PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. McCully*, 2016 NSPC 70

Date: 2016-11-10
Docket: 2703841
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Alicia McCully

Charter Section 11(b) Application Decision

Judge:	The Honourable Judge Theodore Tax,
Heard:	September 23rd, 2016 at Dartmouth, Nova Scotia
Oral Decision	November 10th, 2016
Written Decision	November 29, 2016
Charge:	5(2) CDSA
Counsel:	Jeff Moors and Angela Nimmo, for the Crown Peter Planetta and Jonathan Hughes for the Defence

By the Court:

INTRODUCTION:

[1] Ms. Alicia McCully has been charged that, on or about December 20, 2013, at or near Eastern Passage, Nova Scotia, she was in possession of oxycodone (endocet) a substance included in Schedule 1 of the **Controlled Drugs and Substances Act**, **("the CDSA")**for the purpose of trafficking, contrary to Section 5(2) of that **Act**. The Crown proceeded by indictment on that charge and Ms. McCully elected to have her trial in the Provincial Court.

[2] Based upon the estimates of the Crown Attorney and Defence Counsel, the trial was originally set for one full day of testimony on October 14, 2015. The Court held the pre-trial conference with the counsel on May 6, 2015. At the time of the pre-trial conference, the Crown Attorney indicated that there was still some outstanding disclosure in the form of cell phone analysis as well as an expert opinion. The trial commenced on October 14, 2015, but was adjourned when evidentiary issues arose and the Crown Attorney advised the Court and Defence Counsel that the police had just received that cell phone analysis. At that point, the case was adjourned for status updates in December, 2015 and January, 2016 on disclosure issues, consideration by the defence of other possible applications and

the setting trial continuation dates. A further status date was set on February 12, 2016 and although earlier trial continuation dates were offered, on that date, the counsel requested two additional days for the trial continuation which were scheduled for August 29 and August 30, 2016.

[3] Prior to the trial continuation dates, Defence Counsel filed a Notice of **Charter** Application pursuant to Section 11(b) of the **Canadian Charter of Rights and Freedoms** ["the **Charter**"] on July 15, 2016, based upon the SCC's recent decision in **R. v. Jordan**. On August 25, 2016, Defence Counsel provided the Court and the Crown Attorney with copies of the transcripts of all appearances made by Ms. McCully, except for her initial appearance on February 12, 2014 where she was charged with four other individuals.

[4] The issue to be determined by the Court is whether Ms. McCully's "right to be tried within a reasonable time" as guaranteed by Section 11(b) of the **Charter** has been infringed and if so, whether, in all the circumstances, it is "appropriate and just" for the Court to order a stay of proceedings pursuant to Section 24(1) of the **Charter**. In the event that the Court concluded that there was either no breach of Ms. McCully Section 11(b) **Charter** right or, in the alternative, the Court concluded that there was a breach of that **Charter** right, but the Court was not

prepared to grant a stay of proceedings, the Court has set a tentative date for the conclusion of the trial evidence and submissions on December 9, 2016.

[5] With respect to the Section 11(b) **Charter** application brought by the Defence, the Court reserved its decision until today's date.

FACTUAL BACKGROUND:

[6] Ms. McCully was arrested and released on charges of possession for the purpose of trafficking oxycodone and trafficking of oxycodone contrary to Section 5(2) of the **CDSA**, on December 20, 2013. She was released on an Undertaking Given to a Peace Officer or an Officer in Charge and was directed to attend court by a Promise to Appear in the Dartmouth Provincial Court on February 12, 2014.

[7] F**ebruary 12, 2014** – When Ms. McCully made her first appearance in the Dartmouth Provincial Court, she was charged on an Information, sworn February 6, 2014, with four other named individuals. On the first three charges of that Information, the other four individuals were jointly charged with Section 4(1) and Section 5(2) **CDSA** offences. Although Ms. McCully was placed on the same Information with those other four individuals, she was charged individually, and not jointly with anyone else, with the unlawful trafficking of oxycodone (endocet) contrary to Section 5(1) of the **CDSA** as well as a separate charge of possession for

the purpose of trafficking oxycodone (endocet) contrary to Section 5(2) of the **CDSA**. Ms. McCully and the other four named individuals made their first appearance in Court on February 12, 2014, all five individuals indicated that they were seeking adjournments in order to obtain and instruct legal counsel and next appearance was set for March 19, 2014. The Crown proceeded by indictment on the **CDSA** charges.

[8] In addition, the Crown Attorney advised the Court that it was highly likely that there would be amendments to the Information or the Crown would effectively sever Ms. McCully from the other four individuals who were jointly charged with the **CDSA** offences. Although there was an indication by the Duty Counsel that the applications for Legal Aid might be processed by the next Intake week in March and the Court asked whether the matters should be put over to the April intake week, the Crown Attorney requested the earlier date, because they might be re-laying an Information and all accused could report back to the Court on their efforts to secure legal representation.

[9] **March 19, 2014 –** On this date, Ms. McCully and the other four individuals who were charged on the original Information, which was sworn on February 6, 2014, also made their first appearance on the "replacement" Informations which were sworn on February 26, 2014. On one of those "replacement" Informations,

Ms. McCully was the only named accused person and she was facing one charge of possession for the purpose of trafficking oxycodone (endocet) a Schedule 1 **CDSA** substance, on December 20, 2013 at or near Eastern Passage, Nova Scotia, contrary to Section 5(2) of the **CDSA**. Ms. McCully was again assisted by the Legal Aid Duty Counsel, who indicated that Ms. McCully had made or would soon be making an application for legal counsel through Nova Scotia Legal Aid. The Crown confirmed that Ms. McCully's "replacement" Information was also proceeding by indictment. Since it was not expected that she would have a Defence Counsel assigned to her file during the Court's April, 2014 "intake" week, the Legal Aid Duty Counsel requested that Ms. McCully's election and plea be adjourned to May 29, 2014.

[10] **May 29, 2014** - On this date, Ms. McCully and the other four individuals appeared on both the "original" Informations and the "replacement" Informations. Ms. McCully, once again, appeared with the Legal Aid Duty Counsel. The Crown Attorney withdrew the "original" Informations against all five people. Since Ms. McCully still did not have a lawyer and the lawyers for the four people charged on the other Information wished to adjourn their plea and election to July 3, 2014, all parties advised the Court that they agreed with that date.

[11] **July 3, 2014** - Defence Counsel were present on behalf of the other four accused persons, however, the Duty Counsel for Legal Aid confirmed that Ms. McCully had made application to Legal Aid and was awaiting an approval of a certificate. The Defence Counsel for the other accused persons were seeking additional disclosure of the Information to Obtain a Search Warrant and they requested that their client's election and plea go over to August 26, 2014.

[12] The Duty Counsel also advised the Court that Ms. McCully was now only "loosely" tied to the other four accused persons who were now on a separate Information and added that she could come back at the Court's next intake week in early August, 2014. However, after Duty Counsel said that the Legal Aid certificate had not yet been issued, Ms. McCully would have to find a lawyer to represent her and then have the lawyer review her disclosure with her, the Court suggested that it would save any further "confusion" between her charges and the other Information to have her come back on a separate date. In addition, the Court noted that this would also give her "ample time" to find a lawyer and meet with him or her before the next court date, which was set for September 11, 2014.

[13] **September 11, 2014** - When Ms. McCully's matter was called by the Court, once again, she was assisted by the Legal Aid Duty Counsel. The Court was advised that Ms. McCully had received a certificate from Legal Aid and had made

arrangements to have Mr. Planetta represent her, although she had not yet met with him. The Duty Counsel also advised the Court that Mr. Planetta was away from the office for a period of time and she suggested that Ms. McCully come back during the October intake week, on October 17, 2014.

[14] **October 17, 2014** - Defence Counsel, Mr. Peter Planetta appeared for the first time with Ms. McCully, made an election to the Provincial Court and entered a not guilty plea. He noted that the Crown Attorney and Defence Counsel had "canvassed and located" a trial date with the clerk on October 14, 2015 "which was agreeable to all parties." Defence Counsel also indicated that the parties were estimating that the trial would take a full day and they also suggested that a pre-trial conference date of May 6, 2015 was satisfactory to both sides.

[15] **May 6, 2015** - The Court held a pre-trial conference in chambers with the Crown Attorney and Defence Counsel. During that meeting, the October 14, 2015 trial date was confirmed and the Crown Attorney indicated there were still some outstanding disclosure issues of the cell phone analysis. The Crown Attorney also indicated they would be introducing expert opinion evidence regarding possession for the purpose of trafficking and that he had still not received the proposed expert's report.

[16] **October 14, 2015** - The trial commenced on this date, but only heard from one witness, Cpl. James Nelson of the RCMP. Cpl. Nelson stated that, during a search of 12 Juniper Crescent, in Dartmouth, Nova Scotia, on December 20, 2013, he was the "supervising member" and the exhibit officer. Prior to the start of Court proceedings, the Crown Attorney had pre-marked Exhibits numbered 1-15, which were to be introduced by Cpl. Nelson. The Crown Attorney and Defence Counsel agreed that there would be no issue regarding the continuity of those items once they came into police custody until they were filed as Exhibits.

[17] During his testimony, Cpl. Nelson identified Ms. McCully and added that she was also known as "Ms. Silver." Defence Counsel confirmed that there were no identification issues in this trial. Then, Cpl. Nelson introduced several of the pre-marked Exhibits, including a black colored, Blackberry cell phone [Exhibit 11] and a pink colored LG cell phone [Exhibit 12] which were both seized by Const. Stephen Beehan and turned over to him as the exhibit officer. Next, Cpl. Nelson tendered a $20 bill [Exhibit 13] which was seized by Const. Beehan from Ms. McCully.

[18] The next exhibit filed in Court was a black and white colored Samsung cell phone [Exhibit 14] with a cracked screen, with the word "Breen" scratched into the white side on the back of the phone. Cpl. Nelson stated that the phone had been

seized by Const. Manuel and turned over to him with a yellow piece of paper, which was apparently the password or design used to unlock the phone. Cpl. Nelson said that, on December 20, 2013, he ran his finger over the dots on the phone following the design on the yellow paper and it unlocked the cell phone. From there, Cpl. Nelson was able to access the various icons on the screen, and he reviewed the text messages of December 20, 2013 and the previous day.

[19] At this point, Defence Counsel objected to this line of questioning and asked for a recess to discuss what he viewed as a "very serious problem" with the Crown Attorney. The Crown Attorney advised the Court that he was about to ask Cpl. Nelson what he saw when he looked at the contents of that phone. Defence Counsel took the position that the Crown Attorney was moving into an area which had not been disclosed to him. The Court granted a short recess to allow time for counsel to discuss the issue.

[20] Upon resuming the trial, Defence Counsel advised the Court that the issue had been discussed with the Crown Attorney and he suggested that the questioning continue along the lines proposed by the Crown Attorney and that he would raise his objection at a later point. Cpl. Nelson stated that he activated the phone and viewed text messages on it from December 19 and 20th, 2013. He added that, although he looked at text messages, he could not recall which names were on

them and while he was convinced that there was a “conversation” between people by looking at the incoming and outgoing messages, he did not make any notes of the “exact conversation.” Following that answer, Defence Counsel again objected to the admissibility of this evidence as being “double hearsay” and without any notes to refresh his memory,the police officer would be giving his best recollection of what he had read some time ago, which may or may not fit into a hearsay exception. Furthermore, the objection also centered on the fact that if the Crown Attorney wished to introduce this evidence, it could have been done through cell phone analysis and by putting the actual text messages into the record. However, Defence Counsel submitted that the messages on that cell phone were hearsay for the purposes of this trial and if Cpl. Nelson was allowed to relate those messages based upon his recollection, without any notes, that would be “double hearsay.”

[21] In response to the objection by Defence Counsel, the Crown Attorney suggested that the Court enter into a *voir dire* to determine whether or not this evidence was admissible. The Crown Attorney was of the view that the evidence sought to be introduced was admissible and, at that point, the Court agreed to enter into the *voir dire* on the issue.

[22] During the *voir dire*, Cpl. Nelson was asked about the text messages that he had seen on the cell phone with the word “Breen” scratched on its back, which was

apparently seized from Mr. Nunn. He stated that once the screen was unlocked, he could scroll through the recent messages and he saw that there were recent messages to and from Ms. Silver/McCully. Cpl. Nelson recalled a "lengthy conversation" with Mr. Nunn asking her for something with the initials "P" and "Pc" and then her reply back to Mr. Nunn. Although he did not remember the exact words, he recalled that the reply from Ms. McCully was that the cost would be $3.

[23] Just before concluding his direct examination of Cpl. Nelson on the *voir dire*, the Crown Attorney advised the Court that the battery for the Samsung cell phone [Exhibit 14] was fully charged and he planned to ask Cpl. Nelson to put the battery in the phone, unlock the phone and then show the Court the exact messages that he had seen when the phone was seized by one of his colleagues. Since it was almost noon, Defence Counsel asked for the Court to recess until the afternoon because the "existence of the phone" had not been disclosed to him and he wanted to consider his options.

[24] When Court resumed after the lunch break, Defence Counsel indicated that he had no disclosure of the contents of that cell phone, if Cpl. Nelson was allowed to turn on the phone and proceed from there. Defence Counsel requested an adjournment and also asked the Court not to set a trial continuation date until he had reviewed the disclosure from the Crown Attorney, as he might be advancing a

different defence application on the continuation date. Since Defence Counsel was not available during the Court's upcoming intake week or during the month of November, he asked to return during the Court's following intake week on December 8, 2015 for a status update on disclosure and setting a trial continuation date.

[25] In response to the Defence Counsel's request for an adjournment, the Crown Attorney advised the Court that the "nature" of the contents of that cell phone were disclosed to Defence Counsel through information provided in Cpl. Nelson's report of the searches incidental to the arrests of people. The Crown Attorney also indicated that the request to power up the cell phone was simply to have the actual contents of the phone available to Cpl. Nelson in order to have him state exactly what he saw. In addition, the Crown Attorney indicated that he had been informed that morning that the police had just received the detailed analysis of one of the seized cell phones from the Tech Crime Unit. Moreover, the Crown Attorney stated that since the disclosure now exists, "there was no need to have so long a delay to December 8, 2015."

[26] However, Mr. Planetta had previously advised the Court that he was involved in a Nova Scotia Supreme Court homicide trial for the month of November, and was not available earlier. Defence Counsel also indicated that he

would need some time to review the disclosure and he did not agree with the Crown Attorney that this information had been previously disclosed. He also said that there was quite a difference between Cpl. Nelson talking in generalities as to what he observed versus having all of the actual text messages available for him to review in Court. Defence Counsel's view was that the Crown's case was now "different" than the one he was dealing with at the start of the day. Defence Counsel also noted that he had not been provided with transcripts of the cell phone exchanges or photographs of the text messages themselves. Given the fact that the Court had entered into a *voir dire* on this evidence, there was a dispute about whether this disclosure had been previously provided to the defence and the fact that the Crown Attorney had indicated that the detailed cell phone analysis was now available, the Court granted the adjournment request made by Defence Counsel, but established December 1, 2015 as the status date.

[27] **December 1, 2015** - Defence Counsel acknowledged that it was "a lengthy adjournment because I wasn't available for a period of time" and added that the text messages still had not been disclosed to him. Since the Crown Attorney with conduct of the trial was not in Court that day, his colleague indicated that she had seen a draft of a letter to Defence Counsel with a CD, but she had not seen the finalized letter on the file. Since Defence Counsel had stated that he had not

received the disclosure or reviewed the disclosure with his client, he maintained that he was not in a position to set a trial continuation date because it might alter the defence position in the trial. The Crown Attorney suggested returning in a week or so, but the Court had limited availability at that time and proposed a date later in the month, however, Defence Counsel stated that he was not available from December 19th until after the New Year. As a result, it was agreed that the next status date and setting the trial continuation date would be held on January 6, 2016.

[28] **January 6, 2016** - On this date, neither of the counsel handling the trial were able to attend Court on this status date and they were represented by colleagues in their office. Defence Counsel confirmed that Mr. Planetta had received some additional disclosure before Christmas, but added that he was not able to fully review it, so Defence Counsel asked the Court to adjourn setting a trial continuation date until February 11 or 12, 2016. The Court set February 12, 2016 as the date for the hearing to set a trial date.

[29] **February 12, 2016** - On this date, the Crown Attorney handling the trial was not able to attend Court, but he was represented by one of his colleagues. Mr. Planetta confirmed that he had received the disclosure of text messages sought during the direct examination of the first witness, he had reviewed them and provided copies to his client. Defence Counsel stated that this mid-trial disclosure

"changed the complexion of the trial" and that other disclosure requests have arisen from that. However, Defence Counsel asked the Court to set a new trial date because the case "has been kicking around forever" and added that there were issues with respect to a warrant and other "outstanding issues." As a result, Defence Counsel suggested that at least a full day and perhaps two days would be required.

[30] The Court noted that a block of time had recently become available and if a courtroom could be secured somewhere in the Halifax Regional Municipality, the trial could continue as early as April 26, 27 and 28, 2016. The Court suggested reserving one or two of those dates with the specific courtroom to be confirmed in either Dartmouth or Halifax in the next few days. The clerk indicated that, in the alternative, the next full day in Dartmouth courtroom #3 would be August 29, 2016. The Crown Attorney stated that the April dates were acceptable and that it was the "Crown's preference to get this matter dealt with as soon as possible" due to the fact that the case had to be adjourned once and it was getting "somewhat dated." However, Defence Counsel advised the Court that he had trials in Halifax on those April dates and as a result, the next available block of time for a two-day trial continuation was confirmed for August 29 and August 30, 2016.

[31] In setting that trial continuation, the Court noted that the trial had progressed a little slower than expected, there were still outstanding disclosure requests and Defence Counsel had noted that there was some issue with respect to a warrant. Therefore, the Court suggested that a status date be established to determine if there was going to be a **Charter** application in order to determine if the evidence being heard during the trial would have to be repeated for a **Charter** *voir dire*. The Court added that if the Defence Counsel served a notice of **Charter** application before the status date, then that date would provide an opportunity before the trial continuation dates to consider the scheduling implications arising from that notice. Defence Counsel indicated that as soon as he had the new disclosure that he was seeking, he would file the notice immediately. The Court scheduled June 6, 2016 as the next status date to confirm any issues with respect to the **Charter** as well as whether or not the two full days for trial continuation would be required, given the fact that the trial had progressed "a little slower than everybody anticipated."

[32] **June 2, 2016** - On this date, the Crown had filed an application with respect to a police officer attending Court by video-link. However, Judge MacRury was sitting in Court when this application was presented and he noted that there was a status date set for June 6, 2016 and that Judge Tax was seized with this trial matter. As a result, the Crown's application was adjourned to that date.

[33] **June 6, 2016** - On this date, the Crown Attorney handling the trial [Mr. Moors] was not available and one of his colleagues spoke to the matter. Defence Counsel noted that an application for video-link evidence had been made in this trial as well as a parallel application in the proceedings which were under way against Mr. Nunn and others. Since the other matters were coming back on June 20, 2016, Defence Counsel asked that the McCully case come back to Court at the same time as the trial which involved Mr. Nunn and others. Defence Counsel also stated that he still had questions with respect to the "other issues" that he had raised at the last appearance and he wanted to have the opportunity to speak with the Crown Attorney handling the trial. There was no mention of any **Charter** application on this date.

[34] **June 20, 2016** - The Crown Attorney handling the trial was present and he advised the Court that he had applied to have Const. Beehan testify by video-link from Ottawa and Const. Manuel to testify from Woodstock, New Brunswick. There was an issue as to whether the Crown Attorney had forwarded an affidavit in support of his application to the Court and to Defence Counsel. Although one of the Defence Counsel who was involved in the other trial confirmed that they had received that information for the application in their case, Ms. McCully's Defence

Counsel indicated that he would like to see the affidavit before determining whether he would consent to the Crown's application.

[35] When the Crown Attorney advised the Court that he had the supporting affidavit with him, the Court suggested setting a date within a week or so to provide time for travel planning, if needed. The Crown Attorney preferred to come in the next few days to address the issue, but, Defence Counsel advised the Court that he would not be available, due to a jury trial the following week and other trial matters, until July 11, 2016. Given the unavailability of Defence Counsel, the video-link application was adjourned to July 11, 2016. There was no mention of any **Charter** applications on this date.

[36] **July 11, 2016** - The Crown Attorney confirmed that he had sent his affidavit in support of the video-link evidence application for Const. Beehan and had a draft form of order available. Defence Counsel noted that the matter had been adjourned on the last day to provide him with a copy of the affidavit in support of the application, and that he had just received it that morning. Having reviewed it, he had no objection to the order. The Court granted the order for video-link evidence. There was no mention of any **Charter** applications on this date and the trial continuation date was confirmed for August 29, 2016.

[37] **Notice of Section 11(b) Charter application issued on July 15, 2016 -** In the Notice of **Charter** application, the applicant alleged that there was a delay of 32 months in bringing her to trial from the date of the charge [December 20, 2013] to the trial continuation date of August 29, 2016. Furthermore, the applicant stated that none of the resulting delay was her fault and the applicant was seeking a stay of proceedings pursuant to Section 24(1) of the **Charter**.

[38] **August 25, 2016 -** The applicant provided the Court with transcripts of all court appearances made by Ms. McCully or her Defence Counsel until that date, except for her first appearance on the "original" Information on February 12, 2014.

[39] **Trial Evidence heard on August 29 and 30, 2016 -** At the outset of the hearing on August 29, 2016, Defence Counsel confirmed that he wished to first proceed with the **Charter** application as transcripts of earlier court appearances had been provided to the Court and the Crown Attorney. Although Defence Counsel's position was that the hearing of further trial evidence should be adjourned until the Section 11(b) **Charter** issue was resolved, the Court ruled that trial evidence would be heard on August 29 and 30, 2016, since all of the witnesses were actually present in Court and those two full days of trial time had been secured since February, 2016. As a result, Cpl. Nelson's testimony was completed and the other two witnesses who had traveled from Ottawa, Ontario and

Woodstock, New Brunswick, also completed their testimony. The final Crown witness was Cpl. David Lane who was qualified as an expert to provide opinion evidence to the Court in relation to drug trafficking, and in particular, with respect to street level trafficking prescription pills. At the conclusion of Cpl. Lane's testimony, the Crown Attorney closed his case. Since the transcripts of the previous court proceedings had just been received on August 25, 2016, the Court also scheduled September 23, 2016 as the date for the oral submissions of counsel on the **Charter** issue. It was agreed that both counsel would file their written legal briefs on the **Charter** issue, at the same time, on or before September 20, 2016

[40] **September 23, 2016** - On this date, Defence Counsel and the Crown Attorney made their oral submissions on Ms. McCully's Section 11(b) **Charter** application. In addition, during his submissions on the **Charter** application the Crown Attorney filed Exhibit 22, which was a letter dated May 16, 2014 containing disclosure materials to the Duty Counsel on behalf of Ms. McCully and the lawyers for the other four individuals named in the separate Information. The Crown Attorney also filed Exhibit 23, which was a letter dated September 18, 2015, addressed to Ms. McCully's Defence counsel [Mr. Planetta] and the lawyers for the other accused persons, which contained a "Can Say" statement from Const. Stephen Beehan in relation to "the McCully phone review" based upon Const.

Beehan's execution of a Warrant to Search the contents of the seized cell phones. Exhibit 23 concludes with the Crown Attorney saying that he anticipated that the "cell phones may be more completely analyzed in the coming days." Finally, the Crown Attorney also filed Exhibit 24, which is a letter dated September 24, 2015, addressed to Defence Counsel as a follow-up to the September 18, 2015 letter, which enclosed a copy of the disc containing the photographs from Const. Beehan's search of the two cell phones seized from Ms. McCully. In that letter, the Crown Attorney added that "if I receive the full analysis from Tech Crime, I will forward it to you."

[41] At the conclusion of this hearing, the Court reserved its decision and indicated that the **Charter** decision would be rendered on November 10, 2016. In addition, the Court also established a tentative trial continuation date for December 9, 2016, if the Court ruled that there was no breach of Section 11(b) of the **Charter** or if there was a breach of that right, the Court determined that the remedy requested by the Defence under Section 24(1) of the **Charter** was not appropriate and just in all of the circumstances of this case.

THE FRAMEWORK FOR SECTION 11(B) CHARTER ANALYSIS:

[42] The relevant **Charter** provisions in determining an application where a person alleges that he or she has not been tried within a reasonable time are found in Sections 11(b) and 24(1) of the **Canadian Charter of Rights and Freedoms** (the "**Charter)** which reads as follows:

> Section 11(b) - Any person charged with an offence has the right to be tried within a reasonable time.
>
> Section 24(1) - 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.

[43] The framework for analyzing an alleged breach of the right to be tried within a reasonable time pursuant to Section 11(b) of the **Charter**, was initially formulated by the Supreme Court of Canada in **R. v. Askov**, [1990] 2 SCR 1199; **1990** CarswellOnt 111 and then more fully developed in **R. v. Morin,** [1992] 1 SCR 771, with further clarifications added by the Supreme Court of Canada in **R. v. Godin**, 2009 SCC 26.

[44] In **Morin**, *supra*, at para. 31, Sopinka J. stated that the general approach to a determination as to whether the right to a trial within a reasonable time has been denied, is **not** by the application of the mathematical or administrative formula, but rather by a judicial determination balancing the interests which the Section is designed to protect against factors which either inevitably lead to delay or are

otherwise the cause of the delay. The Supreme Court of Canada also noted, at para. 31, that "it is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?"

[45] Having established the individual and societal interests at issue in the analysis of a Section 11(b) **Charter** application in **Morin**, Sopinka J. stated that the Court had now accepted that the factors to be considered in analyzing how long is too long, are as follows:

1. the length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including
    (a) Inherent Time Requirements of the case,
    (b) actions of the accused,
    (c) actions of the Crown,
    (d) limits on institutional resources, and
    (e) other reasons for delay; and
4. prejudice to the accused.

[46] In **Morin**, *supra*, at para. 32, Justice Sopinka added that the judicial process of reviewing those factors is referred to as "balancing" which requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interest which Section 11(b) is designed to protect. Leaving aside the question of delay on

appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. See **R. v. Kalanj**, [1989] 1 SCR 1594. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests Section 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused.

[47] In **R. v Godin**, 2009 SCC 26 at para. 18, Justice Cromwell, writing for the Supreme Court of Canada reaffirmed the **Morin** framework and factors to be considered in a section 11(b) **Charter** application:

> [18] The legal framework for the appeal was set out by the Court in **Morin**, at pages 786-89. Whether delay has been unreasonable is assessed by looking at the length of the delay, less any periods that have been waived by the defence, and then by taking into account the reasons for the delay, the prejudice to the accused, and the interests that section 11(b) seeks to protect. This often and inevitably leads to minute examination of particular time periods and a host of factual questions concerning why certain delays occurred. It is important, however, not to lose sight of the forest for the trees while engaging in this detailed analysis. As Sopinka J. noted in **Morin** at p. 787, "[t]he general approach… is not by the application of the mathematical or administrative formula but rather by a judicial determination balancing the interests which [section 11(b)] is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of the delay.

[48] In **R. v. R.E.W**., 2011 NSCA 18, at para. 51, Beveridge JA cited the foregoing remarks of Justice Cromwell in **Godin** with approval in confirming the goal of the inquiry using the **Morin** factors is not to engage in an accounting exercise, but rather, to balance the interest which the right is designed to protect

against factors which either inevitably lead to delay or are otherwise the cause of the delay. Since prejudice to the accused person is also one of factors considered in the examination of the Section 11(b) **Charter** framework, Mr. Justice Beveridge also went on to state in **R.E.W**., *supra*, at para. 73 that it cannot be disputed that the trial judge is entitled to infer prejudice based on the length of the delay.

[49] Under the **Morin** framework, the onus was on the applicant to establish the breach of her Section 11(b) **Charter** right to be tried within a reasonable time on a balance of probabilities.

REVISED FRAMEWORK FOR SECTION 11(B) CHARTER ANALYSIS:

[50] On July 8, 2016, the Supreme Court of Canada (5:4) took the opportunity in the case of **R. v. Jordan**, 2016 SCC 27, to completely revamp the framework analysis for Section 11(b) **Charter** applications. The majority of the Court held that the new framework would govern all cases, including those already in the system, however, they also indicated that there would be a transitional framework for cases already in the system. The majority of the Court was of the view that the **Morin** framework was unduly complex, led to a detailed accounting and explanation for each day of the proceedings, leading to a retrospective analysis which encouraged rationalizations for vast periods of pre-trial delay. The Court

recognized that there had been an increased complexity of pretrial and trial processes since **Morin** and that this new framework would encourage all participants in the justice system to take preventative measures to address inefficient practices and resourcing problems. The very clear expectations of the Supreme Court of Canada with respect to efforts and coordination of all participants in the criminal justice system - Crown counsel, Defence Counsel, the Courts, Parliament and the provincial legislatures - were summarized succinctly in **Jordan**, *supra*, at paras. 138-141.

[51] The core concepts of the new framework for Section 11(b) **Charter** analysis were described in **Jordan**, *supra*, at paras. 46 to 48:

> [46] At the heart of the new framework is a ceiling beyond which "delay is presumptively unreasonable." The presumptive ceiling is set at 18 months for cases going to trial in the provincial court and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry).
>
> [47] If the total delay from the charge to the actual or anticipated end of the trial (minus defence delay) ***exceeds*** the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of "exceptional circumstances." If it cannot, the delay is unreasonable and a stay will follow.
>
> [48] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls ***below*** the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings ***and*** (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.

A) The Presumptive Ceiling

[52] The Supreme Court of Canada noted in **Jordan**, *supra*, in para. 49-56, that the presumptive ceiling will enhance analytical simplicity and foster constructive incentives for all of the participants in the criminal justice system. However, as the majority specifically noted, in referring to the presumptive ceiling at para. 51:

> [51] … (i)t is not the end of the exercise: as we will explain in greater detail, compelling case-specific factors remain relevant to assessing the reasonableness of a period of delay both above and below the ceiling. Obviously, reasonableness cannot be captured by a number alone, which is why the new framework is not solely a function of time. …

[53] Since a number of factors were taken into account in setting the presumptive ceiling, the majority noted that prejudice to the accused will no longer play an explicit role in the Section 11(b) **Charter** analysis and that once the ceiling is breached, the Court can presume that accused persons will have suffered prejudice to their **Charter**-protected liberty, security of the person and fair trial interests.

[54] Finally, since the presumptive ceiling is the point at which delay becomes presumptively unreasonable, the public should expect that most cases can and should be resolved before reaching the ceiling. For that reason, the Supreme Court of Canada held that the Crown bears the onus of justifying delays that exceed the ceiling. It is also the reason for which an accused may, in clear cases, still

demonstrate that his or her right to be tried within a reasonable time has been infringed, even before the ceiling has been breached.

B) Accounting for Defence Delay

[55] The majority of the Court stated, in **Jordan**, *supra*, at para. 60 that the application of the new framework, as in the **Morin** framework, begins with calculating the total delay from the charge to the actual or anticipated end of the trial. Once that is determined, delay attributable to the defence must be subtracted. The defence should not be allowed to benefit from its own delay causing conduct. As Sopinka J. wrote in **Morin:** "The purpose of 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits [p. 802]."

[56] The majority of the Supreme Court of Canada in **Jordan**, *supra*, at paras. 60-66 pointed out that defence delay has two components. The first is delay waived by the defence and they added that the waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect that the waiver will have on those rights. As in the past, the important point is that the waiver in the context of Section 11(b) **Charter**, is not a waiver of the right itself, but only to the inclusion of specific periods in the overall assessment of reasonableness.

[57] The second component of defence delay is that delay, which is caused solely by the conduct of defence. The Court points out that this kind of delay comprises "those situations where the accused's acts either directly caused the delay… Or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial" (**Askov**, at pages 1227-28). The most straightforward examples of this defence delay would include frivolous applications and requests, which the majority encouraged trial judges to generally dismiss when it becomes apparent that they are frivolous.

[58] Another example of defence delay cited by the majority is where the defence has directly caused the delay, if the Court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the Court and the Crown were also unavailable would not constitute defence delay, even if Defence Counsel was also unavailable. This should discourage unnecessary inquiries into Defence Counsel's availability at each appearance. Beyond defence unavailability, it is also open to trial judges to find that other defence actions or conduct have caused delay: see **Jordan**, *supra*, at para. 64.

[59] However, the Court added in **Jordan**, at para. 65, that defence actions which are legitimately taken to respond to the charges do not constitute 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, since such deductions would run contrary to the accused's right to make full answer and defence. Ultimately, since this is not an exact science, trial judges are "uniquely positioned to gauge the legitimacy of defence actions."

[60] Once the total delay from the charge to the actual or anticipated end of the trial has been calculated, and the Court has subtracted the period of time attributed to defence delay, then, the next step in the analysis depends upon whether the remaining delay which is not caused by the defence - is *above* or *below* the presumptive ceiling.

C) Presumptively Unreasonable Delay -Above the Ceiling

[61] Delay (minus the defence delay) that exceeds the ceiling is presumptively unreasonable. However, the Crown may rebut this presumption by showing that the delay is reasonable because of the presence of exceptional circumstances: see **Jordan** at paras. 67-68.

D) Exceptional Circumstances

[62] Exceptional circumstances are those situations "outside the Crown's control" in the sense that (1) they are reasonably unforeseen or reasonably unavoidable *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. As long as the circumstances meet this definition, the Court stated, in **Jordan,** at para. 69, that they will be considered exceptional and the Crown does not have to establish that they were rare or entirely uncommon.

[63] However, once the ceiling is breached, the Crown must also show that it took reasonable, available steps to avoid and address the problem *before* the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the Court or seeking assistance from defence to streamline evidence or issues for trial or to coordinate pre-trial applications or resorting to other appropriate procedural means. The Court added that the Crown is not required to show that the steps taken were ultimately successful, rather, just that it took reasonable steps in an attempt to avoid the delay: see **Jordan**, at paras. 70-71.

[64] In **Jordan**, at paras. 72-75, the Court notes that it is impossible, in advance, to identify all circumstances that may qualify as "exceptional" for the purposes of adjudicating a Section 11(b) application. Ultimately, the determination of whether

circumstances are “exceptional” will be determined by the trial judge. Generally speaking, while the list of exceptional circumstances is not closed, they fall into two categories – discrete events and particularly complex cases.

[65] For example, discrete events would include medical or family emergencies (whether on the part of the accused, key witnesses, counsel or the trial judge). Cases with an international dimension, involving extradition or an accused from a foreign jurisdiction, may also meet the definition.

[66] In addition, discrete, exceptional events arising during a trial may qualify as being “exceptional circumstances” as there may be unforeseeable and unavoidable developments that can cause delays. By way of example, the Court in **Jordan**, [at para. 73] mentions a situation where a complainant unexpectedly recants 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 that the delay is unavoidable and may therefore amount to an exceptional circumstance.”

[67] Furthermore, in **Jordan**, at para. 74, the majority reminded trial judges to be “alive to the practical realities of trials,” especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In those cases, the focus

should be on whether the Crown made reasonable efforts to respond to issues and to conclude the trial under the ceiling. However, trial judges should also bear in mind that when an issue arises in a trial, which is close to the ceiling, it will be more difficult for the Crown and the Court to respond with a timely solution. For that reason, "it is likely that unforeseeable or unavoidable delays occurring jury trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances."

[68] The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. However, the Court added that the Crown must always be prepared to mitigate the delay resulting from discrete exceptional circumstances as must the justice system. In those circumstances, within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events. In those circumstances, it may not be appropriate to subtract the entire period of delay caused by discrete exceptional events where the Crown and the system could reasonably have mitigated the delay.

[69] There is also a second category of exceptional circumstances which the Supreme Court of Canada describes as those cases that are "particularly complex." Particularly complex cases are ones which, 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. By way of example, with respect to the nature of the evidence, the Court mentions, in **Jordan** at para. 77, cases with voluminous disclosure, a large number of witnesses, significant requirements for expert evidence or charges covering a long period of time. Complex cases may also include 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, may also impact the complexity of the case. The Court in **Jordan** concludes, at para. 80, that where "the trial judge finds that the case was particularly complex such that the time the case is taken is justified, the delay is reasonable and no stay will issue. No further analysis is required."

[70] In summary, in **Jordan** at para. 81, the Court reiterates that the presence of exceptional circumstances is the **only basis** upon which the Crown can discharge its burden to justify delay that exceeds the ceiling. Exceptional circumstances can arise from discrete events or from the complexity of the case, but the seriousness or gravity of the offence alone cannot be relied upon to justify the delay, nor can chronic institutional delay. Furthermore, the Court points out that the absence of prejudice to the accused can no longer be used to justify delays after the ceiling is breached. It is only those circumstances that are genuinely outside the Crown's

control and ability to remedy that may furnish a sufficient excuse for the prolonged delay.

E) Delay Below the Presumptive Ceiling

[71] The majority in **Jordan**, at paras 82-83, stated that delay may be unreasonable even if it falls below the presumptive ceiling (after deducting the defence delay and any delay attributable to exceptional circumstances that are discrete in nature). However, in those circumstances, the onus is on the defence to 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. If those two factors are not established by the defence, "the 11(b) application must fail." The Court went on to note that stays beneath the ceiling would only be granted in "clear cases" and added that, in setting the ceiling, they have factored in the tolerance for reasonable institutional delay established in **Morin** as well as the inherent needs and the increased complexity of most cases.

1) Defence initiative re-"meaningful and sustained steps"

[72] The Court provided guidance to counsel and trial judges in **Jordan**, at paras 84- 86, that, in order to discharge its onus, the defence must demonstrate that it took meaningful, sustained steps to expedite the proceedings. The majority

repeated the comments made earlier in **Morin** that action or non-action by the accused which is inconsistent with the desire for a timely trial is something that the Court must consider [**Morin** at p. 802]. Trial judges should consider what the defence "could have done and what it actually did, to get the case heard as quickly as possible. Substance matters, not form. see **Jordan** at para. 84.

[73] Moreover, the Court points out that this is not about making "token efforts" to put on the record that it wanted an earlier trial date, rather, the defence must show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the Court, put the Crown on timely notice when delay was becoming a problem and conducted all applications (including the 11(b) application) reasonably and expeditiously. The defence is required to act reasonably, not perfectly: see **Jordan**, at para. 85.

2) Reasonable Time Requirements of the Case – Time Markedly Exceeded

[74] The Court also stated that the defence must also show that the time which the case has taken, "markedly exceeds the reasonable time requirements of the case." The reasonable time requirements of the case are derived from a variety of factors, including the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings. The reasonable time

requirements of the case will increase proportionately to a case's complexity. In addition, where the Crown has done its part to ensure that the matter proceeds expeditiously, including genuinely responding to defence efforts, seeking opportunities to streamline issues and evidence, and adapting to evolving circumstances as the case progresses - is unlikely that the reasonable time requirements of the case will have been markedly exceeded. When trial judges assess the conduct of the Crown, like the defence, the majority of the Supreme Court of Canada point out that the Crown is also not be held to the standard of perfection: see **Jordan**, at paras. 87-90.

F) Applying the New Framework to Cases Already in the System

[75] The Court states that this new framework applies to cases already in the system, but is subject to two qualifications. First, for cases which exceed the ceiling, a "transitional exceptional circumstance" may arise where the charges were brought prior to the release of the **Jordan** decision. This transitional exceptional circumstance will apply where the Crown satisfies the Court that the time which the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behavior cannot be judged strictly, against a standard, which they had no

notice. Judges in jurisdictions plagued by lengthy, persistent and notorious institutional delays should account for this reality. The majority point out that it will take time to make the necessary changes and therefore there should be a transitional exceptional circumstance that institutional delay, even if it is significant, will not automatically result in a stay of proceedings: see **Jordan**, at paras. 95- 98.

[76] The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls *below* the presumptive ceiling. For those cases, the two criteria - defence initiative and whether the time the case has taken markedly exceeds what was reasonably required - must be applied contextually, sensitive to the parties' reliance on the previous state of the law. In the **Morin** framework, the defence was not required to demonstrate having taken the initiative to expedite matters before the **Jordan** decision and therefore, it would be unfair to require it to do so for the period before the release of the decision. However, in "close cases," any defence initiative during that time would assist the defence in showing that the delay markedly exceeds what was reasonably expected. The trial judge must also still consider the actions or inaction by the accused that may be inconsistent with the desire for a timely trial. Furthermore, if the delay was occasioned by an institutional delay that was reasonably acceptable in the relevant

jurisdiction under the **Morin** framework, before this decision, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system. For those reasons, a stay of proceedings below the ceiling will be even more difficult to obtain for cases currently in the system: see **Jordan** at paras. 99-103.

[77] In conclusion, the Court notes in **Jordan** at paragraphs 111-116, that the new framework reduces, but does not eliminate the need to engage in complicated "micro-counting," since trial judges will still have to determine defence delay, and whether the case took markedly longer than it reasonably should have where the defence seeks a stay below the presumptive ceiling. Once again, that inquiry need only arise if the accused has taken meaningful and sustained steps to expedite matters. Above the presumptive ceiling, the 11(b) analysis is only triggered where the Crown seeks to rely on exceptional circumstances.

[78] It is clear from their decision in **Jordan** that, going forward, the majority expected that there will be a shift in culture which creates incentives for both sides to bring an accused to trial within a reasonable time. Crown Counsel will be motivated to act proactively throughout the proceedings - if the case exceeds the ceiling, in order to preserve its ability to justify a delay, should the need arise,

whereas below the ceiling, a “diligent, proactive Crown” will be a strong indication that the case did not take markedly longer than reasonably necessary.

[79] Moreover, the new framework also encourages the defence to be part of the solution, if the total delay [minus defence delay or delay attributable to exceptional circumstances] on a Section 11(b) application is below the ceiling, since, in those circumstances, the onus is on the defence to demonstrate that it took meaningful and sustained steps to expedite the proceedings.

[80] Finally, the new framework makes Courts more accountable, as absent exceptional circumstances, the ceiling limits the extent to which judges can tolerate delays before a stay must be imposed. The Supreme Court of Canada notes that Courts are important players in changing courtroom culture and have developed more robust case management and trial scheduling processes, focusing attention on possible sources of delay (like pre-trial applications or unrealistic estimates of trial length) and thereby seeking to avoid or minimize unnecessary delay

Application of New Framework to this Case:

[81] As the Supreme Court of Canada stated in **Jordan**, the first step in applying the new framework is to determine the total delay between the institution of the charges and the end of the trial. In this case, but for the Section 11(b) **Charter**

application by the Defence, it is likely that the last day of the trial would have been August 30, 2016. The Crown Attorney had closed his case on that date, but given the timing of the defence application, there was no opportunity for the parties to make submissions on the **Charter** issue on that date. Furthermore, as a result of the transcripts being received just days before the trial continuation date, additional dates were established by the Court for the filing of written briefs and oral submissions. The Court indicated that the decision would first be rendered on the **Charter** issue and that a tentative trial continuation date would be established for defence evidence or submissions of counsel, if the defence application was dismissed. Therefore, for the purposes of this application, I find that the end of the trial or the anticipated end of the trial ought to be considered as August 30, 2016, and as such, the total delay is approximately 32 months.

[82] During their submissions, the Crown Attorney and Defence Counsel referred extensively to the new framework established in the **Jordan** case and they were fairly close in their calculation of the total delay as a starting point.

[83] However, Defence Counsel submits that the total delay is due to the actions of the Crown or institutional lack of resources, but he does acknowledge that possibly one month or, at most, two months of that total delay might be attributed to the actions of the defence. In those circumstances, it is the position of Defence

Counsel that the total delay in this case significantly exceeds the "presumptive ceiling," the large majority of that delay is due to the actions of the Crown, in particular, with respect to reasonable disclosure requests which were not addressed in a timely fashion. Defence Counsel submits that the onus is upon the Crown to rebut the presumption of unreasonableness on the basis of "exceptional circumstances" and that the Crown has failed to rebut that presumption. Therefore, the charge against Ms. McCully should be stayed.

[84] On the other hand, the Crown Attorney submits that, when the Court deducts the defence delay from the total delay of 32 months, the total delay does not exceed the "presumptive ceiling" and therefore the onus is on the defence to show that the delay is unreasonable and that they took (1) meaningful steps that demonstrate a sustained effort to expedite proceedings and (2) the case took markedly longer than it reasonably should have. It is the position of the Crown that since it took 10 months for Ms. McCully to retain and instruct Defence Counsel, that 10 month period of time, from December 20, 2013 [the offence date and date of her arrest] to October 17, 2014, when Defence Counsel first appeared on her behalf, entered an election and set the matter down for trial, should be deducted from the total delay of 32 months. The Crown acknowledges that the 12 months between the plea being entered and the start of the estimated one day trial on

October 14, 2015 was within the normal timeframe, given the local conditions and the volume of cases in Dartmouth Provincial Court at that time, and that period of time would be considered to be institutional delay and attributable to the Crown.

[85] The Crown Attorney also acknowledges that it was reasonable for the Court to adjourn the trial at the request of Defence Counsel for the disclosure of information which had just come to the attention of the Crown on the morning of the trial. For that reason, the three month period of time between October 14, 2015 [the trial date] and January 6, 2016 when it was confirmed that Defence Counsel had the disclosure for a few weeks, might be considered part of the total delay, but the one month between January 6, 2016 and February 12, 2016 should be deducted from the total delay, since the trial continuation date could have been set in January, 2016. The Crown acknowledges that the two months between February and April, 2016 when the Court had offered three days for trial continuation on dates when the Court and the Crown were available should also be factored into the total delay. However, since Defence Counsel advised the Court that he was not available on any one of the three days in late April, 2016, it is the position of the Crown that the four months of delay between April 28, 2016 and August 29, 2016, is delay which ought to be attributed to the Defence.

[86] In the final analysis, it is the position of the Crown that the total delay [minus defence delay] is 17 months and that the defence has not met the onus upon them when the delay is **below** the "presumptive ceiling." In the alternative, if the Court was to conclude that the defence was not responsible for the amount of the delay as submitted by the Crown, then, the Crown Attorney submits that this is one of those "close cases" which was referred to by the majority in **Jordan** and that the delay does not "markedly exceed what was reasonably expected," the institutional delay was "reasonably acceptable" in the jurisdiction at the time under the "**Morin** framework" and therefore, the Court should apply the new framework in a contextual and flexible manner. In those circumstances, the Crown Attorney submits this is not one of those "clear cases" where a stay ought to be ordered given the fact that the parties were reasonably relying on the law as it previously existed, and that therefore, the Court should apply the "transitional exceptional circumstance" mentioned in **Jordan**.

[87] Under the new framework for Section 11(b) analysis, the first step in determining whether Ms. McCully's Section 11(b) right was infringed is to determine the total delay between the charges and the possible end of the trial. For this initial purpose, based upon the reasons outlined above, I have found that the total delay is approximately 32 months. After determining the total delay, the next

step is to determine whether any of that delay was waived or caused solely by the defence.

A) December 20, 2013 - October 17, 2014 (10 months):

[88] Ms. McCully was arrested on December 20, 2013 and released on an Undertaking to the Officer-in-Charge with a direction to make her first appearance in Court on February 12, 2014. I find that this was a reasonable period of time to make arrangements to secure legal counsel to represent her. In those circumstances, that period of time, being approximately two months should not be considered to be defence delay.

[89] However, I find that the period of time between Ms. McCully's first appearance in Court on February 12, 2014 until October 17, 2014 when Defence Counsel made his first appearance on behalf of his client, entered a not guilty plea and set the matter down for trial should be considered as defence delay. I find that Ms. McCully appeared with the assistance of the Legal Aid Duty Counsel on five occasions during that eight month period of time, where her election and plea was postponed at her request, until her application for a Legal Aid certificate was approved and she retained Defence Counsel. As a result, I find that Ms. McCully's requests to adjourn her election and plea, which were made on her behalf by the

Duty Counsel, amount to an implied waiver of any delay, since no specific statement was made by that Duty Counsel about this issue, nor was she asked whether she was expressly waiving any delay occasioned by Ms. McCully's requests to adjourn her election and plea. In these circumstances, I also find that Ms. McCully was not reasonably diligent in her efforts to retain and instruct counsel and therefore, I attribute this eight-month period of delay to the Defence and I will deduct that eight months of delay from the total delay in this case (32 months), leaving a total of 24 months delay, at that point in time.

B) October 17, 2014 - October 14, 2015:

[90] On October 17, 2014, Defence Counsel appeared with Ms. McCully for the first time and elected Provincial Court and entered a not guilty plea. At that time, given the volume of cases in this jurisdiction, it was not uncommon for a one day trial to be set in the range of eight to 12 months later, for an accused who was not in custody. Then and now, the Court gives priority to its earliest trial dates to those accused persons who are remanded into custody or for other reasons, consent to remain in pre-trial custody. Here, Ms. McCully was released at the time of her arrest under the terms and conditions of an Undertaking Given by an Officer in Charge. As the court record indicates, the parties had agreed that the estimated time for trial would be one day and furthermore, when the trial date was set for

October 14, 2015, it was confirmed that the date was “agreeable to all parties.” From that remark, it is also fair to say that under the **Morin** framework neither the Crown Attorney nor Defence Counsel had concerns with respect to the reasonableness of the estimated time for trial.

[91] Further, with respect to the setting of the trial date, at that time, it should also be noted that when potential trial dates were “canvassed” with the Court, those dates were discussed with the clerks, off the record. As a result, there is no formal record of any other earlier dates being offered for a possible one day trial when Defence Counsel was not ready or able to proceed due to other previously scheduled commitments, but the Crown and the Court were available. Given the local practice in setting trial dates, at that time, I find that that it is highly likely that the clerk offered counsel earlier trial dates for a trial which they estimated would require one day of court time. In this case, the court record only refers to the one “agreeable” date confirmed by the parties and in his brief, the Crown Attorney has acknowledged that this 12 month period should be considered, using the **Morin** analysis as institutional delay and therefore attributable to the Crown.

[92] Having said that, I find that it is logical and realistic that, given the day-to-day realities of the conduct of a litigation practice that Defence Counsel was not available or ready to proceed on other earlier dates that were likely offered by the

clerk of the court, when the Court and the Crown could have been available for the trial before October 14, 2015. More recently, the Court has adjusted its practice and now, all of the dates offered before the trial date is confirmed by both sides are clearly expressed on the record. While the defence is not assumed to be perpetually available, I also find that there is also a practical reality that Defence Counsel have other clients and trials, trial preparation, legal briefs and facta to write, office and personal commitments which would have meant that they were not available or ready to proceed with a trial the day after the plea was entered or for a reasonable period of time after the trial date was set or on subsequent trial continuation dates. Obviously, in the context of a Section 11(b) **Charter** application, these realities of practice take on a heightened importance where the Court has to determine if there was an express or implied waiver of any or all of that delay by the Defence.

[93] However, in the actual context of this application, given the absence of any specific confirmation on the record that earlier dates were offered to the defence when the Crown and the Court could have been available, but the defence was not ready or available to proceed, there is only the one “agreeable” date that was established as the day for trial evidence to be heard. Furthermore, given the concession by the Crown Attorney, I find this 12 month period of time is

considered to be institutional delay using the **Morin** framework, and as such, remains part of the total delay.

C) Pre-Trial Conference – May 6, 2015:

[94] Given the new framework which has been developed by the Supreme Court of Canada in **Jordan**, I find that the discussions held between counsel and the Court during these meetings become even more important for several reasons. First, it is an opportunity for both sides to re-evaluate, at an early date, whether their estimated, reasonable time requirements for the case on their prior assessment of the evidentiary, factual and legal issues which determine the complexity of the case, remain accurate. Secondly, the pre-trial conference provides an occasion to consider the "local conditions," to determine if additional dates are needed, and for the Court to inquire whether the Crown and defence have taken any reasonable steps to expedite the proceedings. The pre-trial conference also provides the opportunity for **both** the Crown and defence to re-evaluate the trial issues and any impact on the estimated time for trial, since the responsibility for estimating the time requirements of the trial does not fall exclusively on the shoulders of the Crown Attorney: See **Jordan,** *supra***,** at para. 122.

[95] During the pre-trial conference, which was held on May 6, 2015, the Crown Attorney acknowledged that there was still outstanding disclosure issues with respect to cell phone analysis and that there would be an expert report since the case involved the charge of possession for the purpose of trafficking controlled drugs and other substances. However, it would appear from a review of (Exhibit 22), the Crown's letter that disclosure was provided to the Legal Aid Duty Counsel for Ms. McCully on May 16, 2014 which, of course, was several months before she made her election and entered a not guilty plea. Although there was outstanding disclosure of cell phone records and provision of an expert report, it would appear that neither the Crown Attorney nor Defence Counsel believed that this additional disclosure would impact the original estimated time for trial, and as a result, they did not suggest holding a further pre-trial conference. Moreover, neither the Crown nor the Defence indicated to the Court, at that early date, that they needed any additional trial time and therefore, the one day for trial was confirmed.

[96] As a result of those discussions between the Court and counsel about five months before the trial, it was evident that cell phone analysis would probably be an important factual issue in the case and that the Crown Attorney had clearly stated that he did not have that information at that time. However, the Crown

Attorney filed letters as Exhibits on this **Charter** application, which confirmed that further disclosure was provided to Defence Counsel in the form of a "Can Say" statement of Const. Beehan in relation to "the McCully phone review" in a letter dated September 18, 2015 and that a follow-up letter was sent on September 24, 2015 which enclosed a disk images photographed by Const. Beehan during his search of the two cell phones seized from Ms. McCully. It would appear from this information that, if Defence Counsel did not have all the specifics of the cell phone analysis of the phones that had been seized by the police, the essence of the cell phone analysis was made available to him, approximately one month before the trial began. As I mentioned previously, the letters from the Crown Attorney to Defence Counsel containing disclosure were only filed as Exhibits in support of the Crown's position on this **Charter** application, but they are also consistent with the views expressed by the Crown Attorney that disclosure had been provided, when Defence Counsel made his application to adjourn the trial in the midst of Cpl. Nelson's testimony, due to the lack of timely disclosure of the Tech Crime Unit's detailed cell phone analysis.

[97] Given the importance of pre-trial conferences, trial judges have made it clear to counsel that, in order to have any meaningful discussions with respect to the effective and efficient use of court time, the narrowing of issues and streamlining

evidence, the Court expects the counsel who will be conducting the trial to attend the pre-trial conference, have a good working knowledge of the information on their files and to be prepared to discuss their position relative to any potential evidentiary, factual or legal issues which may impact the length of the trial, one way or the other. This is especially so, in those cases, where it appears to counsel that there has been a significant underestimation of the amount of trial time required based upon their subsequent review of the disclosure materials received or expected to be delivered and their understanding of the key evidentiary, factual or legal issues in the trial. If the parties had advised the Court, during the pre-trial conference or at some other time before the trial date, that there were more complex evidentiary, factual or legal issues than they had initially contemplated, then, the Court could have scheduled additional days for trial, well before the first day of trial, so that there would have been a relatively short period of time between the start of the trial and any trial continuation dates. However, in this case, neither the Crown Attorney nor Defence Counsel advised the Court that there were other significant **Charter**, legal, evidentiary or factual issues which might impact the completion of an estimated one day trial, on October 14, 2015.

[98] In addition, for the purposes of the **Jordan** framework, commitments made by counsel during the pre-trial conference which were important under the **Morin**

framework, now take on a more heightened importance if the Crown wishes to justify delay. In this case, it would appear that the request for the Tech Crime Unit to conduct their cell phone analysis had been outstanding for several months, but there is no information before me to indicate that the Crown had taken reasonable steps to follow up on the request and ensure that the disclosure was provided to the Defence in a timely fashion.

[99] On the other hand, I find that, in all likelihood, it would have been evident to Defence Counsel that the analysis of the cell phones seized by the police, would be a key piece of evidence during this trial. The Crown Attorney had mentioned that this outstanding disclosure would be provided to the defence in due course, but I have no information before me to indicate whether the defence took any reasonable steps to follow up on the status of what was viewed as key additional disclosure. For the defence, in the **Jordan** framework, when the total delay is below the "presumptive ceiling," the Supreme Court of Canada has made it clear that the onus is on the defence to demonstrate that it took "meaningful steps" to demonstrate "sustained effort to expedite the proceedings."

D) October 14, 2015-January 6, 2016:

[100] The trial commenced on October 14, 2015, but during the testimony of Cpl. Nelson, the Crown sought to introduce evidence of an exchange of text messages, between Mr. Breen Nunn and Ms. McCully, which were viewed by Cpl. Nelson on the cell phone seized from Mr. Nunn. Cpl. Nelson stated that he did not make any notes of the text messages that he had viewed and that his evidence would be based on his recollection of what he saw on December 20, 2013.

[101] Since the Crown Attorney did not have the detailed results of the cell phone analysis done by the Tech Crime Unit when he began his direct examination of the first witness, Cpl. Nelson, the Crown Attorney planned to introduce this evidence through Cpl. Nelson's review of the cell phone. Almost immediately, Defence Counsel objected to this evidence as "double hearsay" and the fact that he had no disclosure of this evidence and that therefore, there was a "very serious problem" and that the case that he had prepared to meet, was now "different" than the one that he was now facing. It is fair to say that with the Crown's decision to proceed in this manner, there is no doubt that the complexity of the trial was increased. As a result of the Defence objections to this evidence and the Crown view that it was properly admissible evidence, the Court entered into a *voir dire*. There was a further objection by Defence Counsel to Cpl. Nelson putting the battery in the cell phone, unlocking the phone and then reading the exact text message exchange into

the record and in addition, having the images on the cell phone available in the form of "screenshots" or photographs of the text message "conversation."

[102] Given the fact that Defence Counsel had indicated that he did not have disclosure of this information, which would certainly be relevant in a possession for the purpose of trafficking trial and since the Crown Attorney stated that the police had just received the cell phone analysis from the Tech Crime Unit, the Court granted an adjournment. Defence Counsel maintained that the nature of the case had changed, quite significantly and he asked for an adjournment to early December, 2015. He also asked the Court not to set a continuation date until he received and reviewed this new Crown disclosure. In addition, Defence Counsel indicated that he was involved in a month-long homicide trial and would not be available until early December, 2015. On the other hand, the Crown Attorney advised the Court that since the disclosure was now available, there was no need to delay the setting of a new date until December, 2015.

[103] On December 1, 2015, Defence Counsel appeared and advised the Court that the text messages had still not been disclosed to him by the Crown Attorney. Since Mr. Moors was not in Court that day, his colleague was not able to confirm that the disclosure had been sent to the defence. Defence Counsel acknowledged that the six-week adjournment had been granted at his request because he was not available

during the month of November, but since he maintained that the disclosure still had not been provided, he again asked the Court to not establish the trial continuation date until he had an opportunity to review that disclosure as it might affect his position in the trial. Based upon the specific defence request, the Court established a further status date for the disclosure and any other issues that might arise from it for January 6, 2016.

[104] On the further status date of January 6, 2016, neither the Crown Attorney nor the Defence Counsel handling the trial were able to attend court and they were represented by colleagues in their office. Defence Counsel confirmed that Mr. Planetta had received some additional disclosure before Christmas, but was not able to review it prior to this status date, and she asked that a further status date a trial continuation date be set in mid-February, 2016.

[105] In these circumstances, I find that one and a half months of this three month period of time is attributed to defence delay as Defence Counsel had indicated that he was not available throughout the month of November, 2015 and his colleague confirmed, on his behalf, that when he got the disclosure in December, 2015, he had not reviewed it prior to the status date of January 6, 2016. In those circumstances, I find that one and a half months of defence delay should be deducted from the total delay. I find that the other one and a half months of this

delay should be attributed to the Crown, as the Court has not been provided with any "exceptional circumstances" which could justify the delay in sending the disclosure to the defence. Clearly, the Crown Attorney stated, on the record, that on the morning of the trial, he learned that the police had just received the Tech Crime Unit's detailed cell phone analysis the day before when the trial began on October 14, 2015, but for some unknown reason, that disclosure was not sent to the defence until sometime in December, 2015. As a result, I am not prepared to attribute the entire three month period of delay to either the Crown or the defence and I find that each side is equally responsible for one and a half months of delay during this period of time. Therefore, I am attributing one and a half months of delay to the defence and I will deduct that amount from the total delay which was left as at this point in time (24 months), which reduces the total delay to 22 ½ months up to January 6, 2016.

E) January 6, 2016 - February 12, 2016:

[106] On this status date, neither the Crown Attorney nor the Defence Counsel handling the trial were present in Court. However, the colleague who represented Defence Counsel confirmed that he had received the additional disclosure before Christmas, but was not able to review it before this date and asked the Court to adjourn the setting of the trial continuation date to mid-February when Mr. Planetta

would be present. Given the fact that the disclosure was confirmed to have been made by the Crown Attorney in or about mid-December, 2015, I find that this one month period of delay is attributed as defence delay which must be deducted from the previous total delay (22 ½ months), leaving a total of 21 ½ months of "total delay" as of February 12, 2016.

F) February 12, 2016 – August 30, 2016:

[107] On this status date, Defence Counsel confirmed that he received disclosure but the disclosure received had "changed the complexion of the trial" and that other disclosure requests have arisen. Despite an outstanding disclosure request, on this occasion, Defence Counsel asked the Court to set a trial continuation date and suggested an additional two full days would be required. The Crown Attorney handling the file was not present on this date, but one of his colleagues requested the "earliest possible date" and the Court offered April 26, 27 and 28, 2016 with the courtroom in the Halifax Regional Municipality to be confirmed. The Crown Attorney advised the Court that he was ready and able to proceed on those dates, but Defence Counsel indicated that he had conflicting trial matters on those dates and was not available. In those circumstances, there was no need to make further inquiries with respect to those earlier dates, and the next earliest dates for a two

day trial continuation which were offered by the Court and accepted by both sides were August 29-30, 2016.

[108] Since Defence Counsel had indicated on this status date and on earlier occasions that the "complexion of the trial" had changed significantly because of the mid-trial disclosure and he had indicated that there was a possible issue with respect to a warrant, the Court questioned whether he was planning to file any **Charter** applications, in order to determine if further evidence would be needed on the **Charter** *voir dire* as well as scheduling time for those applications before the trial continuation dates. Defence Counsel advised the Court that if there was to be a **Charter** application, he would provide early notice to the Court and the Crown. As a result, June 6, 2016 and July 11, 2016 were scheduled as status dates on any outstanding disclosure issues and any possible **Charter** issues. Defence Counsel did not mention any intention to file any **Charter** applications on either of those dates, and as a result, the Court did not schedule any additional dates to hear any **Charter** applications before or during the trial continuation dates, which obviously would have had an impact on the trial continuation dates themselves.

[109] However, on July 15, 2016, Defence Counsel served a notice of **Charter** application under Section 11(b) **Charter** and approximately one month later, just four days before the trial continuation, provided the Court and the Crown with the

transcript of almost all of Ms. McCully's previous appearances on this matter. In addition, on the trial continuation date of August 29, 2016, Defence Counsel asked the Court to adjourn the hearing of further trial evidence until the Section 11(b) **Charter** application was determined. The Crown Attorney opposed that application. The Court ordered that the Crown's trial evidence be completed, but prior to calling on the Defence with respect to whether they wished to call any evidence, the Court would hear submissions and determine this Section 11(b) **Charter** application.

[110] Looking at this period of time between February 12, 2016 and August 29, 2016 which is roughly six and a half months, I find that the earliest trial time where the Crown was able and ready to proceed and the Court could have been available for the continuation of Ms. McCully's trial was April 26-28, 2016, but Defence Counsel confirmed that he had conflicting matters on those dates and was not available. In those circumstances, the Court did not secure those dates for the trial continuation with the confirmation of the specific location in the Halifax Regional Municipality to be confirmed at a later date, and therefore, I find that it would be appropriate to attribute that two and a half months of delay to the Crown, and that period of time remains part of the "total delay."

[111] However, I find that the four months between April 26, 2016 and August 29, 2016, represents the earliest period of time, when the Crown was ready and able to proceed, the Court had trial time available, but Defence Counsel was unable or unavailable to proceed with Ms. McCully's trial due to other commitments. In those circumstances, I find that the four months between April and August 2016, is delay directly attributable to the defence, due to the fact that the delay during that period of time was caused exclusively by the unavailability of Defence Counsel. As a result, I find that it is appropriate to attribute that four months of the delay to the defence and that amount of delay should be deducted from of the total delay up to that point in time (21 ½ months) leaving a total of 17 ½ months "total delay" as of August 29-30, 2016, when the Crown Attorney closed his case.

Below the Presumptive Ceiling - Onus on the Defence

[109] Under the new **Jordan** framework, in coming to the conclusion that the "total delay" in this case is 17 ½ months, I find that the "total delay" is just slightly below the "presumptive ceiling." In those circumstances, this is one of those "close cases" described by the majority of the Supreme Court of Canada in **Jordan** which is below the "presumptive ceiling" and in those circumstances, the onus is on the defence to demonstrate that it took the initiative by taking "meaningful, sustained steps to expedite the proceedings." It is not enough for the defence to make "token

efforts" such as to simply put on the record that it wanted an earlier trial date. See **Jordan**, *supra*, at paras. 82-85.

[112] Moreover, the Supreme Court of Canada pointed out that the defence ought to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the Court, put the Crown on timely notice when delay was becoming a problem and conducted all applications reasonably and expeditiously. In addition, the defence must also show that the time the case has taken "markedly exceeds the reasonable time requirements of the case." The Supreme Court of Canada also notes that the reasonable time requirements of the case come from a variety of factors, including the complexity of the case, local conditions, that is, how long a case of this nature typically takes in this jurisdiction in light of local and systemic circumstances and whether the Crown took reasonable steps to expedite the proceedings, that is, did the Crown genuinely respond to defence efforts to seek to streamline the issues and evidence or adapt to evolving circumstances as the case progressed. If the Crown took those reasonable steps to respond to efforts by the defence, the Supreme Court of Canada stated that it would be unlikely that the reasonable time requirements of the case would have been "markedly exceeded." See **Jordan**, *supra*, at paragraphs 87-90.

[113] As I have indicated above, since my assessment of the "total delay" comes just slightly below the "presumptive ceiling," I find that the onus is on the defence to establish that they took meaningful and sustained steps and that the time that the case has taken to date "markedly exceeds the reasonable time requirements" of the case of this complexity. Given the fact that this is a circumstantial case, which involves a Section 5(2) **CDSA** charge of possession for the purpose of trafficking, I find that the case would be one of moderate complexity, especially where it was indicated during the pre-trial conference that cell phones had been seized and that the Crown intended to introduce opinion evidence through a properly qualified expert to assist the Court in reaching its conclusion.

[114] During the pre-trial conference which was held on May 6, 2015, although the Crown Attorney had indicated that there would be a cell phone analysis of phones seized during the evening of December 20, 2013, it was clear from the information provided by the Crown Attorney, that he did not have that cell phone analysis available at that time. There is no information before me to determine when the seized phones were sent to the Tech Crime Unit of the RCMP to be analyzed or what priority, if any, was given to the analysis of the phones which the Crown had intended to rely upon during this trial. Furthermore, there is no

information before me as to what, if any, steps were taken by the Crown to ascertain when that cell phone analysis was expected to be completed.

[115] Since the Crown Attorney did not have the cell phone analysis available to him when the trial began on October 14, 2015, it would appear that the Crown developed an alternate plan to introduce text message "conversations" involving Ms. McCully through Cpl. Nelson's recollection, without notes, of messages seen on Mr. Nunn's cell phone which had also been seized by the police on December 20, 2013. As a result of that trial strategy, which Defence Counsel indicated had changed the complexion of the trial "significantly" and with vigorous defence objections to the introduction of that evidence, the Court entered into a *voir dire* with respect to the admissibility of that evidence. In those circumstances, I find that the complexity of this trial which might have been regarded by counsel as being of minimal complexity transformed into a trial of moderate complexity, with the obvious impact on what were the original "good faith" trial time estimates.

[116] During his submissions, Defence Counsel noted that the *voir dire* took up half a day and necessitated an adjournment which resulted in two further days for trial being set 10 months later, in August 2016. Defence Counsel submits that the further period of 10 months was due to a failure of the Crown to disclose the cell phone analysis in a timely fashion and in the end, the Crown Attorney discontinued

or abandoned the *voir dire*. Defence Counsel has maintained that the failure to complete the trial as scheduled is due, entirely, to the Crown's actions or inactions. While acknowledging that the Court adjourned the trial following the objections of Defence Counsel to the manner in which the Crown was attempting to introduce the text message "conversations" and the defence position that the Crown had not disclosed this evidence, Defence Counsel submits that the "Defence had no role in this adjournment and it is submitted that the record shows Defence was blindsided by the disclosure."

[117] Although the Court granted the defence request to adjourn the trial, the Crown Attorney had maintained that the "nature" of the contents of that cell phone analysis had been disclosed to the Defence. In addition, the Crown Attorney stated, on the record, that the full cell phone analysis by the Tech Crime Unit had just come into the possession of the police the preceding day and that he only became aware of its completion that morning. Clearly, the statements made by the Crown Attorney put into question whether the Defence had been "blindsided" by the lack of disclosure and whether the nature of the case was now "different" than the one which the Defence was prepared to meet.

[118] Furthermore, since Defence Counsel had also alluded to the possibility of "other applications" being made after he reviewed the disclosure, Defence Counsel

asked the Court to postpone scheduling the trial continuation date until he reviewed the full disclosure from the Crown. Since the possibility of these "other applications" presumably **Charter** applications would likely have an impact on the trial timing and the complexity of the trial, the Court agreed not to schedule a trial continuation date until Defence Counsel had the opportunity to review that disclosure. As a result, the Court established a status date for an update on the disclosure issue and any possible applications in early December, 2015. In those circumstances, I find that the time requirements for the trial and the complexity of the trial had changed significantly and I cannot agree with Defence Counsel that he had no "role" in the adjournment of the trial.

[119] As I indicated in the previous paragraphs, I have not been provided with any information as to why the analysis of Ms. McCully's cell phone took so long, whether the Crown actively followed up with the Tech Crime Unit to ensure that the cell phone analysis disclosure would be available to the Defence a reasonable time before the trial date. If the preparation of that cell phone analysis was outside of the Crown's control, it may well be one of those "exceptional circumstances" referred to in **Jordan** that were reasonably unforeseen and that the Crown itself could not reasonably remedy once those circumstances arose. The fact is that the Crown Attorney appears to have decided to proceed with the trial, on the basis of

the evidence that he had available to him, rather than adjourn the trial and wait until he had the Tech Crime Unit's analysis of the text message "conversations." Faced with the possibility of potentially having to adjourn the trial until the Tech Crime Unit's information was available, it appears that the Crown Attorney took reasonable steps to attempt to avoid that delay by proceeding with the evidence that he had available to him at that time, and which he believed had been disclosed to the defence.

[120] Defence Counsel objected to the Crown proceeding in that manner, for the reasons outlined above which were disputed by the Crown Attorney, and as a result, what counsel had estimated to be a one day trial of minimal complexity, has transformed into a moderately complex trial of a minimum of three to four days. In hindsight, despite the good-faith efforts to establish realistic time estimates, there was a significant underestimation of the time required for trial evidence when the unforeseeable or unavoidable developments occurred. As the Court said in **Jordan**, at para. 73: "Trials are not well-oiled machines." In my view, this very significant fact has to be taken into account in the contextual analysis of determining whether Ms. McCully's Section 11(b) **Charter** right has been violated.

[121] On the other hand, I have no information that, the Defence knowing of the importance of cell phone analysis in the trial, took any meaningful and sustained

steps to obtain the disclosure of the cell phone analysis and the expert's opinion, which the Crown Attorney had undertaken to provide to the Defence. In addition, during the submissions of the Crown Attorney on this **Charter** Section 11(b) application, he filed copies of letters sent to Defence Counsel as Exhibits for the purposes of the **Charter** application, which enclosed disclosure or outlined that disclosure would be forthcoming, since it was not in the Crown Attorney's possession at that time. Those letters were sent to Defence Counsel in mid-September 2015, which was approximately one month before the trial began and in that correspondence, there was disclosure of information obtained from a review of cell phones in a "Can Say" of Const. Beehan which was obtained following the execution of the Warrant to Search the contents of the seized cell phones. It would appear from those Exhibits filed by the Crown Attorney that the Crown had provided the Defence with the disclosure as they received it, as part of the Crown's ongoing disclosure obligations.

[122] Furthermore, since the Crown Attorney advised the Court that the police had received the detailed cell phone analysis from the Tech Crime Unit just before the trial started on October 14, 2015, I find that it is not surprising that the Crown later abandoned the *voir dire* relating to Cpl. Nelson's testimony, without any decision being rendered by the Court. I find that it was reasonable for the Crown to abandon

the *voir dire* in August, 2016 and not to pursue the introduction of "conversations" viewed by Cpl. Nelson on a seized cell phone, but rather, to introduce cell phone evidence through the detailed analysis provided by a member of the Tech Crime Unit. In fact, I find that the position adopted by the Crown with respect to the *voir dire* was reasonable and as a result, it was no longer necessary to pursue the introduction of that evidence through Cpl. Nelson, which had the impact of streamlining the issues for the Court to address.

[123] As it turned out, the "screenshots" of Mr. Nunn's cell phone were later introduced as Exhibits through another police officer. In those circumstances, I find it was reasonable for the Crown to abandon the *voir dire* without attributing any improper motive to them, since it became apparent that there was a more direct manner to introduce that evidence and not taking additional Court time to pursue an unnecessary ruling on the *voir dire*.

[124] In terms of the reasonable time requirements of the case, as I have indicated above, the complexity of the trial and the time requirements for the trial changed at the outset of the trial by virtue of the Crown's decision to proceed with the evidence that was available, rather than adjourn the trial and seek another date for one or two day trial. Given the local conditions in this very busy jurisdiction, which has a significant volume of cases in the system, in order to set a trial date

taking into account the availability of the Court, the Crown Attorney and the busy schedules of Defence Counsel, who are not expected to be "perpetually available," finding a date for a one or two day trial of an accused person, not in custody, in October 2014 or 2015, would have been several months later. As one might reasonably expect, the Court gives priority to its earliest trial dates to accused persons who have been remanded in custody or have voluntarily consented to their remand in custody. In this case, Ms. McCully had been released on terms of an Undertaking to an Officer in Charge at the time of her arrest.

[125] Looking at the totality of the facts and circumstances, I have determined the "total delay" as being 17 ½ months as of August, 2016. As indicated above, in setting the "good faith" time estimates for this trial, I find it is fair to say that both counsel probably regarded this trial as one of minimal complexity. However, I find that, as a result of the developments which occurred during the testimony of the first witness called by the Crown, the complexity of this case increased significantly and became a moderately complex trial. Furthermore, it would appear that the Crown Attorney made a strategic decision to introduce the evidence of cell phone "conversations" through Cpl. Nelson's viewing of cell phones at the time they were seized by the police, since the detailed cell phone analysis was not available to him from the Tech Crime Unit. It is evident that the Crown Attorney

chose to proceed in that fashion rather than requesting an adjournment of the trial until that detailed cell phone analysis had been provided to him and Defence Counsel, which would have obviously created an additional delay. Since the Crown Attorney has taken the position that disclosure of the "nature" or essence of those "conversations" had been provided to the Defence well before the trial date, I cannot conclude, as the Defence has submitted, that the Crown had an improper motive to proceed in that fashion and attempt to "blindside" the Defence. In those circumstances, I find that the Crown Attorney took reasonable steps to avoid any further delay of the trial by proceeding with the trial rather than requesting an adjournment of the trial.

[126] On the other hand, since Defence Counsel had objected to the manner in which the Crown was attempting to introduce those cell phone "conversations" as well as objecting to the introduction of evidence which had not been disclosed, the Court granted the Defence request to adjourn the trial. Although there may still be a dispute as to whether the Crown disclosure of the "nature" or essence of that cell phone evidence provided the Defence with sufficient disclosure to make informed and strategic decisions in a trial, which was forecast to involve evidence of cell phone "conversations," I find that Defence Counsel's objections to the manner in

which the Crown proceeded cannot be regarded as "deliberate and calculated defence tactics aimed at causing delay."

[127] However, it was Defence Counsel who had requested that the Court not establish trial continuation dates on the trial date, until he had a chance to receive and review the impact of that disclosure with his client. Putting aside for a moment the issue of whether Defence Counsel already had disclosure of the "nature" of the information which the Crown had when the trial commenced, the fact is, that the trial continuation dates could have been set on October 14, 2015 with status dates to follow. In the alternative, trial continuation dates could have been set within a week or two as the Court had suggested, or on the December, 2015 or January, 2016 status dates. In those circumstances, I cannot conclude that the Defence took "meaningful and sustained steps" to expedite the proceedings as I find that it is highly likely that the trial continuation dates would have been found well before late August, 2016.

[128] Having found that the "total delay" was below the "presumptive ceiling," while I find that Defence Counsel acted reasonably in representing the interests of his client, at the same time, I cannot conclude that the defence had taken the initiative through "meaningful and sustained steps" to ensure that Ms. McCully was tried quickly. Defence Counsel agreed to dates which were convenient with

his schedule and the first indication that the delay was becoming an issue was in February, 2016. During the status hearing dates to determine if there were going to be new issues, such as **Charter** applications which might impact the length of the trial on December 1, 2015, January 6, 2016, February 12, 2016, on two dates in June, 2016 and finally on July 11, 2016, there was no mention of any **Charter** applications being advanced by the Defence. Clearly, the **Jordan** decision of the Supreme Court of Canada, which was released in early July, 2016 was the impetus for Ms. McCully's notice of a Section 11(b) **Charter** application on July 15, 2016.

[129] Since this case was started well before the **Jordan** decision was released by the Supreme Court of Canada, it is evident that both the Crown Attorney and the Defence Counsel were operating under the **Morin** framework. Clearly, neither the Crown Attorney nor the Defence Counsel had any notice of the new framework and in those circumstances, it is not entirely fair to judge their behavior against a standard of which they had no notice. The complexity of this case dramatically changed as the trial unfolded and finding several extra days of trial time in the jurisdiction which already had lengthy institutional delays, requires a contextual assessment of the "total delay" to ensure that the administration of justice is not compromised and that there is an appropriate balance between the interests of the

accused in being tried within a reasonable time and the societal interest in ensuring that accused persons are not absolved of crimes simply to clean up the docket.

[130] Moreover, I find that this case is not one which was simple and straightforward as it changed dramatically with the normal vicissitudes of a trial and furthermore, I have found that it did not exceed the "presumptive ceiling" by virtue of repeated missteps and mistakes by the Crown. While there were certainly some actions which could have been taken on both sides to ensure that the continuation dates were established at an earlier time, or to expedite the trial, the Supreme Court of Canada has reminded trial judges that counsel are expected to act reasonably, not perfectly.

[131] Since I have concluded that the total delay in this case remained below the "presumptive ceiling" although it was certainly close to that ceiling, I have found that the Defence has not met their onus to establish that the total delay was unreasonable in all the circumstances of this case. In **Jordan** at para. 48, the Supreme Court of Canada stated that they expected "stays beneath the ceiling to be rare, and limited to clear cases." Having considered the totality of the facts and circumstances in this case, I find that this is not one of those "clear cases."

[132] Furthermore, as the Supreme Court of Canada noted in **Jordan** at para. 102: "ultimately, for most cases that are already in the system, the release of this decision should not automatically transform what would previously have been considered a reasonable delay into an unreasonable one. Change takes time."

[133] There is no doubt that the **Jordan** case represents a significant shift in past practice. The Supreme Court of Canada has outlined clear expectations for the manner in which they expect that the Crown, the Defence and the Court will act in the future, but they recognize that change will take time and that all participants in the justice system must work in concert to achieve speedier trials.

[134] For all of the reasons outlined above, I conclude that Ms. McCully's Section 11(b) **Charter** right to a trial within a reasonable time has not been violated. As a result, her application for a stay of proceedings is also dismissed. The Court has already set a tentative trial continuation date and the trial will continue on that date with either Defence evidence or the closing submissions of counsel.

Theodore K. Tax, JPC