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COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: *The Criminal Code of Canada*

AND IN THE MATTER OF: Section 7, section 11(b) and section 24(1) of *The Canadian Charter of Rights and Freedoms*

BETWEEN:	**APPEARANCES:**
HER MAJESTY THE QUEEN	Heather Leonoff, Q.C. for the Crown
- and -	
KEVIN GORDEN KEHLER, (Accused) Applicant.	Katherine Bueti for the (Accused) Applicant
	Judgment delivered: May 29, 2017

JOYAL, C.J.Q.B.

I. INTRODUCTION

[1] When assessing judicial delay in decision-making in the context of an alleged breach of an accused's ***Charter*** right to be tried within a reasonable time, should such judicial delay be assessed and accounted for by including it in the presumptive ceiling set out in the transformative Supreme Court of Canada

judgment of ***R. v. Jordan***, 2016 SCC 27, [2016] 1 S.C.R. 631? That is just one of the animating questions that must be addressed in the reasons that follow.

[2] Kevin Gorden Kehler (hereinafter referred to as "the applicant"), was convicted in this court of sexual offences against one of his own children. One day before he was convicted, he filed this motion for unreasonable delay.

[3] Although the applicant's trial was concluded (in terms of the evidence and submissions) in just over 33 months from the date of his charges, the trial judge reserved his decision as to guilt. Nine months later, the trial judge gave a decision convicting the applicant.

[4] While I was not the judge at trial, I did hear this motion for unreasonable delay. The judge who presided at trial (and who convicted the applicant) had recused himself from the adjudication of this motion. He did so at the behest of the applicant who alleged a reasonable apprehension of bias because of the trial judge's role in the alleged overall delay (the "judicial delay"). The trial judge expressed concern that he might harbour some inhibition that could encumber his impartiality (or the perception of it) in the determination of this motion. Having applied the governing test respecting a reasonable apprehension of bias, the trial judge had every right to make the determination (to recuse) that he did. See ***Wewaykum Indian Band v. Canada***, 2003 SCC 45, [2003] 2 S.C.R. 259; ***Committee for Justice and Liberty v. Canada (National Energy Board)***, [1978] 1 S.C.R. 369; and ***R. v. R.D.S.***, [1997] 3 S.C.R. 484. That said, save for the judge's identified inhibition in this particular case relating to his delay, it is far

from clear that the recusal of the judge in question is inevitable or required in all such similar circumstances. Nonetheless, it did occur in this case and it is for that reason that I have become involved.

[5] The allegation of judicial delay in this case triggers a novel issue. That novel issue relates to how, if at all, judicial delay in the rendering of a decision should be treated under the new framework for s. 11(b) set out in ***R. v. Jordan***.

[6] The above question involves a tension that gives rise to a consideration of two colliding constitutional principles. That collision or tension, as between the constitutional principle of judicial independence and the constitutional right to trial in a reasonable time, cannot be resolved by a simple reference to a presumptive ceiling which, in this case, would result in one right or principle trumping the other. Instead, as must occur any time constitutional rights or principles collide, the rights and principles in question must be balanced and reconciled in the context in which they arise.

II. CONTEXT AND CHRONOLOGY

[7] The applicant was charged on April 11, 2013.

[8] On September 6, 2013, the matter was set for preliminary inquiry which was to be held on October 14, 2014.

[9] The preliminary inquiry proceeded as scheduled and the applicant was committed to stand trial.

[10] On January 29, 2015, a pre-trial conference was held and trial dates of January 11-22, 2016 were fixed by the parties and the court.

[11] The applicant's trial proceeded as scheduled and concluded January 21, 2016.

[12] At the end of trial, the trial judge reserved his decision.

[13] The applicant's delay motion was filed October 24, 2016.

[14] The trial judge's decision convicting the applicant was delivered on October 25, 2016.

III. LEGAL FRAMEWORK

[15] Section 11 of the ***Charter*** reads as follows:

> Any person charged with an offence has the right
>
> . . .
>
> (*b*) to be tried within a reasonable time;

[16] Section 24 (1) of the ***Charter*** reads:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[17] In ***Jordan*** at paras. 19-20, the importance of the ***Charter*** right to be tried within a reasonable time was well explained:

> 19 As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.
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> 20 Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the

> stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.

[18] The Supreme Court of Canada, for close to 25 years, relied upon the framework set out in its judgment in ***R. v. Morin***, [1992] 1 S.C.R. 771. Despite that reliance, the Supreme Court noted in ***Jordan*** that the ***Morin*** framework brought with it certain inefficiencies in bringing cases to trial. As a consequence, the court re-worked that framework in the companion decisions of ***R. v. Jordan*** and ***R. v. Williamson***, 2016 SCC 28, [2016] 1 S.C.R. 741. Those two judgments set forth a new framework involving a presumptive ceiling as to the time that it ought to take to bring an accused person to trial. The framework contemplates case-specific factors above and below the presumptive ceiling. As noted in para. 5 of ***Jordan***, the purpose of the new framework is to "focus the s. 11(b) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(b)'s important objectives."

[19] The new framework for s. 11(b) is summarized in ***Jordan*** 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.
>
> * **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.
>
> * **For cases currently in the system**, the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

[20] Despite the desired rigour and efficiencies connected to the new framework intended to better protect the accused's right to a trial within a reasonable time, the Supreme Court in ***Jordan*** nonetheless provided the following caution at para. 21:

> 21 At the same time, we recognize that some accused persons who are in fact guilty of their charges are content to see their trials delayed for as long as possible. Indeed, there are incentives for them to remain passive in the face of delay. Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(*b*) was not intended to be [page 650] a sword to frustrate the ends of justice (*Morin*, at pp. 801-2).

Defence Delay

[21] As noted under the ***Jordan*** framework, defence delay is not counted towards the presumptive ceiling. There are two categories of defence delay that must be subtracted when calculating the quantum of delay. The first category is delay waived by the defence. For a period of delay to be waived by the defence, waiver must be clear and unequivocal. The second category is delay caused solely by the conduct of the defence.

[22] Delay caused by the conduct of the defence refers to those situations where the accused's acts have obviously caused the delay, or where the accused's acts can be shown to have been a deliberate and calculated tactic employed to delay the trial. See ***R. v. Askov***, [1990] 2 S.C.R. 1199 at para. 95.

[23] In ***Jordan***, the Supreme Court took into account ordinary defence preparations into the calculation of the presumptive ceilings. Accordingly, routine actions taken to prepare for trial should not count against the period of delay. At para. 65, the court noted the following:

> 65 To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

Exceptional Circumstances

[24] Once the presumptive ceiling has been breached, the only manner in which the delay can be justified is if the Crown establishes exceptional circumstances. In any case, if the Crown attempts to rebut the presumption by invoking exceptional circumstances, it will be for the trial judge to determine whether such exceptional circumstances exist. There is not an exhaustive list of what constitutes exceptional circumstances. They will generally fall into one of two categories: discrete events and particularly complex cases. See ***Jordan*** at para. 71.

[25] The description of what might constitute discrete events was set out at paras. 72-73 of ***Jordan***:

> 72 Commencing with the former, by way of illustration, it is to be expected that medical or family emergencies (whether on the part of the accused, important witnesses, counsel or the trial judge) would generally qualify. Cases with an international dimension, such as cases requiring the extradition of an accused from a foreign jurisdiction, may also meet the definition.
>
> 73 Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected—even where the parties have made a good faith effort to establish realistic time estimates—then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.

[26] At para. 77, the court identified those exceptional circumstances that would be encompassed in the reference to "particularly complex cases":

> 77 As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration. Particularly complex cases are cases that, because of the nature of the *evidence* or the nature of the *issues*, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.
>
> 78 A typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance. …

[27] If the Crown seeks to invoke an exceptional circumstance in an attempt to challenge the presumption that the delay is unreasonable, it must demonstrate

that they (the Crown) took reasonable steps to avoid and address the problem before the delay exceeded the presumptive ceiling. See ***Jordan*** at para. 70.

Cases Currently in the System

[28] There is no question but that the new framework applies retroactively. Cases currently in the system will still be stayed where s. 11(b) breaches are found. However, for cases involving charges that were brought prior to the release of ***Jordan***, the court must consider whether the transitional exceptional circumstance justifies the delay. In this connection, "[t]his transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed." See ***Jordan*** at para. 96. In other words, had the parties (and the court) known at the time trial dates were set in the particular matter in question that a 30-month ceiling would apply, it can be assumed that a different approach might have been taken. The transition period must be considered in the context of the Supreme Court's warning against staying tens of thousands of charges due to the change in the law, as occurred after the ***R. v. Askov*** decision in the 1990's. See Jordan at paras. 92-96.

Judicial Delay

[29] In its extensive analysis in respect of the new framework for s. 11(b), the Supreme Court of Canada in ***R. v. Jordan*** did not consider the issue of reserve judgments and how such related judicial delay can or should be assessed.

[30] Under the ***Morin*** framework, the time a judge spent on a reserve judgment was typically assessed as part of the inherent time requirements of a case. In other words, it was considered as one of the periods of time that was "needed to get a case into the system and to complete that case". See ***R. v. McDougall***, [1998] 3 S.C.R. 45 at para. 45. An example of this approach to the consideration of judicial delay is found in ***R. v. Lamacchia***, 2012 ONSC 2583, 2012 CarswellOnt 5382:

> 7 Generally speaking, the period of time a judge takes to prepare reasons should be considered to be part of the inherent time requirements of the case. Within reasonable limits, it is desirable that judges take the time that they need to prepare carefully reasoned decisions. …

[31] For the most part, it can be said that periods of judicial delay were considered as neutral in the analysis, not giving rise to legally relevant prejudice. In some instances, the time for decision-making on defence-initiated pre-trial motions or *voir dires* was attributed to the defence. See ***R. v. Lynden Ferguson***, 2005 CanLII 28538 (ON SC) at para. 234.

[32] Although under ***Morin***, the time a judge spent on a reserve decision was typically assessed as part of the inherent time requirements of a case, some judicial delays were extraordinary and attracted distinct attention. For example, where a delay was caused by a judge's illness, there was some suggestion that it would be reasonable for the Crown to take action to have the judge replaced. If the Crown failed to act when appropriate, delay might be counted against it for the purposes of an analysis. See ***R. v. McDougall***, *supra*, at para. 67. The

Crown obligation to act in such circumstances of judicial delay relating to judicial illness or otherwise, was usually discharged upon the Crown writing to the court seeking a decision. Yet even in those circumstances, it was recognized that prudence was required given the equally applicable constitutional principles of judicial independence and fair trial within a reasonable time. See ***R. v. McDougall*** at para. 30.

[33] In the context of my consideration of the new applicable legal framework as it relates to s. 11(b) and the manner in which judicial delay should be considered, I note that the Crown's submission in the present case properly acknowledged that there is clearly a place within s. 11(b) to consider delays in judicial decision-making, and that those delays may in some cases amount to ***Charter*** breaches. In that regard, in rejecting the ***Jordan*** framework for the consideration of judicial delay, the Crown identified and invoked the approach taken in ***R. v. Rahey***, [1987] 1 S.C.R. 588. ***Rahey*** was an early s. 11(b) case in which the Supreme Court was divided on several fundamental parts of the s. 11(b) analysis. There were four judgments, each endorsed by two judges. At issue was the 11-month delay of a provincial magistrate in coming to a decision on a motion for no-evidence, a mid-trial motion which at most would normally take no more than several days. The defence case was delayed by nearly a year for what amounted to a one-sentence decision. In ***Rahey***, despite the four judgments, the Supreme Court was unanimous that the delay in issue was unreasonable and that a stay of proceedings was the appropriate remedy. The

Supreme Court concluded that the lower courts were correct in holding that this delay was "shocking, inordinate and unconscionable". See ***R. v. Rahey*** at para. 43.

IV. POSITIONS OF THE PARTIES

Submissions of the Applicant

[34] The applicant submits that the period of time from the date on which he was charged (April 11, 2013) to the conclusion of the trial (October 25, 2016) exceeds the presumptive ceiling of 30 months at the Superior Court level and must be presumed unreasonable. The applicant argues that the period exceeding the 30-month presumptive ceiling must be assessed to include the impugned nine months of judicial delay, taking the total delay to just over 42 months.

[35] The applicant contends that following the date on which he was charged (April 11, 2013), the bulk of the delay in this case is "purely" institutional. In that regard, he submits the following:

(a) From September 6, 2013 until October 14, 2014 (a period of 13 months), the delay was caused by the unavailability of earlier preliminary inquiry dates;

(b) From January 29, 2015 until January 11, 2016 (a period of 11.5 months), the delay was caused by the unavailability of earlier trial dates;

(c) From January 21, 2016 until October 28, 2016 (a period of nine months), the delay was caused solely by the delay connected to the rendering of the verdict.

[36] The applicant submits that the institutional delay totals a period of 33.5 months and any additional time involved the applicant retaining counsel. The applicant asserts that once counsel was retained, the defence was at all times prepared and ready to respond to the charges. The applicant explains that negotiations were conducted with the Crown, elections were made and pre-trial conferences were held. In this connection, the applicant insists that all actions on the part of the defence have been legitimately taken to respond to the charges and none of those actions constitute defence delay. In other words, the defence did not request to reschedule any of the dates nor did it intentionally elect dates in order to delay the proceedings. Accordingly, it is the position of the applicant that no period of time should be subtracted from the total identified time from the date the charges were laid to the now-known date at the end of trial.

[37] The applicant argues that, given that the presumptive ceiling has been breached, the only way the delay can be justified is if the Crown establishes exceptional circumstances. The applicant submits that neither of the two available categories of exceptional circumstances has application in the present case. In other words, the proceedings were not complex and no discrete events

have occurred which sidelined the trial. Preliminary inquiry and trial dates were scheduled in the ordinary course and no dates had to be rescheduled.

[38] The applicant further submits that this court ought not to be persuaded to justify the delay on the basis of what ***Jordan*** identifies as the transitional exceptional circumstance. In that connection, the applicant submits that the delay incurred in the present case is such that it is an unreasonable delay even if the previous framework is applied. The applicant insists that this is not a situation where the new framework would take a previously reasonable delay and turn it into an unreasonable delay.

Submissions of the Crown

[39] The Crown takes the position that the judicial delay in this case cannot and should not be considered under the framework set out in ***Jordan***. That said, the Crown concedes that the nine months taken for the rendering of a verdict in this case was a long time, but it was not so long as to be "shocking, inordinate and unconscionable" which the Crown submits is the appropriate standard to determine if judicial delay infringes the ***Charter*** s. 11(b) right.

[40] It is the position of the Crown that the matter proceeded as scheduled and that the relevant reference point in terms of time for the ***Jordan*** analysis is approximately 33 months and one week from the date of the charges. The Crown maintains that, at the very least, this is a transitional case and even though the matter falls above the presumptive ceiling, it should benefit from the transitional exception set out in ***Jordan***.

[41] The Crown also submits that this is a case where some delay attributable to the defence must be subtracted from the total delay in issue. The defence-caused delay in this case, according to the Crown, relates to the delay incurred where the Crown and the court were available but the defence was not. See ***Jordan*** at para. 64. When one examines the facts of this case, it can be noted that, when the matter appeared for pre-trial on January 29, 2015, the parties were offered dates for September 21 to October 2, 2015. Neither Crown nor defence were available. Further dates were offered for October 19 to 30, or December 7 to 18, 2015. While the Crown was available, defence was not. Thus, the January 11 to 22, 2016 dates were set. As such, with both the Crown and the court being available as of October 19, 2015, the Crown submits that according to ***Jordan***, the time between that date and January 11, 2016 must be deducted from the total. This is a period of two months and three weeks, bringing the total delay in issue to 30 months and two weeks. The Crown emphasizes that this is marginally above the presumptive ceiling.

V. ISSUES

[42] Based upon the underlying facts, the positions and submissions of counsel and the governing law, the issues on this motion reduce to the following questions:

(1) When conducting an analysis pursuant to ***R. v. Jordan*** respecting an alleged allegation of a s. 11(b) ***Charter*** violation, can and should any judicial delay, as represented by judicial reserve time,

be included as part of the time measured against the stipulated presumptive ceilings of 18 and 30 months?

(2) If in the context of an alleged s. 11(b) violation, judicial delay relating to judicial reserve time cannot be addressed using the framework and/or presumptive ceilings set out in ***R. v. Jordan***, how is such judicial delay to be assessed and when might such delay be seen as violative of an accused's s. 11(b) ***Charter*** rights?

(3) On the particular facts of the present case, does the relevant period of time leading up to the completion of the trial evidence (prior to the judicial delay in respect of the reserve decision) constitute - within the framework of ***Jordan*** - a delay that is violative of the accused's s. 11(b) ***Charter*** right?

(4) On the particular facts of the present case, is the judicial delay relating to the reserve judgment sufficiently "shocking, inordinate and unconscionable" so as to warrant the exceptional ***Charter*** remedy of a judicial stay of proceedings?

VI. ANALYSIS

Issue 1: When conducting an analysis pursuant to R. v. Jordan respecting an alleged allegation of a s. 11(b) Charter violation, can and should any judicial delay, as represented by judicial reserve time, be included as part of the time measured against the stipulated presumptive ceilings of 18 and 30 months?

[43] For the reasons that follow, I have determined that judicial delay should not be treated under the new framework for s. 11(b) set out in ***Jordan***. In

other words, on the necessary balancing and reconciling of all of the relevant constitutional principles and interests at play, judicial deliberation time must be excluded from the presumptive ceiling analysis.

[44] Both judicial independence and the right to a trial within a reasonable time "constitute essential parts of the Constitution of Canada", although neither one "prevails over the other". See ***Harvey v. New Brunswick (Attorney General)***, [1996] 2 S.C.R. 876. The Supreme Court of Canada noted in ***Harvey*** at para. 69 that:

> 69 … Where apparent conflicts between different constitutional principles arise, the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them.

[45] The interaction in the present case of the principle of judicial independence and the right to a trial in a reasonable time, requires this court to remain mindful that "it is a basic proposition that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution. See ***Reference Re Bill 30, an Act to amend the Education Act (Ontario)***, [1987] 1 S.C.R. 1148; and ***New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)***, [1993] 1 S.C.R. 319 at para. 108.

[46] Quite properly, the Crown urges the court in the present case to interpret and apply the colliding constitutional principles in a way that allows them to co-exist. In that connection, the Crown cites ***Reference re Same-Sex Marriage***, 2004 SCC 79 at para. 50, [2004] 3 S.C.R. 698, where it was noted that a "… collision between rights must be approached on the contextual facts of

actual conflicts. The first question is whether the rights alleged to conflict can be reconciled …." Where ***Charter*** rights come into conflict, it may be the case that "many if not all such conflicts will be resolved within the ***Charter*** … by way of internal balancing and delineation." See ***Reference re Same-Sex Marriage*** at para. 52. The needed interpretation and balancing in situations of constitutional tension and collision require that full value be given to the purpose, content and place of the respective constitutional principles in the context of the Constitution as a whole. See ***Harvey***, *supra*, at para. 70.

[47] I am in full agreement with the Crown when it submits that the principle of judicial independence and the right to a trial within a reasonable time must both be given their full effect and, at the same time, reconciled in a way that respects the place of both the principles in our Constitution. In that spirit, a more purposeful and contextual analysis requires more than a reflexive imposition of the presumptive ceilings set out in ***Jordan***.

[48] In the earlier-cited paras. 19 and 20 of ***Jordan*** (see para. 17 of this judgment), the purpose, essence and importance of the accused's right to be tried within a reasonable time was well explained.

[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. …

[50] Judicial independence has its source in the preamble of the ***Constitution Act, 1867*** as well as s. 11(d) of the ***Canadian Charter of Rights and Freedoms***, which guarantees an accused the right to a fair trial before an impartial tribunal. See ***R. v. Valente***, [1985] 2 S.C.R. 673 at pp. 685-689. The Supreme Court has also recognized judicial independence as an unwritten ***Constitution*** principle. See ***Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island***, [1997] 3 S.C.R. 3. Judicial independence is similarly acknowledged as foundational for public confidence in the proper administration of justice and for the constitutional separation of powers. See ***Ell v. Alberta***, 2003 SCC 35, [2003] 1 S.C.R. 857; ***Mackin v. New Brunswick (Minister of Finance)***, 2002 SCC 13 at paras. 37-38, [2002] 1 S.C.R. 405.

[51] Following from their judicially independent status, judges are required to carry out their duties and responsibilities in possession of a great deal of discretion. This discretion extends beyond independent decision-making and includes a judge's capacity to prioritize his or her own workloads. In ***R. v. Creve***, 2014 ABQB 494 at paras. 108-109, 595 A.R. 328, Graesser J. noted as follows:

> [109] Judges do need to prioritize their tasks. Older reserve decisions may have to yield to newer ones, depending on the legitimate and comparative urgencies of the cases they have on reserve. …

[52] Notwithstanding the above, few would dispute that at some stage, judicial delay in rendering a decision will potentially have a determinative impact on s. 11(b). Nonetheless, the Crown is correct when it insists that that threshold is not amenable to a "one size fits all" presumption. As Graesser J. noted in ***Creve*** at para. 110:

> [110] … Judicial independence allows for substantial variations on how different judges approach their duties.

A necessary corollary of that proposition is that save for the ethical implications of judicial delay and the juridical consequences flowing from excessive judicial delay that is violative of s. 11(b), 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.

[53] The foundational difficulty that arises when it comes to measuring judicial delay against a presumptive ceiling, was well expressed in the Crown's brief at paras. 35-37:

> 35. … [W]hen it comes to measuring delay in a criminal proceeding against a presumptive ceiling, judges are put in an untenable position. If they fulfill their constitutional duty to independently determine the guilt or innocence of the accused, and take the time required to come to a reasoned decision, this inevitably causes delay. The amount of delay is unpredictable given the competing demands on a judge's adjudicative function and depending on other case specific factors like the complexity of the matter at hand. At the same time, if any adjudicative delay contributes to a breach of the presumptive ceiling, the judge him or herself will have been the cause of a breach of the very right they are charged to protect.
>
> 36. Thus, two constitutional principles inherent in the judicial process—protection of rights and impartial decision making—come into conflict within the role of the judge. The principle of judicial independence is also pitted against the personal right of the accused under s. 11(b), to the extent the judge may cause delay by fulfilling the

> adjudicate function. Finally, the broader societal aspect of s. 11(b) is in tension with the aspect of judicial independence which "belongs not to judges, but to the public." … This is to the extent that the public expects both reasonably prompt as well as fair, impartial and properly considered justice.
>
> 37. The way this issue is approached under *Jordan* has normative implications for the way criminal prosecutions are conducted. As the Supreme Court has recently cautioned, "[a]ll courts … must be mindful of the impact of their decisions on the conduct of trials."

[54] 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.

[55] 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***.

[56] Two recent decisions since ***Jordan*** have examined the issue of delay caused by judges reserving their decisions. Although using different rationale, both cases refused to count reserve time toward unreasonable delay. Both cases underscored the practical problems in counting reserve time in the context of considering whether the delay is unreasonable.

[57] In ***R. v. Lavoie***, 2017 ABQB 66, [2017] A.J. No. 85 (QL), Belzil J. of the Alberta Court of Queen's Bench determined that reserve time (which in that case was seven months) should be subtracted from the total delay as a discrete exceptional circumstance. The court reasoned as follows:

> 38 … The decision by presiding judges to reserve decisions are both unforeseen and unavoidable.
>
> 39 … the Crown has no ability to control whether a case is adjourned and, if so, for how long. That decision, which is a function of judicial independence, rests solely with the presiding judge.

[58] In ***R. v. Ashraf***, 2016 ONCJ 584, 367 C.R.R. (2d) 30, Band J. of the Ontario Court of Justice subtracted her own deliberation time from the total delay. In that case, had that period been included, the presumptive ceiling would have been violated. Including the reserve time as part of the total delay time would have also raised a number of fundamental problems which she addressed:

> 74 … First, when a s. 11(b) application is brought prior to trial, as required by the Rules, one wonders how the judge will be able to

> determine the period he or she will require to deliberate without knowing (a) how the trial will unfold and (b) what other demands will be placed on his or her time surrounding the "anticipated end of trial". Second, in a case like this one, where counsel brought the application on a date that was initially set for trial continuation, some concerns may arise as to the optics and incentives at play. Should a judge inquire as to whether the defence is willing to waive the judge's deliberation time? In a case where the 18 month mark might be reached during the judge's period of deliberation, thereby shifting the onus, will the judge's "turnaround time" cause one party or the other to feel aggrieved or, worse, to question the judge's impartiality?

[59] In its submissions, the Crown supplements the practical concerns raised in ***Ashraf*** by noting that the use of the ***Jordan*** framework could lead to an increasingly consistent view that it might be inappropriate for judges to assess the constitutional implications of their own delay. This would create two additional practical difficulties. First, if judicial delay is to be considered as part of the s. 11(b) presumptive ceiling, it is likely that an increasing number of delay motions in the trial courts will involve a recusal motion which may lead in turn to the potential requirement that a different judge be assigned for the adjudication of that motion. It is not conjecture to suggest that this will add complexity and potential additional delays. That is precisely what ***Jordan*** sought to remedy. The second practical difficulty relates to the unavailability of relevant information that will prevent the Crown from being able to adequately and meaningfully respond as to the reasonableness of that part of the delay which is over the presumptive ceiling but is judicial. This in turn affects the fairness of the required Crown accountability which is an inherent and important part of the ***Jordan*** analysis. In other words, where 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.

[60] To summarize, judicial delay should not be assessed and accounted for by including it under the new ***Jordan*** framework and measuring it against the stark and associated presumptive ceilings. Not only does the ***Jordan*** framework not provide a mechanism for adequately balancing and reconciling the relevant constitutional principles at play, the framework – if applied to judicial delay – would give rise to practical problems that would have the paradoxical effect of compromising much of the predictable and certain efficiency and accountability that ***Jordan*** was attempting to bring.

[61] Needless to say, the discussion of the implications and practicalities of including judicial delay in the presumptive ceilings set out in ***Jordan*** must be kept separate from any discussion of the ethical issues that are triggered when there is undue delay in judicial decision-making. Later in this judgment, I will briefly touch upon the distinction between the professional/ethical issue of judicial delay and judicial delay which is constitutionally violative.

[62] So if it is inappropriate to include judicial delay or judicial deliberation time in a presumptive ceiling analysis, is there an appropriate place anywhere in a s. 11(b) analysis to consider and assess potentially violative judicial delay? If so, how is such a consideration and assessment to be done? On what test can it be

determined that judicial delay in the preparation of reasons infringes an accused's right to be tried within a reasonable time?

[63] I attempt to address those questions in my discussion of the next issue.

> ***Issue 2: If in the context of an alleged s. 11(b) violation, judicial delay relating to judicial reserve time cannot be addressed using the framework and/or presumptive ceilings set out in R. v. Jordan, how is such judicial delay to be assessed and when might such delay be seen as violative of an accused's s. 11(b) Charter rights?***

[64] For the reasons that follow, I have determined that judicial delay in decision-making may be in some circumstances – however exceptional – violative of an accused's constitutional right to be tried within a reasonable time.

[65] I have already explained why this court ought not to consider judicial delay in the context of a presumptive ceiling. Such a reference point was not conceived so as to adequately balance and reconcile the applicable constitutional principles and interests at play. As I set out below, it is my view that the appropriate applicable test is that which is set out in ***Rahey***, *supra*. The determinative question is whether, in the overall context of the case, the delay in preparing a decision was "shocking, inordinate and unconscionable". If it was, then "in the words of s. 11(b), the delay was unreasonable". See ***Rahey***, para. 43.

[66] As a starting point, I accept that there must be an appropriate place in a s. 11(b) analysis so as to enable a consideration of judicial delay which may be constitutionally violative. Notwithstanding everything I have already acknowledged and discussed in relation to the constitutional principle of judicial

independence and its practical exercise in the realm of judicial decision-making and judicial reserves, in this post-***Jordan*** era, it would be incongruous to suggest that there is not some point at which judicial delay becomes unreasonable for the purposes of s. 11(b).

[67] Using the identified test in ***Rahey*** 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. The nature of that ***Rahey*** test and its application does not involve either of these principles superseding or abrogating the other. The "shocking, inordinate and unconscionable" test enables a reconciliation of the colliding constitutional principles in a way that does indeed preserve the core of each principle.

[68] Where it can properly be said on the facts of a given case that the judicial delay in question is "shocking, inordinate and unconscionable", such a characterization would suggest that the delay was not within the "substantial variations on how different judges approach their duties" as permitted under the ambit of judicial independence. See ***Creve***, *supra*, at para. 110. Accordingly, delay that is "shocking, inordinate and unconscionable" violates the accused's right to a trial within a reasonable time.

[69] In attempting to find an appropriate mechanism for assessing constitutionally violative judicial delay in post-***Jordan*** cases, it is possible to assert (as the Crown has) that the application of the ***Rahey*** test contains relevant reference points which capture the spirit of the issue as it was

determined in ***Rahey***, and, at the same time, it permits an analysis unencumbered by the now-discarded ***Morin*** factors which were not in play in ***Rahey***. In this connection, one sees in the adjectives "shocking, inordinate and unconscionable" a sufficiently clear meaning so as to enable one to understand why any such described judicial delay is one which has exceeded the proper bounds of judicial independence and entered the realm of what is unreasonable.

[70] Judicial delay which would exceed the proper bounds of judicial independence would first have to be "shocking". "Shocking" in this context connotes that a reasonable person with full knowledge of the justice system would be alarmed at the delay and find it significantly in excess of acceptable standards.

[71] A judicial delay which exceeds the proper bounds of judicial independence would also be "inordinate". "Inordinate" in this sense would be that delay which significantly exceeds the time reasonably required in reference to, amongst other things, the complexity of the particular case and any identifiably available personal or workload factors that may be present and knowable.

[72] Finally, unreasonable judicial delay that exceeds the proper bounds of judicial independence need be "unconscionable". In this respect, an unconscionable delay would be that which is excessive to the extent that it cannot be explained or justified on any reasonable basis, *a priori* or otherwise.

[73] The application and associated analysis of the ***Rahey*** test will involve a consideration of any relevant factor arising in the particular context of a given

case. Those contextually relevant factors may vary because of their case-specific nature.

[74] In conducting an analysis as to potentially violative delay using the test set out in ***Rahey***, the court should take into account contextual factors like the complexity of the matter and the amount of evidence that requires review. In ***Jordan***, the Supreme Court confirmed that a case-specific factor such as complexity remains a relevant consideration, as it relates to situations falling both above and below the presumptive ceiling. See ***Jordan***, *supra*, at paras. 77 and 88.

[75] Despite my emphatic earlier determination of the first issue on this application, in some cases, as part of the broader context, one of the factors to be considered in determining if a judicial delay is "shocking, inordinate and unconscionable" may be whether or not (from the time of the charge to the end of the evidence) the judicial delay in question is taking place in a case where a presumptive ceiling has already been breached. Limited to a contextual factor, it should still be recognized that even in cases where the time from the charge to the end of the trial exceeds a presumptive ceiling, a judge will require time to deliberate, come to a decision and craft appropriate reasons for judgment.

[76] The reasonableness of the time required for a judge to fulfill this adjudicative function 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***, *supra*, at para. 7, citing ***R. v. R.E.M.***, 2008 SCC 51, [2008] 3 S.C.R. 3. It is for that reason that although any excessive time taken between the charge and the completion of the evidence may be taken into account as a contextual factor to the application of the ***Rahey*** test (i.e. a breach of a presumptive ceiling prior to the judicial delay), the relative importance of such a factor will usually be minimal and never determinative.

[77] In adopting the test in ***Rahey*** for identifying judicial delay that is constitutionally violative, I appreciate that the threshold may be perceived as being high. But it is only with that high threshold that the colliding constitutional principles and interests at play can be reconciled and balanced, while at the same time ensuring a necessary recognition that there is a point beyond which judicial delay becomes unreasonable. Despite the stipulated high threshold required for showing judicial delay that is violative of s. 11(b), it ought to be understood that confirming such a high threshold is not tantamount to an indifference about the judiciary's need to deliver decisions as promptly as possible. Indeed, in an era where the ideals of access to justice and systemic

efficiency have been properly emphasized, the judiciary's concern for prompt but thoughtful decision-making has never been more important.

[78] The Canadian Judicial Council ("CJC") in its "Ethical Principles for Judges" notes that as an aspect of the principle of "diligence", judges should deliver reserve judgments within six months, barring special circumstances. Those special circumstances include "illness, the length or complexity of the case, an unusually heavy workload, or other factors making it impossible to give judgments sooner". See CJC Ethical Principles for Judges, p. 21. It need be emphasized that while an important yardstick, the CJC recommendation is aspirational and identified on the order of a "best practice". Yet even if the six-month mark is identified and sometimes de-emphasized as a mere "best practice", that six-month marker has in fact congealed so as to become a well-known demarcation line for signalling what may be, in the context of a judge's professional obligations, an undue judicial delay.

[79] It need be recognized that judicial delay which may be "undue", is nonetheless not necessarily delay which is constitutionally unreasonable. In most cases, judicial delay in the rendering of a decision will remain an ethical not a juridical matter. In that majority of cases, any undue judicial delay is properly overseen and regulated by the court's Chief Justice, Associate Chief Justice or Senior Regional Judge, who would be best placed to appreciate, balance and regulate the professional and personal factors that surround any given judicial delay.

[80] Having determined that judicial delay ought not to be specifically considered in the context of the presumptive ceiling set out in ***Jordan***, and having also determined that judicial delay that can be characterized as "shocking, inordinate and unconscionable" is delay which is violative of a s. 11(b) and thus is unreasonable, I will now momentarily leave the issue of the particular judicial delay in this case. I will proceed next to assess, using the ***Jordan*** framework, the delay in the present case that can be identified as being separate and apart from judicial delay. If that delay is, in the context of the ***Jordan*** framework, not determined to be in violation of s. 11(b), I will then return to the question of whether on the particular facts of the present case, the judicial delay relating to the reserve judgment was sufficiently "shocking, inordinate and unconscionable" so as to be unreasonable and in violation of s. 11(b).

Issue 3: On the particular facts of the present case, does the relevant period of time leading up to the completion of the trial evidence (prior to the judicial delay in respect of the reserve decision) constitute - within the framework of Jordan - a delay that is violative of the accused's s. 11(b) Charter right?

[81] The applicant insists that given that this matter falls above the presumptive ceiling (even prior to the consideration of a nine-month judicial delay), on any application of ***Jordan***, the only way the delay can be justified is if the Crown establishes exceptional circumstances. The applicant submits that no such special circumstances exist to explain the period between the charges and the completion of the evidence. The applicant further contends that the Crown

in the present case should not be able to benefit from what ***Jordan*** identifies as the transitional exceptional circumstance.

[82] While I accept the applicant's position that there appears to be no exceptional circumstances present in terms of the available categories of exceptional circumstances identified in ***Jordan*** (the proceedings were not complex and there were no discrete events that sidelined the trial), I reject the applicant's argument that this is not a case where the Crown should benefit from the transitional exception set out in ***Jordan***. On the contrary, this would seem to be the very type of case where the transitional exception should apply.

[83] I should note immediately that I am not convinced that the facts in the present case establish that this is a case where the delay is seriously above the presumptive ceiling. As the Crown argued, it can be reasonably concluded that if one deducts the purported defence delay of two months and three weeks (the period during which both the Crown and the court were available in the setting of trial dates but the defence was not), the total delay between the date of the charges and the completion of the evidence (prior to the judicial delay) is 30 months and two weeks. Despite the reality that the delay between the charges and the completion of the evidence is effectively at or only marginally above the 30-month presumptive ceiling, I will, for the purposes of my analysis and in order to give every consideration to the defence position, assume the delay was 33 months and one week. Obviously, that 33-month and one week delay does not involve the deduction of the time respecting the alleged unavailability of the

defence for certain earlier trial dates. Nonetheless, in the circumstances of the present case, my conclusions respecting the transitional exception remain the same whether the reference point is 30 months and two weeks or 33 months and one week.

[84] Although the identified delay may cause this case to fall above the presumptive ceiling, this is a proceeding where the application of the transitional exception is appropriate. The Crown is correct when it submits that most of these proceedings, including the setting of trial dates, took place before ***Jordan*** was released. Accordingly, I agree with the Crown's submission that it would be unfair to hold the parties to the strict standards of conduct set out in ***Jordan***. I do accept that had the parties and indeed the court known at the time trial dates were set that a 30-month ceiling would apply, there is little question that things would have been done much differently.

[85] While no one would applaud the delay of 33 months and one week, this is a case where the facts suggest 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 for assessing s. 11(b) challenges.

[86] The transition period set out in ***Jordan*** provides a mechanism by which courts can address those cases that were already in the system prior to the release of ***Jordan***. The recognition of the need for some transitional period

affords some allowance and flexibility in the application of the new ***Jordan*** framework to those cases that were already in the system. This is such a case.

[87] The transitional exception is an acknowledgement by the Supreme Court that care must be taken to ensure that the rash and precipitous legal consequences that flowed from ***R. v. Askov***, *supra*, are not repeated. In that regard, the court warned against staying tens of thousands of charges due to the change in the law as occurred in ***Askov***. In ***Jordan***, the court noted that "[s]uch swift and drastic consequences risk undermining the integrity of the administration of justice. … the administration of justice cannot tolerate a recurrence of what transpired after the release of *Askov*, and this contextual application of the framework is intended to ensure that the post-*Askov* situation is not repeated." See ***Jordan*** at paras. 92-94.

[88] On any analysis of the possible application in the present case of the transitional exception, the court must consider the impugned delay from the perspective of the former legal regime. Nonetheless, there need not be a wholesale and minute computation of time on the basis of the prior test. Indeed, such an approach is discouraged. See ***Jordan*** at paras. 92-102; and ***R. v. Richard***, 2017 MBQB 11 at para. 44, [2017] M.J. No. 46 (QL). To the extent that some of the analysis will occur from the perspective of the former legal regime, prejudice and the seriousness of the offence will be particularly relevant. When I consider those factors in the context of the present case, while I acknowledge that the charges are serious, no obvious prejudice has been

established by the applicant. I accept that any delay is inherently prejudicial, but I do note that some of 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.

[89] If I assume, as I have, that the timeframe in this case involves a delay of 33 months and one week, I must note that it is a timeframe in line with other recent cases where the transitional exception has been applied.

[90] In ***R. v. Amyot and Emslie***, (unpublished – Docket No. CR 15-01-34461), the court adopted an approach first adopted in the B.C. Supreme Court case of ***R. v. Curry***, 2016 BCSC 1435 at paras. 173-184, 2016 CarswellBC 2152. That approach involves determining whether the parties' efforts in bringing the matter to trial were reasonable given the law as it applied at the time. It is an approach that properly avoids the pitfalls of ***Askov*** (which pitfalls were identified by the majority in ***Jordan***) and applies the transitional exception in a flexible and contextual manner. See ***Amyot***, paras 52-53. It should be noted that ***Amyot*** involved a situation where the identified delay was 32.5 months.

[91] In another case involving a delay of approximately 33 months, this court determined that the delay and the efforts to bring the case to trial were reasonable having regard to the prior law and the rationale underlying the transitional exception. See ***R. v. Summerfield***, 2016 MBQB 241 at para. 39, [2016] M.J. No. 366 (QL).

[92] In ***R. v. Richard***, *supra*, the court would have applied the transitional exception to a delay of 41 months had time not already been deducted for defence delay. See ***Richard*** at para. 41.

[93] When I conduct one final review of the facts that constitute the background to this case, I note that the early stages of this case did involve inaction on the part of both the Crown and the defence. It need be acknowledged (as the Crown does) that there were no meaningful discussions taking place between counsel until August 2013. Indeed, it would appear that the defence did not attend for remands as it relates to this matter when it was appearing in the rural court at Selkirk. Following the preliminary inquiry which proceeded as scheduled, the committal took place and the matter moved into the Superior Court where it proceeded in the normal course. Pre-trial conferences were held which addressed evidentiary issues for trial. The pre-trial conferences also permitted the Crown to decide whether or not to join the matter with new charges that were in the early stages of investigation. Again, the Crown is correct when it asserts that these were basic case management efforts that were not out of line with accepted practice for the time. When, on January 29, 2015, trial dates of January 11-22, 2016 were agreed to and scheduled in the Court of Queen's Bench, no objections or complaints were raised by the defence regarding delay. Indeed, the issue of delay was not raised until it was identified in connection to the judicial delay in rendering a decision.

Even then, the matter was not raised until the day before the accused was convicted.

[94] Given the length of delay in this case, the apparent lack of obvious additional prejudice (apart from the inherent prejudice of any delay), and given the fact that I have found that the parties conducted themselves reasonably having regard to the previous and prevailing legal framework and culture, I have determined that this is a case where the transitional exception should apply. Accordingly, the delay as between the date of the charge and the completion of the evidence, when considered separate and apart from any judicial delay, was not unreasonable and is thus not violative of s. 11(b) of the ***Charter***.

Issue 4: On the particular facts of the present case, is the judicial delay relating to the reserve judgment sufficiently "shocking, inordinate and unconscionable" so as to warrant the exceptional Charter remedy of a judicial stay of proceedings?

[95] In the present case, it cannot be denied that the nine-month judicial delay in the rendering of the trial judge's decision on the issue of guilt, represents a comparatively long timeframe. That said, the period of nine months, on a contextual analysis and on an application of what I have identified as the applicable test, does fall within the variation properly allowed by judicial independence. The nine-month delay in the circumstances of this case is not "shocking, inordinate and unconscionable" and it is a delay that is thus not unreasonable and not in violation of s. 11(b) of the ***Charter***.

[96] Although the judicial delay in this case takes place in relation to a trial of a serious offence, further context must be considered. Contextualizing a judicial

delay like that in the present case involves, amongst other things, taking into account any real impact the judicial delay has had on an ongoing trial. It may also involve considering any actual or egregious prejudice to the accused or the administration of justice. As mentioned earlier, the contextualization of an impugned judicial delay may include, to a limited extent, noting whether the time taken from the date of the charge to the completion of the evidence involves a breach of a presumptive ceiling.

[97] In the present case, the delay in reaching a final decision did not impact on the conduct of the trial itself. The absence of any impact on the trial itself can be contrasted with what occurred in ***Rahey*** and in ***R. v. Junkin***, 2011 MBQB 170, 266 Man.R. (2d) 11. The present case was effectively completed on January 21, 2016 and the nine-month delay in coming to a decision as to guilt had no impact or associated delay in respect of how the parties presented their evidence, nor did it have any impact on the nature of that evidence.

[98] While there is always inherent prejudice to the accused and the administration of justice any time delay takes place, the judicial delay in this case, because of the absence of any impact upon the manner in which the evidence was presented and the trial unfolded, has not resulted in prejudice which is egregious to either the applicant or the administration of justice.

[99] As discussed earlier, if defence delay is accounted for, it is possible to say in the present case that even though this trial was conducted and completed before ***Jordan***, it is arguable that the time between the charge and the

completion of the trial involved only a marginal breach of a presumptive ceiling. Assuming defence delay is not accounted for, and the delay is as earlier identified, at the 33-month and one week mark, that delay when considered with the other contextual factors is not enough to transform the nine-month judicial delay into one that is unreasonable because it is "shocking, inordinate and unconscionable".

[100] The circumstances of this case and the contextual factors discussed above would not create, in a reasonable person with the full knowledge of the justice system, the sort of shock or sense of alarm that would cause that reasonable person to conclude that the nine-month judicial delay is significantly in excess of acceptable standards.

[101] The nine-month judicial delay in the present case does not exceed the proper bounds of judicial independence in that it cannot be identified to be an "inordinate" delay. While there is relatively little evidence before the court on the degree of the complexity of this case and not surprisingly, little information about the personal circumstances of the judge and/or his workload, it is possible to conduct, to some degree, a comparative analysis for the type of decision that is required in a case like the present. As the Crown acknowledged, a final decision as to guilt or innocence, when reserved, is not normally expected to be made within a few days, as could be said of the issue in ***Rahey*** (a no-evidence motion). Similarly, the nine-month judicial delay taken for a final decision in the

present case is quite different from the 20.5 months taken to decide a *voir dire* which, in ***Junkin***, was a delay found to be unreasonable.

[102] Finally, when one examines the nine-month judicial delay in light of all of the above, neither is it possible to characterize that delay as "unconscionable". While the nine-month delay may be regrettable and perhaps on an all-things-considered analysis, long, it is not possible to describe it as an unconscionable delay which is excessive to the extent that it cannot be explained or justified on any reasonable basis, *a priori* or otherwise.

[103] Even if this delay was longer than desirable, in light of the particular circumstances of the case and in comparison to other proceedings, this is not a situation where nine months of judicial delay should be determined to be unconstitutional. For the reasons given, this judicial delay falls within the variation allowed by judicial independence and it was therefore not "shocking, inordinate and unconscionable".

VII. CONCLUSION

[104] My conclusions respecting the issues addressed on this application can be summarized as follows:

(1) Impugned judicial delay in the context of delayed decision-making and judicial reserves, ought not to be assessed or evaluated under the framework for s. 11(b) set out in ***Jordan***;

(2) Judicial delay in decision-making may be in some circumstances – however exceptional – violative of an accused's constitutional right

to be tried within a reasonable time. The appropriate applicable test is that which is set out in ***Rahey*** and the determinative question is whether, in the overall context of a case, the delay in preparing a decision was "shocking, inordinate and unconscionable". If it was, then in the words of s. 11(b), the delay was unreasonable;

(3) The delays in the present case as between the date of the charge and the completion of the evidence, when considered separate and apart from any judicial delay, were not unreasonable and are thus not violative of s. 11(b) of the ***Charter***. That determination is made on the basis of the availability of the transitional exception as contemplated in ***Jordan***;

(4) On the particular facts of the present case, the nine-month judicial delay relating to the reserve judgment is not so sufficiently "shocking, inordinate and unconscionable" as to be violative of the applicant's s. 11(b) ***Charter*** rights and to warrant the exceptional ***Charter*** remedy of a judicial stay of proceedings.

[105] In the result, the application is dismissed.

_____ C.J.Q.B.