IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella

B E T W E E N :

	)	***R. I. Histed***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
	)	***C. R. Savage***
Respondent	)	***M. Paramanathamoorthy*** *and*
	)	***C. P. R. Murray***
- and -	)	*for the Respondent*
	)	
MARJORIE SCHENKELS	)	*Appeal heard:*
	)	***January 10, 2017***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***June 29, 2017***

Corrected Judgment: A corrigendum was issued on July 12, 2017; the corrections have been made to the text and the corrigendum is appended to this judgment.

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On appeal from 2016 MBQB 44

HAMILTON JA

[1] The accused appeals her conviction, by a jury, for aggravated sexual assault by endangering life under section 273(1) of the *Criminal Code* (the *Code*). The conviction arises from her failure to disclose her HIV positive status to a sexual partner (the complainant), who was diagnosed

with HIV soon after their last sexual activity.

[2] First, she asserts that the delay in getting this case to trial should have resulted in a stay of proceedings for breaching her right under section 11(*b*) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), to be tried within a reasonable time. The recent decision in *R v Jordan*, 2016 SCC 27, must be considered.

[3] Second, she asserts several grounds of appeal related to her conviction for aggravated sexual assault. The key ones arise from the absence of evidence as to the complainant's HIV status before his sexual activity with the accused. The accused argues that this absence of evidence precluded the Crown from being able to prove two elements of the offence in this case: 1) the element of deprivation, arising from exposure to a significant risk of serious bodily harm, required to vitiate consent to the sexual activity under section 265(3)(c) of the *Code*; and 2) the element of endangerment of life to establish the offence of aggravated sexual assault under section 273(1) of the *Code*.

[4] For the reasons that follow, I would dismiss the accused's appeal.

Delay

[5] The accused's motion for a stay of proceedings for unreasonable delay was argued and decided by the trial judge before the Supreme Court of Canada released *Jordan*. The trial judge's decision was based on the analytic framework established in the then leading case of *R v Morin*, [1992] 1 SCR 771. The parties filed supplementary factums to address the new "presumptive ceiling" framework established in *Jordan*, which applies to

transitional cases like this that were "in the system" when *Jordan* was released.

[6] Therefore, the question for this Court is whether the trial judge erred in the result (the dismissal of the accused's motion for a stay of proceedings), based on the analysis now mandated by *Jordan*. A fresh analysis is called for, but with two qualifications. First, a transitional approach applies for cases that were "in the system" when *Jordan* was released. This may call for a review of how the trial judge applied the *Morin* factors. Second, the trial judge's findings of fact are entitled to deference where they are relevant to the analysis now required by *Jordan* (see *R v Vandermeulen (M)*, 2015 MBCA 84 at para 24). Although a pre-*Jordan* delay case, I am of the view that *Vandermeulen* remains good authority with respect to the applicable standards of review for issues arising from a section 11(*b*) decision.

Jordan

[7] Until *Jordan*, *Morin* established the analytic framework to decide the reasonableness, or not, of delay for *Charter* motions under section 11(*b*). The *Morin* framework required the courts to balance four factors: 1) the length of the delay; 2) defence waiver; 3) the reasons for the delay; and 4) prejudice to the accused person's interests in liberty, security of the person, and a fair trial (see *Jordan* at para 30).

[8] In *Jordan*, Moldaver, Karakatsanis and Brown JJ, writing for the majority, concluded that a "change of direction" (at para 5) from the *Morin* framework was required to ensure timely justice in the criminal law context. The majority described the *Morin* framework, from a "doctrinal

perspective", as "too unpredictable, too confusing, and too complex" (at para 38). To address this, the Court created a new analytic framework for determining whether a breach of section 11(*b*) had occurred. At its centre, is "a ceiling beyond which delay is presumptively unreasonable" (at para 46). If a trial is completed within the time period established by the ceiling, the delay is presumptively reasonable, subject to "compelling case-specific factors [that] remain relevant to assessing the reasonableness of the period of delay both above and below the ceiling" (at para 51).

[9] The majority set two presumptive ceilings for the period of time from the date an accused person is charged to the actual, or anticipated, end of trial (the total delay). They set the presumptive ceilings "[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).

[10] They explained that the presumptive ceilings reflect the guidelines for institutional delay established in *Morin* (eight to ten months in provincial court and an additional six to eight months in the superior court) and "other factors that can reasonably contribute to the time it takes to prosecute a case" (at para 53), such as increased complexity of criminal cases. Prejudice is no longer a specific factor to be considered, as it is presumed "[o]nce the ceiling is breached" (at para 54).

[11] The total delay is to be reduced for any periods of time attributable to defence delay. The first of the two categories for defence delay is waiver. Waiver can be explicit or implicit, but it must be clear and unequivocal. The other category of defence delay is "delay caused solely by the conduct of the

defence" (at para 63). This category covers a broad spectrum of factual situations where "defence actions or conduct have caused delay" (at para 64). Common examples include where a tactical choice is made to pursue a frivolous application to stall a trial of the merits of the allegation or where the court and the Crown are available to proceed, but the defence is unavailable despite having been afforded a reasonable period of preparation time. See paras 60-68.

[12] Where the total delay, after being reduced for periods of time attributable to defence delay, exceeds the presumptive ceiling, the delay is presumptively unreasonable. To rebut this presumption, the Crown "must establish the presence of exceptional circumstances" (at para 47). Otherwise, the delay is unreasonable.

[13] Exceptional circumstances are circumstances that are reasonably unforeseen, or unavoidable, that are outside of the control of the Crown and that cannot be reasonably remedied. Usually they will be discrete events or will arise because a case is particularly complex.

[14] The period of time attributable to a discrete event is subtracted from the total delay to determine whether the delay is above or below the presumptive ceiling. See paras 69-81.

[15] Where the total delay, reduced for any periods of time attributable to defence delay and discrete events, falls below the presumptive ceiling, the onus is on the defence to rebut the presumption of reasonableness and to show that the delay is unreasonable. To do this, the defence must establish two criteria: 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 (see para 105). See also paras 83-91. Such circumstances will be rare (see para 48).

[16] Thus, as summarized by the majority, the new framework is as follows (at para 105):

> • There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.
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> • **Once the presumptive ceiling is exceeded**, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.
>
> • **Below the presumptive ceiling**, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (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.

Also see *R v Coulter*, 2016 ONCA 704 for a helpful summary of the *Jordan* framework.

[17] The majority directed that this new framework applies to transitional cases, but is to be applied contextually and flexibly (at para 94).

[18] Therefore, for transitional cases where the delay, after subtracting any periods of time attributable to defence delay and discrete events,

exceeds the presumptive ceiling, the delay will be unreasonable, unless the Crown shows (at para 96):

> [T]hat the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable.

[19] For transitional cases where the total delay, after subtracting any periods of time attributable to defence delay and discrete events, falls below the presumptive ceiling, the delay will be reasonable, unless the defence demonstrates the two criteria of: 1) defence initiative; and 2) that the case took markedly longer than was reasonably required. These two criteria must be applied "contextually, sensitive to the parties' reliance on the previous state of the law" (at para 99). With respect to defence initiative, the majority explained (*ibid*):

> Specifically, the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the *Morin* framework, it would be unfair to require it for the period of time before the release of this decision. However, in close cases, any defence initiative during that time would assist the defence in showing that the delay markedly exceeds what was reasonably required. The trial judge must also still consider action or inaction by the accused that may be inconsistent with a desire for a timely trial (*Morin*, at p. 802).

[emphasis added]

[20] Furthermore, for transitional cases, if the delay was occasioned by institutional delay that was reasonably acceptable under the *Morin* framework before *Jordan* was released, "that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system" (*Jordan* at para 100).

Background and Proceedings

[21] The parties agreed before the trial judge that the total time period of the delay from the date the information was laid on May 31, 2012, to the anticipated end of the trial was 30 months. The parties agree that we now know that the time period of the total delay is 30 months and 19 days.

[22] The court proceedings progressed in Provincial Court (Gimli circuit court) until August 28, 2013, when the Crown preferred a direct indictment. As a result, the preliminary inquiry, set for six days in September and October 2013, was cancelled. The accused's jury trial, initially set for 11 days, took place over 5 days in the Court of Queen's Bench (the Queen's Bench) between December 9 and 17, 2014.

[23] The chronology of the court proceedings is as follows:

Provincial Court (Gimli)

- May 31, 2012—information laid;
- June 25, 2012—the accused's first appearance; adjournment to the next sitting of the court for Crown disclosure;
- June 29, 2012—defence requests Crown disclosure by email;

- By July 3, 2012—the accused advised she would be pleading not guilty and requiring a preliminary inquiry—the Crown sought case management;

- July 10, 2012—the Crown offered dates for the case management conference (August 13, 16 and 23 and September 26, 2012)—defence counsel advised that he was available for all dates but preferred September 26;

- September 26, 2012—the case management conference occurred during which six days were set for the preliminary inquiry for dates in September and October of 2013 to accommodate anticipated expert witnesses to be called by the defence; and

- August 28, 2013—the Crown preferred a direct indictment and the preliminary inquiry dates were cancelled.

Court of Queen's Bench (Winnipeg)

- September 3, 2013—the accused's first appearance in the Queen's Bench; bail granted;

- October 10, 2013—a pre-trial conference occurred during which 11 days of trial were set for dates in October 2014—dates were also set for several defence motions seeking: disclosure of reasons for the direct indictment (December 17, 2013); a stay for unreasonable delay (March 31, 2014); disclosure of third party records under

section 278(2) of the *Code* (May 9, 2014); and the admission of evidence of prior sexual activity of the complainant under section 276 of the Code (commencement of the trial);

(Note that all motions were abandoned by the defence except for the stay motion for unreasonable delay.)

- October 15, 2013—the court retracted trial dates and provided different dates in October 2014—defence counsel advised immediately he was not available and provided dates for when he was available in December 2014—the Crown immediately agreed to those dates;

- March 31, 2014—the stay motion for unreasonable delay was argued and decided;

- December 9-17, 2014—five days of trial;

- September 9, 2015—the sentencing hearing; and

- March 1, 2016—the sentencing decision.

Decision of the Trial Judge

[24] The trial judge found that the accused waived a 45-day period of delay related to the choice of date for the case management conference in the Provincial Court:

> [T]here is a minor period which I conclude was waived by the accused through her counsel relating to the selection of the date of the case management meeting in Provincial Court from an

> early date of August 13th [2012] to the date that it proceeded, of September 26 [2012].

[25] She noted that, "[j]ury trials take longer" and did not see any institutional delay caused by a lack of a courtroom for a jury trial. She noted that the Crown was agreeable to a judge-alone trial and therefore, viewed the mode of trial "to be a factor which has extended the inherent time." She also stated that the pre-trial motions brought by the defence "would have added to the inherent time of the case."

[26] She rejected the accused's assertion "that the Crown's decision to proceed by way of a Direct Indictment effectively caused a year delay." She noted that the decision to proceed by direct indictment is a matter of Crown discretion. She did not accept the accused's argument that the proceeding should be evaluated as a "one-stage proceeding". She found that there was no additional delay caused by the direct indictment decision. Rather, she found that, "[T]he case proceeded on to this court somewhat sooner given that the first appearance here was September the 3rd and the preliminary inquiry would have ended no earlier than October the 8th."

[27] She noted that the Court offered trial dates commencing September 30, 2014, but that counsel for the accused was not available until December 8, 2014. She attributed this to institutional delay.

[28] She found that the delay from the date the case arrived in the Queen's Bench (in September 2013) until the trial completion (in December 2014) required explanation, but it was not "substantial". She stated:

> The inherent requirements of this case, namely, to have a jury hear the case, to hold two pre-trial motions, and to accommodate the necessary trial time is approximately 15 months. Adjusted for these accommodations it is not significantly beyond that which was suggested in Morin.

[29] As for prejudice to the accused, the trial judge found that the stress and pressure experienced by the accused arose from being charged, and related publicity, as well as personal choices to delay events in her life, not from the delay.

[30] As for the societal interest, she stated that, "This is a very serious charge and it is rare and unusual that a charge of this nature would be dismissed for delay."

Positions of the Parties

[31] The accused's foundational argument is that the applicable presumptive ceiling is 18 months and it matters not that the trial took place in the Queen's Bench.

[32] The accused argues that *Jordan* distinguishes between a one-step trial process (without preliminary inquiry) and a two-step trial process (with preliminary inquiry) and that the 18-month presumptive ceiling applies to the one-step process, while the 30-month presumptive ceiling applies to the two-step process. She says that the process here was one step given that she was denied a preliminary inquiry when the Crown preferred the direct indictment. Therefore, she asserts that the 18-month ceiling applies and that the delay here (30 months and 19 days) is presumptively unreasonable.

[33] Furthermore, the accused says that because the delay of 30 months

and 19 days exceeds the presumptive ceiling of 18 months by such a significant period of time, the Crown cannot satisfy its onus to demonstrate transitional exceptional circumstances to render the delay reasonable.

[34] The Crown agrees that if the presumptive ceiling is 18 months the delay is clearly unreasonable.

[35] However, the Crown's position is that the applicable presumptive ceiling is governed by the court in which the trial proceeds, not by whether a preliminary inquiry took place, except for the circumstance when an accused person elects a trial in the provincial court after a preliminary inquiry. Therefore, the Crown says that the applicable presumptive ceiling here is 30 months because the accused's trial proceeded in the Queen's Bench. It argues that there is no compelling reason that a direct indictment should have the effect of applying the provincial court ceiling to a jury trial in a superior court (see *R v Jones*, 2016 ABQB 691). Furthermore, it argues that the use of direct indictments as a time-saving device (as suggested in *R v Manasseri*, 2016 ONCA 703, leave to appeal to SCC refused, 2017 CarswellOnt 5288) would be thwarted by converting an otherwise 30-month ceiling to an 18-month ceiling.

[36] As for whether the delay is above or below the presumptive ceiling of 30 months, the Crown asserts that it is below the ceiling, because of two instances of defence delay. First, it relies on the trial judge's finding that the defence waived 45 days, which it says equates to defence delay under the *Jordan* framework. Second, it also relies, for the first time on appeal, on another instance of defence delay under the *Jordan* framework. It says that the period of time when trial dates were available, between

September 30 and December 8, 2014, is defence delay under the *Jordan* framework and, as a result, the trial judge's finding of institutional delay for this time period is not entitled to deference.

[37] The accused responds that the trial judge was in error when she found that 45 days were waived by the defence, that the new assertion of defence delay is unwarranted, and that the trial judge's finding of institutional delay is entitled to deference.

[38] She argues that the Crown is not entitled to subtract the 45-day period as defence delay because defence counsel advised that he was available August 13th, but the Crown, not the accused, fixed the later date. She asserts that because defence counsel was available, it is not defence delay under *Jordan.* She also asserts that the delay from July 3 to September 26, 2012, is delay specifically insisted upon by the Crown.

[39] The Crown argues that, after taking into account either instance of defence delay, the delay is under the applicable presumptive ceiling of 30 months, and the accused has not met her onus to rebut the presumption of reasonableness by demonstrating both defence initiative and that the time taken was markedly in excess of what was reasonably required.

[40] Alternatively, the Crown argues that if the presumptive ceiling of 30 months is exceeded, the transitional exception should be applied. It says that 19 days over the ceiling does not represent a vast excess of delay and the Crown acted reasonably in bringing the matter to trial.

[41] In her supplementary factum, the accused raised a new issue, arguing that the total delay was 45 months (May 31, 2012 to March 1, 2016),

calculated from the laying of the information to the date that the accused was sentenced. She acknowledges that *Jordan* is silent on how the post-conviction period is to be considered. In this regard, the majority noted (in footnote 2 to para 49):

> 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.

[42] The panel declined to hear this new issue. There was no record pertinent to it other than the dates on which the sentencing hearing occurred and the sentencing decision was pronounced. The accused did not bring a motion for unreasonable delay related to the sentencing proceeding before the trial judge. She did not bring a motion in this Court to file an amended notice of appeal to raise a new issue nor did she bring a motion for fresh evidence to provide the factual foundation for this Court to assess any argument in this regard. See *R v Beaulieu*, 2015 MBCA 90 at paras 64-68.

Analysis

Applicable Presumptive Ceiling

[43] I conclude that the applicable presumptive ceiling is 30 months because the accused's trial proceeded in the Queen's Bench, the superior court of Manitoba.

[44] Some have questioned whether the 30-month ceiling applies to a superior court trial without a preliminary inquiry. This may be because *Jordan* incorporates into its presumptive ceiling framework the inherent delay approach of *Morin*, which differentiated between a two-step case in the superior court after a preliminary inquiry and a one-step case in the provincial court that did not involve a preliminary inquiry.

[45] In my view, *Jordan* is clear. The presumptive ceiling is 18 months for a trial in the provincial court. Where a trial occurs in the superior court, the presumptive ceiling is 30 months. The only exception is for a trial in the provincial court after a preliminary hearing. In that exceptional case, the presumptive ceiling is 30 months.

[46] Moldaver, Karakatsanis and Brown JJ did not differentiate between trials in the superior court preceded by a preliminary inquiry and those that are not, as they did for the provincial court. Furthermore, I see no basis in their reasons to conclude otherwise. They stated that the presumptive ceilings were "18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in superior court (or cases going to trial in the provincial court after a preliminary inquiry)" (at para 46). Other references in their reasons to the presumptive ceilings are equally clear that the presumptive ceiling is based on the court in which the trial occurs, subject to the one exception for a trial in the provincial court after a preliminary inquiry. See paras 5, 49, 57, 82, 105.

[47] I find support for this conclusion in several appellate court decisions. See *R v McManus*, 2017 ONCA 188, in which the Ontario Court of Appeal stated that, "[t]he Supreme Court set a presumptive ceiling of 30

months of delay for cases proceeding to trial in the Superior Court, beyond which the delay is presumptively unreasonable" (at para 21). Also see *DMS v R*, 2016 NBCA 71, in which the Court observed that the "presumptive ceiling increases to 30 months if the case proceeds in Superior Court or Provincial Court after a preliminary inquiry" (at para 6).

[48] Lower court decisions also support this conclusion. See *R v Regan*, 2016 ABQB 561 at para 37; *Jones* at para 25; *R v Cabrera*, 2016 ABQB 707, leave to appeal to Alta CA pending; and *Corriveau c R*, 2016 QCCS 5799. The facts in *Cabrera* are very similar to those in this case. I find the analysis of Poelman J in *Cabrera* to be particularly persuasive (at paras 20, 21, 23, 25, 26, 28, 46):

> This case was not tried in Provincial Court. It was tried in Queen's Bench, but without a preliminary inquiry. The Crown preferred a direct indictment under section 577 of the *Criminal Code*.
>
> The Defence argues that the 30-month ceiling for a Queen's Bench trial does not apply because it assumes a preliminary inquiry. *Jordan* does not make that a condition, but the Defence argues it is implicit in the statement that "the 30-month ceiling would also apply to cases going to trial in the provincial court after a preliminary inquiry" (para. 49). In other words, as I understand the logic of the Defence's argument, the ceiling should be 18 months for a trial in any court if a preliminary inquiry has not been held, or 30 months in any court if a preliminary inquiry has been held.
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> In response to the *Jordan* minority's criticisms of an approach based on ceilings, the majority emphasized the care taken to establish the new framework. Of course, in setting a new framework expressly applicable to a broad range of cases (not just the one before it), it would have been aware of the Crown's discretion to prefer an indictment at any stage of Provincial Court proceedings (section 577). It chose not to create an exception

> from the 30-month ceiling for cases where a direct indictment occurred before completion of a preliminary inquiry.
>
> Cases where a preliminary inquiry has not been held or completed because of a direct indictment are not amenable to a specific ceiling other than the 30 months for a superior court trial.
>
> There may be cases where the Defence can show that even though net delay in a case in Queen's Bench is less than 30 months, it is unreasonable because the Crown preferred a direct indictment and avoided the need for a preliminary inquiry. The *Jordan* framework allows for the possibility of stays even though net delay is below the presumptive ceiling (paras. 82 to 91).
>
> The Defence has not undertaken that burden here, relying instead on an 18-month presumptive ceiling, which I conclude does not apply. It is unlikely such an onus could be met during *Jordan*'s transitional phase in any event, but there may be cases in the future where a late direct indictment would enable the Defence to meet the onus.
>
> I have concluded that the delay in this case should be measured against *Jordan*'s presumptive ceiling of 30 months for trials conducted in a superior court. The delay exceeded that ceiling, albeit by less than one month. Nevertheless, the Crown has established a transitional exceptional circumstance, based on reasonable reliance on prior authorities and significant institutional delay.

[49] Also see the academic commentary of Christopher Sherrin, "Understanding and Applying the New Approach to Charter Claims of Unreasonable Delay" (2017) 22 Can Crim L Rev 1 at paras 7-8, in which he concludes that 30 months is the presumptive ceiling for a case that goes to trial in the superior court without a preliminary inquiry, whether because of waiver by the accused person or as a result of a direct indictment by the Crown.

[50] Finally, the Supreme Court of Canada stated in its first decision since the release of *Jordan*, that the new framework established two presumptive ceilings: "18 months for cases tried in provincial courts and 30 months for cases tried in superior courts (*Jordan*, at para. 46)". See *R v Cody*, 2017 SCC 31 at para 20.

Application of the Jordan Framework

[51] As noted already, the total delay in this case is 30 months and 19 days.

[52] I agree with the Crown that the trial judge's finding of defence waiver of 45 days is entitled to deference and should be subtracted as defence delay, in accordance with the *Jordan* framework. The record supports the trial judge's finding of waiver. Defence counsel was offered a range of dates for the case management conference in the Provincial Court. He was available on all dates, but preferred the latest one.

[53] Furthermore, the Crown has persuaded me that, under the *Jordan* framework, the period of time for setting trial dates that the trial judge found to be institutional delay is appropriately considered as defence delay under *Jordan* because it is a circumstance where "the court and the Crown are ready to proceed, but the defence is not" (at para 64). This amounts to approximately a further two months, being the delay caused by proceeding to trial in December 2014, rather than October of that year.

[54] The accused argues that there is no evidence that the Crown was available on the earlier trial dates. However, neither is there evidence that the Crown was not available. In *R v Williamson*, 2016 SCC 28, the

companion case to *Jordan*, the Supreme Court of Canada did not require specific evidence of the availability of the Crown to allocate defence delay in circumstances where court dates were available, but the defence was not available (see paras 21-22).

[55] If I am wrong about this second instance of defence delay, the delay is still under the presumptive ceiling because of the defence delay attributable to the defence waiver of 45 days.

[56] Therefore, the delay falls below the presumptive ceiling.

[57] Because the delay is presumptively reasonable, the accused can rebut the presumption by establishing the two criteria: 1) defence initiative (i.e., the defence took meaningful steps that demonstrate a sustained effort to expedite the proceedings); and 2) the case took markedly longer than it reasonably should have. Because this is a transitional case, these factors are to be applied contextually, sensitive to the parties' reliance on the previous state of the law (see *Jordan* at para 90). That means, in this case, that the accused need not demonstrate defence initiative because it was not expressly required by the *Morin* framework and *Jordan* was released after the trial was completed. It would be unfair to require the accused to demonstrate defence initiative in such circumstances. See *Jordan* at para 99 (quoted above at para 19).

[58] Furthermore, institutional delay that was reasonably acceptable at the relevant time under the *Morin* framework will be a component of the reasonable time requirements. See *Jordan* at para 100.

[59] While the accused need not demonstrate defence initiative, she

must demonstrate the trial took markedly longer than it reasonably should have to rebut the presumption of reasonableness. I am of the view that she has failed to do so.

[60] The accused argues that the decision to prefer the direct indictment extended the period of time by many months. This is contrary to the finding of the trial judge that there "was no additional delay" caused by the direct indictment and, in fact, "the case proceeded on to [the Queen's Bench] somewhat sooner given that the first appearance here was September the 3rd and the preliminary inquiry would have ended no earlier than October the 8th." This finding is entitled to deference.

[61] In addition, at the outset, the defence required dates for several pre-trial motions and sufficient dates at the preliminary inquiry, and the trial, to call defence witnesses. This approach called for more extensive court time, which is more difficult to schedule, particularly for a jury trial. Ultimately, the accused only pursued her section 11(*b*) motion for a stay. The defence theory and approach changed in the end, but only after the effects of scheduling a six-day preliminary inquiry in a circuit court, dates for motions that did not proceed and an 11-day jury trial had already delayed the scheduling of dates.

[62] Finally, putting aside the two deductions for defence delay, I agree with the Crown that the delay would only be 19 days over the presumptive 30-month ceiling. Given that this is a transitional case, this is not unreasonable delay that warrants a stay of proceedings.

[63] For these reasons, I conclude that the accused has not demonstrated unreasonable delay from the date of her charge to the end of

the trial and the trial judge did not err when she dismissed the accused's application for a stay of proceedings for breach of her section 11(*b*) right.

[64] Despite the failure of the accused's motion, I wish to point out that defence counsel properly moved with appropriate dispatch for the stay based on delay well before the jury trial began. This was in keeping with the approach mandated in *Jordan*. In my view, once a trial date is set, if there is to be a motion for delay, it should be filed and determined as soon as possible, as opposed to waiting until the eve of the trial. This is particularly so when the trial is with a jury. The facts necessary to decide a motion for unreasonable delay are essentially established once a trial date is set and any other pre-trial motions are determined. If the motion is successful, the trial dates can be used for other accused persons, thereby ameliorating delay pressures on the justice system as a whole.

Conviction

Relevant Statutory Provisions

[65] The following provisions of the *Code* are relevant to this appeal:

> **Assault**
> **265(1)** A person commits an assault when
>
> **(a)** without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> . . .
>
> **Application**
> **265(2)** This section applies to all forms of assault, including sexual assault . . . and aggravated sexual assault.

Consent
265(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or

(d) the exercise of authority.

. . .

Aggravated sexual assault
273(1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

. . .

Meaning of *consent*
273.1(1) Subject to subsection (2) and subsection 265(3), ***consent*** means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

[emphasis added]

Background

[66] The accused was charged with the following offence:

> [O]n or between the 15th day of April A.D. 2011 and the 1st day of November A.D. 2011, both dates inclusive . . . [the accused] did in committing a sexual assault on [the complainant] endanger the life of [the complainant] thereby committing an aggravated sexual assault.

[67] In December 2009, the accused was diagnosed as being HIV positive. She and the complainant were friends and they saw each other several times per week between April 2011 and November 2011. During this time period, they engaged in unprotected sexual intercourse three times.

[68] In her statement to the police, the accused admitted that she never disclosed her HIV status to the complainant.

[69] At the five-day trial, the Crown's case consisted of an agreed statement of facts, the complainant's statement to the police and the evidence of four witnesses. The defence called no evidence. Prior to the trial, the accused withdrew her motion, under section 276 of the *Code*, to adduce evidence of prior sexual activity of the complainant and her motion, under section 278.2 of the *Code*, to adduce the complainant's medical records.

[70] The Crown's witnesses were the complainant, the arresting police officer who took the statement from the accused and two doctors: the accused's family physician and Dr. Kasper, the accused's treating physician for her HIV positive condition from May 3, 2010 to early 2014. Dr. Kasper was qualified as an expert with respect to the diagnosis and treatment of HIV.

[71] Both doctors testified that they told the accused about the importance of practicing safe sex and the use of condoms. On several occasions between May 2010 and October 2011, Dr. Kasper told the complainant that the law required her to disclose her HIV positive condition to any sexual partner and that it would be a criminal offence to engage in sexual activity without such disclosure.

[72] Dr. Kasper also testified that HIV is transmitted both sexually and by blood and that, at the time of trial, there were about 1,200 Manitobans living with HIV and probably another 300 to 400 who were unaware of their condition.

[73] The complainant testified that he was diagnosed with HIV in December 2011, that he had never been tested for HIV before that and that he would not have engaged in unprotected sexual intercourse with the accused had he known about her HIV status. He agreed in cross-examination that he initiated the sexual activity with the accused and that he inserted his penis into her vagina.

[74] The agreed statement of facts stated:

> 1) That HIV can be transmitted through unprotected sexual intercourse
>
> 2) That HIV can cause AIDS
>
> 3) That AIDS endangers life
>
> 4) Accused was HIV positive during the period between April 2011 and November 2011

[75] At the end of the Crown's case, the accused brought a motion for a directed verdict of acquittal on the basis that there was no evidence of any application of force by the accused, for the purpose of section 265(1) of the *Code*, or any submission, or failure to resist, on the part of the complainant, for the purpose of vitiating consent under section 265(3)(c) of the *Code*. The accused argued that she did not apply force to the complainant and that he did not "submit" to her because he was the one who initiated the sexual

intercourse, inserted his penis into her vagina and she did not force him in any way to do so.

[76] In dismissing the motion, the trial judge stated that *R v Mabior*, 2012 SCC 47 sets out the principles that must be applied, the *Code* is gender neutral in its application and that the meaning of the words "submission or failure to resist" is much broader than the narrow interpretation argued by the accused.

[77] She refused to instruct the jury to reflect the accused's position with respect to the meaning of "application of force" and "submit". She also refused the accused's request to instruct the jury that, absent proof beyond a reasonable doubt that the complainant was HIV negative prior to his sexual activity with the accused, the jury had to acquit the accused.

Grounds of Appeal

[78] The accused asserts two grounds of appeal related to the absence of evidence concerning the complainant's HIV status prior to his sexual activity with the accused:

1) The trial judge erred in law by failing to instruct the jury that, for the Crown to prove beyond a reasonable doubt that the accused exposed the complainant to significant risk of serious bodily harm and endangered his life, the Crown had to prove beyond a reasonable doubt that the complainant was HIV negative when he first had unprotected sex with the accused; and

2) The verdict is unreasonable.

[79] The Crown's position is that the trial judge correctly instructed the jury in accordance with the leading case, *Mabior*, and that the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered based on the whole of the evidence.

[80] The accused also asserts three other grounds of appeal:

3) The trial judge erred in law by concluding that there was some evidence upon which a properly instructed jury could reasonably find that the complainant submitted, or failed to resist, the sexual activity with the accused for the purposes of section 265(3)(c) of the *Code* and, as a result, by dismissing the accused's motion for a directed verdict of acquittal;

4) The trial judge erred in law in how she instructed the jury with respect to the meaning of "application of force" for the purposes of section 265(1) of the *Code* and the meaning of "submits" for the purposes of section 265(3)(c) of the *Code*; and

5) The trial judge erred in law by unfairly restricting the cross-examination of the complainant.

[81] The Crown's position is that these three grounds of appeal have no merit.

Elements of the Offence

[82] To prove the *actus reus* of sexual assault, the Crown must prove beyond a reasonable doubt: 1) touching; 2) the sexual nature of the contact; and 3) the absence of consent. The first two elements are objective in nature. The third is determined by the complainant's subjective internal state of mind with respect to the touching. See *R v Ewanchuk*, [1999] 1 SCR 330 at para 26.

[83] In *Wilcox c R*, 2014 QCCA 321, aff'd 2014 SCC 75, Dalphond JA explained the additional elements that are required to establish the *actus reus* and *mens rea* of aggravated sexual assault, the key one for this appeal being endangerment of life (at para 8):

> In the case of aggravated sexual assault, the *actus reus* comprises a fourth element, namely: the need to prove wounding, permanent injury (maiming), disfigurement, or endangerment to the life of the complainant (273(1) *Cr C*). The HIV virus can lead to a devastating illness with fatal consequences and thus could constitute an aggravated sexual assault. This explains why most charges related to HIV are of aggravated sexual assault. As for the *mens rea* of aggravated sexual assault, in addition to the elements associated with sexual assault, the Crown must establish objective foresight of the risk of bodily harm.
>
> [emphasis added]

[84] Proof of endangerment of life is an essential element of the offence of aggravated sexual assault and, therefore, must be proven by the Crown beyond a reasonable doubt (see *R v Williams*, 2003 SCC 41 at paras 47, 64). Endangerment of life in an HIV transmission case will be established where there is a significant risk of serious bodily harm, which equates to a realistic

possibility of transmission of HIV. See *R v Bear (CW)*, 2013 MBCA 96 at para 60; and *Mabior* at paras 84, 91.

[85] Absence of consent can be established by the fact that the complainant expressed no consent to the touching or that the consent was given but is found to have been vitiated (see section 265(3) of the *Code*). In this case, as in other HIV cases, the vitiation of consent is based on fraud (see section 265(3)(c) of the *Code*).

Vitiation of Consent in HIV Non-Disclosure Cases

Cuerrier

[86] In *R v Cuerrier*, [1998] 2 SCR 371 (an HIV case where the offence was aggravated assault), the two complainants were HIV negative.

[87] The Supreme Court of Canada held that the Crown has to prove beyond a reasonable doubt two elements in order to establish absence of consent because of fraud: 1) a dishonest act; and 2) deprivation.

[88] A dishonest act "consists of either deliberate deceit respecting HIV status or non-disclosure of that status" (at para 126). Cory J explained that the dishonest act "must be related to the obtaining of consent to engage in sexual intercourse, [which] in this case [was] unprotected intercourse" (*ibid*). He explained further (at para 127):

> Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status. . . . [T]here exists a positive duty to disclose.

[89] The Crown must also prove beyond a reasonable doubt that a complainant would not have engaged in unprotected sex with the accused if he/she had been properly informed and that the sexual activity caused actual serious bodily harm or exposed him/her to "significant risk of serious bodily harm" (at paras 128, 130). Cory J concluded that, "The risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet [the] test" (*ibid*) of significant risk of serious bodily harm.

[90] Furthermore, the Court held that the exposure to the risk of HIV infection, through unprotected sexual intercourse, satisfied the Crown's requirement to prove beyond a reasonable doubt the element of endangerment of life required for the aggravated offence (see para 95).

Mabior

[91] Mabior was charged with, and convicted by the trial judge of, numerous counts of aggravated sexual assault. All the complainants were HIV negative. This Court allowed Mabior's appeal on a number of the counts on the basis that the Crown had not proved significant risk of serious bodily harm beyond a reasonable doubt (see *R v Mabior (CL)*, 2009 MBCA 93).

[92] The Supreme Court of Canada allowed, in part, the Crown's appeal and dismissed Mabior's appeal. In doing so, the Court confirmed *Cuerrier* with one clarification that arose from the expert medical evidence presented by Mabior at trial. It held that, for HIV cases, the significant risk of serious bodily harm requirement established in *Cuerrier* is met by proving "a realistic possibility of transmission of HIV" (at paras 94, 104). McLachlin CJC, writing for the unanimous Court, described HIV as

"indisputably serious and life-endangering" (at para 92), but noted that may change with medical advances. She explained that where the Crown had made a prima facie case of dishonest act and deprivation, the tactical burden may fall on the accused to raise a reasonable doubt (see para 105).

[93] At trial, Mabior called expert evidence as to his treatment, low viral load and the risk of transmission of HIV with, and without, wearing a condom. The Court concluded that the evidence about his low viral load, when coupled with evidence of his use of a condom, negated the Crown's prima facie case of a realistic possibility of transmission of HIV (see paras 104, 109).

Grounds 1 and 2—Absence of Evidence

[94] The accused did not concede at trial that she infected the complainant. Given that, her position is that the trial judge was obliged to instruct the jury that the Crown was required to prove beyond a reasonable doubt that the complainant was HIV negative at the time he first had sexual intercourse with her and, absent that proof, she must be acquitted. Alternatively, she says that the jury should have been instructed that, absent that proof, the accused could only be convicted of attempted aggravated sexual assault, in keeping with *Williams*.

[95] She argues that if the complainant was HIV positive when they had sexual intercourse, his life was not endangered by that sexual activity nor was he deprived of anything. Therefore, she says that there could not be a fraud that vitiated the complainant's consent to the sexual activity because there was no realistic possibility of transmission of HIV.

[96] The trial judge was not required to instruct the jury that the Crown had to prove beyond a reasonable doubt that the complainant was HIV negative before he engaged in sexual activity with the accused. That is a factual matter, not an element of the offence. The trial judge was required to instruct the jury that the onus on the Crown was to establish beyond a reasonable doubt that the unprotected sexual activity with the accused exposed the complainant to a realistic risk of transmission of HIV (or, as instructed by the trial judge, a significant risk of serious bodily harm) and that such activity endangered his life. Her instructions were more than adequate in this regard.

[97] Importantly, the trial judge highlighted for the jury that there was an absence of direct evidence about when the complainant acquired HIV, not only when instructing the jury as to what the Crown had to prove beyond a reasonable doubt, but also in the context of explaining to the jury the difference between direct and circumstantial evidence and when setting out the theory of the defence. Furthermore, the trial judge appropriately instructed the jury as to the included offence of attempt aggravated sexual assault:

> Thus, if you have a reasonable doubt that [the complainant] was exposed to a significant risk of serious bodily harm and that he was endangered, because there is an absence of evidence as to when he acquired the HIV virus, you would find [the accused] guilty of attempted aggravated sexual assault.

[98] In my view, *Williams* does not assist the accused. In that case, there were timing issues that do not exist here and concessions as to the evidence. In *Williams*, the accused (Williams) and the complainant (C) had

a sexual relationship for about a year and one-half. Early into their relationship, Williams learned that he was HIV positive but did not tell C. Later, she tested HIV positive. Williams conceded that he infected C. The Crown conceded that it was possible that Williams infected C before he learned that he was HIV positive.

[99] Binnie J, for a unanimous Court, applied *Cuerrier* and explained that C never consented to sexual intercourse with a partner who was HIV positive. He noted that C was HIV positive, unlike the complainants in *Cuerrier* (at para 39):

> In *Cuerrier*, *supra*, an HIV-positive accused had, as had the respondent in this case, engaged in unprotected sex with two complainants without disclosing his infection. However, unlike here, the complainants in *Cuerrier* did not become infected with HIV. Cory J. held, at para. 127:
>
> > Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent.
>
> In that case, sex with the accused had put the complainants at significant risk to their health. This was sufficient to vitiate their consent to sexual intercourse.

[100] Although Binnie J did not specifically address the element of deprivation (that is, the exposure to a significant risk of serious bodily harm) that is also required to vitiate consent, he held that all elements of the offence of aggravated assault had been proven except the aggravating

circumstance of endangerment of life. He concluded that, given the evidence, the appropriate conviction was for the offence of attempt aggravated assault (at para 57):

> [T]here was a reasonable doubt on the evidence that the life of the complainant was *capable* of being endangered [after the date that Williams learned that he was HIV positive] by re-exposure to a virus she had likely already acquired.
>
> [emphasis added]

[101] The decision in *Williams* was based on the evidence in that case. *Williams* is not a precedent for the accused's position that the Crown has the obligation to prove beyond a reasonable doubt that the complainant in this case was HIV negative prior to his sexual activity with the accused.

[102] Furthermore, *Williams* was decided before *Mabior.* In HIV non-disclosure cases, the current state of the law is that proof of a significant risk of serious bodily harm, as modified to a realistic possibility of transmission of HIV, is sufficient for a finding of endangerment of life. Steel JA explained this in *Bear* (not a non-disclosure case but on point for this issue) (at paras 44, 46):

> Rather, [the Supreme Court in *Mabior*] held that medical science with respect to the transmission of HIV is still of the view that it is a very dangerous disease, if not a death sentence. The court equated significant risk of serious bodily harm with endangerment.
>
> As a result, I am of the opinion that the *Cuerrier* "significant risk" test, as modified by the Supreme Court of Canada in *Mabior*, applies to determine the level of "endangerment of life"

> with respect to HIV aggravated assault charges, even where consent is not an issue.
>
> [emphasis added]

[103] To accede to the accused's position would require the Crown to call medical evidence in each case. In my view, this would be inconsistent with the approach directed in *Mabior*. McLachlin CJC rejected Mabior's argument that the Crown has to establish, by medical evidence, "a significant risk of serious bodily harm" in each case (at paras 68-69). She was concerned that, "[t]he process would be onerous" (at para 69).

[104] Importantly, in my view, McLachlin CJC explained that the onus on the Crown is to establish a prima facie case of a dishonest act and deprivation, after which a tactical burden may shift to the defence, in accordance with the usual rules of evidence. She wrote (at paras 7, 95, 105):

> In defence, Mr. Mabior called evidence that he was under treatment, and that he was not infectious or presented only a low risk of infection at the relevant times.
>
> The conclusion that low viral count coupled with condom use precludes a realistic possibility of transmission of HIV, and hence does not constitute a "significant risk of serious bodily harm" on the *Cuerrier* test, flows from the evidence in this case. This general proposition does not preclude the common law from adapting to future advances in treatment and to circumstances where risk factors other than those considered in this case are at play.
>
> The usual rules of evidence and proof apply. The Crown bears the burden of establishing the elements of the offence — a dishonest act and deprivation — beyond a reasonable doubt. Where the Crown has made a *prima facie* case of deception and deprivation as described in these reasons, a tactical burden may fall on the accused to raise a reasonable doubt, by calling

> evidence that he had a low viral load at the time and that condom protection was used.
>
> [emphasis added]

[105] Therefore, I agree with the Crown that *Mabior* established that the Crown need only prove a prima facie case of a realistic possibility of transmission of HIV. Applying *Mabior*, Cronk JA explained this in *R v Felix*, 2013 ONCA 415 (at para 57):

> It follows, in my opinion, that once it was established in this case that: (1) the appellant was HIV–positive; (2) the appellant did not disclose his HIV–positive status prior to intercourse with the [complainants]; (3) the complainants would not have engaged in sexual activity with the appellant had they known of his HIV–positive status, and (4) the appellant failed to use a condom on the relevant occasions of intercourse, the Crown had established a *prima facie* case of a realistic possibility of HIV transmission.

[106] In these circumstances, the evidential or tactical burden then shifts to an accused to negate the prima facie case. That is not a shifting of the onus from the Crown, as argued by the accused.

[107] In *Felix*, the two complainants were HIV negative. Here the complainant is HIV positive. The essence of the accused's argument is that the fact that the complainant is HIV positive should change what is required of the Crown to prove its case. I do not accept that proposition.

[108] Certainly, the fact that the complainant is HIV positive was important evidence for the jury to consider. So too, was the absence of evidence as to his HIV status prior to the sexual activity with the accused. However, the crucial question for the jury was whether the Crown had

proved beyond a reasonable doubt that the accused had exposed the complainant to a significant risk of serious bodily harm in light of the evidence, and absence of evidence. The trial judge's instructions made this clear.

[109] For these reasons, I would dismiss the ground of appeal that the trial judge erred in not instructing the jury that the Crown had to prove beyond a reasonable doubt that the complainant was HIV negative prior to the sexual activity with the accused.

[110] The accused also asserts that the verdict was unreasonable, for essentially the same reasons that she asserts that the trial judge erred in law in how she instructed the jury. I would dismiss this ground of appeal.

[111] As is well known, the standard of review for an assertion of unreasonable verdict was set out in *R v Yebes*, [1987] 2 SCR 168. This was recently explained by Cromwell J in *R v Villaroman*, 2016 SCC 33 (at paras 55-56):

> A verdict is reasonable if it is one that a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 SCR 381. Applying this standard requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence: *R. v. Yebes*, . . . at p. 186. This limited weighing of the evidence on appeal must be done in light of the standard of proof in a criminal case. Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence [citations omitted].
>
> The governing principle was nicely summarized by the Alberta Court of Appeal in *Dipnarine*, [2014 ABCA 328] at para. 22.

> The court noted that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences" and that a verdict is not unreasonable simply because "the alternatives do not raise a doubt" in the jury's mind. Most importantly, "[i]t is still fundamentally for the trier [of] fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt."

[112] The accused admitted that she did not tell the complainant that she was HIV positive. The complainant testified that he would not have had unprotected sex with her if he had known. Consistent with *Cuerrier* and *Mabior*, the agreed evidence was that HIV can cause AIDS, which endangers life. There was no evidence called in this case refuting that significant life-threatening risk.

[113] The theory of the defence was that, given the absence of evidence, there is no way of knowing when the complainant was infected and therefore, he may have been infected from another source prior to his sexual activity with the accused. Certainly, "a reasonable doubt, or theory alternative to guilt, is not rendered 'speculative' by the mere fact that it arises from a lack of evidence. . . . A certain gap in the evidence may result in inferences other than guilt" (*Villaroman* at para 36). On the other hand, "those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense" (*ibid*). The trial judge instructed the jury to this effect.

[114] The absence of evidence as to the complainant's HIV status when he first had intercourse with the accused was a live issue. The trial judge put it directly to the jury in her charge on more than one occasion. As evidenced by the verdict, the jury was satisfied beyond a reasonable doubt that the

accused exposed the complainant to a significant risk of serious bodily harm. In other words, the absence of evidence at issue in this appeal, which was explained to the jury, did not raise a reasonable doubt for the jury about whether the accused exposed the complainant to that risk.

[115] As stated by Cromwell J in *Villaroman*, "it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation. The trier of fact's assessment can be set aside only where it is unreasonable" (at para 71). In my view, this is not one of those cases.

[116] The weakness of the defence theory is that there was no evidence as to other possible ways in which the complainant could have contracted HIV. Without such evidence, the accused was asking the jury, and now this Court, to speculate. She is asking this Court to focus on hypothetical alternative theories that have no basis in the evidence. There was no evidence with respect to ways in which the complainant may have contracted HIV, other than from his sexual activity with the accused, such as through any other sexual partners, blood transfusions or intravenous drug use. As noted before, the accused abandoned her motions to elicit relevant testimony related to other ways in which the complainant could have contracted HIV. In cross-examination, the complainant was not asked about blood transfusions or intravenous use of needles. Simply put, there was no foundation in the evidence for these theories. As such, they are hypothetical.

[117] For these reasons, I am of the view that the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered.

Other Grounds of Appeal

[118] I agree with the Crown that grounds 3, 4 and 5 are without merit. They can be dismissed with brief comment.

[119] Grounds 3 and 4 arise from the accused's argument that there was no evidence that the complainant submitted to, or did not resist, the application of force by the accused for the purposes of section 265(1)(a) and section 265(3) of the *Code*. In this regard, she asserts that the trial judge erred in law by dismissing her motion to direct a verdict of acquittal for lack of evidence and how she instructed the jury. The accused also asserts that the trial judge erred in law when she instructed the jury that application of force can be "the slightest physical contact" and arise from "participation in sexual intercourse."

[120] The fundamental issue here was whether the voluntary consent of the complainant to consensual sexual activity was vitiated by fraud because of the complainant's failure to disclose her HIV positive status. A touching can be an assault. The application of force is inherent in sexual activity (see *Cuerrier* at para 96). The complainant's gender or the "anatomy" of the sexual activity is irrelevant. See *Cuerrier* at para 134; and *Mabior* at paras 45-48 in which the McLachlin CJC explains the relevance of *Charter* values for the interpretation of section 265(3)(c). She stated: "To engage in sexual acts without the consent of another person is to treat <u>him or her</u> as an object and negate his or her human dignity" (emphasis added) (at para 48).

[121] The trial judge applied the correct test for a motion for a directed verdict of acquittal: whether or not, on the whole of the evidence, there is any evidence upon which a reasonably instructed jury could return a verdict

of guilty (see *Mezzo v The Queen*, [1986] 1 SCR 802). She did not err in law in dismissing the accused's motion to direct a verdict of acquittal or in how she instructed the jury with respect to the meaning of "application of force" and "submit".

[122] Finally, in ground 5, the accused argues that the trial judge unjustly interfered with the cross-examination of the complainant because she disallowed the following question:

> Did you know, sir, at that time, that the chance of getting HIV, an HIV infection from a woman, for a guy, from heterosexual intercourse, was approximately one in two thousand five hundred? Did you know that?

[123] The purpose of this question, and others about risk, put to the complainant in cross-examination were to challenge the complainant's evidence that, had he known of the accused's HIV status, he would not have engaged in unprotected sex. Over the objections of the Crown, the trial judge permitted questions about the complainant's state of knowledge about the risk of transmission of HIV. However, she disallowed this question because "by putting scientific information in the form of a question is really calling for, may be calling for an expert opinion".

[124] Unlike in *Mabior*, the accused made a tactical choice not to elicit expert evidence as to her viral load and related risk of transmission. There was no evidence before the Court, or anticipated by the Court, for establishing a foundation for the question. This case is distinguishable from *R v JTC*, 2013 NSPC 105, relied upon by the accused, because in that case, expert evidence was called about the risk of transmission.

[125] The trial judge did not unjustly interfere with the cross-examination of the complainant.

Conclusion

[126] Applying the new *Jordan* framework to this transitional case, the accused has not demonstrated that the delay from the laying of the charge to the end of the trial was unreasonable. Accordingly, the trial judge did not err when she dismissed the accused's motion for a stay of proceedings for unreasonable delay.

[127] The accused has not persuaded me that appellate intervention is called for with respect to any of her grounds of appeal relating to her conviction. Most importantly, the trial judge did not err by not instructing the jury that the Crown had to prove beyond a reasonable doubt that the complainant was HIV negative prior to having unprotected sexual intercourse with the accused. Furthermore, the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered.

[128] I would dismiss the appeal.

Hamilton JA

I agree: Beard JA

I agree: Mainella JA

CORRIGENDUM

July 12, 2017

TO WHOM IT MAY CONCERN:

Re: *R v Schenkels*, 2017 MBCA 62
Docket No. AR16-30-08553
Released on June 29, 2017

The attached decision replaces the previous decision which was released June 29, 2017. In para 80, subparagraph 3, the word complainant was replaced with the word **accused**. The subparagraph in question now reads as follows:

> The trial judge erred in law by concluding that there was some evidence upon which a properly instructed jury could reasonably find that the complainant submitted, or failed to resist, the sexual activity with the **accused** for the purposes of section 265(3)(c) of the *Code* and, as a result, by dismissing the accused's motion for a directed verdict of acquittal;