Case Name:
R. v. Brar

Between
Her Majesty the Queen, and
Davinder Brar

[2019] O.J. No. 695

2019 ONCJ 71

Brampton Court File No.: 15-6766

Ontario Court of Justice

N.S. Kastner J.

Heard: January 14, 2019.
Judgment: February 7, 2019.

(134 paras.)

Counsel:

Ms. Daniella Portolese, counsel for the Crown.

Mr. Alan D. Gold and Ms. Laura J. Metcalfe, counsel for the defendant Davinder Brar.

Reasons for Judgment

N.S. KASTNER J.:--

Introduction

1 The Court delivered Reasons for Judgment following a complex *Charter* argument and a three day trial on Nov. 19, 2018[1]. Ms. Metcalfe then indicated that the defence was electing not to call

any evidence at trial, and had no submissions to make. The admissible evidence established that Mr. Brar's blood alcohol concentration when he was operating his motor vehicle was 170 milligrams of alcohol in 100 millilitres of blood. Thus, the Court found Mr. Brar guilty of driving with a blood alcohol concentration exceeding the legal limit of 80 milligrams of alcohol in 100 millilitres of blood.

2 Following the conviction, defence counsel asked to stand the matter down. When the matter was addressed next that same day, she filed a detailed application to stay the proceedings due to an alleged unreasonable delay contrary to section 11(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*)[2].

3 Counsel then scheduled Jan. 14, 2019 to hear the application. There is no issue of delay alleged for the period of time from the Judgment on Nov. 19, 2018 to the present, which was required by both the late application filed and schedule of all the parties.

4 The Applicant filed an Application Record and Written Argument on Dec. 18, 2018. The Respondent filed Written Response and Application Record on Jan. 8, 2019. The Applicant produced Supplemental Written Submissions on the hearing date Jan. 14, 2019, which were subsequently filed.

5 On Jan. 22, 2019, the Applicant also brought the Court's attention, on consent, to a further case reported after submissions were made[3]. I thank counsel for their diligence.

6 The argument on the motion concerns a narrow period of time (8 to 9 months approximately) in the overall time of a little more than 40 months from the offence date to the time of verdict. Most of the time after the intake period and prior to the commencement of the trial in 2018 was either defence delay or waived time periods. The factual background that follows outlines the case history.

7 In oral submissions, the issue became focused on whether the time the Court took to deliver reasons for judgment exceeded the *Jordan*[4] ceiling, and requires a remedy of a stay of proceedings.

Factual Overview

8 Mr. Brar was arrested on May 31, 2015 for an alleged offence contrary to s. 253(1) (b) of the *Charter*. This trial began Jan. 3, 2018. It was scheduled for only two days, Jan. 3 and 4. On the second day, it was apparent that a third date was required, which was scheduled expeditiously and the evidence and initial oral submissions concluded on Jan. 29, 2018. Thereafter written submissions were filed by both Crown and Defence, as well as written Reply. The Court reserved judgment, which was given on Nov. 19, 2018. The Applicant was found guilty in this Court on Nov. 19, 2018.

9 The following chart illustrates the Timeline of Proceedings[5]:

Date	Event
May 31, 2015	Date of arrest
June 8. 2015	Information Sworn
June 12, 2015	First appearance. Adjourned to review initial disclosure provided and to retain counsel
July 10, 2015	Second appearance. Adjourned to review additional disclosure[6] provided and to retain counsel
July 25, 2015	The Applicant retains counsel of choice
August 14, 2015	Third appearance. Defence are awaiting additional disclosure but conduct a Crown pre-trial in the interim to move the matter along
September 4, 2015	Fourth appearance. Defence are awaiting additional disclosure but schedule a judicial pre-trial to move the matter along
October 27, 2015	Fifth appearance. Judicial pre-trial conducted and trial dates set for June 7 to 8, 2016
June 7, 2016	Successful third party records application. Matter adjourned to June 30, 2016 to obtain and receive those records and set new trial dates
June 30, 2016	Trial set for April 6 to 7, 2017. Due to defence unavailability, the Applicant waived delay between June 30, 2016 and April 6, 2017
July 8, 2016	*R. v. Jordan,* 2016 SCC 26 is released
April 6, 2017	Trial adjourned to January 3, 2018 due to late defence application. The Applicant waived 11(b) from April 6, 2017 to January 3, 2018
January 3, and 4, 2018 January 29, 2018	Trial. Jan. 3 and 4 were the original 2 days scheduled for a third trial date. Matter underestimated and 3rd date scheduled on Jan. 4th for Jan. 29 to complete. Court and Crown available Jan. 8, 2018[7]. Oral submissions. Defence files written submissions on January 29, 2018. Date set for judgment on March 20, 2018.
February 12, 2018	Crown files reply submissions
February 13, 2018	Defence files written reply submissions
March 9, 2018	Email from Justice Kastner's assistant advising that the decision would not be ready for March 20 and counsel are to pre-arrange a next court date.
March 14, 2018	Matter brought forward to adjourn to the agreed to date in May. Decision adjourned to May 30, 2018 as

	arranged
May 23, 2018	Email from Justice Kastner's assistant advising that the decision is not ready and counsel are to pre-arrange a next court date.
May 30, 2018	Decision adjourned to July 11, 2018 as arranged
July 9, 2018 July 11, 2018	Email from Justice Kastner's assistant advising that the decision would not be ready on July 11 and counsel are to pre-arrange a next court date. Parties agreed to Sept. 14, 2018. New date set. Crown states his understanding from off record discussion with defence agent is that "11(b) is not an issue at this point", so he is content with that date.
September 13, 2018	Email from Justice Kastner's assistant advising that the decision would not be ready and counsel are to pre-arrange a next court date.
September 14, 2018	Although Crown offered dates commencing October 9[8], between the Applicant's medical appointment and Crown unavailability, the decision was adjourned to November 19, 2018 as arranged
November 19, 2018	Written Reasons for Judgment delivered in Court

[Editor's Note: Notes[6];[7];[8] are included in the image above]

10 As the above illustrates, delay was expressly waived for the bulk of the appearances before the trial dates of Jan. 3 and 4, 2018. All previously arranged trial dates were adjourned at the request of the defence.

11 The trial was estimated to take 2 days to complete the trial. Four witnesses testified on the *Charter* application. They were extensively cross-examined. By the second day, it was clear that the matter required a third day to complete the trial. A very early date of Jan. 29th was scheduled to complete the trial. The Court was available on Jan. 8, and 21 days delay are as a result of lack of availability in the Applicant's schedule.

12 While counsel does not have to hold their calendars open perpetually, the 21 days between the trial dates set on April 6, 2017 and the third trial day of January 29 is caused by the underestimate of time, and is a discrete event subtracted from the *Jordan* calculation.

13 At the conclusion of the trial, and during submissions, Mr. Gold suggested that he file written submissions on the *Charter* ss. 8 and 9 application:

Mr. Gold: I don't know if Your Honour's aware, but there's a summary conviction appeal decision that's come out since my argument...

The Court**:** I was not aware.

Mr. Gold**:** ... called *Cheema*. Oh, yes. And it raises -- the Crown will rely on it strongly. I will strongly urge it doesn't assist the Crown, but it does involve some rather complicated, more complicated, submissions that would take me about an hour, and -- I'm wondering if Your Honour would accept them in writing? I could get them. They're almost done, because they -- we prepared submissions. I wanted to make sure my friend was aware of the *Cheema* decision; obviously, that's my duty. I'm wondering if Your Honour would let me file written submissions, because it really is something I should have dealt with in-chief, had the decision been available at that time, and then the Crown would - could reply in writing, dealing.

Mr. Gold**:** That would probably be the better way of dealing with kind of more complicated legal issues that now arise, because it's a summary conviction appeal decision, which, on its face, appears binding, but I believe I can demonstrate to Your Honour that it isn't binding, and was, in fact, decided *per incuriam.* So as Your Honour appreciates, that probably would be better presented in writing. I can have the submissions to your Honour in writing within a couple of days, and then I'm -- if Your Honour wishes, my friend could have a couple weeks to reply and we could come back for judgment at that time.

The Court: Mr. -- Ms. Portolese, do you agree with that?

Ms. Portolese: I would be in agreement with that, as well.

The Court: All right. Did you both know that I was speaking about written submissions on the weekend, about written submissions on a continuing professional development course; but yes, this is that kind of situation in which written submissions are helpful. So how long would it take you to reply to Mr. Gold; do you think?

Ms. Portolese**:** I would ask for two weeks, Your Honour.

...

The Court: ... So I'll need a couple of weeks for sure, after that. So...

Mr. Gold: So...

The Court: ...About a month from now.

14 At the time of these rough estimates, the submissions had not yet been received. Written submissions of both counsel, and reply, were submitted by Feb. 13, 2018. They were not brief.

15 As at Jan. 29, 2018, the Court scheduled a date thought to be sufficiently removed to consider all the submissions and to render a decision. Unfortunately, that was not the case.

16 The delay in completing the written submissions necessitated the first adjournment to deliver reasons for judgment. In any event, counsel expressly waived the delay between Jan. 29 and March 20, 2018 when the matter initially scheduled[9].

17 When the matter was addressed on Jan. 29, 2018 to be remanded for decision, delay was expressly addressed by the Court:

Mr. Gold**:** So, Your Honour, in terms of -- of my schedule, I -- I might suggest, for example, Monday, February 26, 2018, but if that's too early -- or I guess...

The Court**:** It probably is.

Mr. Gold**:** All right. The following week, the problem is I'm out of the province. In fact, I'm out of province until the week of March 22nd, Your Honour.

The Court**:** **I take it delay is not at issue?**

Mr. Gold**:** **Not at this point, Your Honour, no**.

The Court**: I would hope it wouldn't be at any point.**

All right. So are you content with that date, Ms. Portolese?

Ms. Portolese**:** So that was March 22nd?

The Court**:** Yes.

Ms. Portolese**:** If it's - I will actually be in the Halton jurisdiction in the month of March, however, if it's just for judgment, any one of my colleagues could receive it.

The Court**:** It would be judgment, yes.

Mr. Gold: How about Tuesday March 20th, Your Honour?

...

The Court: Sure, 20th?

Ms. Portolese: Yes

The Court**: ...** So we'll have judgment on March 20th at 409 Court, at 10:00 am. All right. Unfortunately, I - I read it all for today, again, but at least that will be fresh in my mind.

(emphasis added)

18 Judicial independence requires that judges' deliberations are not subject to scrutiny, except to say the decision or ruling should be delivered within a reasonable time[10]. Although difficult to objectively scrutinize one's own reasonableness, this Court acted reasonably throughout.

19 The backdrop for this case is the extremely busy jurisdiction of Peel and the Brampton Court. Many cases have reiterated that Brampton is one of the busiest jurisdictions in Canada, if not *the* busiest jurisdiction; with a large population that grows exponentially each year, and which includes within it an international airport:

> *R. v. Meisner*, 2003 CanLII 49317 (ONSC) Hill, J., at paras. 26, 57 to 66; affirmed 2004 CanLII 30221 (OCA).
>
> *R. v. Daibes,* [2015] O.J. No. 2818 (ONSC) Hill J., at paras.7, 29.
>
> *R. v. McPherson,* 2012 ONSC 7127 Baltman J., at para. 4.
>
> *R. v. Beaulieu,* 2017 ONSC 6543 Barnes J., at para. 138.
>
> *Mississauga (City) v. Uber Canada Inc.*, 2016 ONCJ 461 Nicklas R.S.J., at para. 18.
>
> *R. v. Formusa,* 2017 ONCJ 236 Band J., at paras.11, 34.
>
> *R. v. Tobin*, 2013 ONCJ 227 Gage J., at pgs. 4 to 5.
>
> See also *R. v. Muhammed*, [2018] O.J. No. 4257 (ONSC) Trimble J., at para. 115; *R. v. Veldman*, [2018] O.J. No. 6871 (ONSC) Trimble J.; *R. v. Ny*, 2016 ONSC 8031 Fairburn J. (as she then was) at paras. 46, 126; *R. v. Sidoro*, 2013 ONSC 6010 Dawson J. at para. 30 and 32; and *R. v. McGregor,* 2015 ONCJ 373 Stribopoulos J. (as he then was), at para.42.

20 Other adjournments between March and October were required for a number of reasons, including accordance with prioritization of workload, and on the understanding that delay was not at issue here. It is important that the Court have time to digest the arguments, which included an effort to have the Court not follow a binding Superior Court of Justice decision[11].

21 The Court continued to deliberate for the specified further times. The judgment could have been delivered on October 11, 2018, but for the unavailability of the Applicant.

22 The time under reserve where no express waiver was voiced is actually March 20 to October 11, 2018, or six months and three weeks.

23 The Court also considers the lack of a s. 11(b) Application prior to date set for decision. That discrete event of at least Sept. 20 to Nov. 19 also must be deducted from the calculation, for a period of six months. The late filing of such a motion, if contemplated by the Applicant earlier than that time, would further reduce the time eventually taken.

24 Decisions by a justice are not just a matter of putting pen to paper. The Court wants to "get it right" for all parties, not just "get it done". It is a fundamental principle of judicial independence that the Court takes a reasonable time to consider all submissions and matters before the Court.

25 Advocacy in this case was superlative, and both parties were highly persuasive. They chose to augment their argument with written submissions. This tends to lengthen the time necessary to write reasons.

26 The Court's decision in this matter is 32 single space typed pages in length, plus an Appendix[12], and consists of 201 paragraphs. It is fair to say that the Court had to engage in a great deal of thoughtful analysis to render its judgment. The Applicant concedes the issues at hand were moderately complex.

27 All of the remands were communicated in advance to counsel, who could have alerted the Court if the period of time on reserve was of concern. The time on reserve and potential *Charter* delay was addressed by the Court directly to counsel at the conclusion of oral submissions and before the receipt of written submissions. The Applicant expressly waived delay to at least the first date selected of March 20, 2018.

28 The Crown also addressed the issue on the record on July 11, 2018. The Applicant was represented by a student in Mr. Gold's office that day. Mr. Gold submits that the date was prearranged with the Crown to accord with dates offered by the Court, and it was somehow unfair for the Crown to raise the issue when the matter was spoken to. One could reasonably expect that the agent be fully informed by their office, or if in doubt, to seek instructions. The silence in the face of the Crown directly raising the issue could reasonably be considered as acquiescence or agreement to the delay.

29 Even if I give that submission of waiver based on July 11 appearance no weight, it is still subsumed in the position that the Applicant did not raise any concerns about delay at any point prior to the verdict.

30 It is conceded that while the time frame for the decision in this case was not ideal or swift, it

did not meet the *Rahey* standard for a stay, and the delay was not "shocking, inordinate or unconscionable". The Court proceeded in good faith to deliberate, and triage and balance its workload to accommodate this matter on top of a heavy daily volume of new and existing matters.

Issue

31 Notwithstanding this long road to trial, most of the time at issue is not attributed to state conduct *per se*; that is, not by actions of the Crown, or in the control of the Crown to mitigate. The complaint is based on the time taken to deliver the Court's reasons.

32 The Applicant states the issue as follows:

(a) whether the judicial time taken to render a decision *can* be excluded from the total delay in the *Jordan* analysis;

(b) If the judicial time taken to render a decision *cannot* be excluded, does the *net* delay exceed the presumptive 18 month *Jordan* ceiling?

(c) If judicial time taken to render a decision *cannot* be excluded, are there any exceptional circumstances justifying the breach of that ceiling?; and

(d) If judicial time taken to render a decision *can* be excluded, was the period of delay[13] to give a decision on the *Charter* issue unreasonable?

33 The Applicant argues the Court should not exclude judicial time to render a decision from the *Jordan* calculation. He submits that the Court should follow the Newfoundland position.

34 They submit the net delay in any event exceeds the presumptive *Jordan* ceiling.

35 The Applicant further argues that if the judicial time to deliver reasons is not excluded from the *Jordan* timeline, that no exceptional circumstances justify a breach of the presumptive ceiling.

36 Lastly the Applicant argued in their Factum that even if the judicial time to deliver its decision is excluded from the *Jordan* analysis, the time to give a decision was not reasonable. Mr. Gold clarified in oral submissions on the Application that he is *not* saying that the length of delay to give reasons in this case breached the *Rahey* standard. The Applicant's position was softened to suggest it was too long a time to reserve, although not inherently unreasonable for a moderately complex case.

37 The Respondent submits this Application be dismissed. Ms. Portolese argues that this Court should *exclude* the time for the judiciary to give reasons for decision from the *Jordan* analysis. This

would follow the Alberta and Manitoba position.

38 Alternatively, the Respondent submits the time frame in question here is somewhat shorter than the Applicant argues, and that the case fell within the *Jordan* presumptive ceiling. She submits that the Applicant has failed to demonstrate it took meaningful steps demonstrating a sustained effort to expedite proceedings, the case did not take "markedly longer" than it should have, and that this is not one of those rare and clear cases to warrant a stay.

39 Further, even if the presumptive ceiling was exceeded, she submits that exceptional circumstances justify the delay.

40 For the following reasons, I would answer the Applicant's statement of the issues as:

(a) Yes. The judicial deliberation time can be excluded from the *Jordan* calculation.

(b) No. If that time is not excluded, the presumptive ceiling in *Jordan* is not exceeded in this case, taking into account subtraction from net delay for defence waiver or defence actions.

(c) Yes. If judicial time to render a decision is included, exceptional circumstances may justify the ceiling breach.

(d) No. The judicial time to render a decision was not unreasonable.

Analysis

41 The Applicant bears the onus of establishing the infringement of the right to trial within a reasonable time on a balance of probabilities.

42 This application acknowledges that the time frame to trial, after considering defence delay, was reasonable to the end of the evidence on Jan. 29, 2018, and to the date written submissions were completed on Feb. 13, 2018.

43 It is the position of the Applicant that the period of time this matter was under reserve triggered an infringement of his *Charter* right pursuant to s. 11(b).

Jordan

Total Delay

44 This proceeding began before the *Jordan* decision was delivered by the Supreme Court of Canada, but the disputed times are post-*Jordan.*

45 The net delay between June 8, 2015 (the date the Information was sworn) and January 4, 2018, was 30 months and 4 days. The parties agree that the defence delay during this period was 18 months and 4 days. Therefore, by January 4, 2018, the total *Jordan* delay was only 12 months.

46 The matter proceeded to a third trial date of January 29, 2018. Although Mr. Gold and Ms. Metcalfe argue that the Court ought to consider that additional 25 days as part of the *Jordan* delay, it was required trial time caused by the under-estimation of time to complete the evidence and argument for the trial. That time is to be deducted from the total delay analysis as a discrete event. Further, even if not a discrete event, the Court was available to hear the final day on January 8, 2018, some 21 days before the matter resumed.

47 This started the proverbial snowball rolling down the hill and growing larger and larger.

48 Written argument added another fifteen days to the trial. The Applicant waived the time to the date that judgment was initially thought to be delivered on March 20. Ultimately the Court gave its decision on Nov. 19, 2018, although prepared to give it earlier in October.

Defence Delay

49 Jordan emphasizes that every actor in the justice system is responsible for ensuring that criminal proceedings are carried out within a reasonable time. Accused persons are not entitled to remain passive in the face of delay in hopes of avoiding prosecution when there is ultimately a stay for delay. Where accused persons benefit from their own delay-causing conduct, such a result "operates to the detriment of the public and the system of justice as a whole."[14] Thus, any delay attributable to defence conduct or inaction must be subtracted from the total delay.

50 The Crown argues that it must be remembered that the *Charter* governs state conduct. Therefore conduct of the accused person or defence counsel that delays the matter does not count against presumptive ceilings. Examples of defence-caused delay include, but are not limited to periods during which the court and Crown are prepared to proceed, but defence is not. It will be open to the trial judges to find that other defence actions or conduct have caused delay. Such determinations are 'highly discretionary' and appellate courts must show a high level of deference thereto[15].

51 The Applicant argues that defence delay must be "illegitimate", a term used in some of the delay cases. Of course the defence is entitled to conduct a vigorous defence, and bring the appropriate applications or objections in the course of a trial. Not all delays challenged by a Respondent in such an application need to exhibit *mala fides.* Several examples of a failure to act by an Applicant have been held to not count in an assessment of net delay.

52 In Ontario, our appellate court has prior to *Jordan*, indicated that all parties bear some responsibility to move matters along. *Jordan* has now expressly changed the expectations of the defence. The defence now has a responsibility to collaborate with Crown Counsel when appropriate and to use court time efficiently. This is reflected in the Ontario Court of Appeal decision in *R. v. Mallozzi*, 2017 ONCA 644 (CanLII), where the court states at para. 31:

> A theme that grounds *Jordan* and *Cody* is that an accused is entitled to have a trial within a reasonable time but has the responsibility to avoid delay. Accused persons must bear in mind that a corollary of the s. 11(b) right to be tried within a reasonable time is the responsibility to avoid causing unreasonable delay: *Cody*, at para. 33. Defence counsel are therefore expected to actively advance their clients' right to a trial within a reasonable time, collaborate with Crown counsel when appropriate and use court time efficiently: *Jordan*, at para. 138; *Cody*, at para. 33.

53 In the recent decision of *R. v. McNeil*[16] , in a summary conviction appeal, the Superior Court found that by agreeing to a proposed allocation of 1.5 days for trial when it knew that this time estimate did not accurately reflect the time needed to try to case, the defendant effectively ensured that the trial could not be completed on time and that an adjournment would be required. An adjournment would inevitably result in a significant delay, especially in circumstances where the court's flexibility would be compromised once the trial had begun because both the trial judge and the Crown would effectively be seized with the matter and any continuation date would be required to fit into their individual schedules. This would, of course, not be the case if a proper allocation of time had been made at the outset.

54 The Court found that even if this delay is not attributed to defence delay, however, it would clearly fall within the category of exceptional circumstances as defined in *Jordan*. At para. 43 of the *Jordan* decision the Supreme Court noted that if a 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 therefore amounts to an exceptional circumstance which is properly deductible from the overall delay.

55 The above case reiterates the principle in *Mallozzi* that defence are therefore expected to actively advance their clients' right to a trial within a reasonable time. It cannot be said that any active advancement occurred here at any point.

Waiver and Defence Actions

56 Periods of delay can be waived either explicitly or implicitly. Implicit waivers may be periods of time where the accused may wish to represent that delay is not in issue. When this occurs, it is not counted in the net delay for *Jordan* consideration.

(i) Express Waiver

57 The history of this case is replete with a number of instances of an express waiver of s. 11(b). For example, the waivers expressed when the trial was adjourned two times previously at the defence request; and the waiver expressed when the Court began to reserve this matter for written submissions, and before deliberation began.

58 This explains why, in a case which is over two years seven months old at the time this trial began on Jan. 3, 2018 (and now is one year older), that the agreed scrutinized *Jordan* period is only 12 months to begin with.

59 The Respondent also argues that the July 11, 2018 appearance also amounts to an express waiver of this constitutional right. The Applicant says this is unfair to his student, and is at best a non-response and not express waiver.

60 That Court appearance could be taken as express waiver, and if not, may well fall into the period of implicit or implied waiver.

(i) Implicit Waiver

61 The Respondent argues that the Applicant has implicitly waived most of the balance of the time up to Nov. 19, 2018. Ms. Portolese submits that the period of Jan. 4, 2018 to Jan. 29, 2018 is a discrete event. She submits that counsel knows the effect of *Jordan* on January 29th, and his failure to respond to the Court's statement following his words that delay was not an issue "at this time", that the Court expressed the hope "the issue will not be raised at any time", constitutes an implied waiver.

62 It certainly was not the case that Mr. Gold was at a loss for words at that time.

Judicial Deliberation Time

63 *Jordan* did not address judicial deliberation time directly.

64 Prior to the release of *Jordan*, the time that a judgment was under reserve was typically considered to be part of the inherent time requirements of a case.[17] It was not counted as delay in the *Morin* guidelines.

65 Prior to *Jordan*, it was a very rare case in which judicial delay was considered unreasonable and warranted a stay.

66 In *R. v. Rahey*[18], the Supreme Court decided that an 11 month delay to issue a decision on a motion for a directed verdict constituted an infringement of s. 11 (b) of the *Charter*. Such delay was found to be "shocking, inordinate, and unconscionable".

67 The Respondent argues that the time the matter was under reserve (February 13 to Nov. 19, 2018) should also be subtracted from the total delay. The Crown submits that including this judicial

delay in the quantum of total delay would put judges in the difficult position of having to rush their decisions in order to keep cases under the ceiling. She also argues that the Crown cannot mitigate this delay, as it is beyond their control.

68 Mr. Gold submits that all of the deliberation time is included in the *Jordan* ceiling. This differs from the approach of the defence in *R. v. Camargo* where the defence suggested a middle ground that, rather than including the entire period of delay in that case, the court should simply estimate a reasonable amount of deliberation time and that anything exceeding that should be considered in deciding whether a case exceeds the presumptive ceiling[19].

69 The Applicant submits that *Jordan* contemplates *all* of the time "to the end of trial" in the presumptive ceiling, less the time for defence delay, discrete events and exceptional circumstances. By choosing this phraseology, Mr. Gold argues that the Supreme Court of Canada has specifically included all former "inherent time requirements" in the presumptive ceiling to address the "culture of complacency".

70 A more in depth analysis to support this position is argued in both the Applicant's Factum and Supplementary Submissions.[20] Lastly, Mr. Gold submits that the Respondent overstates the persuasiveness of the decisions she relies on.

Appellate Decisions

71 Since the *Jordan* decision, there have been only three appellate decisions dealing with whether deliberation time is included in the presumptive ceiling. Neither is from Ontario.

72 The Ontario Court of Appeal has left the issue for a future case with a "fuller evidentiary record and argument".[21] The Ontario Court of Appeal has also granted leave to appeal in *Ontario (Labour) v. Nugent*, 2018 ONCA 1014, on a matter which directly raises the "issue of the addition of judicial reserve time to the net delay, a factor over which the Crown has no control".

73 None of the cases argued are binding on this Court.

74 The Applicant urges the Court to be persuaded by the Newfoundland Court of Appeal decision of *R. v. King*, 2018 NLCA 66, and find that the time under reserve is included in the presumptive ceiling.

75 The Respondent relies on the decisions to the contrary from the Alberta Court of Appeal and the Nova Scotia Court of Appeal:

> *R. v Brown*, 2018 NSCA 62 at paras 72-75.
>
> *R. v Gambilla*, 2017 ABCA 347(leave to appeal dismissed [2018] S.C.C.A. No.176).

76 Mr. Gold argues that the Alberta Court of Appeal is inconclusive on the issue of whether the time under reserve is included in the presumptive ceiling, since the majority agreed on the disposition to dismiss the appeal but not the issue at hand, and the concurring judgment indicated it was not necessary to decide the issue of how time under reserve should be dealt with. In other words, only one jurist indicated that the time under reserve should be excluded. While this is accurate, I find the decision by Justice Watson, J.A., who decided the issue against the Applicant's position, is highly persuasive. Leave was denied by the Supreme Court of Canada.

77 He also submits the Nova Scotia Court of Appeal did not engage in a meaningful analysis.

Trial decisions

78 Both counsel made extensive submissions on a small number of trial decisions on this issue.

79 There have been several trial decisions on the issue of whether deliberation time is included in the Jordan calculation.

80 Mr. Gold relies of the following cases which has held that the time for a judge to pronounce a verdict should be included when calculating total delay under *Jordan*:

> *R. v. J.M.*, 2017 ONCJ 4, (Paciocco J., as he then was) at paras. 29 to 42;
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> *R. v. Ashraf*, 2016 ONCJ 584 (Band J.), at paras. 73 to 76;
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> *R. v. Mcllquham*, [2018] O.J. NO. 4226 (LeDressay J.), at paras. 87 to 88;
>
> *R. v. Formusa*, 2017 ONCJ 236 (Band J.), at para. 97; and
>
> *R. v. Madill*, [2019] O.J. No. 107 (Broderick J.), at paras. 21 to 32 (sitting on a Provincial Offence Act appeal).

81 Justice Band dealt with this issue in one of the earliest cases in *Ashraf*. He opined that in his case a s. 11(b) application was not brought prior to trial, and was brought on the date initially set for trial continuation, causing some concerns "as to optics and incentives at play"[22]:

> Should a judge inquire 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?

> Where the ceiling has already been reached, the issue is less troubling, as the Crown cannot be said to have any ability to remedy any judge-caused delay, absent extraordinary circumstances such as those in *Rahey* and *MacDougall*.

82 In that case, my former colleague Justice Band *subtracted* his deliberation time from the "total delay." This was particularly so because the Application was not raised in compliance with the Rules, and had they done so, the Application would have been heard earlier.

83 Similarly, in this case, the Application was brought after the verdict and not in compliance with the Rules. Had the Applicant brought the Application earlier, the Court could have given its decision earlier and dealt with the Application much earlier. This would subtract at least one month or more from the deliberation time.

84 Mr. Brar's case is factually distinguishable from the cases the Applicant relies on. For example, *Ashraf* involves the time period taken to schedule a trial continuation, and ultimately deducts deliberation time from total delay. *Formusa* is a prospective application that is, whether a ceiling would be exceeded in the future by deliberation time.

85 The ratio of *J.M.* is a consideration of the time to trial for a youth under the *YCJA*, and how that is applied to the *Jordan* calculation. It can be distinguished. The issue of deliberation time is *prospectively* considered as part of the remaining time required to complete the trial. It does not consider actual judicial time to deliberate.

86 The Respondent/ Crown relies on the following trial decisions:

> *R. v. K.G.K.*, 2017 MBQB 96.
>
> *R. v. Camargo*, 2018 ONCJ 740.
>
> *R. v. Basha*, 2017 ONSC 5897 at para 137.

87 It is the Respondent's position that interference with judicial discretion and judicial independence results with inclusion of deliberation time in the *Jordan* calculation. Such a position recognizes that if the Applicant is right, the Court is put in the difficult position of having to rush decisions to keep cases under the presumptive ceiling in some cases, and would be forced to decide between having adequate time to complete a fulsome decision and meeting *Jordan* requirements. Reconciling these competing principles are antithetical to a reflexive imposition of the presumptive ceilings.[23]

88 As the Alberta Court of Appeal articulated, reserved decisions, although taking time, do not

amount to delay. "Rushed decisions will only serve to generate more appeals, and thus more delay"[24]. I also noted up the case after argument in this case. The Supreme Court of Canada denied leave to appeal on September 27, 2018.[25] Counsel did not bring this to the Court's attention.

89 My colleague Justice Rahman thoughtfully analyzed the issue in the recent decision of *R. v. Camargo*[26]. I adopt completely his analysis as the correct approach. He reasoned as follows:

> Unfortunately, the Supreme Court in *Jordan* was silent on the issue of whether a judge's deliberation time should count within the presumptive ceiling. The Court of Appeal recently mentioned, but did not decide, the issue in *R. v. MacIssac*.[6] Huscroft J.A. commented that the Supreme Court did not address whether judicial deliberation time is part of total delay (para. 24).
>
> > [34] The appellant argued that the period during which a decision is under reserve should be counted in calculating total delay, while the Crown argued that it should not.
> >
> > [35] Prior to *Jordan*, the time a judgment was under reserve was typically considered to be part of the inherent time requirements of a case: *R. v. Schertzer*, 2009 ONCA 742 (CanLII), 255 O.A.C. 45, at para. 114, leave to appeal refused [2010] S.C.C.A. No. 3; e.g. *R. v. Lamacchia*, 2012 ONSC 2583 (CanLII), at para. 7; *R. v. Ferguson* (2005), 24 M.V.R. (5th) 47 (Ont. S.C.), at para. 213, leave to appeal refused 2008 ONCA 764 (CanLII), 69 M.V.R. (5th) 18. However, some judicial delays in rendering a decision were considered unreasonable and warranted a stay. Most notably, in *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588, the Supreme Court was unanimous that an 11-month delay to issue a decision on a motion for a directed verdict constituted an infringement of s. 11(b). See also *R. v. Milani*, 2014 ONCA 536 (CanLII), 120 O.R. (3d) 641, at para. 28, leave to appeal refused [2014] S.C.C.A. No. 426.
> >
> > [36] The appellant's stay application was heard prior to commencement of the re-trial, and the trial judge used the final day scheduled for the re-trial -- February 17, 2017 -- as the end date for calculating total delay. As it happened, the trial ended one day earlier than expected and the appellant was not convicted until over two months later -- April 18, 2017 -- when the judgment was delivered.
> >
> > [37] *Jordan* did not address whether the time a judgment is under reserve

> in Included in the calculation of total delay and appears to have left the matter open. On the view I take it is not necessary to resolve the issue of reserve time for purposes of this case, and I would leave the issue for resolution in a future case, with a fuller evidentiary record and argument.

Later in the decision, Huscroft J.A. held that the judge's deliberation time did not constitute a discrete event (para. 25).

> [46] The Crown submits that time the decision was under reserve was a discrete exceptional event because "[t]he extraordinary length and scope of the trial judge's reasons evidence that a reserve was unavoidable in this case."
>
> [47] I would reject this submission.
>
> [48] This was a vigorously contested, multi-day and witness trial. That time is required to provide the parties with reasonably intelligible reasons the trial judge considers sufficient to provide a basis for meaningful appellate review is to be expected. It is not, in itself, a discrete exceptional event, nor does it become such an event in this case by virtue of the length of the reasons provided or the issues involved.

Other decisions have held that the time a decision is under reserve will not be included in deciding whether the delay falls within or outside the presumptive ceiling. In *R. v. K.G.K.*[7] the court rejected including judicial delay within the presumptive ceiling. The court expressed concern that the principle of judicial independence, including judges' discretion about how to prioritize their workloads, would clash with the protection of an accused's constitutional rights. On a practical level, the court observed the untenable position that judges would be placed in to rush their decisions. As Joyal C.J.Q.B. noted:

> 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.

The Superior Court came to a similar conclusion in *R. v. Basha*.[8] In that case, Maranger J. concluded that the time a case is under reserve after the parties have made their submissions should be deducted from the presumptive ceiling analysis (paras. 26, 27).

137. Logically, given the shortness of time, it is doubtful the Supreme Court in creating this 30 month *Jordan* presumptive ceiling intended to include the following time periods therein:

a) Judicial deliberation after closing argument at trial;

b) Periods after the trial to sentencing; or

c) Periods of appeal and to the decision thereof;

as each of those:

d) Are beyond the control of the Crown which has the onus to justify time in excess of 30 months;

e) To include those additional time periods materially reduces the time available to the parties to "the end of trial"; and

f) Were not matters or time periods addressed in *Jordan*.

138. Based upon the above authorities, since *Jordan*, the court concludes that the period for judicial deliberation and to prepare its decision between May 19 and September 14, 2017:

a) is to be excluded from the *Jordan* 30 month presumptive ceiling analysis

as to whether Mr. Basha's s. 11(b) right to be tried within a reasonable time was denied;

b) in the alternative, is not a shocking, inordinate or unconscionable period of deliberation pursuant to *Rahey*, given there were two co-accused with 11 joint charges, two other undivided charges, the number of witnesses, the length of trial, the circumstantial nature of the case presented and the level of complexity; and

c) in the further alternative, is a discrete unexpected event and exceptional circumstance pursuant to *Jordan* which the Crown could not control, rectify or now justify and is to be excluded from the period of delay to be considered on this application; and

d) in the final alternative, is inherent delay pursuant to *Morin*, [1992] 1 S.C.R. 771.

Similarly, in *R. v. Lavoie*,[9] the court concluded that the delay occasioned by judges reserving decisions is a discrete event and therefore excluded from the presumptive ceiling calculation (para. 28).

37. As noted, exceptional circumstances as defined in *Jordan* lie outside the Crown's control in that they are reasonably unforeseen and unavoidable and cannot be corrected by the Crown.

38. In my view, delays occasioned by judges reserving decisions are discrete events which constitute exceptional circumstances. The decision by presiding judges to reserve decisions are both unforeseen and unavoidable.

I agree with the respondent that judicial delay should not be included in the presumptive ceiling analysis. Like defence delay, judicial delay should be subtracted from the total delay and should not factor in to deciding that a case has exceeded the presumptive ceiling. I say that for the following reasons (para. 29).

First, I agree with the comments of Joyal C.J.Q.B. that factoring deliberation

time into the presumptive ceiling analysis puts a judge in a difficult position in deciding whether to reserve judgment and for how long. There are many factors that a judge must consider in deciding how long to reserve.[10] While the age of a case is a relevant factor, it should not be the driving factor in determining how long to deliberate. The following hypothetical illustrates this difficulty. The accused brings a delay application prior to trial. The delay is under the presumptive ceiling. The judge dismisses the application and goes on to hear the trial. The end of the trial is only a week shy of the ceiling. By reserving more than one week, the trial judge will be sending the case above the presumptive ceiling, thereby requiring a new, post-verdict application to be heard if the accused is found guilty. A trial judge should not be forced to decide between taking adequate time to decide a case, and keeping the *Jordan* clock from running above the presumptive ceiling (para. 30).

Second, and in the same vein, because most jurisdictions require s. 11(b) applications to be heard in advance of the scheduled trial dates, it will often be impossible to estimate the anticipated end of the trial. How is a judge to guess how long he or she will have to deliberate for after the final day of trial? Should judges build in a certain amount of deliberation time when hearing the pre-trial application? What about cases where a case-management judge[11] hears the application and must estimate the deliberation time of a colleague who will be hearing the trial? (para. 31).

Both of the two foregoing concerns were identified in *R. v. Ashraf*.[12] In *Ashraf*, Band J. described the difficulty of determining the estimated completion of the trial in jurisdictions where delay applications must be argued in advance of the trial. He also commented on the uncomfortable position of the judge who is faced with a mid-trial delay application:

> [74] It would seem, then, that the time a judge takes to render a decision must be included in the calculation of "total delay." This raises a number of problems. 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?[13]

> None of the foregoing is to say that judicial delay is not relevant at all for the purposes of 11(b). It is. The right protects an accused person until the end of trial. Nothing in *Jordan* overruled *R. v. MacDougall*.[14] And the decision in *R. v. Rahey*,[15] where a case was stayed because of a trial judge's inordinate delay in deciding the case, demonstrates that there are cases where a judge's deliberation time can render the delay unreasonable. However, it makes more sense for an appeal court to make that determination (as happened in *Rahey*) rather than have trial judges assess the reasonableness of their own delay (para. 33).

> Consequently, I agree with the applicant that the net delay in this case, after subtracting defence delay, is 22 months and 5 days. Further, I would subtract the two months and one week of deliberation time. The net delay in this case is just under 20 months. Because this delay is over the 18-month presumptive ceiling, the burden shifts to the Crown to establish that there were exceptional circumstances in this case (para. 34).

Exceptional Circumstances

90 This trial was originally set to conclude within the 18 month ceiling. It was then adjourned twice at the request of the Applicant. On the third scheduled trial, the trial time required was underestimated. This caused a delay, although fortunately brief, to complete the evidence. Written submissions then made it impossible for the Court to respond immediately at the conclusion of the Jan. 29 appearance.

91 Exceptional circumstances lie outside the Crown's control. They fall under two categories: discrete events and particularly complex cases.

Discrete Events

92 Delays occasioned by discrete events are to be subtracted from the total period of delay. The Crown could not reasonably have anticipated the length of cross-examination of the first officer in charge of the station in this case, nor the domino effect of the unavailability of the next witness to appear on the second day of trial until the afternoon. In any event, counsel assured the Court that the matter would complete on Jan. 4th. That did not happen.

93 I find the period of time to find a new Day 3 for the trial was likely a discrete event. In the alternative, it was not inherent time delay, but caused by the underestimate of time.

94 The Crown could not have reasonably anticipated the need for Sgt. Lang to testify over two days, nor the absence of Sgt. Lang to attend to medical appointments on the second day of trial, nor mitigated it.

95 It is clear that the time reserved for judicial deliberation is *not* a discrete event[27].

Complex Case

96 The Applicant advocated in their Factum that this was not a complex case, but in oral argument conceded that it was moderately complex.

97 The case was not complex in the sense of voluminous disclosure, large numbers of witnesses, expert evidence, or a long transaction time period averred.

98 Each case is considered on its own nature of the evidence and issues. This case was not a "typical over 80" case. The constitutional argument, recent cases just released, extra witnesses required on the *voir dire* for the discrete *Charter* issue from the trial proper, lengthy cross-examination and written submissions added to the complexity for this case.

99 While the case up until its decision took much longer than one would have expected, I find the time it has taken was reasonable in all the circumstances[28].

Judicial Decisions

100 Although the time a Judge requires to deliberate and write reasons is not expressly considered in *Jordan* or *Cody*, one must not lose sight of the fact that it is *not* delay *caused* by the Crown or able to be mitigated by them.

101 It would seem to be entirely unfair to the Respondent if the Court, by its own actions which are inherently reasonable and necessary for judicial independence, counts against them in the *Jordan* calculation.

102 The Applicant in his written material argues that one should compare how long other jurists reserved on "overholding" cases to this case. He did not advance this argument in oral submissions. This kind of faux comparison is not helpful. It detracts from the principle of judicial independence, and the myriad variables to any case to have any empirical value.

103 Ontario does not have any binding authority to date. So far in the appellate jurisprudence, all provinces except Newfoundland, are inclined to the view that deliberation time is not included in the *Jordan* calculation.

104 Trial decisions in Ontario go both ways. I distinguish the strictly transitional cases and prospective applications which try to determine how much longer the trial is likely to last, and how long it may take to write reasons.

105 I find that firstly, Justice Rahman and others are right that this time should not be included in the *Jordan* calculation. Secondly, its reasonableness is to be considered in the context of *overall* delay protected by s. 11(b) of the *Charter*, as it was in *Rahey* case by the Supreme Court of Canada. Thirdly, it can be attributed, if included in the J*ordan* analysis, to exceptional circumstances, since the Crown cannot mitigate that type of delay.

Transitional Case

106 The Applicant was charged with this offence on May 31, 2015. *R. v. Jordan* was decided on July 8, 2016. Applications pursuant to s. 11(b) of the *Charter* were determined in accordance with the principles of *R. v. Morin* prior to the *Jordan* decision. Charges after July 8, 2016 are considered with the *Jordan* timelines of 18 months in the Provincial Trial Court, and 30 months in the Superior Court for each province[29].

107 This is a case which falls in between both frames of reference to determine if the Applicant has established a s. 11(b) *Charter* infringement on a balance of probabilities.

108 The Crown factum on this hearing outlines both the time periods of "*Jordan* delay" and "*Morin* delay"[30].

109 Mr. Gold and Ms. Portolese both submitted at the oral hearing of the application that the parties relied on the *Jordan* timeline for all the dates set for this trial date, and opined that this was not truly a transitional case.

110 Notwithstanding this concession, I must briefly consider an analysis of both timeframes, at least in part, when considering the total time period involved here, with the emphasis on the *Jordan* analysis.

111 Under the *Morin* analysis, I find that the Applicant would not succeed in establishing a s. 11(b) *Charter* infringement. I need not outline a fulsome Morin analysis, since the parties to this Application agree that they conducted themselves at all times cognizant of the *Jordan* decision.

112 This being a transitional case, in all the circumstances the delay was entirely reasonable, and certainly not unreasonable. The Application would be dismissed if this was considered on the *Morin* guidelines.

Conclusions

113 It appears that the Applicant was content to proceed at a glacial pace throughout the history of this case.

114 The issue of any alleged infringement of s. 11(b) of the *Charter* was never raised prior to the ruling on the s. 9 *Charter voir dire*, and the conclusion of the trial.

115 This is particularly significant in light of the fact the Court expressly asked counsel if delay was at issue prior to the matter being adjourned for the Court to consider all of the submissions on reserve. Mr. Gold clearly and unequivocally indicated that delay was not at issue "at this time." Counsel remained silent when the Court opined to the effect "not at any time I would hope[31]."

116 The time the Court had this matter on reserve was informed in part by the above concession.

117 No real reason was provided in argument as to why the *Jordan* application was not filed sooner. If it had been brought to my attention, there would be different discussions as to scheduling.

118 In addition, Mr. Gold is senior counsel and was well able to analyze *Jordan's* potential impact. It is clear that all parties must work together to minimize delay. In light of the history of this case, any *Jordan* concerns ought to have been brought to the attention of the Court.

119 The Ontario Court of Justice in Brampton is considered in many decisions as one of the busiest courthouses in Canada, if not the busiest. The jurisdiction includes the Lester B. Pearson International Airport, a busy drug court, and a large and diverse population. A Court must manage workload and priorities based on numerous considerations, and triage matters accordingly. Some matters require more judicial time to consider them.

120 While the time under reserve was not a model of expedience, it was not unreasonable, and is far from the *R.* v. *Rahey* standard of infringement by unconscionable and shocking delay.

121 Mr. Gold conceded in oral submissions that he is not submitting that the time reserved for reasons in this case contravened the *Rahey* standard, and was not unconscionable or "shocking".

122 It is to be remembered that the majority in Jordan stated that, "reasonableness cannot be captured by a number alone, which is why the framework is not solely a function of time" (at para. 51).

123 I find that the defence expressly waived the first period of deliberation time to March 20, 2018. This deducts 50 days from the calculation of net delay and reduces the time period in question.

124 The Court further finds an implicit waiver by Mr. Gold of the remaining period of time until reasons for judgment were delivered. When a very experienced counsel remains silent in the face of the Court's concern of whether delay was at issue, it is reasonably found that the defence was not raising any concerns about delay.

125 This conclusion is reasonable in light of the rest of the record, where no counsel raises any concern about delay when the matter was put over for further consideration of the arguments. The

only mention was by a Crown representative on July 11, 2018, and the agent for the defence did not dispute the assertion of s.11 (b) *not* being at issue. The Applicant never raised unreasonable delay until *after* verdict.

126 The waiver, both express and implied, brings the *Jordan* time calculation to well below 18 months[32].

127 If I err in finding implicit waiver, I do consider the failure to raise an issue as to trial within a reasonable time, or file a *Charter* notice, during the time under reserve constitutes an action (or lack of action) by the parties which causes that time to be deducted from the overall *Jordan* calculation.

128 Notwithstanding the very able argument of Mr. Gold, and the factum of Mr. Gold and Ms. Metcalfe, I agree with the Respondent that the Applicant has failed to establish an infringement of s. 11(b) of the *Charter* in all of the circumstances of this case.

129 Alternatively, the Court must consider whether the time it took to prepare and deliver reasons caused an infringement of s. 11(b) in this case.

130 There is at present little appellate authority on the issue of whether the time the judge devotes to reasons on a ruling or on the trial proper counts or weighs heavily in the *Jordan* calculation.

131 The Court has outlined the cases considered to date. I find the reasoning of the Alberta Court of Appeal, Nova Scotia Court of Appeal, the Manitoba Trial Division, and my colleague Rahman J., most persuasive. The time devoted to judicial deliberation should *not* count in the *Jordan* calculation of net delay.

132 Thirdly, on a full contextual consideration of the entirety of the record, I must consider whether the Applicant's right to trial within a reasonable time was infringed. The Court finds that the Applicant has not met the onus of establishing such a *Charter* violation on a balance of probabilities, and it was not infringed.

133 The Court is prepared to hear sentencing submissions today.

134 Ms. Metcalfe asked the Court via email earlier this week to excuse Mr. Brar to write an examination this date and to schedule sentence submissions, if required, for next week or later in the month.

N.S. KASTNER J.

* * * * *

Appendix A

RESPONDENT'S PROCEDURAL HISTORY OF THE CASE

Date	Date Adjourned To	What Occurred	Delay Attribution
June 8, 2015	June 12, 2015	• Information is sworn • First appearance date was set for June 12, 2015	**Jordan Delay:** 4 days **Morin Delay:** Intake delay[1]: 4 days
June 12, 2015	July 10, 2015	• First appearance – disclosure was provided • Adjourned to review disclosure and consult private counsel	**Jordan Delay:** 28 days **Morin Delay:** Intake delay: 28 days
July 10, 2015	August 14, 2015	• Mr. Brar requested an extension of time to retain counsel • Additional disclosure provided • Justice of the Peace cautions Mr. Brar to seriously consider what he wishes to do with his matter on the next appearance	**Jordan Delay:** 35 days (1 month and 4 days) **Morin Delay:** Intake delay: 35 days
August 14, 2015	September 4, 2015	• Adjournment for Crown to respond to a disclosure request from defence counsel • Crown notes on the record that the list of requested items is quite lengthy, and a number of the items may not exist. The Crown expresses that this disclosure request may be a fishing expedition. • CPT to be had	**Jordan Delay:** 21 days **Morin Delay:** Inherent delay: 21 days
September 4, 2015	October 27, 2015	• Additional disclosure provided in court • CPT was held • JPT scheduled	**Jordan Delay:** 53 days (1 month and 23 days) **Morin Delay:** Inherent delay: 53 days
October 27, 2015	June 7, 2016	• Judicial pre-trial conducted • Trial dates set for June 7 & 8, 2016	**Jordan Delay:** 224 days (7 months and 11 days) **Morin Delay:** Inherent delay: 224 days
June 7, 2016	June 30, 2016	• 3rd party records application granted • Matter adjourned to set new trial dates	**Jordan Delay:** 23 days **Morin Delay:** Inherent delay: 23 days

June 30, 2016	April 6, 2017	• New trial dates set • 11(b) waived, due to defence unavailability • *R v Jordan* was released between these 2 dates	**Jordan Delay:** Defence delay: 280 days (9 months and 7 days) **Morin Delay:** Defence delay: 280 days
April 6, 2017	January 3, 2018	• Trial adjourned due to a late defence application • 11(b) waived	**Defence delay:** 272 days (8 months and 28 days)
January 3,4 2018	January 29, 2018	• Trial commenced • Evidence concluded • Defence counsel concluded submissions on the *Charter* – Crown was mid-way through submissions when court adjourned for the day • Justice Kastner had an earlier available continuation date on January 11, 2018, however defence was not available. Crown was available.	**Discrete event:** 25 days **In the alternative - Defence delay:** 18 days (January 11-January 29)
January 29, 2018	March 14, 2018	• Due to the release of the *R v Cheema* decision from the SCJ, the matter was adjourned in order for counsel to complete written submissions • Defence counsel advises the court that delay is not at issue at this point. • A date was set for judgment on March 22, 2018	**Time under reserve/discrete event:** 44 days (1 month and 13 days)
March 14, 2018	May 30, 2018	• Counsel were advised that the decision would not be ready for March 22, 2018 • The matter was brought forward and adjourned to a new date	**Time under reserve:** 77 days (2 months and 16 days)
May 30, 2018	July 11, 2018	• Counsel were advised that the judgment would not be ready, and were asked to select a new date • The court offered five dates in June, the earliest of which was June 18. • The Crown and the Court were available on June 28, 2018. Defence was unavailable.	**Time under reserve:** 42 days (1 month and 11 days) **In the alternative – defence delay:** 13 days (June 28-July 11)
July 11, 2018	September 14, 2018	• Counsel were previously advised by email that the judgment would not be ready, and were asked to select a new date • Crown offered 11 available dates in August and September. The earliest date was August 8. • Defence counsel indicated that he was content with the latest date offered by the Crown, September 14, 2018. • Prior to court, the representative for the Crown spoke to agent for counsel who advised that delay was not a concern at this point	**Time under reserve:** 65 days (2 months and 3 days) **In the alternative – defence delay:** 37 days (1 month and 6 days) (August 8-September 14)
		• This representation was placed on record before adjourning the matter[2]	

September 14, 2018	November 19, 2018	• Counsel were previously advised by email that the judgment would not be ready, and were asked to select a new date during the weeks of October 9-12, 15-19, or during November. • Crown was available as early as October 11. • Defence counsel was available on October 19, however the court subsequently advised that it was not available. • The date of November 19 was mutually agreed upon.	**Time under reserve:** 66 days (2 months and 5 days) **In the alternative – defence delay:** 39 days (1 month and 8 days) (October 11-November 19)
November 19, 2018	-	• The judgment was delivered • Defence counsel advised the Crown and the Court for the first time that they are bringing an 11(b) application	**N/A**

Procedural Summary:

Total delay	1260 days (41 months and 11 days)
Defence delay	659 days (21 months and 29 days)
Total delay less defence delay[3]	601 days (20 months and 1 day)

Discrete events	69 days (2 months and 9 days)
Time under reserve	294 days (9 months and 24 days)

Net delay excluding time under reserve (Total delay, less defence delay and reserve time)	307 days (10 months and 7 days)
Net delay including time under reserve (Total delay, less defence delay and discrete events)	532 days (17 months and 22 days)

[1] "Intake activities (first appearance, retaining of counsel, disclosure, resolution meeting, etc.) lasting two months is an entirely normal feature of a case entering the Ontario Court of Justice" – see *R v. Meisner*, [2003] OJ No 1948 (Ont. SCJ) at paras 30-32, affirmed [2004] OJ No 3812 (Ont. CA).

[2] The transcript for the July 11, 2018 appearance erroneously states: "MR. SINGH: And I have spoken to my friend off the record, and it's my understanding that 11(b) is an issue at this point, so I'm content with that – that date.". However, a review of the audio recording reveals that Mr. Singh stated: "… it's my understanding that 11(b) is NOT an issue at this point. So I'm content with that – that date." [Emphasis added]. Counsel for the applicant was notified of this on January 3, 2019.

[3] Period of time between June 8, 2015 and December 8, 2016 (18 months) is 549 days

* * * * *

Appendix B

30300 102m line 4 II DIV.

VERIFICATION OF TRIAL DATE PROVIDED BY TRIAL COORDINATOR

Date: April 6, 2017.	Name: Brar, Davinder
Charges: Over 80	Info#: 15-6766.
Presiding Justice / JP: Keaney	Crown: PRP / REP.
Defence Counsel: Retained: yes no Gold, A	Phone#: 416 3681726.

Dates Suggested	Crown Avail.	Def. Avail.	Comments
Apr 10 & 11/17	X	X	
Apr 11 & 12/17	X	X	
Apr 18 & 19/17	X	X	IIB waived def n/a
Nov 29 & 30/17	✓	X	until Nov 1, 2017.
Dec 5 & 6/17	✓	X	IIB waived def n/a
Jan 3 & 4/18.	✓	✓	until Jan 3, 2018.

3rd.

AGREED DATE: Trial/Prelim /Cont.: January 3 & 4, 2017				Courtroom: 350 2nd fl.	
2nd Stage PreTrial Date:			PT Rm # 2	Estimated Time:	6 hrs.
In Custody	Yes	No	Motions/Applications	Yes	No
Interpreter Required	Yes	No	Child Friendly Required	Yes	No

NEW DATE PROVIDED AS A RESULT OF:
1) Pretrial: JS.
2) Matter not reached:
3) Defence request for adj. granted:
4) Crown request for adj. granted:
5) Matter commenced, not completed:
6) Other:

If for any reason this date(s) is not set on the record please contact the Trial Co-ordinator's Office as soon as possible.
If this date(s) is vacated please contact the Trial Office.

Signature of Trial Coordinator _____ Time 1050.

Justice P. R. Currie

* * * * *

Appendix C

#304 @ 10 A.M. 11 DiV

VERIFICATION OF TRIAL DATE PROVIDED BY TRIAL COORDINATOR

Date: January 4, 2018	Name: Brar, Davinder
Charges: Over 80	Info#: 15-6766
Presiding Justice/ JP: Kastner	Crown: DRP
Defence Counsel: Retained: yes no Gold, A	Phone#: 416 3681726

Dates Suggested	Crown Avail.	Def. Avail.	Comments
Jan 8/18	✓	X	★ Justice Kastner ★
Jan 15/18	X	✓	
Jan 29/18	✓	✓	

AGREED DATE: Trial/Prelim /Cont	January 29, 2018			Courtroom#: 306 @ 10	
2nd Stage PreTrial Date:			PT Rm # 2	Estimated Time: 2hrs	
In Custody	Yes	No	Motions/Applications	Yes	No
Interpreter Required	Yes	No	Child Friendly Required	Yes	No

NEW DATE PROVIDED AS A RESULT OF:
1) Pretrial: JS
2) Matter not reached:
3) Defence request for adj. granted:
4) Crown request for adj. granted:
5) Matter commenced, not completed:
6) Other:

If for any reason this date(s) is not set on the record please contact the Trial Co-ordinator's Office as soon as possible.
If this date(s) is vacated please contact the Trial Office.

Signature of Trial Coordinator _____ Time 405

Justice P. R. Currie

1 *R. v. Brar*, 2018 ONCJ 966.

2 The Application is seven (7) pages long and might reasonably be taken as prepared in advance of the Court appearance on Nov. 19, 2018. The Factum filed later was even more expansive on the grounds for the Application, as were the Supplemental Submissions.

3 *R. v. Madill*, [2019] O.J. No. 107 (O.C.J.)

4 *R. v. Jordan*, 2016 SCC 27.

5 This chart is based on the chart in the Applicant's Factum with some modifications made by the Court, as based on transcripts and exhibits filed.

6 The disclosure was the breath room DVD and the tow officer's notes.

7 See Verification Forms from Trial Co-Ordinator's Office in Appendix B and Appendix C to this decision.

8 The Court suggested the week of October 9 to 12, October 15 to 19 or any date in November 2018 for the decision on the *Charter* argument. The Defence was available for all but the October 11 date. The Crown was available October 11, but then unavailable until the mutually agreed to date.

9 The case was brought forward to March 14 to reschedule the March 20 date.

10 See the Supreme Court of Canada decision of *Rahey*, *infra*.

11 *R. v. Cheema*, 2018 ONSC 229 (Barnes, J. released Jan. 10, 2018).

12 36 pages in total.

13 The Applicant characterizes the period of delay to decision as 9 months, 6 days. The time ought not to include the period of time between October 11 and November 19, when the Court could have given judgment but for the unavailability of the Applicant. This deducts one month one week or 39 days and amounts to a period of 8 months. The Applicant also never raised the issue of concern for delay on a constitutional basis at *any* time prior to verdict. The Application could have been brought at any time post March 20. The failure to bring the

Application earlier could reduce the time from March 20 to November 19 at best (7 months, 4 weeks, 1 day), or at least 60 days prior to the date of verdict (Sept. 20), with the delay remaining as 6 months total (if included).

14 *R. v Jordan*, *Supra* at paras 21; 49; and 60 to 66. *R. v Cody*, *Supra* [2017] 1 S.C.R. 659 at para 1; 32 to 33. *R. v J.M.*, 2017 ONCJ 4 at para 60. *R. v Williamson*, 2016 SCC 28 at paras 21 to 22.

15 For example, *Jordan*, at para 65

16 *R. v. McNeil,* 2019 ONSC 487, at paras. 32 to 34 (McKelvey J.) decided Jan. 18, 2019.

17 See *R. v. MacIssac,* 2018 ONCA 650 at para. 35; *R. v. Schertzer*, 2009 ONCA 742, at para. 114, leave to appeal refused [2010] S.C.C.A. No. 3; *R. v. Lamacchia*, 2012 ONSC 2583, at para. 7; *R. v. Ferguson* (2005), 24 M.V.R. (5th) 47 (Ont. S.C.), at para. 213, leave to appeal refused 2008 ONCA 764.

18 *R. v. Rahey*, [1987] 1 S.C.R. 588, at para 43. See also *R. v. Milani*, 2014 ONCA 536 at para. 28, leave to appeal refused [2014] SCCA No. 426.

19 *R. v. Camargo*, 2018 ONCJ 740 (CanLII).

20 Applicants Factum, para 44; Supplementary Submissions, at para to 36.

21 *R. v. MacIssac* at para. 37.

22 *R. v. Ashraf*, at paras.74 to 76.

23 See *K.G.K.*; *Camargo* at paras.26 to 30; *Gambilla*, at para. 90.

24 *Gambilla*, at paras. 84, 88, 90 to 93.

25 *R v. Gambilla* (*appeal by Mamouni*) or *R. v. Mamouni*, [2018] S.C.C.A. No. 176.

26 At paragraphs 24 to 34 and following.

> [*R. v. Carmargo*, 2018 ONCJ 740: [6] *R. v. MacIsaac*, 2018 ONCA 650 (CanLII)]
>
> [*R. v. Carmargo*, 2018 ONCJ 740: [7] *R. v. K.G.K.*, 2017 MBQB 96 (CanLII).]
>
> [*R. v. Carmargo*, 2018 ONCJ 740: [8] *R. v. Basha*, 2017 ONSC 5897.]

> [*R. v. Carmargo*, 2018 ONCJ 740: [9] *R. v. Lavoie*, 2017 ABQB 66 (CanLII).]
>
> [*R. v. Carmargo*, 2018 ONCJ 740: [10] Those factors include the age and seriousness of the case; how many outstanding reserved judgments the judge has; the nature of those cases and whether they involve accused persons in custody; and what the judge's schedule looks like in the near future.]
>
> [*R. v. Carmargo*, 2018 ONCJ 740: [11] I refer here to the case-management judges as defined by s. 551.1 of the *Criminal Code*. In the Superior Court of Justice, it is not uncommon that the delay application is heard before a judge other than the trial judge.]
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> [*R. v. Carmargo*, 2018 ONCJ 740: [12] *R. v. Ashraf*, 2016 ONCJ 584 (CanLII).]
>
> [*R. v. Carmargo*, 2018 ONCJ 740: [13] *Ashraf*, *supra*, at para. 74.]
>
> [*R. v. Carmargo*, 2018 ONCJ 740: [14] *R. v. MacDougall*, 1998 CanLII 763 (SCC), [1998] 3 SCR 45.]
>
> [*R. v. Carmargo*, 2018 ONCJ 740: [15] *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 SCR 588.]

27 This is at least the position in Ontario: see *R. v. MacIsaac*, per Huscroft, J.A.

28 See also the passage in *Jordan* recognizing trial judges should use the knowledge they have of their own jurisdiction and relevant local circumstances, at para. 89.

29 These time frames or ceilings involve subtracting time periods of defence delay, discrete events, and exceptional circumstances. A trial which does not exceed the *Jordan* ceiling may still establish an infringement of s. 11(b) in some circumstances, and a trial which does exceed the Jordan ceiling may not amount to unreasonable delay in some circumstances.

30 See Appendix A to these reasons for such an analysis by the Respondent. Not all of this iterated analysis should be taken as adopted by the Court. It is illustrative of the point.

31 This is not verbatim, but a paraphrase.

32 The net delay would remain at 12 months, with implicit and express waiver, and the 21 days for the third day deducted in the calculation. Even with *only* the express waiver applied, if the period of time between the first date scheduled for decision(March 20) and the time period this Application should have been brought (at least 60 days prior to the Nov. 19 date) at most brings the case to the *Jordan* ceiling but not over it.