PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. CB*, 2022 NSPC 47

Date: 20220828
Docket: 8450694
8450695
8450696
8450698
Registry: Halifax

Between:

His Majesty the King

v.

C.B.

CHARTER – s. 11(B) DECISION

Restriction on Publication:

s. 486.4: Ban under this section directs that any information that will identify the complainant shall not be published in any document or broadcast or transmitted in any way

Judge:	The Honourable Judge Elizabeth Buckle,
Heard:	April 4, 5, 6, 11, July 12, and September 2, 2022 in Halifax, Nova Scotia
Decision	October 28, 2022
Charge:	Sections 151, 152, 271 and 172.1(1)(b) for the Criminal Code
Counsel:	Kristyn Stevens, for the Crown Josh Nodelman, for the Defence

By the Court:

Note: This judgment has been anonymized to comply with legislative requirements to protect the identity of the complainant.

Introduction

[1] C.B. is charged with sexual offences relating to a person under the age of 16. He was arrested on March 19, 2020 and released on an Undertaking. The Information was sworn on June 17, 2020. He elected trial in Supreme Court and to have a preliminary inquiry. Prior to the preliminary inquiry, the Crown preferred a Direct Indictment and consented to his re-election to Provincial Court. His trial in Provincial Court concluded on April 11, 2022.

[2] At the conclusion of trial, the Defence applied for a stay of proceedings, arguing that C.B.'s right to be tried in a reasonable time, as guaranteed by s. 11(b) of the *Charter*, had been violated.

[3] In *R. v. Jordan* (2016 SCC 27), the Supreme Court of Canada set ceilings, beyond which delay is presumptively unreasonable, of 18 months for trials in Provincial Court and 30 months for trials in Supreme Court.

[4] Beyond the issues that are normally at play in this kind of application, in this case there are two additional issues. First, the Defence argues that delay should be calculated from the date of the arrest rather than the date the Information was sworn. Second, the Crown argues that because the Defence initially elected trial in Supreme Court and then re-elected trial in Provincial Court, the 30-month ceiling should apply.

Issue 1 – When does the *Jordan* clock start running?

[5] The Defence argues that the clock for s. 11(b) should start with the arrest and release on conditions rather than with the swearing of the Information. The Defence does not dispute that the Supreme Court has clearly stated that the clock for unreasonable delay begins when the accused is charged, which is when the Information is sworn (*R. v. Kalanj*, [1989] 1 S.C.R. 1594, at para. 16; and *R. v. Rahey*, [1987] 1 S.C.R. 588, at para. 95).

[6] However, the Defence notes that these authorities are now 30 years old and submits that this should be revisited. In making that argument, the Defence relies

on lower court decisions from Ontario that suggest that, post *Jordan*, the approach to delay is more flexible and where there is significant delay between arrest and the swearing of the Information, the earlier date should be used to calculate delay (see, *R. v. Gleiser*, 2017 ONSC 2858, at para. 18; and *R. v. Luoma*, 2016 ONCJ 670).

[7] This approach has however been rejected by the Ontario Court of Appeal (*R. v. Allison*, 2022 ONCA 329, paras. 39-44) and the New Brunswick Court of Appeal (*R. v. Doak*, 2022 NBCA 48, para. 15). In both *Allison* and *Doak*, the Courts relied on *Kalanj* and *Rahey* to say that the clock starts when the Information is sworn.

[8] Further, as was discussed in *Allison*, in *Jordan*, the Supreme Court could itself have revisited this point but did not. Instead, it repeatedly said that the relevant time period for calculating delay was from "the charge to the actual or anticipated end of trial" (paras. 47 – 49).

[9] Finally, in *R. v. J.F.* (2022 SCC 17), the Supreme Court of Canada addressed what it called the "temporal scope of the right to be tried within a reasonable time" in the context of a retrial. The Court was not specifically required to comment on the period between arrest and the Information being sworn but in discussing the protection offered by s. 11(b), the Court said "[s]ection 11(b) protects an accused only while they have the status of a person charged with an offence" and "[a] person is charged with an offence from the time the charge is laid" (para. 23). In the latter statement, the Court relied on its earlier decision in *Kalanj* (para. 23).

[10] In this case, the delay between C.B.'s arrest and the Information being sworn was almost three months. I appreciate that for most accused, the negative consequences associated with being charged with a criminal offence begin immediately upon arrest. Many, including C.B., are subject to restrictive release conditions and most will experience anxiety. However, the Supreme Court of Canada has repeatedly and recently interpreted s. 11(b) as applying to delay during the time the accused is under charge and that period begins when the "charge is laid", meaning when the Information is sworn. I cannot ignore such a clear statement of the law from the Supreme Court of Canada.

[11] Therefore, I conclude that the relevant time period is from the date the Information was sworn until the end of the trial (prior to deliberation time). That period is 21 months and 26 days.

Issue 2 - What ceiling applies?

[12] In this case the accused initially elected trial in Supreme Court and to have a preliminary inquiry. Before the preliminary inquiry was held, the Crown preferred the Direct Indictment and, with the consent of the Crown, the Defence re-elected trial in Provincial Court.

[13] The Crown argues that the presumptive ceiling should be 30 months rather than 18 months because there was a re-election.

[14] In *Jordan*, the Court said that if an accused re-elects to have a trial in provincial court after having had a preliminary hearing, the 30-month ceiling will apply (footnote 3).

[15] However, the Court did not directly address the issue of which ceiling applies in cases where there is re-election before preliminary inquiry. The Court simply noted that this would require the Crown's consent and it would be open to the Crown to ask the accused to waive the delay stemming from the re-election as a condition of its consent (para. 62).

[16] This question has, however, been addressed by other courts with differing results.

[17] The Courts of Appeal in New Brunswick and Newfoundland and Labrador have found that the 30-month ceiling applies where an accused re-elects at or shortly before a preliminary hearing (*R. v. D.M.S.*, 2016 NBCA 71; and, *R. v. Kaulback*, 2018 NLCA 8). In *D.M.S.*, para. 17, the New Brunswick Court of Appeal said:

> … On the date set for the inquiry, he waived it and re-elected to the Provincial Court. This resulted in a total delay of 184 days, attributed to him. This raises the question whether this case falls in the same category as those that actually proceeded with a preliminary inquiry, thus making the presumptive ceiling 30 months. In my view, when an accused makes an election and requires the Provincial Court to schedule a preliminary inquiry, barring exceptional circumstances such as a very early re-election to be tried by a Provincial Court judge, the case should be treated as one that included a preliminary inquiry even if the preliminary inquiry is eventually waived. The parties appear to agree with this approach. Thus, the presumptive ceiling is 30 months.

[18] In *Kaulback*, the Newfoundland Court of Appeal reached the same conclusion. However, in doing so, it noted that counsel had conceded that the

appropriate ceiling was 30 months, so the issue was not fully argued on appeal (para. 24). In that case, the accused originally elected trial in Provincial Court. Then 7 months later he re-elected to be tried in Supreme Court by judge alone and to have a preliminary hearing. Several dates were set for the preliminary inquiry, but on the day before the last of these, he again re-elected to be tried in Provincial Court.

[19] The Ontario Court of Appeal has reached a different result (*R. v. Shaikh*, 2019 ONCA 895; and *R. v. Wookey*, 2021 ONCA 68).

[20] In *Shaikh*, the accused also re-elected to Provincial Court without having his preliminary inquiry, but after the date it was originally scheduled to commence. In the subsequent s. 11(b) application, the trial judge applied the 18-month ceiling but dismissed the application. The Accused appealed. Paciocco J.A., writing the decision of the court (with Watt, J.A. and Lauwers J.J.A. concurring) addressed which presumptive period applied. I will quote at some length from Justice Paciocco's analysis (paras. 47 to 54):

> 47 … For more than two years, Mr. S.'s case proceeded as if it was a superior court matter, until his re-election to trial before the provincial court on November 28, 2016. This raises the question of whether the 30-month presumptive period applicable in superior court proceedings applies, or the 18-month period applicable to provincial proceedings.
>
> 48 If the 30-month presumptive delay period is to be applied, Mr. Shaikh's appeal would be easily dismissed. …
>
> 49 However, on the authority of *Jordan*, the 30-month presumptive ceiling does not apply in this case. The 18-month presumptive ceiling does. The *Jordan* majority described how the appropriate ceiling is to be selected, at para. 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 <u>after</u> a preliminary inquiry). [Emphasis added].
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> 50 Later in the decision, at para. 49, the *Jordan* majority repeated this:
>
> > We note the 30-month ceiling would also apply to cases going to trial in the provincial court after a preliminary inquiry.
>
> 51 Then again in footnote three of the majority decision:

> While most proceedings with a preliminary inquiry are eventually tried in the superior court, this is not always the case. For example, a case may go to trial in the provincial court after a preliminary inquiry if the province in which the trial takes place offers this as an option (such as Quebec), or if the accused re-elects a trial in the provincial court following a preliminary inquiry. In either case, the 30-month ceiling would apply.

52 Here, the re-election to provincial court did not occur after the preliminary inquiry, but before it commenced. Applying the standards expressed in *Jordan*, the 18-month period applies.

53 I appreciate that *Jordan* did not involve a re-election, and so this issue was not directly before the court. However, *Jordan* was not about delay in a provincial court trial either. In the interests of certainty and simplicity, the majority nonetheless established an authoritative framework for provincial court trials as well, setting a presumptive period of unreasonable delay of 18 months. In the circumstances, I do not feel at liberty to interpret the criterion specifically identified by the *Jordan* majority as a passing comment when it is manifest that the majority was delineating how its presumptive delay framework was to apply.

54 I understand the attraction of the appeal Crown's submission that, instead, a case-by-case approach should be used to determine whether a re-election occurs late enough to warrant imposing the 30-month period of presumptive delay. The difference in substance between a re-election after a four-day preliminary inquiry, and a re-election during the scheduled dates but before the preliminary inquiry is completed does seem negligible. However, it would grate against the objective of *Jordan* to evaluate which presumptive ceiling applies on an after-the-fact, case-by-case basis during s. 11(b) motions. The *Jordan* majority was attempting to establish a bright line structure for s. 11(b) cases using a framework that "accounts for case-specific factors": at para. 5. The *Jordan* majority established the regime it did to overcome the previous, "highly unpredictable", "unduly complex", and endlessly flexible approach that does little to prevent delay by giving clear guidance in advance: *Jordan*, at paras. 31-37. The formula thrice stated in *Jordan* for when the 30-month period applies to provincial court trials must therefore be taken at face value and used as the bright line measure. Since re-election occurred before and not after the preliminary inquiry, this case falls on the wrong side of that bright line for the Crown.

[21] The Court also addressed the contrary authority in *D.S.M.* and disagreed with it for the following reasons:

> 56 With respect, the case-by-case approach applied in *S. (D.M.)* cannot be squared with the language or ethic of *Jordan*. This issue does not appear to have been fully litigated before the New Brunswick Court of Appeal

> because of the agreement between the parties, and the guidance provided by the *Jordan* decision as to when the 30-month presumptive period applies in provincial court trials may not have been brought to the court's attention.*)*

[22] The facts in the case before me are even more favourable to that position than those that were before the Court in *Shaikh.* Here, the Crown preferred the Indictment about four months before the preliminary inquiry was scheduled to proceed and the Defence immediately, with the consent of the Crown, re-elected to Provincial Court. In contrast, in *Shaikh*, the re-election was not done until after the date the preliminary was scheduled to proceed.

[23] The case before me is factually similar to that in *R. v. Teeti*, 2018 ABPC 207. In that case, the accused advised the Crown he was prepared to re-elect trial in Provincial Court within weeks after the Crown preferred the Direct Indictment and the Crown consented. The Court distinguished *Kaulback* and *D.S.M.* and concluded that where a trial proceeds in provincial court without a preliminary inquiry, the 18-month ceiling applies (para. 16).

[24] I agree with *Shaikh, Wookey* and *Teeti* – the 18-month ceiling applies to trials in provincial court without a preliminary inquiry.

[25] Of course, when I consider whether there has been an unreasonable delay here, I will consider the Crown's alternative argument which is that any delay caused by the re-election should be apportioned between Crown and Defence.

Issue 3 - Is the delay unreasonable?

[26] The analytical framework to be applied was set out in *Jordan*:

> 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 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.

[27] In this case, the Defence argues that the total delay, 21 months and 26 days minus what it concedes to be Defence delay exceeds the presumptive ceiling and there are no exceptional circumstances. Therefore, the delay is unreasonable and a stay should result. If I conclude that the net delay is below the 18-month ceiling, the Defence does not argue that it is nonetheless unreasonable.

[28] The Crown argues that the net delay after subtracting Defence delay is under 18 months and, in the alternative, that there are exceptional circumstances that account for some of the delay.

Total Delay and Timeline

[29] As I said, the total delay, prior to deducting any Defence delay, is 21 months and 26 days from the date the Information was Sworn to the conclusion of the trial (other than deliberations).

[30] The timeline of important events, taken from the Defence Brief and materials filed by Crown and Defence, is as follows:

- March, 2020 – seizure of digital devices from accused and complainant.
- April 24, 2020 – Disclosure requested by Defence.
- June 17, 2020 – Information sworn.
- June 25, 2020 – First appearance at which the Crown elected to proceed by Indictment. Disclosure not available.
- July 21, 202 – Court Appearance - Defence had not yet received disclosure.
- July 30, 2020 – Disclosure available to Defence, subject to signing Undertaking.
- August 4, 2020 – Disclosure picked up by Defence
- August 19, 2020 – Court appearance - Defence advised that disclosure recently received but not reviewed with client.
- September 18, 2020 – Court appearance - Defence advised that had not yet reviewed disclosure with client.

- October 9, 2020 – Defence wrote to Crown raising concerns with poor quality of audio on complainant's recorded statement.

- October 13, 2020 – Crown relayed information from lead investigator acknowledging that complainant had a soft voice and suggesting that Defence use the investigator's written summary of the interview to help fill in any inaudible portions of the recording.

- October 13, 2020 – Court appearance - Defence reported that she and her client had problems hearing the complainant's statement. The Crown agreed the statement was "quite quiet" but again suggested that the investigator's summary was helpful.

- November 10, 2020 – the Defence wrote to the Crown to ask for his estimate of trial time and the Crown responded that the matter was being re-assigned.

- November 13, 2020 – Court appearance - Defence requested an adjournment because the Crown had recently been assigned and they needed to have some discussions before she could make election.

- November 23, 2020 – Defence notified of the new assigned Crown

- November, 2020 – Warrant obtained and submitted for forensic analysis of accused's digital device

- December 7, 2020 – Additional disclosure provided to the Defence

- December 11, 2020 – Court appearance - Defence requested adjournment of election to review the recently provided supplemental disclosure.

- January 8, 2021 – Court appearance - Defence request adjournment to allow her to review the supplemental disclosure with the accused.

- February 5, 2021- Court appearance - Defence elected trial in Supreme Court and to have a preliminary hearing. The preliminary inquiry was scheduled for November 2, 2021.

- March 4, 2021 - Crown advised Defence that it would almost certainly prefer an Indictment and would or would probably consent to re-election.

- March 5, 2021 – Defence filed Statements of Issues and Witnesses.

- June 25, 2021 - Crown advised Defence that it was preferring the Indictment so would be seeking to docket the matter and mentioned that re-election had been discussed.

- July 7, 2021 - Defence wrote to the Crown confirming instructions to re-elect and suggesting 4 days would be required for trial.

- July 8, 2021 - Crown responded saying the Crown was ok with re-election. On the same day, the Defence sent the Crown the notice of re-election.

- July 9, 2021 – Court appearance in Provincial Court - re-election was confirmed, it was agreed that the matter would require 4 days and, in accordance, with the practice, the matter was adjourned to the next intake date for 'long trial court' which was July 20, 2021.

- July 20, 2021 – Court appearance - not guilty pleas were entered and the trial was scheduled for April 4, 5, 6, and 11, 2021. Court offered February 28 to March 3, 2021 and March 29 to 31, however, Crown was not available for and did not want to have the case reassigned due to the age of the complainant and the nature of the charges. The Crown was available for earlier dates when the Court was not.

- August 19, 2021 – Court appearance - new Defence counsel appeared. He confirmed he was available for the scheduled trial dates.

- October 12, 2021 – a substantive pre-trial conference was held and the trial dates were confirmed.

- The trial proceeded and was completed during the scheduled time, ending on April 11, 2022.

Defence Delay

[31] The Defence concedes that the time from September 18, 2020 to October 13, 2020 and January 8, 2021 to February 5, 2021 can be attributed to the Defence since in both instances, Defence counsel had received disclosure but had not had time to meet with the accused to review it.

[32] The Defence argues that none of the remaining time can be attributed to the Defence. Specifically, that other delay is the result of late or insufficient disclosure and Crown or Court unavailability. The Defence position is that as of October of

2020, the disclosure was not sufficient – the audio on the complainant's statement was not adequate and the Defence was legitimately pursuing better disclosure. Then, in December, it was provided with the forensic analysis of digital devices that had been seized, including a large volume of text messages, some of which were significant in the trial.

[33] The Crown argues that the entire delay from September 18, 2020 to February 5, 2021 should be attributed to the Defence because the Defence was in a position to make its election in September, 2020. Specifically, the complainant's statement was sufficiently audible to permit an understanding of the allegations, especially with the investigator's notes in aid, and the subsequent disclosure of the text messages changed nothing.

[34] In *Jordan*, the Court discussed what kind of Defence delay should be subtracted from the total delay: "Defence delay comprises delays waived by the Defence, and delays caused solely or directly by the defence's conduct. Defence actions legitimately taken to respond to the charges do not constitute defence delay" (para. 66).

[35] These concepts were further explored and explained in *R. v. Cody*, 2017 SCC 31. There, the Court, at paragraph 29, reiterated that not all delay caused by the Defence should be deducted from the total delay and went on to further explain what was meant by 'deductible defence delay':

> 30 The only deductible defence delay under this component is, therefore, that which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate insomuch as it is not taken to respond to the charges. As we said in *Jordan*, the most straightforward example is "[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests" (*Jordan*, at para. 63). Similarly, where the court and Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted (*Jordan*, at para. 64). These examples were, however, just that -- examples. They were not stated in *Jordan*, nor should they be taken now, as exhaustively defining deductible defence delay. Again, as was made clear in *Jordan*, it remains "open to trial judges to find that other defence actions or conduct have caused delay" warranting a deduction (para. 64).
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> 31 The determination of whether defence conduct is legitimate is "by no means an exact science" and is something that "first instance judges are uniquely positioned to gauge" (*Jordan*, at para. 65). It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they

> must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.
>
> 32 Defence conduct encompasses both substance and procedure -- the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny. . . . Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(*b*) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.
>
> 33 As well, inaction may amount to defence conduct that is not legitimate (*Jordan*, at paras. 113 and 121). Illegitimacy may extend to omissions as well as acts (see, for example in another context, *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 37). Accused persons must bear in mind that a corollary of the s. 11(*b*) right "to be tried within a reasonable time" is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to "actively advanc[e] their clients' right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and ... us[e] court time efficiently" (*Jordan*, at para. 138).
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> . . .
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> 35 We stress that illegitimacy in this context does not necessarily amount to professional or ethical misconduct on the part of defence counsel. A finding of illegitimate defence conduct need not be tantamount to a finding of professional misconduct. Instead, legitimacy takes its meaning from the culture change demanded in *Jordan*. *All* justice system participants -- defence counsel included -- must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11(*b*) of the *Charter*.

[36] So, with respect to this ‘pre-election’ delay, there are essentially two issues: (1) was disclosure adequate in September of 2020 to permit Defence to make its election? and, (2) what is the impact of the supplemental disclosure that was provided in December?

[37] The law is clear that an accused is not entitled to perfect disclosure before making his election (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at pp. 342-343; *R. v. Kovacs-Tatar* (2004), 73 O.R. (3d) 161 (CA) at para. 47; and, *R. v. Apostol*, 2016 NSSC 241, para. 61).

[38] In *Kovacs-Tatar* the Defence had refused to set a trial date because the Crown had not yet provided an expert report. The Ontario Court of Appeal, in the context of a pre-*Jordan* claim of unreasonable delay, said that counsel had not acted reasonably (para. 47). The Court noted the continuing disclosure obligations on the Crown, that the Defence did not waive its rights to disclosure by agreeing to

set a trial date and the report would have been available in time for the Defence to prepare for trial, including retaining their own expert (para. 47).

[39] The reasonableness of counsel's decision to delay election or plea due to inadequate disclosure is still relevant under the *Jordan* framework, albeit now discussed in terms of legitimacy or illegitimacy of conduct. In *Apostol*, a transition case, Justice Arnold summarized the general principles relating to pre-election disclosure:

> [61] The accused does not have the right to perfect disclosure before electing a mode of trial. As the court said in *R. v. Kiameh*, [2009] O.J. No. 2327 (Sup. Ct.), at para. 64, "[w]hether an accused is justified in refusing to proceed to the next step because of outstanding disclosure will depend on whether the disclosure sought is required in order for the accused to make informed choices at that step in the proceedings." The accused must have "sufficient disclosure to know the allegations against him and for his Counsel to [assess] the allegations and advise him."

[40] He went on to say:

> [64] An accused will often be justified in seeking an adjournment or refusing to proceed to the next step in the proceeding where outstanding disclosure consists of material that is relevant and significant to the Crown's case. The diligence of the accused in seeking disclosure may be important. … [citing *R. v. N.M.M.* (2006), 209 C.C.C. (3d) 436 (Ont. C.A.)].

[41] In this case, the first issue with disclosure relates to the sound quality of the complainant's recorded statement. The Defence received that statement on August 4, 2020. It is approximately one hour long. The Defence did not raise a concern about the quality of the audio until two months later, on October 9, 2020, when she wrote to the Crown. That was a Friday, and the matter was scheduled to be back in court on the following Tuesday, October 13, 2020. The Crown conveyed the complaint to the lead investigator and on the morning of the court appearance, and then provided her response to the Defence. The investigator acknowledged that the complainant's voice was faint and said she had used the same recording to prepare the synopsis which was almost verbatim and had been previously provided. In court, the Defence asked to adjourn election to November 13, 2020. No subsequent complaint was made about the audio. That audio is the same recording that was ultimately transcribed (Ex. 3 in trial) and played in court pursuant to s. 715.1 of the *Criminal Code* (Ex. 1 & 2 in trial).

[42] There is no doubt that the complainant is soft-spoken and, at times, it is difficult to hear her on the recorded statement. However, I listened to it in court and again during my deliberations. At times I had to replay portions, but I was able to hear it. Of course, I had the benefit of the transcript as an aid and I appreciate that Defence counsel did not have that in the fall of 2020. However, the transcriber was apparently also able to hear the complainant. There are very few 'inaudibles' noted in the transcript and the Defence has not suggested there were errors.

[43] While the audio quality is not perfect, the recorded statement was, in my view, sufficiently audible to allow the Defence with reasonable effort to hear and understand the complainant's allegations. Better audio would have made counsel's job easier but was not required before making election. That would not have prevented the Defence from pursuing a better-quality audio or a transcript, but it was not necessary to the election. Further, the Defence delay in raising the concerns contributed to the delay. On October 13th, the Defence learned that the audio quality was the result of the complainant's voice and apparently accepted that, since no further action was taken. Had she raised her concerns earlier, she would have received that response earlier and been in a position to enter election on October 13th. Therefore, the delay from October 13, 2020 to November 13, 2020 is Defence delay.

[44] The next date was November 13, 2020. A newly assigned Crown appeared and Defence asked to adjourn election to December 11, 2020, saying "my friend was just recently assigned to his matter and (inaudible) some discussions before we're able to set dates and for my client to enter the election and plea". It is not clear whether the Defence is speaking for herself and her client or for herself and the Crown. Nothing was said on the record about what discussions needed to be had or how those discussions impacted the election or plea decision. The Applicant's brief suggests that Defence had written a few days prior to ask the Crown for its estimate of time required for trial and been told that a new Crown was being assigned. That correspondence wasn't filed on this Application, but the Crown does not dispute that this happened. Assuming that obtaining an estimate of trial time was part of what the Defence wanted to discuss with the Crown, I have no evidence of how that information impacted the election or plea decision. There is no evidence that the Crown was not prepared to proceed with setting dates if the Defence had made their election. Therefore, the delay between November 13, 2020 and December 11, 2020 is Defence delay. At the very least, there was implicit waiver.

[45] On December 9, 2020, the Defence received the forensic analysis of C.B.'s phone which included over 700 pages of text messages. On December 11, 2020, the Defence asked to adjourn election to review that material.

[46] Assessing the impact of this is complicated. It inevitably results in a 'what if' analysis.

[47] The Crown argues that, in September, the Defence had sufficient disclosure to make their election. The subsequent disclosure of the text messages does not change that so even if that disclosure legitimately required an adjournment of the election, it cannot change what should have happened in September. The Crown also argues that the text messages have become a focus of the Defence only in the context of this delay application. The Defence would have been aware that the accused's device had been seized and never requested the extraction, never raised it as an issue on the record and never made any inquiries of the Crown. Essentially, the Defence did not rely on the absence of disclosure of the text messages in its request to adjourn election in September, October or November, so to now argue that election was delayed because of the subsequent production of that material is unfair.

[48] The Defence argues that the material was voluminous and Defence counsel was obligated to review it to determine whether it impacted election or plea. So, the request for an adjournment to do that was legitimate.

[49] If the Defence had made their election in October of 2020, a date would have been scheduled for either preliminary inquiry or trial. Given the inherent delays in Provincial Court, that date would not have been earlier than May of 2021. Disclosure of the material obtained from the accused's device in December would still have given the Defence ample time to review that material and incorporate it into their trial or preliminary inquiry strategy, so it is highly unlikely that either the trial or preliminary inquiry would have been adjourned as a result of that disclosure.

[50] I have no evidence of whether the disclosure of the text messages impacted the Defence election. If I assume that it did - that the Defence would have elected trial in Provincial Court if called upon to make its election in September, but upon receipt of the text messages decided that a preliminary inquiry was required - the re-election from Provincial Court to Supreme Court did not require the Crown's consent as long as it was done not later than 60 days before the trial (s. 561(2)). The date previously scheduled for trial would simply have been converted to a

preliminary inquiry without any need for adjournment. The matter would then have proceeded, either to trial in Supreme Court or with a re-election. In neither case would the delay in disclosure have caused additional delay in Provincial Court.

[51] If the analysis is as simple as saying that the Defence was in a position to make its election on September 18, 2020 and, if it had, the subsequent disclosure would have had no impact, then the entire period of delay from September 18, 2020 to February 5, 2021 is Defence delay. That period, 4 months and 18 days, when subtracted from the total delay (21 months and 26 days) would bring the net delay to 17 months and 7 days, below the presumptive 18-month ceiling.

[52] However, the analysis may not be that simple. The Defence did not make their election in September and was provided with additional disclosure in early December. The investigating officer did not complete the warrant to access the phone until November. She testified that the delay was somehow due to Covid-related work restrictions. I don't accept that Covid was a significant contributing cause of the delay in obtaining the warrant. In my view, the delay was caused primarily by the investigating officer's lack of familiarity with writing warrants and her other high-priority commitments. However, the Defence also did not ask that the phones be analysed or make any inquiries about whether that would be done. I agree with the Crown that the Defence would have known the device had been seized and, since it was C.B.'s phone, would have also had some idea of what was on it.

[53] The text messages were relevant. The Crown's case rests primarily on the testimony of the complainant, but both Crown and Defence relied on them to support their respective submissions at trial. I accept that once the results were produced to the Defence, they were obligated to review them. The question is whether they were reasonably diligent in pursuing the information and whether it was necessary to delay election until they had a chance to review them.

[54] I cannot say that the Defence decision to adjourn election to review the new disclosure was unreasonable or illegitimate. However, the Defence knew that C.B.'s device had been seized, had some idea of what was on it and chose not to pursue disclosure of its contents. In that, they were not reasonably diligent. That of course does not relieve the Crown and police of the responsibility to investigate and provide disclosure in a timely manner. That wasn't done in this case.

[55] Therefore, if the analysis required me to assess this period of delay between December 11, 2020 and January 8, 2020 separate from my general conclusion that the Defence was in a position to make their election in September, I would say that the Crown and Defence are each responsible for the delay. The material should have been made available to the Defence earlier, but the Defence had a responsibility to seek it out if they believed it was important to their case. As such, while the Defence desire to review the material was reasonable, their inaction in failing to pursue disclosure which they knew was potentially available, contributed to the delay. Therefore, I would apportion the resulting delay between Crown and Defence equally.

[56] The Defence delay during the pre-election period, after apportioning the time between December 11, 2020 and January 8, 2021 would be 4 months and two or three days (depending on whether months have 30 or 31 days). That would make the net delay 17 months and 23 or 24 days, still below the presumptive ceiling.

[57] This would be sufficient to dismiss the Defence application since no argument has been made the delay was unreasonable even if it was below the presumptive ceiling. However, I will also consider the arguments made by the Crown and Defence relating to the post-election period.

[58] The Crown argues that not all this delay should be borne by the Crown.

[59] First, with respect to the period between election and re-election, the Crown submits that it could not make its decision about whether to file the direct Indictment until it received the Defence statement of issues and witnesses for the preliminary inquiry. That was filed on March 5, 2021. There is some support for this in the materials filed on the Application. On March 4, 2021, Defence counsel authored an email to herself which is essentially a memo to file. It says she had a conversation with the Crown, that the Crown was thinking of preferring an Indictment, that the Crown consented to re-elect trial in Provincial Court, and that Defence had told her she would file the statement of issues and witnesses the next day. This suggests some link between the Crown's decision and the filing of the statement of issues and witnesses. Logically, it also seems reasonable that the reasons a preliminary inquiry was being requested would factor in to the Crown's decision on whether to seek permission to take a step that would remove that right and on the ultimate decision of the Director of Public Prosecutions (or his delegate).

[60] Therefore, I accept that the Crown's decision to prefer the Indictment was to some extent dependent on the statement of issues and witnesses, so the delay in filing it caused delay. That period is from February 5, 2021 to March 5, 2021, one month. That is not an unreasonable amount of time for the Defence to do this and, based on Defence counsel's notes, it seems the Defence acted immediately after speaking with the Crown about the statement of issues and witnesses.

[61] On June 25, 2021, the Crown advised Defence that it would be preferring the Indictment, the Crown consented to re-election and the matter was back in Provincial Court on July 9, 2021. There is no suggestion that the Defence is responsible for any of the delay between March 5, 2020 and July 9, 2020. The Crown took from March 5th to June 25th to formalize its decision to prefer the Indictment. That required permission from the Director of Public Prosecutions (or his delegate). Once that decision was communicated to Defence, Defence acted very quickly to get instructions and then formalize the re-election.

[62] The Crown did not ask the Defence to waive delay as a pre-condition for its consent to re-election.

[63] The next period to be assessed is the time between re-election and completion of the trial. The Crown argues that the Defence decision to re-elect caused the matter to be delayed so this period, at least, should be apportioned between the Defence and Crown.

[64] The Crown's position is summarized in its Brief as follows:

> It seems procedurally unfair that an Accused can set a matter for preliminary inquiry, triggering the 30-month ceiling, and then after a direct indictment is filed, re-elect to provincial court and then fall under the 18-month window, without being responsible for that delay. Though in this case there was no condition of waiver to consent to the re-election, a Crown oversight should not be taken as a tactical benefit for Defence when it is their application to re-elect.

[65] The option of making a waiver of delay a condition for Crown consent to re-elect was raised in *Jordan* and relied on in *Shaikh* and *Wookey*. In *Shaikh*, the Court said:

> 57 The bright line approach that I consider myself compelled to follow does not enable the defence to manufacture a s. 11(b) delay by re-electing into a shorter presumptive period of delay. Section 561(1) of the *Criminal Code* requires Crown consent before the accused can re-elect to a trial by a provincial court judge. Where

> re-election would create the risk of s. 11(b) problems, the Crown has the authority to, and should, refuse consent, absent a s. 11(b) waiver.

[66] This paragraph was relied on in *Wookey* where the Court went on to say:

> 68 In *Shaikh*, as in this case, the Crown at trial submitted that it was prejudiced by the late re-election. In that case, the re-election was made after the preliminary inquiry was originally scheduled to proceed; in this case, the accused re-elected on the scheduled commencement date for the preliminary inquiry, but it was agreed upon earlier. The complaint is that a late re-election unfairly shifted the Crown into a much shorter presumptive ceiling, automatically imperilling the case for s. 11(b) purposes.
>
> 69 The Crown need not be exposed to vulnerability in these circumstances. The solution lies in the Crown requiring a waiver by the accused person in exchange for consent to re-elect. As Paciocco J.A. said, at para. 57 of *Shaikh*:
>
> > The bright line approach that I consider myself compelled to follow does not enable the defence to manufacture a s. 11(b) delay by re-electing into a shorter presumptive period of delay. Section 561(1) of the *Criminal Code* requires Crown consent before the accused can re-elect to a trial by a provincial court judge. Where re-election would create the risk of s. 11(b) problems, the Crown has the authority to, and should, refuse consent, absent a s. 11(b) waiver. [Emphasis added.]

[67] I do not fault the Crown in the circumstances of this case for not making a delay of waiver a condition of for consent to re-elect. That may be entirely appropriate in a case where Defence simply changes its mind late in the process or where there is some concern that the Defence is using illegitimate trial strategy or an accused is "playing the system".

[68] However, in my view, Justice Paciocco's comments in *Shaikh* have to be taken in the context of that case – an accused whose decisions might be perceived as 'manufacturing delay' by re-electing. I note that in a recent decision of the Ontario Superior Court of Justice, in circumstances similar to those before me, the Court concluded that the Crown's refusal to consent to re-election to Provincial Court was an abuse of process (*R. v. T.R.* 2022 ONSC 4300). In that case, after election to Superior Court, the Crown withdrew some charges resulting in the removal of the accused's right to a preliminary inquiry. The Court found that the Crown's conduct violated s. 7 and granted a remedy under s. 24(1) to permit the accused to re-elect without condition.

[69] The circumstances in the case before me are very different than those in *Shaikh*. Here, the Defence request to re-elect back to Provincial Court came immediately after being advised that the Crown had obtained authority to prefer the Indictment. The Crown submits that there is no evidence before me of the reasons for the re-election. I agree. However, I am entitled to make reasonable inferences from the evidence that is before me. Given the timing, I infer that the Defence decision to re-elect was the direct result of the Crown's decision to prefer the Indictment which removed the possibility of a preliminary hearing. As such, I do not necessarily agree that a reasonable alternative for the Crown would have been to insist on a waver of delay before consenting to re-election.

[70] There is no doubt that the decision to re-elect caused delay. The preliminary inquiry was scheduled for one day in November of 2021 and, in July of 2021, the Court was advised that four days would be required for trial. There was no discussion on the record about this, but given the circumstances in Provincial Court, I can say that there is no way that three days could simply have been added on to the previously scheduled trial date in November and an additional three days in the originating court would probably not have been available until summer of 2022. After the matter was moved into the 'long trial court', the trial was scheduled for April 4, 5, 6, 11, 2022. Those were the earliest dates available to the Court and the Crown. If the original election had been to Provincial Court, it is probable that four days could have been found in the 'long trial court' in the fall of 2021.

[71] However, I have found that the decision to re-elect was the result of the Crown's decision to prefer the Indictment which removed the possibility of a preliminary inquiry. When I consider the Defence decision to re-elect in light of the comments from the Supreme Court of Canada concerning legitimacy of actions, I conclude that the Defence decision to re-elect was legitimate, both in the substance and the manner in which it was carried out. Therefore, I would not fault the Defence for the post-election delay.

[72] I have considered how to treat the time from February 5, 2021to March 5, 2021 (the post-election period during which the Crown did not have the Defence statement of issues). As I have said, I accept that the Crown could not make its decision about preferring the Indictment until it received the statement of issues from the Defence. I would not say that a delay of one month for the Defence to file its statement of issues was an inordinate or unreasonable amount of time so would not categorize it as Defence delay in the way that is described in *Jordan*.

However, I would subtract it from the post-election delay that I have otherwise attributed to the Crown/system. The decision to prefer the Indictment and the subsequent re-election to Provincial Court are relatively unusual. They would not qualify as "exceptional circumstances" under the *Jordan* definition because they were entirely foreseen by the Crown and within the control of the Crown. However, the timing of the filing of the statement of issues was not within the control of the Crown so should not be held against the Crown.

[73] As such, I believe it would be reasonable to subtract the period between February 5, 2021 and March 5, 2021.

Final Analysis

[74] As I said the total delay here was 21 months and 26 days.

[75] If the fact that the Defence should have been in a position to make its election on September 18, 2020 and did not make it until February 5, 2021, means that this entire period is Defence delay, then 4 months and 18 days would be subtracted from that total, leaving a net delay of 17 months and 7 days, which is below the presumptive ceiling.

[76] If that is not correct, and I am required to look at the delay caused by the supplemental disclosure separately, giving the Defence the benefit of apportioning the resulting delay, the Defence delay which must be subtracted is as follows:

- September 18th to December 11th, 2020 - 2 months & 23 days
- December 11th, 2020 to January 8, 2021 - 14 days (half the total)
- January 8th to February 5, 2021 - 26 days

[77] That total would be 4 months and two or three days (depending on whether months have 30 or 31 days), leaving a net delay of 17 months and 23 or 24 days, still below the presumptive ceiling.

[78] If I am correct in also subtracting the period from February 5, 2021 to March 5, 2021 as delay due to an exceptional event over which the Crown had no control. That would further reduce the total delay to just over 16 months.

[79] The delay is therefore under the presumptive ceiling and the Defence has not argued that it is otherwise unreasonable, so the Applicant has not met its burden under s. 11(b) of the *Charter* and I would dismiss the Application.

Elizabeth Buckle, JPC