SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Longaphy*, 2019 NSSC 93

Date: 20190322
Docket: CRH No. 483622
Registry: Halifax

Between:

Christopher Longaphy

Appellant

v.

Her Majesty the Queen

Respondent

DECISION
SUMMARY APPEAL

Judge:	The Honourable Justice Kevin Coady
Heard:	March 7, 2019, in Halifax, Nova Scotia
Written Decision:	March 22, 2019
Counsel:	Tiffany Thorne, Crown Counsel Jonathan Hughes, Counsel for Mr. Longaphy

By the Court:
Overview:

[1] Mr. Longaphy was convicted of several assault offences in Dartmouth Provincial Court. He received a conditional sentence for these summary offences. Prior to the completion of the trial, Mr. Longaphy applied for a stay of proceedings based on trial delay which violated his s. 11(b) *Charter* rights. The Honourable Judge Tax heard that application on September 25, October 16 and November 14, 2017. On November 21, 2017 he dismissed the s. 11(b) application. Mr. Longaphy appealed that decision. I have heard that summary appeal and this is my decision.

[2] The grounds for this appeal are that Judge Tax erred in law in his application of the principles set forth in the seminal case of ***R. v. Jordan***, 2016 SCC 27. It is further submitted that he committed a palpable and overriding error of fact in attributing large portions of the delay to the defence.

[3] Counsel on the application agree that Mr. Longaphy's information was sworn on February 22, 2012 and that the end of the trial would be April 7, 2017. They agree this prosecution was before the courts for 61.5 months -- just over five years. In addition, counsel acknowledged that this was not a complex case.

[4] The Court, in ***Jordan***, created a presumptive ceiling of 18 months for trials in Provincial Court and 30 months for Superior Court trials. When a trial exceeds these ceilings, the delay is presumptively unreasonable and the burden shifts to the Crown to justify the delay as having been due to exceptional circumstances.

[5] In Mr. Longaphy's case the ceiling is 18 months and the trial took 61.5 months. This was a very straightforward prosecution without any complexity whatsoever. If it had been properly scheduled, the trial would take three days and would be completed well within the 18-month ceiling. Unfortunately, a whole series of events turned the case into a never-ending ordeal. It is very clear from Judge Tax's decision that responsibility for delay fell at the feet of Lyle Howe, Mr. Longaphy's counsel.

[6] The majority of the Supreme Court of Canada in ***Jordan*** determined that the existing ***Morin*** framework had allowed a "culture of complacency" to develop in relation to delay. The Court commented on this at para. 29:

> While this Court has always recognized the importance of the right to a trial within a reasonable time, in our view, developments since *Morin* demonstrate that

> the system has lost its way. The framework set out in *Morin* has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it.

The Supreme Court described the existing s. 11(b) framework as too unpredictable, too confusing and too complex and that it has itself become a burden on already overburdened trial courts. Further, the minute accounting it requires might be fairly considered the "bane of every trial judge's existence."

[7] The majority in ***Jordan*** further commented that the culture of delay causes great harm to public confidence in the justice system. It rewards the wrong behaviour, thwarts the well-intentioned, makes frequent users of the system cynical and disillusioned, and frustrates the rehabilitative goals of the system. The Court noted that the ***Morin*** framework did not encourage the players to take preventative measures to address inefficient practices. There is an acknowledgement that the s. 11(b) right is one which often can be transformed from a protective shield to an offensive weapon in the hands of the accused.

[8] ***Jordan*** directed that ultimately all participants in the justice system must work in concert to achieve speedier trials and that such communal efforts would benefit all players. Defence counsel must be part of the solution and cannot sit on their hands throughout the prosecution.

[9] The prosecution of Mr. Longaphy presents as the epitome of the culture of complacency around delay. The first appearance occurred on February 22, 2012 and the trial concluded on April 7, 2017 -- a period of over five years. There were 14 court appearances during that period. No evidence was called until October 7, 2015 -- 45.5 months after the Information was sworn.

[10] The learned trial judge's decision is lengthy and very detailed. In his decision he sets out the factual background around each step in the prosecution (paras. 16 through 90). It is very obvious that he reviewed the record with precision and these paragraphs paint the broad picture.

[11] ***Jordan*** also addresses transitional cases, which are cases that were in the system when it was decided. This is one of those cases. When ***Jordan*** was released, Mr. Longaphy's prosecution had consumed 57.5 months of the total 61.5 months. Consequently, this factor must play a major role in the assessment of delay. The majority in ***Jordan*** discussed this factor at para. 94:

> 94 Here, there are a variety of reasons to apply the framework contextually and flexibly for cases currently in the system, one being that it is not fair to strictly judge participants in the criminal justice system against standards of which they had no notice. Further, this new framework creates incentives for both the Crown and the defence to expedite criminal cases. However, in jurisdictions where prolonged delays are the norm, it will take time for these incentives to shift the culture. As well, the administration of justice cannot tolerate a recurrence of what transpired after the release of *Askov*, and this contextual application of the framework is intended to ensure that the post-*Askov* situation is not repeated.

Standard of Review:

[12] The Appellant argues that the standard of review on a question of law is "correctness". He further submits that the standard of review for findings of fact is whether the trial judge made a "palpable and overriding error". He submits that the standard of review for errors of mixed law and fact is "correctness". The Respondent does not disagree and states at para. 12 of its brief:

> 12 The Respondent submits that underlying factual findings, including findings on the legitimacy of procedural steps, the determination of whether the parties' litigation conduct was reasonable, the assessment of case complexity, and determination of prejudice, are entitled to deference unless the trial judge has committed a palpable and overriding error.

The Respondent further submits that trial judges are entitled to deference regarding the application of transitional exceptional circumstances, so long as the trial judge does not err in law in the analysis and has considered the relevant factors. Otherwise, the standard of review is correctness.

[13] In ***R. v. R.E.W.***, 2011 NSCA 18, the Court discussed standard of review in delay appeals at paras. 29-33:

> 29 Before turning to address the contentions of the appellant, I should say something about the appropriate standard of review. The Crown asserted that all of its complaints of alleged error should be reviewed on the standard of correctness. If this is the correct standard, no deference is accorded to the trial judge's decision. The respondent seemed to acquiesce to this position. I am not convinced the issue is as straight forward as the Crown suggests. Let me explain.
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> 30 Whether a right guaranteed by the *Canadian Charter of Rights and Freedoms* has been infringed or denied is a question of law. A trial judge is required to articulate and apply the correct legal principles. A failure to do so will be reviewed on a standard of correctness.

> 31 However, not every factor that goes into deciding a question of law attracts such a standard. Trial judges are frequently required to make findings of fact that inform the ultimate legal question to be answered. In my opinion, such findings of fact, or of mixed law and fact, without an extricable legal component, are subject to deference and cannot be disturbed unless the trial judge made a palpable and overriding error (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras. 25, 26 and 36). I see no reason why this does not also apply generally to facts found in a dispute over violation of rights (see *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48). This imports an assessment of whether the finding is unreasonable or not supported by the evidence (see *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401).
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> 32 However, if a trial judge, in the course of making findings of fact or mixed law and fact, seriously misapprehends important evidence or ignores relevant evidence, deference evaporates since these kinds of errors are errors of law on their own, although they frequently underlie findings that are found to be errors that are palpable and overriding.
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> 33 In addition, in my view, where a trial judge is required to balance competing interests, some deference is appropriate (see *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353). In carrying out the final analysis in determining whether a delay has caused a denial of an accused's right to be tried within a reasonable period of time, a trial judge is required to balance the prejudice suffered by the accused with the public interest in seeing a trial on the merits. On this aspect of the analysis, assuming the trial judge has correctly identified the appropriate approach and considered the relevant factors, considerable deference is owed.

While this case pre-dates the ***Jordan*** decision, I see no reason why these principles should not apply in a ***Jordan*** analysis.

[14] In ***R. v. Regan***, 2018 ABCA 55, the Alberta Court of Appeal discussed standard of review at para. 32:

> The 'characterization' of periods of delay, and the ultimate decision concerning the reasonableness of a period of delay, are both reviewed on a standard of 'correctness' while underlying fact findings are reviewable on the standard of palpable and overriding error.

I am satisfied that Judge Tax's conclusion that Mr. Longaphy's s. 10(b) rights were not infringed is correct. On all attributions of delay I can find no palpable and overriding error.

Transitional Exceptional Circumstance:

[15] In these cases, where the Crown proves that the time which the case has taken is justified, based on the parties' reasonable reliance on the pre-***Jordan*** law, this reliance will constitute transitional exceptional circumstances justifying delay over the presumptive ceiling. After all the parties' behaviour cannot be judged strictly against a standard of which they had no notice. For cases currently in the system the judge must determine whether the parties' reliance on the previous state of the law was reasonable. The judge should also consider whether enough time has passed for the parties to "correct their behaviour and the system has had some time to adapt" before determining that the transitional exceptional circumstances exist. This last point has minimal application in this case given that only four months of this prosecution was post ***Jordan.***

[16] The learned trial judge relied significantly on transitional circumstances to dismiss Mr. Longaphy's application. He stated, at para. 300:

> Since the large majority of the delay in the conduct of this trial occurred years before the Supreme Court of Canada released its *Jordan* decision, there is no question that the Crown may also rely on transitional circumstances to what otherwise might be considered to be presumptively unreasonable delay where the charges were brought before the release of the *Jordan* decision.

This is an explicit recognition that the changes promoted by ***Jordan*** realistically take time to implement.

[17] In ***Jordan's*** companion case of ***R. v. Williamson***, 2016 SCC 28, the Supreme Court elaborated on the contextual manner of applying ***Jordan*** in transitional cases. The relevant circumstances include:

1. The complexity of the case;
2. The period of delay in excess of the ***Morin*** guidelines;
3. The Crown's response, if any, to institutional delay;
4. The Defence's efforts, if any, to move the case along; and
5. Prejudice to the accused.

In ***R. v. Cody***, 2017 SCC 31, the Court stated, at para. 41, that "the parties' diligence in moving matters forward can be an important transitional consideration". The Court further commented at paras. 70 and 71:

> 70 It is important to clarify one aspect of these considerations. This Court's decision in *R. v. Williamson*, 2016 SCC 28 (CanLII), [2016] 1 S.C.R. 741, should

> not be read as discounting the important role that the seriousness of the offence and prejudice play under the transitional exceptional circumstance. The facts of *Williamson* were unusual, in that it involved a straightforward case and an accused person who made repeated efforts to expedite the proceedings, which efforts stood in contrast with the Crown's indifference (paras. 26-29). Therefore, despite the seriousness of the offence and the absence of prejudice, the delay exceeding the ceiling could not be justified under the transitional exceptional circumstance. This highlights that the parties' general level of diligence may also be an important transitional consideration. But the bottom line is that all of these factors should be taken into consideration as appropriate in the circumstances.
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> 71 When considering the transitional exceptional circumstance, trial judges should be mindful of what portion of the proceedings took place before or after *Jordan* was released. For aspects of the case that pre-dated *Jordan*, the focus should be on reliance on factors that were relevant under the *Morin* framework, including the seriousness of the offence and prejudice. For delay that accrues after *Jordan* was released, the focus should instead be on the extent to which the parties and the courts had sufficient time to adapt (*Jordan*, at para. 96).

[18] In rejecting Mr. Longaphy's application, Judge Tax concluded, at paras. 306 and 307:

> 306 Therefore, in addition to finding the total 'net delay' is at worst slightly above the 'presumptive ceiling,' I find that the Crown has established that there were several 'discrete and exceptional circumstances' as outlined above, which have justified the delay. In those circumstances, I hereby dismiss Mr. Longaphy's section 11(b) **Charter** application for a stay of proceedings based on that conclusion. Furthermore, I also find that the Crown has established that this trial involves a 'transitional exceptional circumstance' and therefore, I would also dismiss Mr. Longaphy's section 11(b) **Charter** application on that basis.
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> 307 For all of the foregoing reasons, and notwithstanding the fact that the total delay from the start of this trial to the anticipated end of the trial was sixty-one and a half (61.5) months, after deducting the defence delay and taking into account the several 'exceptional circumstances' which I find to have been established by the Crown, I find that Mr. Longaphy's section 11(b) **Charter** right to be tried within a reasonable time has not been infringed or denied. After having come to that conclusion, I find that Mr. Longaphy's application for a stay of proceedings under section 24(1) of the **Charter** is hereby dismissed.

[19] Judge Tax canvassed each of the factors that come into play on transitional cases. In terms of seriousness of this offence, he concluded the counts were serious as were the circumstances around their commission. He also recognized institutional delay at page 75 of his decision:

> I find that the record does indicate that the Dartmouth Provincial Court was experiencing significant institutional delay problems, given the nine to twelve month delay to find a half day or more for trial for this matter.

[20] On the issue of complexity Judge Tax stated, "The Crown concedes and the Defence agrees that this is not a particularly complex case." But as the Nova Scotia Court of Appeal noted under this heading in ***R. v. Mouchayleh***, 2017 NSCA 51: "That works both ways."

[21] On the issue of institutional delay Judge Tax commented at page 76:

> As I have previously indicated, given the number and timing of the 'discrete and exceptional events' which have arisen during this trial, I find that they were completely unforeseen and unavoidable on the part of the Crown. Therefore, I find that there was very little, if anything, the Crown could do to respond to institutional delays, the unforeseen unavailability of Defence Counsel at the last moment and the other 'discrete and exceptional circumstances.'

He further stated, "I find that the Defence did absolutely nothing to move this case along." Additionally, he stated, at page 77:

> As the Court of Appeal pointed out in **Mouchayleh** at para. 35 in describing the actions of Mr. Howe which were very similar, if not identical to the actions or inactions taken by him in this case, that 'all of these events are indicative of a casual attitude, even indifference, that obviously gave the judge the impression that Mr. Mouchayleh was in no hurry to proceed.' Likewise, in this case, I find that the defence did not do anything to reduce the time required for trial or enter into any agreements with the Crown that would expedite matters.

[22] On the issue of prejudice to the accused Judge Tax stated at page 77:

> As the Nova Scotia Court of Appeal pointed out in **Mouchayleh** at para. 54, under the **Jordan** analysis, prejudice disappears into the presumptive periods [**Jordan** at para. 54 and 109]. But it is still a relevant factor consider [*sic*] in transitional cases, where appropriate.

He continued that the only two interests to which prejudice applied are Mr. Longaphy's liberty interests and trial fairness. He stated that he could not find any actual prejudice to his liberty interests given he was on a summons which only required he attend court when directed. He further concluded that, due to the nature of the evidence, he could not find any actual or inferred prejudice in trial fairness.

[23] There can be little doubt but that Judge Tax concluded that the conduct of the defence was the greatest cause of delay notwithstanding the significant institutional delays at Dartmouth Provincial Court. It can be inferred from his comments that he felt Mr. Howe adopted a strategy of delay, either intentionally, or consequently.

Defence Delay:

[24] The learned trial judge's calculations of defence delay are well supported in his ruling:

> April 18, 2012 to June 25, 2012: On April 18th Mr. Longaphy sought an adjournment of 2.5 months when a five-week return was available. Judge Tax attributed 2.5 months of delay to the defence. He obviously felt that the February 22 to April 18, 2012 provided Mr. Longaphy with a reasonable amount of time to retain and instruct counsel.
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> June 25, 2012 to July 30, 2012: On June 25th Mr. Howe appeared with Mr. Longaphy for "today only". He requested an adjournment to "confirm the retainer and review the disclosure". Judge Tax attributed 1.25 months of delay to the defence because this case was not complex and a review of the disclosure could be completed in short order.
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> July 30, 2012 to September 7, 2012: On July 30, 2012 Mr. Longaphy appeared with Mr. Howe who did not confirm whether he was retained. He requested that the plea be adjourned so he could discuss disclosure with the Crown. Judge Tax attributed 1.25 months' delay to the defence, once again because the case was not complex and Mr. Howe had plenty of time to firm up his retainer.
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> September 7, 2012 to June 26, 2013: On September 7, 2012 Mr. Howe entered a not guilty plea and agreed to a June 26, 2013 trial date. Judge Tax attributed this 9.75 months of delay to the defence. On April 10, 2013, Mr. Howe advised the Court he needed to urgently adjourn the June 2013 trial. He asked that the file be docketed for April 16, 2013. On that date no one from the defence appeared and the trial date remained set for June 2013. On June 20, 2013 Mr. Howe's partner attended court and advised that an adjournment was required. A new trial was scheduled for June 9, 2014.
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> June 26, 2013 to June 9, 2014: On June 9, 2014, Mr. Howe was not present for trial because he had been suspended by the Nova Scotia Barristers' Society. Mr. Howe's Receiver requested this trial be adjourned and a third trial date was scheduled for September 3, 2015. Judge Tax attributed this 11.5 months' delay to the defence as Mr. Howe could not proceed on June 9th due to his suspension.
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> June 9, 2014 to August 6, 2014: The June 9th date was lost and the case was adjourned until August 6, 2014 to allow Mr. Longaphy to retain new counsel.

Judge Tax attributed these two months of delay to the defence because it was requested by Mr. Longaphy as a result of Mr. Howe's suspension.

August 6, 2014 to September 3, 2015: At the August 6, 2014 hearing to set a new trial date, Mr. Howe's partner, Ms. Laura McCarthy, attended with Mr. Longaphy to schedule a third trial. September 3, 2015 was the only day mentioned and confirmed. While this was a 13-month delay, Judge Tax attributed four months' delay to the defence and commented as follows at paragraphs 175-176:

> 175 Therefore, I am prepared to apportion most of the delay to be institutional delays which were present when the third date was scheduled for the start of this trial. However, I find that given all of the factors which have been outlined in the preceding paragraphs, I find that four months of this total delay should be apportioned to the defence and that period of time was implicitly waived by Defence Counsel in order to secure a trial date when Ms. McCarthy, the Court and the Crown Attorney were all available to conduct the trial.
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> 176 As a result, I find that a four (4) month period of time should be apportioned to the defence and deducted from the total delay of thirteen months.

September 3, 2015 to October 7, 2015: On October 7, 2015, the Crown failed to subpoena a police officer and stated that a short delay, though not ideal, was required. The Court offered the parties the alternative of starting the trial that afternoon, or on September 18 or on September 24, 2015. Mr. Howe's partner, Ms. McCarthy, was not available until October 7, 2015 and the case was adjourned to that date. Judge Tax attributed 0.75 months' delay to the defence and stated at para. 185 of his decision:

> 185 As a result of this short adjournment request, the Court and the Crown were available and ready to proceed on September 18, 2015 or also on September 24, 2015. Defence Counsel advised the Court that she was not available on those two dates, but was available on October 7, 2015, which was the fourth scheduled date for the commencement of this trial. In those circumstances, I find that there is no defence delay for the first two weeks of this adjournment, but I find that there was defence delay for the next three weeks to be scheduled to be [*sic*] scheduled trial date of October 7, 2015.

October 7, 2015 to December 2, 2015: On October 7 Mr. Howe's suspension was lifted and he was back on the Longaphy file. He refuted agreements that were clearly given on September 3, 2015 by Ms. McCarthy. As a result, little of that day was available for testimony. The cross-examination of one of the complainants was adjourned until December 2, 2015. Judge Tax commented as follows at para. 202:

> 202 In those circumstances, since only half of the first date for trial was able to be utilized for the hearing of the direct examination of Mr. Tristan

> Guibault, one of the youthful complainants, I find that the defence action or, in this case, inaction prior to trial impacted the presentation of evidence on October 7, 2015, in a very significant way. As a result, I am prepared to apportion one half of the two-month delay between the October 7, 2015 trial date and the trial continuation date on December 2, 2015 as defence delay.

December 2, 2015 to June 28, 2016: No defence delay. The remainder of the trial was adjourned until June 28, 2016. A March 2016 date was offered but the Crown was not available.

June 28, 2016 to December 9, 2016: Judge Tax attributed 2.75 months of this 5.5-month adjournment to defence delay. He stated it was because of defence actions or conduct. The specifics of that conduct are set forth at paras. 216 to 233 of the decision. Judge Tax stated that the actions of the defence "demonstrated . . . a marked indifference towards delay." It should be noted that Mr. Howe was re-suspended by the Nova Scotia Barristers' Society during this period of time.

December 9, 2016 to April 7, 2017: On April 7, 2017, Mr. Longaphy appeared with Mr. Hughes, his present counsel. The Crown closed its case and Mr. Longaphy gave notice of a s. 11(b) delay application. Judge Tax attributed this four-month period to defence delay and stated at para. 244 of his decision:

> 244 In those circumstances, I find that this entire four (4) month period of time is clearly delay which was caused by the defence, as a result of the sudden and unforeseen unavailability of Defence Counsel due to the suspension of Mr. Howe prior to a trial continuation date, which necessitated a further full day of trial to be scheduled. As a result, there is no doubt that Mr. Longaphy's waiver of delay was clearly and unequivocally expressed by the Receiver for the Barrister's [*sic*] Society and therefore, the entire four (4) month period of time should be deducted from the 'total delay' in order to calculate the 'total net delay' in this matter.

On May 8, 2018, the defence closed its case and the learned trial judge convicted Mr. Longaphy on all counts.

[25] Judge Tax provided a summary of his conclusions at paras. 248 and 249 of his decision:

> 248 Having carefully reviewed and analyzed the transcripts of each and every one of the days that this matter was before the court, I have found that the total delay which was waived by the defence, either explicitly or implicitly or where the defence action, inactions or conduct caused the delay, amounts to a total of forty and three-quarter (40.75) months.
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> 249 Therefore, after deducting defence delay of forty and three-quarter (40.75) months from the total delay of sixty-one and a half (61.5) months, I find that the total 'net' delay is twenty and three-quarter (20.75) months, which slightly exceeds

> the 'presumptive ceiling' of 18 months in the Provincial Court. Therefore, I find that the delay is 'presumptively unreasonable' as defined by the SCC in the **Jordan** decision and that the onus is on the Crown to justify that the total 'net' delay was either due to 'exceptional circumstances' or 'transitional exceptional circumstances' since this case began several years before the **Jordan** decision.

[26] The Appellant and Respondent urge me to revisit Judge Tax's computations. I resist that approach as I view it as tinkering. Clearly, the learned trial judge is in a better position to draw these conclusions than a reviewing judge and, as such, he is entitled to deference. Further, it is my view that the transitional exceptional circumstance is so prominent in this case that it can justify a presumptively unreasonable delay of various lengths. After all, these computations are not an exact science.

[27] In ***Jordan***, the Court realized that some accused persons are content to see their trials delayed for as long as possible. Clearly a trial judge must be on the alert for such individuals. It is to be expected that a trial judge will form an impression of an accused's approach to the conduct of their trial. It is very obvious that Judge Tax formed the impression that Mr. Longaphy was content to see his case drag on. That is reflected in the amount of time he attributed to defence delay.

[28] The majority in ***Jordan*** stated that reasonableness cannot be captured by a number alone, which is why the new framework is not solely a function of time. A judge must apportion delay by looking at the circumstances of the case. The ***Jordan*** majority stated at para. 91:

> 91 Determining whether the time the case has taken markedly exceeds what was reasonably required is not a matter of precise calculation. Trial judges should not parse each day or month, as has [page 672] been the common practice since *Morin*, to determine whether each step was reasonably required. Instead, trial judges should step back from the minutiae and adopt a bird's-eye view of the case. All this said, this determination is a question of fact falling well within the expertise of the trial judge.

The Court went on to state, "We rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case."

[29] The majority in ***Jordan*** encouraged trial courts to pursue a global assessment when determining causes of delay. The Court stated at para. 111:

> 111 Third, the new framework reduces, although does not eliminate, the need to engage in complicated micro-counting. While judges still have to determine defence delay, the inquiry beneath the ceiling into whether the case took markedly longer than it reasonably should have replaces the micro-counting process with a global assessment.

It is my view that this is exactly the path followed by Judge Tax. He did not lose sight of the forest from the trees.

[30] In ***R. v. Cody***, *supra*, the Court commented on determining the legitimacy of defence delay at para. 31:

> 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 be reticent about finding defence action to be illegitimate where it is appropriate to do so.

The Court stated that inaction by an accused may amount to defence conduct that is not legitimate. In the ***Cody*** trial the judge found that there was "nothing in Cody's conduct to suggest that he was deliberately delaying matters". The Supreme Court of Canada stated that this finding was entitled to deference and consequently, "We would not interfere." In this case, Judge Tax's impression of Mr. Longaphy's conduct demands deference.

[31] The case of ***R. v. Mouchayleh***, *supra*, involved the same defence counsel (Mr. Howe and Ms. McCarthy) and came out of Dartmouth Provincial Court. The trial was held, for the most part, at the same time. Mr. Howe's suspensions, as well as other conduct, mirrored factors in Mr. Longaphy's case. The trial judge, in rejecting Mr. Mouchayleh's s. 11(b) application, formed an impression much as was done by Judge Tax. On appeal, Justice Bryson commented at para. 28:

> 28 The trial judge formed the impression that Mr. Mouchayleh was not anxious to proceed to trial on the merits. She came to the conclusion both because of his actions and inactions.

And further, at para. 35:

> 35 All of these events are indicative of a casual attitude, even indifference, that obviously gave the judge the impression that Mr. Mouchayleh was in no hurry to proceed (*Jordan,* para. 63). In all of these assessments, deference should

> be shown to the trial judge. Trial judges are uniquely positioned to gauge the legitimacy of defence actions, (*Jordan*, para. 65). Ordinarily deference should be accorded to the trial judge in these types of assessments (*R. v. Evans*, 2014 MBCA 44, para. 3).

Justice Bryson acknowledged that the total delay was 32 months, well beyond the 18-month ceiling. He found that the Crown's reliance on the transitional exceptional circumstances satisfactorily justified the additional delay.

[32] The ***Mouchayleh*** case was considered by Judge Tax. He stated at para. 304 of his decision:

> 304 Given some of the similarities between the cases, I find that the Nova Scotia Court of Appeal's brief analysis of the transitional exceptional circumstances mentioned in **Jordan** is particularly illuminating in the evaluation of the circumstances present in this case. Of course, as the Nova Scotia Court of Appeal pointed out, the 'transitional exceptional circumstances' only come into play if the overall 'net' delay remains over the **Jordan** 'presumptive ceiling' and may render that delay reasonable.

[33] This prosecution was straightforward without any serious legal issues. Under normal circumstances it should be heard in 2-3 days and be well within the 18-month ceiling. I find that the genesis of the ongoing delay occurred when the defence initially insisted that two hours would be sufficient to hear the entire trial. The defence continued to underestimate time requirements and that complicated subsequent scheduling. I acknowledge that often the Crown agreed with defence but in the ***Morin*** era, and given the institutional delay at Dartmouth Provincial Court, that was not surprising.

[34] I accept Judge Tax's conclusion that defence delay amounted to 40.75 months and that the net delay amounted to 20.75 months. This is above the ***Jordan*** ceiling by 2.75 months. I further conclude that delay is justified by transitional exceptional circumstances. Given the lay of the land at Dartmouth Provincial Court between 2012-2015, I find that the reliance on the previous state of the law was reasonable. Courts were jammed, systems were inefficient and Crown and Defence counsel felt helpless to correct the status quo. It appears as if most counsel went with the flow without any thought. However, in this case the conduct of the defence went beyond acquiescence. It amounted to a strategy of delay that significantly overshadowed the other factors at play. Consequently, I find that Mr. Longaphy's s. 11(b) Charter right to be tried within a reasonable time has not been infringed and, as such, this appeal is dismissed.

Coady, J.