possible in the circumstances (see the Canadian Judicial Council, "Ethical Principles for Judges" (last visited 19 December 2018) at 21, online (pdf): <www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicial conduct_Principles_en.pdf>). The six-month guideline established by the Canadian Judicial Council does not provide a presumption of reasonableness for all circumstances.

[122] Judicial independence is a foundational principle for the administration of justice and, as explained by the motion judge, it has a constitutional underpinning. However, judicial independence has never insulated judges from scrutiny under section 11(*b*) of the *Charter* (see *Rahey SCC*; and *MacDougall*). To remove a judge's decision-making time from the *Jordan* framework, would have the effect of insulating judges from the governing principles for all actors in the system to address the culture of complacency in the criminal justice system that *Jordan* is addressing.

[123] The Crown argues that including decision-making time in the presumptive ceiling calculation will result in more recusal motions, which in turn will cause more delay. I do not find this argument persuasive. Judges must address issues that call for scrutiny of their own actions or biases in other circumstances, such as recusal motions themselves. As well, under the

previous section 11(*b*) framework, a judge could likewise be asked to assess the constitutional aspects of his or her own delay.

[124] I reiterate that the *Jordan* framework allows for specific circumstances to be addressed by the Crown in establishing an exceptional circumstance. Circumstances particular to a judge may excuse all or part of the decision-making time if such circumstances are placed on the court record. For example, in *Vandermeulen*, a pre-*Jordan* decision of this Court, an email from the preliminary hearing judge to counsel advising that he had taken an unexpected leave of absence during that time resulted in the time taken by the judge being excused as inherent delay.

[125] Finally, just as trial judges anticipate the length of time of many aspects of proceedings, trial judges are capable of estimating how long it might take to write a decision following the last day set for an anticipated trial. See, for example, the decision of Paciocco J (as he then was) in *R v JM*, 2017 ONCJ 4.

[126] To conclude, I am of the view that a judge's decision-making time is to be assessed under the *Jordan* framework. A judge's decision-making time is not, in and of itself, a discrete exceptional event. However, circumstances may exist that could be characterised as a discrete exceptional event for which some time deduction could be made. What constitutes exceptional circumstances is not a closed list and "will depend on the trial judge's good sense and experience" (*Jordan* at para 71). Furthermore, a judge's decision-making time can be considered, along with other circumstances, when determining whether or not the case is particularly complex.

[127] The majority in *Jordan* indicated that a case may be considered a particularly complex case if there are a significant number of applications brought in a case, a significant number of legal issues raised in a case or the issues in the case are complicated. In such circumstances, a judge may take a significant amount of time to consider, decide and write a decision regarding the numerous or complicated issues raised. Or, as alluded to by Watson JA in *Mamouni*, time may creep up because of the number of motions or applications that are brought and have to be heard and decided by the judge, regardless of how complicated they actually are (see para 55). As noted in *Cody*, when determining whether a case's complexity is sufficient to justify its length, a qualitative assessment must occur and the overall complexity of the case must be considered. A case will not automatically be considered exceptionally complex solely because one aspect of the case is complex, or simply because the trial judge took a long time to render a decision.

[128] Given the foregoing, I am of the view that the motion judge erred in law in concluding that the decision-making time by a judge does not fall under the *Jordan* framework, but rather is to be assessed separately by determining, in the context of the particular case, whether the time taken was "shocking, inordinate and unconscionable".

Applying the Jordan Framework in This Case

[129] Because this is a transitional case, all of the steps of the *Jordan* framework are to be applied. Thus, total delay must be calculated and defence delay deducted. If the net delay exceeds the presumptive ceilings, then any deductions for discrete exceptional events should be calculated. If the ceiling is still exceeded, it must be determined whether the delay can be excused on

the basis that the case was particularly complex. If the case does not qualify as being particularly complex, then the court must consider whether the transitional exceptional circumstance applies to excuse the delay (see *Cody* at paras 20-25).

[130] The total delay in this case encompasses the time elapsed from the charge date (April 11, 2013) to the date of conviction (October 25, 2016). The total delay is 42 months and two weeks.

[131] I agree with the Crown that two months and three weeks for defence delay should be deducted. This relates to the period when both the Crown and the Court were available for trial dates, but the defence was not (see *Cody* at para 30; also see *Schenkels* at para 36). This leaves a net delay of 39 months and three weeks, well over the *Jordan* ceiling of 30 months for superior court trials.

[132] There is no issue with the motion judge's determination that there were no exceptional circumstances present, the proceedings were not complex and there were no discrete events that sidelined the trial (see *KGK* at para 82). Thus, as the net delay still exceeds the 30-month presumptive ceiling, the motion judge's analysis of the transitional exceptional circumstance must be considered, but in the context of his error of not including the decision-making time in his calculations of total delay and net delay.

The Morin Analysis

[133] As discussed earlier, the length of the delay under *Morin* includes the time period from the charge until the end of trial, which included the decision-making time of the judge. The length of the delay here was

42 months and two weeks. The length of the delay raises the issue of its reasonableness and calls for an inquiry into the reasons for the delay (see *Morin* at p 789).

[134] The motion judge did not specifically consider the reasons for the delay according to the categories set out in *Morin*—inherent time periods; accused's actions; Crown actions and institutional delay; and other reasons. Therefore, this Court must conduct its own balancing of the relevant factors (see *R v Picard*, 2017 ONCA 692 at para 137; and *R v Regan*, 2018 ABCA 55 at para 116).

[135] No defence waiver was alleged by the Crown.

[136] In my view, the delay period is reasonably assessed as follows:

1. five months for the Court, the Crown and the defence to be ready to move forward to the preliminary inquiry (from the date of the charge on April 11, 2013 to September 6, 2013 for setting the preliminary inquiry date) is inherent delay;

2. 13 months and one week for the preliminary hearing on October 14, 2014, which I assume was the first date available by the Court, given the lack of information about setting this date (September 6, 2013 to October 14, 2014) is institutional delay;

3. three months and two weeks after committal until a trial date was set (October 14, 2014 to January 29, 2015) is inherent delay;

4. seven months and three weeks from the date of setting the trial to the first trial date offered by the Court (January 29, 2015 to

September 21, 2015) is appropriately divided between institutional delay and inherent delay. Both the Crown and the defence would have needed preparation time for trial. Given the lack of complexity of the case and the fact that the preliminary inquiry had been held, I am of the view that a reasonable allocation of this period is two months and three weeks for inherent delay and five months institutional delay; and

5. 13 months between the first offered trial date of September 21, 2015 to October 25, 2016 when the trial judge convicted the accused, is appropriately divided between inherent delay and institutional delay. I think it is reasonable for the time required for the trial (which took 10 days) and for the trial judge to decide the case is three months, given that this was a relatively straightforward case. The remainder of the time would therefore be assessed as Crown delay, which is 10 months.

[137] With respect to the last determination of Crown delay, for the purposes of the *Morin* analysis, I did not deduct any time for the unavailability of defence counsel when setting trial dates, as I did under the *Jordan* framework. The *Jordan* framework treats the unavailability of defence counsel differently than the *Morin* framework. Under the *Jordan* framework, where the court and Crown are ready to proceed, but the defence is not, the resulting delay is to be deducted from the total delay as defence delay (see *Jordan* at para 64; and *Cody* at para 30). The motion judge made no finding against the accused that defence counsel acted unreasonably in the setting of trial dates and the record does not disclose that defence counsel's unavailability was unreasonable (see *Vandermeulen* at para 48). As stated in

Godin, defence counsel are not required "to hold themselves in a state of perpetual availability" (at para 23).

[138] The total institutional delay therefore totals 18 months and one week, with Crown delay of 10 months, for a total of 28 months and one week. The *Morin* guideline for institutional delay in the superior court is 14 to 18 months for a trial after a preliminary hearing.

[139] *Morin* also requires consideration of prejudice. The motion judge accepted that any delay is inherently prejudicial, but noted that "inherent prejudice must be considered in light of the applicant's late filing of the delay motion and in light of what the Crown points to as the lack of any evidence of action taken to mitigate delay in trying the matter" (at para 88).

[140] The motion judge was correct to indicate that the inherent prejudice to the accused had to be considered in light of the late delay motion. However, in my view, the motion judge erred by considering that the accused's lack of action had the effect of mitigating the delay. The Court in *Morin* stated that, "Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider" (at p 802) (emphasis added), but went on to state (*ibid*):

> Nonetheless, in taking into account inaction by the accused, the Court must be careful not to subvert the principle that there is no legal obligation on the accused to assert the right. Inaction may, however, be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay.

[141] In *Godin*, the Court indicated that it is reasonable to infer that prolonged exposure to criminal proceedings resulting from delay gives rise to

some prejudice and that the longer the delay, the more likely it is that such an inference should be drawn (see para 31). In *Vandermeulen*, this Court held that, "Where the delay . . . is in the area of three years, the trial is not complex and none or little of that delay is attributable to the accused, the inherent prejudice is significant" (at para 56).

[142] *Godin* also indicates that the prejudice to an accused's liberty interests, in regard to pre-trial custody and bail conditions, should be taken into account (see para 30). However, the motion judge did not take into consideration the fact that the accused was under strict bail conditions, including a curfew. In *R v George*, 2006 MBCA 150, this Court held that, "An absolute curfew, even with an exception for school or work purposes, is significantly restrictive of one's liberty" (at para 68).

[143] Here, the institutional delay to the end of evidence and submissions was very close to the high end of the *Morin* guidelines. It would have been reasonable for the accused to have believed, based on previous law, that the time elapsed would be treated as reasonable, not anticipating that nine more months would pass before he received a decision. Indeed, the trial judge indicated at the end of submissions that he considered whether he might issue the decision the next day, but ultimately indicated he would get to the decision as soon as he could. The accused should not be faulted for not bringing forward a delay motion sooner in these circumstances, considering that the ever-increasing delay was due to the trial judge, in whose hands the accused's fate rested.

[144] There is no question that the charges in this case are indeed serious. In *Godin*, the Supreme Court of Canada also considered that the case was a

straightforward one with few complexities and requiring very modest amounts of court time. Here, the case was straightforward with few complexities, had been set for two weeks of trial time and took less than 10 full days of court time.

[145] Finally, as stressed in *Godin*, despite that the *Morin* framework calls for the "minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important . . . not to lose sight of the forest for the trees while engaging in this detailed analysis" (at para 18).

[146] In summary, the delay from the charge to the conviction date was 42 months and two weeks, none of which was directly attributable to the defence, for the completion of a relatively straightforward case. The inherent prejudice to the accused's security interests, given the passage of time, was significant, and the prejudice to the accused's liberty interests are relevant. Although under *Morin* standards the amount of institutional delay would be considered marginally reasonable up until the adjournment for the trial judge's decision, the addition of Crown delay (including the decision delay) pushed the time elapsed above the limits of reasonableness under the *Morin* framework. In this regard, both defence counsel and the Crown took steps at different points to enquire as to the status of the trial judge's decision. The Crown's enquiry had some effect. Nonetheless, the decision was released one and one-half months after that enquiry and almost four months after the Supreme Court of Canada delivered its message in *Jordan* to all participants in the criminal justice system to address the culture of complacency.

[147] Therefore, considering all of these factors and not losing sight of the forest for the trees, I conclude that the transitional exceptional circumstance does not apply in this case.

[148] This result is consistent with section 11(*b*) case law from the Supreme Court of Canada and this Court under the *Morin* framework (see *Godin*; *Vassell*; *Cody*, *Williamson*; *George*; and *Vandermeulen*).

[149] In *Godin*, a pre-*Jordan* case, a preliminary inquiry into a serious sexual assault charge took place 21 months after charges were laid, and the trial was only set to commence nine months later, a total of 30 months after charges were laid. The Court upheld the stay of charges, noting that the case was straightforward and needed only modest amounts of court time, and yet still far exceeded the *Morin* guidelines (see para 2). The Court also noted that virtually all of the delay was attributable to the Crown and was unexplained, and there was evidence of prejudice to the accused.

[150] In *Vassell*, the Supreme Court of Canada's last section 11(*b*) case under the *Morin* framework, the Court determined that section 11(*b*) was breached where the accused "waited three years for a three-day trial" in a drug trafficking case of moderate complexity (at para 3). The Court noted that the accused ended up being the sole person to be tried in the case, which originally included six other accused persons, who slowed the proceedings down, contrary to the accused's proactive steps to move the matter along (see paras 6-7). The Court concluded that the accused's trial "became bogged down as a result of a series of events over which he had no control and for which he bore no responsibility" (at para 12).

[151] In *Jordan*, the majority ultimately determined that "a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating" (at para 128).

[152] In *Cody*, despite serious drug and weapons charges, the Court held that the Crown had not justified a net delay of 36.5 months based on its reliance on the previous state of the law, in circumstances where the trial judge found "real and substantial actual prejudice" and "[t]he trial judge also made an express finding that Mr. Cody's conduct was not 'inconsistent with the desire for a timely trial'" (at para 73; see also paras 72, 74).

[153] In *Williamson*, despite the accused being charged with very serious historic sexual offences against a child, the Court held that the net delay of 34 months could not be justified by the Crown based on its reliance on the previous state of the law in circumstances where the case was straightforward, the institutional delay exceeded the *Morin* guidelines and the accused had attempted to move the case along.

[154] In *George*, a pre-*Jordan* case, despite serious charges, including kidnapping and robberies with a firearm, a 39-month delay from the date of the charges to the conclusion of trial was unreasonable in circumstances where the case was "not a hugely complicated case in and of itself" (at para 33), inherent prejudice was inferred from the length of the delay, most of the delay was institutional or caused by the Crown and little of the delay was attributable to the accused.

[155] In *Vandermeulen*, a pre-*Jordan* case, despite serious domestic assault charges, including sexual assault causing bodily harm, this Court determined that a 37-month delay from the date of the charges to the conclusion of trial, with no delay attributable to the accused in a relatively simple matter, was unreasonable.

[156] This case is different from three other decisions of this Court (see *Schenkels*; *Johnston*; and *Tummillo*).

[157] *Schenkels*; and *Johnston* involved total delays of just over 30 months and were ultimately considered reasonable, either due to the net delay falling below the presumptive ceiling after time periods for defence waiver were taken into account (see *Schenkels*), or because the transitional exception applied in circumstances where additional time was required as the result of the case taking an unexpected turn when the main witness in the case died (see *Johnston*).

[158] In *Tummillo*, a post-*Jordan* case, the total delay was 51 months, but the trial judge found the accused had either waived or was directly responsible for over 21 months of the delay. Thus, the 30-month ceiling had not been breached. Also, the Court held that the transitional exceptional circumstance did not apply as a *Morin* analysis would likewise have taken into account the accused's responsibility for a large portion of the delay.

Conclusion

[159] This is a transitional case under *Jordan*. The motion judge erred in law in how he assessed the nine months taken by the trial judge to decide the

case and render his verdict. More particularly, the motion judge erred in not assessing that time under the *Jordan* framework.

[160] The total delay from the date of the charge to the date of the trial judge's decision is 42 months and two weeks. After deducting defence delay of two months and three weeks, the net delay is 39 months and three weeks. There are no exceptional circumstances in this case. The Crown has not demonstrated that the transitional exceptional circumstance should apply in this case. Under the *Morin* framework, the delay in question is 42 months and two weeks. I am of the view that such delay (or even a delay of 39 months and three weeks) for this relatively straightforward case is unreasonable for the purposes of section 11(*b*) of the *Charter*.

[161] Given this conclusion, the question of whether the motion judge erred in stating that the test established by *Rahey SCC* was whether a judge's decision-making time was "shocking, inordinate and unconscionable", is moot. Nonetheless, for the sake of completeness, I will explain briefly why I am of the view that *Rahey SCC* does not stand for that principle.

[162] In *Rahey*, the accused moved for a directed verdict after the Crown closed its case. The provincial court magistrate rendered a decision dismissing the directed verdict motion 11 months after the motion was made and 27 months after the charges were sworn.

[163] The accused applied to the superior court for a stay of proceedings, alleging unreasonable delay. In considering the length and reasons for the delay, Glube CJTD noted that the delay was unexplained and "shocking, inordinate and unconscionable" (*Rahey TD* at p 399).

[164] On appeal, MacKeigan CJNS, for the Court, agreed with Glube CJTD that the provincial court magistrate "took inordinate time to decide the nonsuit motion" and "was disgracefully slow" (*Rahey AD* at p 305).

[165] While the four separate judgments of the Supreme Court of Canada justices in *Rahey SCC* vary somewhat, all call for a consideration of all of the circumstances, including any explanation given by the judge in determining whether the delay was unreasonable and therefore breached section 11(*b*) of the *Charter*.

[166] None of the judgments referred to the test of "shocking, inordinate and unconscionable". These words were Glube CJTD's description of the delay in that case. As stated by Lamer J (Dickson CJC concurring) (at para 19):

> Glube C.J.T.D. was of the view that this delay was "shocking, inordinate and unconscionable" and prejudiced the accused. The Court of Appeal called the trial judge "disgracefully slow". Regardless of how it is phrased, the courts below have agreed that this delay was unreasonable.
>
> [emphasis added]

[167] La Forest J (McIntyre J concurring) also referred to the lower courts' descriptions of the judicial delay, stating, "The delay itself was described by both courts below as shocking; there is no adequate explanation for it" (at para 127) (emphasis added).

[168] I am not aware of any appellate court case or academic commentary that suggests the test in *Rahey SCC* is as described by the motion judge. The lower court cases in which a test of "shocking, inordinate and

unconscionable" has been applied are recent and rely upon the motion judge's application of such a test in the present case (see *R v Zilney*, 2017 ONCJ 610 at para 19; *R v Basha and Dokaj*, 2017 ONSC 5897 at para 138; and *Hammer* at para 21).

[169] I am of the view that the motion judge erred in law when he concluded that *Rahey SCC* established the test of "shocking, inordinate and unconscionable" when assessing whether a judge's decision-making time breaches an accused's section 11(*b*) right to be tried within a reasonable period of time. Rather, the test applied in *Rahey SCC* was whether the decision-making time, in the context of all of the circumstances of the case, is unreasonable for the purposes of addressing an accused's section 11(*b*) motion for a stay of proceedings. Given that the motion judge did not apply the correct test, his conclusion that the nine months taken by the trial judge to render his decision "is not so sufficiently 'shocking, inordinate and unconscionable' as to be violative of the [accused's] s. 11(b) ***Charter*** rights" is not entitled to deference (at para 104(4)).

[170] Therefore, in the event that I am wrong in my conclusion that a judge's decision-making time falls under the *Jordan* framework, I would apply the test of whether the nine months taken by the trial judge to render his decision, in the context of all of the circumstances, is unreasonable for the purposes of section 11(*b*) of the *Charter* and I would conclude that it was.

Decision

[171] I conclude that the accused's section 11(*b*) right to be tried within a reasonable period of time was breached.

[172] I would allow the accused's appeal and stay the proceedings against him.

Hamilton JA

CAMERON JA

Introduction

[173] I have had the benefit of reading the reasons of my colleague Hamilton JA regarding the accused's section 11(*b*) motion. I do not disagree with her that the time that it takes a judge to make a decision is subject to section 11(*b*). However, with respect, I differ from her finding that the 18-month and 30-month ceilings set out in *Jordan* (the *Jordan* ceilings), which delineate when delay becomes presumptively unreasonable, apply to the time that it takes a trial judge to reach a decision in either a pre-trial motion or the ultimate decision regarding guilt in a criminal trial. In my view, the *Jordan* ceilings do not apply to the time it takes to make a judicial decision.

[174] I am also of the view that the motion judge correctly determined that the standard of unreasonableness for the time it takes to make a judicial decision is that set out in *Rahey*. That is, whether the delay is "'shocking, inordinate and unconscionable'" (*Rahey SCC* at para 43). Applying that test, I would not find that the motion judge erred in finding that, while the time that it took the trial judge in this case to reach his decision regarding the guilt of the accused was long, it was not unreasonable.

[175] Absent the time it took to reach a judicial decision, and applying *Jordan*, I would not find the delay occasioned between the time that the accused was charged and the time that the evidence was concluded to be unreasonable.

[176] Regarding his conviction appeal for the charges of sexual interference and invitation to sexual touching, the accused maintains that the

trial judge erred in admitting his video-recorded statement to police as evidence in the trial, and in his credibility analysis. He also asserts that the reasons of the trial judge were insufficient. In my view, the accused has not shown error and I would dismiss these grounds of appeal.

[177] Finally, I would deny the accused leave to appeal the sentences of five years' incarceration on the charge of sexual interference and four years' incarceration on the charge of invitation to sexual touching.

Background

[178] At the time of the allegations, the accused was the stepfather of the complainant. The complainant was born in 1998. Her mother (J) and the accused married in 2001. Between 2002 and 2009, the accused and J had five children together. In February of 2011, J moved out of the family home and the accused became the primary caregiver to all of the children, including the complainant.

[179] In April of 2013, when she was 14 years old, the complainant disclosed to her teacher that the accused had been "violating" her. A police investigation ensued resulting in the complainant providing a video-recorded statement. In that statement, she alleged that the accused had been sexually abusing her since she was a child. She said that abuse started with the accused touching her breasts and vagina and progressed to him committing oral sex on her and trying to rub his penis on her vagina. She said that he also tried to get her to perform oral sex on him. Aside from a general recall of abuse when she was younger, the complainant also described specific incidents of recent abuse occurring up until the week prior to her disclosure. One of those

incidents included the use of a vibrator and the most recent one involved the accused showing the complainant pornography on his computer.

[180] When the accused was arrested, he provided a video-recorded statement to police. Originally, he denied any wrongdoing. However, after being shown portions of the complainant's statement, he admitted to touching her breasts and vagina while masturbating himself on three to four occasions between 2011 and 2013.

[181] The charges alleging sexual interference and invitation to sexual touching were broken down into two periods. The accused was charged with invitation to sexual touching and sexual interference between September of 2002 to April of 2008 and the same charges between May of 2008 and April of 2013. He was also charged with one count of sexual assault between September of 2002 and April of 2013.

[182] At the accused's trial, the complainant's statement was entered as evidence pursuant to section 715.1 of the *Criminal Code* (the *Code*). She also testified. After a *voir dire*, during which the accused testified, his statement was also admitted in the trial. The accused again testified in his defence.

[183] The evidence and final submissions concluded on January 21, 2016 and the trial judge reserved his decision. He delivered his final verdict on October 25, 2016.

[184] The trial judge held that there was a reasonable doubt about the accused's guilt on the charges of sexual interference and invitation to sexual touching spanning between 2002 and 2008. He acquitted the accused of those charges. However, the trial judge convicted the accused of the three

remaining charges. He specified that the instances of abuse for which he convicted the accused occurred between 2011 and 2013. He entered a stay of proceedings on the charge of sexual assault based on the principle enunciated in *Kienapple v The Queen*, [1975] 1 SCR 729. After the preparation of a pre-sentence report, the accused was sentenced to five years' incarceration for the charge of sexual interference and four years concurrent for the charge of invitation to sexual touching.

[185] On October 24, 2016, the accused brought the delay motion that is the subject of this appeal. On January 9, 2017, the accused argued a motion seeking that the trial judge recuse himself from hearing the delay motion. The trial judge allowed the recusal motion. Thus, the delay motion was heard and decided by another judge (the motion judge).

Grounds of Appeal

[186] The accused appeals on the following grounds:

1. that the motion judge erred in not granting the accused a stay of proceedings based on a breach of section 11(*b*) of the *Charter*;

2. that the trial judge erred in admitting the accused's statement into evidence;

3. that the trial judge erred in his assessment of credibility by applying a greater degree of scrutiny to the evidence of the accused compared to the evidence of the complainant;

4. that the reasons of the trial judge were insufficient; and

5. that the sentence imposed was harsh and excessive.

Ground 1—Unreasonable Delay

[187] The proceedings leading up to the trial and its disposition are dealt with by my colleague at paras 24-39 of her decision and I need not repeat them here. In addition, I do not intend to substantially review the law as set out in *Jordan* and explained in *Cody*, as that has been done by my colleague in her reasons and explained in other decisions of this Court (see, for example, *Schenkels* at paras 6-20; *Johnston* at paras 14-18; and *Tummillo* at paras 12-14). Finally, I agree with her statement about the standards of review applicable to the various stages of section 11(*b*) decision-making.

The Jordan Ceilings Do Not Include Judicial Decision-Making Time

[188] As earlier indicated, it is my respectful view that the *Jordan* ceilings do not apply to the time that it takes a trial judge to make a decision. In this regard, I rely on the reasons of the motion judge found at paras 29-32, 43-60, and, as well, in part, on the reasons of Slatter JA of the Alberta Court of Appeal in *Mamouni* at paras 72-93; the Nova Scotia Court of Appeal in *Brown* at paras 72-75; and the *obiter* comments of Hoegg JA in *King* at paras 167-182. I also rely on the unofficial English translation of the reasons written by Vauclair JA on behalf of a unanimous five-member panel of the Québec Court of Appeal in *Rice* at paras 10, 41-43.

[189] In *Jordan*, a majority of the Supreme Court of Canada significantly changed the framework for determining whether a person's right to a trial within a reasonable time pursuant to section 11(*b*) has been violated. In the

translated version of *Rice*, Vauclair JA described *Jordan* as "the third case to send shock waves through the interpretation of section 11(*b*)" (at para 10).

[190] Despite its overhaul of the framework for applying section 11(*b*), the Court never mentioned or considered how to analyse a judge's decision-making time in either *Jordan* or its companion case of *Williamson*. It was not at issue in those cases. Rather, in each of those cases, the bulk of the delay occasioned was institutional (see *Jordan* at para 15; and *Williamson* at paras 3-8, 27). In the subsequent decision of *Cody*, the delay was caused by the Crown, the defence and the system (see para 1). Again, judicial decision-making time was not considered.

[191] There is no question that *Jordan* emphasises the importance of all players, including judges, in ensuring that trials proceed efficiently. That does not mean that the Court intended to impose deadlines on a judge's decision-making time based on how long it takes a case to go to trial. Interestingly, in *Cody*, the Court had the opportunity to suggest ways in which judges could act to improve the process, yet did not mention the decision-making process (at paras 37-39):

> We reiterate the important role trial judges play in curtailing unnecessary delay and "changing courtroom culture" (*Jordan*, at para. 114). As this Court observed in *Jordan*, the role of the courts in effecting real change involves
>
> > implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this Court, must

> be mindful of the impact of their decisions on the conduct of trials. (para. 139)
>
> In scheduling, for example, a court may deny an adjournment request on the basis that it would result in unacceptably long delay, even where it would be deductible as defence delay.
>
> In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion.
>
> Trial judges should also be active in suggesting ways to improve efficiency in the conduct of legitimate applications and motions, such as proceeding on a documentary record alone. This responsibility is shared with counsel.

[192] The above suggestions address the process of getting the trial done. Save for the suggestion that summary decisions should be made where a matter is frivolous, the issue of decision-making time is not mentioned. In my view, the failure to mention this important issue evidences that the Court did not consider the time it takes to make a judicial decision to be factored in the *Jordan* ceilings.

[193] It is also significant that, in *Cody*, the Court specifically noted that provincial Attorneys General intervened asking that the *Jordan* ceilings be adjusted (see para 3). Clearly, the Court was alive to the institutional resource issues that had arisen in trying to set trial dates and have the evidence completed within the *Jordan* ceilings. Yet, again, the Court did not address judicial decision-making time. In my view, this further emphasises that the focus of the Supreme Court of Canada in delineating and affirming the *Jordan* ceilings was not on such delay. That is, the Court was concerned with moving the case through the system to the conclusion of the evidence.

[194] I do not disagree with my colleague that, under the *Morin* framework, the Supreme Court of Canada found that, absent unreasonable delay, the time that is required for judicial decision-making was classified as inherent time required to bring the case to trial. I understand her argument that the fact that *Jordan* states that the 30-month ceiling was intended to account for inherent delays means that it includes judicial delay. In my view, however, the Court was referring to trial process issues and not the time required for judicial decision-making. For example, *Jordan* states (at para 53):

> Second, the presumptive ceiling also reflects additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case. These factors include the inherent time requirements of the case and the increased complexity of criminal cases since *Morin*. In this way, the ceiling takes into account the significant role that process now plays in our criminal justice system.
>
> [emphasis added]

[195] This further indicates that the Court did not consider the time it takes to render a judicial decision a factor in the process of prosecuting a case.

[196] Similarly, in *Brown*, the Nova Scotia Court of Appeal stated (at para 73):

> *Jordan* was only released on July 8, 2016 and makes no reference to judicial decision-rendering being a factor in the determination of unreasonable delay. Under a *Morin* analysis, this time would be excluded as part of the inherent time requirements of a case (*R. v. K.G.K.*, 2017 MBQB 96, at para. 30). That said, an inordinately delayed decision can provide a stand-alone basis for a stay of proceedings (*R. v. Rahey*, [1987] 1 S.C.R. 588).
>
> [emphasis added]

[197] As pointed out by Slatter JA in *Mamouni*, "consideration of the 'inherent needs of the case', [is] a discrete factor that is dropped in ***Jordan*/*Cody***" (at para 76). Further, as he notes, the solution in *Jordan* was to "remove the very concept of 'delay' and look instead to the mere passage of time, measured against presumptive deadlines" (*ibid*).

[198] Historically, in the great majority of cases, section 11(*b*) motions were made prior to the commencement of the trial and not on the date of the verdict. A verdict may be delivered on the last day of the trial, or it may be reserved. Prior to *Jordan*, there was nothing in the jurisprudence indicating that trial judges were to estimate how long a reserved decision might take in advance of the trial and include that in their calculation of inherent delay in the *Morin* analysis.

[199] The evolution of the *Morin* analysis to include judicial decision-making time became what I would describe as an uncomfortable fit in the category of inherent delay.

[200] For example, in *Morin*, when considering reasons for delay, Sopinka J noted that there would be an acceptable amount of inherent delay in every case, including consideration of the complexity of the case and the time required for the trial to be conducted. He did not specifically consider whether a judge's decision-making time would be considered to be part of the inherent delay. However, in considering "other reasons" for delay, he stated (at p 800):

> There may be reasons for delay other than those mentioned above, each of which should be taken into consideration. As I have been at pains to emphasize, an investigation of unreasonable delay must take into account all reasons for the delay in an attempt to delineate what is truly reasonable for the case before the court. One such factor which does not fit particularly well into any other category of delay is that of actions by trial judges. An extreme example is provided by *Rahey* [*SCC*], *supra*. In that case it was the trial court judge who caused a substantial amount of the delay. Nineteen adjournments over the course of 11 months were instigated by the judge during the course of the trial. Such delay is not institutional in the strict sense. Nevertheless, such delay cannot be relied upon by the Crown to justify the period under consideration.

[201] Based on the above, I am unable to equate an inherent factor, such as normal time frames for defence and the Crown to bring a case to trial, with the time that it takes to render a judicial decision—especially in light of the constitutional principle of judicial independence.

Unreasonable Delay and Judicial Independence

[202] *MacDougall* was the first case wherein the Supreme Court of Canada classified the time that it took to render a decision as inherent delay. However, in that case, the Court was careful to recognise concerns with trial fairness and judicial independence.

[203] In *MacDougall*, the Supreme Court of Canada considered a period of nine months of sentencing delay, caused by the illness of the sentencing judge, in the context of a motion pursuant to section 11(*b*). Writing for a unanimous Court, McLachlin J explained that, in the *Morin* analysis, inherent delay is "neutral and does not count against the Crown or the accused in the s. 11(*b*) reasonableness assessment" (at para 44).

[204] She noted that delay caused by a judge's illness is inherent delay until a point is reached where it would be reasonable for the Crown to apply to have the judge replaced.

[205] She stated that, when considering whether to apply to have a judge replaced (at para 52):

> [T]he Crown must balance two competing factors: (1) the need to proceed with the utmost care and caution when considering the removal of a judge seized with a case in order to protect judicial independence and fairness to the accused, and (2) the need to protect the accused's s. 11(*b*) rights and prevent undue prejudice to the accused. The practical question is whether the apprehension of a violation of the accused's s. 11(*b*) rights has reached the stage where it outweighs the general rule that the judge seized of a case should conclude it.

[206] In my view, the effect of including judicial decision-making time in the *Jordan* ceilings is to transform the characterisation of judicial decision-making time from neutral to time now ticking on the clock of presumptively reasonable delay in the *Jordan* framework. The effect of imposing the *Jordan* ceilings on judicial decision-making time, which, once breached, can only be justified by exceptional circumstances, raises the issue of the constitutional principle of judicial independence. It must be remembered that, aside from sentencing, the decision to convict or acquit is the very last step in the trial process and the one least likely to be accounted for in setting trial dates.

[207] In finding that the *Jordan* ceilings did not apply to judicial decision-making time, the motion judge noted the interaction between the constitutional principles of the right to be tried within a reasonable time and judicial independence. He observed that Supreme Court of Canada jurisprudence provides that courts should interpret constitutional principles in a manner that allows them to co-exist as opposed to conflict (see paras 45-46; see also *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 50).

[208] The motion judge considered the principle of judicial independence, stating (at para 49):

> In ***Beauregard v. Canada***, [1986] 2 S.C.R. 56, the Supreme Court noted as follows in respect to what was at the core of the constitutional principle of judicial independence:
>
> > 21 Historically, the generally accepted core of the principle of judicial independence *(sic)* has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.

He further observed that judicial discretion also includes a judge's capacity to prioritise his or her own workloads (see para 52).

[209] The motion judge continued to consider the practical implications of the imposition of the *Jordan* ceilings on judicial decision-making time, stating (at paras 54-55):

> The Crown is on solid ground when it asserts that a bright-line presumption does not provide an adequate or sufficiently nuanced mechanism to resolve the tension between colliding constitutional principles. As a practical matter, were judges subject to the categorical and unconditional obligation to come to determinations within the presumptive ceilings, the manner in which the case was conducted or unfolded would determine the manner in which a judge approaches and perhaps makes his own or her own decision. In other words, in some cases which might conclude well below the ceiling, a judge would have many months to render well-crafted written reasons. In other cases which conclude very close to the ceiling, the judge might be left with mere days.
>
> It is also worth noting that the inclusion of judicial reserve time in the presumptive ceiling would put both the Crown and the courts in the untenable position of having to schedule all matters in a manner so as to have them completed many months below the ceiling in order to accommodate potential judicial writing time. As noted by way of example, if as in the present case, nine months (of judicial delay) were considered as a reference point, all Superior Court trials would have to be completed within 21 months, and Provincial Court trials within nine months. Like the Crown, I do not believe this is what the Supreme Court intended when it provided the identifiable, predictable and certain timelines discussed in ***Jordan***.

[210] I agree with the above observations.

[211] The decision of the motion judge, that judicial decision-making time should not be included in the *Jordan* ceilings, was cited with approval by the

Nova Scotia Court of Appeal in *Brown* at para 74; by Hoegg JA in *King* at paras 176, 180; and by Slatter JA in *Mamouni* at para 90.

[212] In *King*, after stating in *obiter* that she was disinclined to include the time taken by a trial judge to decide pre-trial applications in the *Jordan* ceilings, Hoegg JA observed (at para 181):

> Given the different approaches taken by different provincial courts, it seems to me that the Supreme Court of Canada must decide this issue. The Supreme Court of Canada did advert to the issue from a somewhat different perspective in *Jordan*, saying at paragraph 139 "all Courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials". I would add that, in my view, consideration of this issue should take into account judges' workloads, the demands on their time, and the resources available to support them.
>
> [emphasis added]

[213] As also noted by Hoegg JA, the Alberta Court of Appeal in *Mamouni* was split with regard to whether delay in judicial decision-making should be factored into the *Jordan* ceilings. Slatter JA held that it should not be included. Watson JA concluded that it should be included in calculating post-charge delay in the first instance, but then subtracted it as an exceptional circumstance. As noted by Hoegg JA, the approach taken by Watson JA places emphasis on the fact that the delay is entirely out of the control of the Crown (see para 177). The problem with such an approach is that it only applies where there are exceptional circumstances, yet the Crown is very rarely able to account for or explain the amount of time it takes for a judge to make a decision.

[214] I would also observe that, if the Supreme Court of Canada had intended to include judicial decision-making time in its calculation of the *Jordan* ceilings, it would have made at least some mention of the Canadian Judicial Council (CJC)'s "Ethical Principles for Judges" (at ch 4):

> **10.** The proper preparation of judgments is frequently difficult and time consuming. However, the decision and reasons should be produced by the judge as soon as reasonably possible, having due regard to the urgency of the matter and other special circumstances. Special circumstances may include illness, the length or complexity of the case, an unusually heavy workload or other factors making it impossible to give judgment sooner. In 1985, the Canadian Judicial Council resolved that, in its view, reserved judgments should be delivered within six months after hearings, except in special circumstances.

[215] I recognise that the ethical principles applicable to the timing for the proper preparation of judgments do not determine whether an individual's section 11(*b*) right has been breached. On the other hand, had the Supreme Court of Canada intended to include decision-making time in the *Jordan* ceilings, I am of the opinion that it would have made mention of the guidelines endorsed by the CJC.

[216] All of the above informs the concern expressed by the motion judge regarding the problematic and random nature of setting trial dates that include judicial decision-making time in the *Jordan* ceilings. For example, when setting trial dates, should the CJC guidelines be factored in, thereby automatically reducing the time in which evidence is to be completed? That approach would mean that the evidence must be completed within 12 months for trials in the provincial court and 24 months in the superior courts. Other practical concerns are with the election of the mode of trial. If an accused

chooses a trial by a jury, wherein a verdict is given immediately after the trial, is the time allocated to complete the evidence the full 30 months? How does this contrast to a judge-alone trial where judicial decision-making time must be determined in advance? When the trial date is being set, who is responsible for determining how much judicial decision-making time the eventual trial judge will require to decide various pre-trial motions and reach a verdict?

[217] To summarise, to the extent that it applies to judicial decision-making time to render a verdict, I agree with the following statement of Vauclair JA in *Rice* (at para 41):

> Total delay is calculated from the time charges are laid to the actual or anticipated end of the trial. On one hand, it must thus be understood that the ceilings and framework include only the time required to complete the presentation of evidence at trial and pleadings. By taking the actual or anticipated end of the trial as a bookend (the latter corresponding to the duration foreseen by the parties to complete their evidence and pleadings), the Supreme Court could not have believed that the verdict would be rendered at the same time.

[218] I respectfully part with *Rice* in its inclusion of the judicial decision-making time required to decide interlocutory matters or pre-trial motions in the *Jordan* ceilings. Rather, I agree with the approach taken in *Brown*. In *Brown*, the issue was the time it took to decide a pre-trial motion. The Nova Scotia Court of Appeal agreed that "there are compelling reasons for not including in the section 11(b) analysis under the *Jordan* framework the time it takes for a judge to render a decision" (at para 74). In *Brown*, the Court did not consider the time that it took the trial judge to decide a pre-trial motion in its calculation of delay. See also Slatter JA in *Mamouni* at para 88.

[219] In conclusion, I would not take judicial decision-making time into account in a determination of whether the *Jordan* ceilings have been breached. In my view, the time that it takes to reach a decision, while not immune to section 11(*b*), should be subject to a separate analysis.

The Test for Unreasonableness of Judicial Decision-Making Time

[220] After determining that the *Jordan* ceilings do not apply to judicial decision-making time, the motion judge held that, pre-*Morin*, the test to be applied to determine unreasonableness was the "shocking, inordinate and unconscionable" test that he stated was set out in *Rahey SCC* at para 43 (at para 65).

[221] My colleague explains at paras 161-68 of her reasons why, in her view, such a test was not enunciated in *Rahey*. In support of her position, she quotes *Rahey SCC* at para 19, where Lamer J states that Glube CJTD described the delay as "shocking, inordinate and unconscionable" and the appellate court called it "disgracefully slow." After referring to these passages, Lamer J stated, "Regardless of how it is phrased, the courts below have agreed that this delay was unreasonable". In my colleague's view, this did not constitute the endorsement of a test.

[222] In my view, the above comment is ambiguous and could be read as having equated the descriptors of "shocking, inordinate and unconscionable" to being unreasonable in the circumstance of judicial decision-making delay. In this regard, I note *Rahey SCC*, where Lamer J states (at paras 42-43):

> Having thus determined that a delay that has occurred after the beginning of the trial is part of the delay that is to be calculated under s. 11(*b*), we must now determine whether the delay from

> the moment Rahey was charged with the offence until Judge McIntyre rendered his decision was unreasonable."
>
> . . .
>
> [T]he eleven-month delay was the result of inaction on the part of the trial judge when faced with a decision that generally is made within a few days. Glube C.J.T.D. called his delay "shocking, inordinate and unconscionable". The Court of Appeal referred to his "disgraceful slowness". In the words of s. 11(*b*), the delay is unreasonable.

[223] In my view, a consideration of Lamer J's comments in their totality leads to the conclusion that he was using all of the terms interchangeably, without distinction.

[224] In adopting the "shocking, inordinate and unconscionable" test, the motion judge noted that such a test "ensures an adequate appreciation for the need to reconcile the tension between the constitutional principles of judicial independence and the right to a trial within a reasonable time" (at para 67). Quoting *R v Creve*, 2014 ABQB 494 at para 110, he emphasised that characterisation of the test in such a manner "would suggest that the delay was not within the 'substantial variations on how different judges approach their duties'" (at para 68).

[225] The test, as enunciated by the motion judge, has been applied in *Zilney* at para 19; *Basha and Dokaj* at para 138; and *Hammer* at para 21.

[226] In the passage that I earlier quoted from *Brown*, the Nova Scotia Court of Appeal cited, with approval, the conclusion of the motion judge that, previously, judicial decision-making delay was considered to be inherent and excluded from the *Morin* analysis. Citing *Rahey*, the Court then stated, "That

said, an inordinately delayed decision can provide a stand-alone basis for a stay of proceedings" (at para 73).

[227] In *King*, Hoegg JA said that the delay that the trial judge took to determine two pre-trial motions was "quite reasonable and not at all excessive, and could not in any way be characterised as 'shocking, inordinate, or unconscionable'" (at para 182). While I concede that neither of these two appellate level references clearly adopt the *Rahey* standard as the test for determining the reasonableness of judicial decision-making delay, neither do they reject it.

[228] In my view, the motion judge did not err in law in his interpretation of *Rahey* nor in his characterisation of the test of reasonableness as it applies to the time that it takes to render a judicial decision.

Was the Judicial Decision-Making Delay Unreasonable?

[229] At the outset, I would agree with the motion judge that "care must be taken before one judge comments on how long another needs to write a decision once the judge has started on the decision" (at para 52). I also agree with him that the six-month ethical guideline established by the CJC is "not necessarily delay which is constitutionally unreasonable" (at para 79).

[230] In considering whether the nine-month judicial delay was excessive, I am mindful of the comments of the motion judge regarding the assessment of delay (at para 76):

> The reasonableness of the time required for a judge to [deliberate, come to a decision and craft reasons] must be considered in light of the reality that a judge's full efforts and time cannot be dedicated to or dictated by a single case. Even in cases which do

> not appear legally complex, the case in question may still require a thorough recitation of evidence which in turn may require a reference to transcripts. In other instances, the decisions may require extensive legal analysis and jurisprudential review. Whatever the unique requirements in a given case, it must always be remembered that in every case, judges should aim to provide considered reasons which "enhance the qualities of justice in the criminal process in many ways." See ***Lamacchia*** [*R v Lamacchia*, 2012 ONSC 2583], *supra*, at para. 7, citing ***R. v. R.E.M.***, 2008 SCC 51, [2008] 3 S.C.R. 3.

[231] The motion judge acknowledged that the nine-month delay that it took the trial judge to reach a decision represented a "comparatively long timeframe" (at para 95). However, in finding that the judicial decision-making time taken in this case was not unreasonable, the motion judge noted that the charge was serious but that other contextual factors must be considered. In this regard, he found that the time it took to render the verdict did not impact the timing of the trial itself. He acknowledged that there was inherent prejudice to the accused and the administration of justice, but found that it was not egregious and that it did not exceed the proper bounds of judicial independence.

[232] While not an unusually complex case, there are contextual factors. The evidence was presented over a period of seven days. The time during which the complainant indicated that the sexual abuse continued was lengthy. The Crown theory was that the abuse started when the complainant was age two. As earlier indicated, the charges alleging sexual interference and invitation to sexual touching were broken down into two periods.

[233] The trial commenced with a *voir dire* to determine the admissibility of the video-recorded statement that the complainant gave to the police. She

was extensively cross-examined, including being cross-examined on her statement as well as on her evidence at the preliminary hearing. The trial included a *voir dire* regarding the admissibility of the video-recorded statement given by the accused to police. That *voir dire* concerned the voluntariness of the video-recorded statement as well as an assertion of a section 10(*b*) *Charter* breach. The trial judge ruled the statement admissible. The accused testified at the *voir dire*, and the trial proper. There was also an agreed statement of facts that was submitted as part of the trial.

[234] Thus, while not unusually complex, the trial judge still did have to consider the testimony of the complainant when she was 17 years old regarding events that happened when she was very young, as well as the statement that she gave when she was 14 years old and her evidence at the preliminary inquiry. He also had to consider the statement that the accused gave to the police admitting to some of the abuse, as well as the evidence of the accused denying that he told the truth in his police statement and denying the charges.

[235] Indeed, at the conclusion of the evidence, the trial judge stated:

> I've been considering whether I'm in a position to, to make a decision on this matter by tomorrow. I don't think I am. I, I want to consider the submissions but the, in particular, the evidence further.

[236] He also stated that he had a "few matters under reserve" but that he was hoping to get to the decision as soon as he could.

[237] When he gave his decision, the trial judge acquitted the accused on the charges dated between 2002 and 2008. He convicted him of the charges

of sexual interference and invitation to sexual touching between 2008 and 2013 and sexual assault. This, in my view, evidences that some thought had to be given to the matter.

[238] As stated by the motion judge, there was, unsurprisingly, little evidence before him about the personal circumstances of the trial judge and/or his workload. Even with the benefit of the transcripts from the trial, this Court has only minimally more evidence. That evidence is that the trial judge wanted to consider the submissions and evidence and that he had a "few matters under reserve". Nonetheless, as the motion judge stated (at para 59):

> [W]here there is an explanation for judicial delay that implicates s. 11(b), the constraints of the judicial role will prevent judges in question from being able to provide that explanation and the Crown, upon whom the burden to explain the delay would fall, will rarely have access to that information. In this context, it should go without saying that judges do not become witnesses nor do they file affidavits.

[239] Short of filing an affidavit, a trial judge may feel compelled in his or her reasons on a section 11(*b*) motion to explain his or her judicial decision-making time taken to reach a decision on any pre-trial motions or even a verdict. See, for example, the unreported decision of *R v Giesbrecht*, 2017 MBPC 41 at paras 25, 33. If such an explanation or justification is not forthcoming until the time of the section 11(*b*) decision that can hardly be fair to the parties.

[240] In *MacDougall*, the Supreme Court of Canada was dealing with a delay that was explained by the illness and eventual retirement of the judge. That constituted a situation different than the one in this instance. In that case,

there was an obvious explanation for the delay. It did not involve the judge's contemplation of the decision that he was making and/or judicial workload or other circumstances personal to the judge. There, the Court found that the Crown should bring an application to replace the judge in circumstances where it is clear that the judge will not recover or return to judicial duties. Absent such a circumstance, compelling reasons would be required to justify the possible interference with judicial independence by applying to remove the judge (see para 51).

[241] In the companion case of *R v Gallant*, [1998] 3 SCR 80, the Court found that a 10-month delay in sentencing the accused was inherent delay on the basis that it was only after 10 months that the Crown learned that the judge would not be returning. Again, the Court emphasised that, where a trial judge falls ill and is expected to return, the Crown must balance (at para 9):

> (1) the need to proceed with the utmost care and caution when considering the removal of a judge seized with a case in order to protect judicial independence and fairness to the accused, and (2) the need to protect the accused's s. 11(*b*) rights and prevent undue prejudice to the accused.

[242] In my view, it is important to note that the Crown's authority to request a new trial judge where a judge dies or is no longer able to continue a trial has been provided for by Parliament in section 669.2 of the *Code*. There is no such authority in the circumstances presented here.

[243] In this case, it is not obvious what the Crown should have done or when it should have done it. Nonetheless, the Crown waited until two months after the six-month guideline provided for by the CJC before writing the letter to the Associate Chief Justice inquiring about the status of the trial decision.

In his affidavit filed on the section 11(*b*) motion, the Crown Attorney with conduct of the trial swore that the only reason the Crown waited until September 14, 2016 to send the letter was because it was aware that, on June 28, 2016, the trial judge indicated to defence counsel that the decision would be forthcoming.

[244] On September 26, 2016, the Associate Chief Justice responded to the letter from the Crown advising that the trial judge would be in contact with them shortly to schedule a date for the decision to be delivered. That is exactly what happened when, on September 30, 2016, the trial judge confirmed that he would deliver his decision on October 25, 2016. I pause to note that the section 11(*b*) motion was only filed on October 24, 2016, one day before the date set for the delivery of the decision.

[245] Absent an error of law, or an error in the application of the correct legal principles to the facts to assess and allocate the various periods of time, the decision of the motion judge regarding the overall reasonableness of the delay is entitled to deference (see *Vandermeulen* at para 30). I agree that the length of time that it took for the trial judge to reach a verdict in this case was long. However, I am not persuaded that the motion judge's decision—that the "judicial delay falls within the variation allowed by judicial independence" (at para 103) and therefore did not breach section 11(*b*)—was unreasonable.

Was the Delay from the Time That the Charge Was Laid to the Conclusion of the Evidence Unreasonable?

[246] In his calculation of delay, absent the time that it took the trial judge to reach a verdict, the motion judge noted that it took 33 months and one week

to bring the matter to trial and conclude the evidence. He acknowledged that there was purported defence delay of two months and three weeks as being the time from when the Crown and the Court were available to set dates, but the defence was not. Nonetheless, in order to give "every consideration to the defence position" (at para 83) he used the 33-month and one-week calculation in his analysis of whether the transitional exception established in *Jordan* should apply.

[247] In his reasons for decision, the motion judge was careful to note that *Jordan* provides that the transitional exception was established to ensure that tens of thousands of charges would not be stayed, as was done after the decision in *Askov*. The motion judge considered the seriousness of the offence, the lack of prejudice to the accused and the lack of the accused's diligence in pursuing the delay as part of his assessment of the transitional exception (see paras 88, 93-94). Ultimately, he found no breach of section 11(*b*).

[248] To start, I agree with my colleague that the two months and three weeks of delay occasioned by the accused should have been deducted in the *Jordan* analysis prior to a consideration of whether the transitional exception applied. If the motion judge had removed that time from the calculation, the total delay to bring the matter to trial and conclude the evidence would have been 30 months and two weeks, just barely over the *Jordan* ceiling. Applying the test of what the parties at the time would have considered to be reasonable delay under the *Morin* guidelines, I would not find the time to be unreasonable. I note that, in *Schenkels*, this Court found that a delay of 30 months and 19 days was not unreasonable (see para 62).

[249] Based on all of the above, I am not persuaded that the motion judge erred in his finding that this case constituted a transitional exceptional circumstance pursuant to *Jordan*.

[250] Having found that no breach of section 11(*b*) occurred, I now continue to deal with the accused's remaining grounds of appeal as well as his application for leave to appeal sentence.

Ground 2—Admission of the Statement

[251] The accused argues that his statement was not voluntary. He argues that, despite knowing that he suffered from ADHD, claustrophobia, problems with his hearing and a learning disability, the police kept him in a cell for four hours and interrogated him for approximately two and one-half hours without allowing him to have fresh air. He argues that he was a heavy smoker in need of a cigarette and thus suffering anxiety.

[252] In addition, during the course of his interview, the police asked the accused what he thought people would think if they played the complainant's video-recorded statement at the MTS Centre during a Winnipeg Jets hockey game. The accused maintains that this statement constituted a threat which induced him to make the admissions that he made.

[253] In his reasons for admitting the statement, the trial judge referred to *R v Oickle*, 2000 SCC 38, for the guiding principles. He noted that the analysis was a contextual one. He specifically acknowledged the accused's circumstances. Based on his review of the accused's video-recorded statement, he found that the police questioning was in a conversational tone, and that it was not confrontational. He observed that the accused's demeanour

was consistent throughout the interview and that there were no verbal or physical signs of anxiety or anything that would have alerted the police that the accused was in some distress. He further found that the accused's responses were appropriate to the questions asked and that the accused did not indicate that he was having any difficulty understanding them. He held that, on the totality of the evidence, there was no evidence of oppression and that the accused had an operating mind.

[254] Regarding the alleged threat, the trial judge found that the comments regarding the MTS Centre were not couched in terms of a threat, "but simply a hypothetical example of how third parties would view the allegations." He noted that the accused's answer was responsive to the hypothetical.

[255] The above findings are findings of fact or mixed fact and law and are entitled to deference unless the trial judge made a palpable and overriding error (see *Oickle* at para 71). In *R v Richard (DR) et al*, 2013 MBCA 105, the standard was explained as follows (at para 33):

> If a trial court properly considers all of the relevant circumstances, a finding of voluntariness is essentially a factual one and should only be overturned on the basis of palpable and overriding error that affected the trial judge's assessment of the facts (see *Oickle* at para. 71). A disagreement with the trial judge regarding the weight to be given to various pieces of evidence is not grounds to reverse a finding on voluntariness (see *Oickle* at para. 22). Where a trial judge considers all the relevant circumstances and properly applies the law, deference is owed to the trial judge's determination on the voluntariness of the statement at issue. See *R. v. Spencer*, 2007 SCC 11 at paras. 16-17, [2007] 1 S.C.R. 500.

[256] In this case, the trial judge considered the accused's testimony at the *voir dire* regarding his difficulty comprehending and concentrating because

of his intellectual disability, as well as his severe hearing loss. He reviewed the video-recorded statement with regard to that testimony and found it to be voluntary.

[257] A review of the video-recorded statement supports his findings. At the outset of the interview, the accused was provided with a drink and was offered a blanket because he was cold. After learning of the accused's claustrophobia, the interrogating officer confirmed that the accused was comfortable in the room. The accused's demeanour and responsiveness to questions supports the findings of the trial judge. After the accused viewed a portion of the complainant's statement, he asked to go outside. When he was told that he was in police custody and was not allowed to go outside, he asked how long he would be in police custody. The interrogating officer responded that police were under an obligation to bring him before a magistrate within 24 hours, but that he did not know how long the accused would be with them. Next, the interrogating officer offered to go get the accused a second glass of water, which he accepted. Once the interrogating officer returned, he asked the accused if he wanted to see more of the complainant's statement. The accused refused this offer and immediately started to admit some of the allegations.

[258] The comment about the MTS Centre was put as a hypothetical question to the accused. His response was that, in his view, people would think that he "did it". He immediately followed that comment with a clear, unequivocal denial of the allegations. The accused did not make any admissions until after he viewed portions of the complainant's statement.

[259] Therefore, based on the above, I cannot conclude that the trial judge made a palpable and overriding error in admitting the accused's statement.

Ground 3—Credibility Assessment

[260] The accused argues that the trial judge erred in his assessment of credibility by applying a greater degree of scrutiny to his evidence compared to that of the complainant.

[261] A credibility assessment error in the nature alleged by the accused constitutes an error in law that undermines the fairness of a trial and can lead to a miscarriage of justice (see *R v Glays*, 2015 MBCA 76 at paras 13-14). However, this is a difficult argument to make. In *Glays*, the Court cited, with approval, the following passage from *R v Howe* (2005), 192 CCC (3d) 480 at para 59 (Ont CA), (at para 15):

> This argument or some variation on it is common on appeals from conviction in judge alone trials where the evidence pits the word of the complainant against the denial of the accused and the result turns on the trial judge's credibility assessments. This is a difficult argument to make successfully. It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.

[262] As already noted, at the trial, the complainant testified that the sexual abuse commenced when she was a small child. She described the abuse

as starting out with the accused touching her and progressing to him licking her vagina and breasts and wanting to get on top of her. She said that he also wanted her to perform oral sex on him, but that she refused. In cross-examination she admitted that she had opportunities to tell Child and Family Services, the police and a doctor about the abuse, but that she did not. She also agreed that she exaggerated at times in her recounting of the number of incidents.

[263] The accused testified. He denied the allegations. He stated that, in all of the years that he lived with the complainant, he was never alone with her. He said that he was lying to the police when he admitted to touching the complainant on the vagina and breasts while masturbating, and lying when describing specific instances of this behaviour in his statement.

[264] Credibility being the issue, the trial judge applied the test in *R v W(D)*, [1991] 1 SCR 742. He found that the accused's evidence was not credible and did not raise a reasonable doubt. He accepted some of the complainant's evidence and ultimately convicted the accused regarding allegations that the complainant said occurred between 2011 and 2013. He acquitted the accused of the charges of sexual interference and invitation to sexual touching spanning from 2002-2008.

[265] The accused argues that the trial judge struggled with the complainant's evidence regarding the charges from 2002-2008. He asserts that her evidence revealed "over-arching concerns" about her credibility and reliability. In support of this, he notes her difficulty in recalling fundamental details of the alleged incidents of abuse; that erroneous details had been provided in her police statement; and that she admitted that, at times, she was

not truthful. The accused also alleges that the trial judge did not give proper consideration to the fact that the complainant refused to have a doctor examine her vagina at the time that she disclosed. He argues that all of the above should have led the trial judge to have a reasonable doubt concerning all of the charges, not just those from 2002-2008.

[266] Further, he argues that the trial judge erred in concluding that the accused's evidence was not credible or reliable.

[267] The Crown argues that the accused is essentially attacking the credibility findings of the trial judge and, absent palpable and overriding error, those findings are reviewable on the standard of deference. I agree.

[268] The trial judge gave clear reasons for rejecting the accused's evidence. He stated:

> I find it is simply not credible that there would not have been times throughout the years when he was with the complainant and his children that he would not have been alone with her during certain periods, particularly when he was a single parent from 2011 onwards. I also find he could not possibly have had a memory of events such that he would remember that entire time period and have been able to testify to this as he did. His evidence in that regard was tailored and was not plausible and not credible. I also find the accused not credible on the issue of how long a roommate lived at the trailer with his family. I find that there were many times, particularly late in the evening, when the accused and the complainant had the opportunity to be alone together.
>
> The accused testified that he lied to police when he made the admissions that he did about the sexual contact he had with the complainant. I do not accept his explanation of why he made these admissions. I find that the accused was telling the truth when he eventually told the police in his statement that he had had sexual contact with the complainant. I do not accept that part of the admission where he alleges that it was the complainant that

> appeared to invite encounters by exposing herself to the accused, but I accept his evidence that he did have sexual contact with her. The accused acknowledged that he touched the complainant's breasts and vagina and ejaculated in her presence and had her touch him. The accused also acknowledged his guilt in writing in a brief apology letter.

[269] The trial judge noted that the complainant was 17 years old when she testified and 14 when she gave her video-recorded statement to the police. He said that he considered her testimony in accordance with *R v W(R)*, [1992] 2 SCR 122. That case recognises that, "Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection" (at p 133).

[270] The trial judge acknowledged the concerns raised by the accused regarding the complainant's evidence. In response to those arguments, he stated:

> Regarding the testimony of the complainant, there were a number of exaggerations and imprecisions in the testimony of the complainant. She acknowledged some of them. An example was when she said that she had been assaulted over "a million times". I accept that this was more in the nature of a manner of speaking than the complainant saying something that was wholly inaccurate. She included more allegations at the preliminary inquiry than what she related in her statement to police. However, she had related to police in her statement that the accused had sexually assaulted her numerous times.

[271] He found some confirmatory evidence of her allegations in the accused's police statement insofar as each of them stated that the accused agreed that he was watching pornography on his laptop the last time that he

engaged in sexual activity with the complainant and that the activity had occurred in her bedroom.

[272] A review of the trial judge's reasons in totality shows that he was keenly aware of the accused's arguments concerning the complainant's evidence. He explained that he was acquitting the accused of the earlier charges based on some of those arguments. Specifically, that the complainant had acknowledged that she had been untruthful in Grade 3 and that she was less specific about what had occurred during that timeframe.

[273] On the other hand, he accepted the complainant's explanation for her earlier lack of disclosure to police or Child and Family Services. That is, that she did not want to live with her biological mother and that the accused told her that, if she disclosed, she would have to live in a foster home, which he described as horrible.

[274] The trial judge was entitled to accept some, none or all of the complainant's evidence. I am not persuaded that he made any palpable or overriding error in his findings of credibility, nor that he erred in law in his assessment of the evidence by applying more scrutiny to the accused's evidence as compared to that of the complainant.

Ground 4—Sufficiency of Reasons

[275] The accused argues that the reasons of the trial judge were inadequate in that they did not connect specific factual findings to the convictions given the contradictory and confusing evidence given by the complainant.

[276] In *R v REM*, 2008 SCC 51, the Court explained how appellate courts should consider the reasons of a trial judge (at para 57):

> Appellate courts must ask themselves the critical question set out in *Sheppard* [*R v Sheppard*, 2002 SCC 26]: Do the trial judge's reasons, considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of the right to meaningful appellate review? To conduct meaningful appellate review, the court must be able to discern the foundation of the conviction. Essential findings of credibility must have been made, and critical issues of law must have been resolved. If the appellate court concludes that the trial judge on the record as a whole did not deal with the substance of the critical issues on the case (as was the case in *Sheppard* and *Dinardo* [*R v Dinardo*, 2008 SCC 24]), then, and then only, is it entitled to conclude that the deficiency of the reasons constitute error in law.

[277] The argument that the accused makes is the same as was made in *REM*. In response to that argument, the Court held that a review of the record in its entirety, in circumstances where numerous incidents of sexual assault were alleged, gave rise to a reasonable inference that the trial judge accepted some or all of that evidence.

[278] In this case, the trial judge made clear credibility findings. In his reasons, he carefully set out the testimony of the complainant regarding a number of incidents that occurred after 2011. In convicting the accused, he stated:

> I am satisfied beyond a reasonable doubt that the accused sexually assaulted the complainant in the manner she described two weeks after her operation, and also at the time of her grandfather's funeral, and other times from 2011 onwards. I accept her evidence regarding an incident involving a vibrator in the trailer, which occurred a year prior to her statement to police, and other

> instances of sexual contact she related after her mother had left the residence.

[279] In my view, the foundation for his decision is apparent from a review of his reasons in the context of the record as a whole.

Sentence Appeal

[280] As earlier indicated, the accused submits that the sentence of five years for the sexual interference and four years concurrent for the invitation to sexual touching was harsh and excessive.

[281] I agree with the Crown that leave to appeal should be denied.

[282] Given the highly deferential standard of review (see *R v Lacasse*, 2015 SCC 64 at paras 43-44), and the gravity of the offences, the accused has not demonstrated an arguable case that the sentence is harsh and excessive. The applicable starting point for major sexual assault involving an adult in a position of trust of a child is four to five years (see *R v Sidwell (KA)*, 2015 MBCA 56 at para 49). Having been convicted of numerous instances of seriously sexually assaulting his stepdaughter, there is no reason why the accused should have received any less time than the starting point.

Decision

[283] In the result, for all of the above reasons, I would dismiss the conviction appeal and deny leave to appeal sentence.

Cameron JA

MONNIN JA (concurring in the result):

[284] I have had the benefit of reading the reasons of both of my colleagues, Hamilton and Cameron JJA. I am unable to agree completely with the approaches taken by either one of them, another example of the lack of consensus of appellate judges across the country on the issue of judicial delay. I have reached the conclusion that the appeal should be dismissed. I agree with the manner in which Cameron JA has dealt with the other grounds of appeal apart from judicial delay.

[285] On the primary issue of whether the time taken by a judge to deliberate and to render a written judgment should be included in the presumptive ceiling timelines set out in *Jordan* and *Cody*, I am of the view that this should not be. I appreciate the logical consistency in Hamilton JA's approach, but I am unable to conclude that judicial deliberation time was contemplated in the Supreme Court of Canada's reasons in *Jordan* and *Cody*. I recognise that judges are not immune from the admonitions as to complacency in the system. However, in my view, the issue is one which deserves a separate and discrete approach recognising the "tension" between the right to trial within a reasonable time and the ability of a judge to take the time necessary to render a reasoned and just decision.

[286] In short, I agree with the conclusion of Cameron JA, set out at para 219 of her reasons, namely, that the time that it takes to reach a decision, while not immune to section 11(*b*), should be subject to a separate analysis.

[287] As to the nature of that analysis, I do not agree that it is subject to the "shocking, inordinate and unconscionable" criteria as found by the motion judge. I agree with Hamilton JA that such a test was not enunciated in

Rahey SCC. While those words were used by the trial judge in that case, whose decision was ultimately upheld by the Supreme Court of Canada, the main issue related to whether there was prejudice to the accused which justified invoking section 11(*b*) and the appropriate remedy. I see no endorsement of a test for judicial delay (other than reasonableness) in any of those reasons. In my view, the use of the test proposed by the motion judge sets too high a bar and is not in keeping with the more recent approach of combating complacency in the judicial system.

[288] The issue of whether a particular delay is one which is unreasonable and merits a remedy under section 11(*b*), in my view, requires a contextual approach which balances a number of facets of the decision-making process according to the relevant evidence of the case. Issues such as the complexity of the trial, the decisions arising from the nature of the evidence, and a judge's or court's particular workload are all appropriate factors to be considered in that analysis.

[289] I am in agreement with the reasoning set out by Cameron JA at paras 229-45 of her reasons that the delay in this case, while long, was not unreasonable in the circumstances. I would therefore dismiss the appeal and deny leave to appeal sentence.

Monnin JA