SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Boyer*, 2018 NSSC 352

Date: 2018/07/26
Docket: Halifax No. CR 463048
Registry: Halifax

Between:

Her Majesty The Queen

v.

Jeffrey Michael Boyer

LIBRARY HEADING

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	in Halifax, Nova Scotia on May 29, 2018
Oral Decision:	July 26, 2018
Written Decision:	March 5, 2020
Subject:	Criminal Law – *Charter of Rights and Freedoms* – Right to be tried within a reasonable time.
Summary:	The Information was laid October 26, 2015 and the trial ended May 29, 2018. The total delay was 31 months and 3 days.
Issues:	Was the accused's right pursuant to Section 11(b) of the *Charter* to be tried within a reasonable time breached.
Result:	After deducting the delay caused by the Defence which totalled 94 days, the total delay in this case was 28 months. The Defence took meaningful steps to expedite the

proceeding. Considering the nature and complexity of the case, it did not markedly exceed the reasonable time requirements of the case.

The Application is dismissed.

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D E C I S I O N

Judge:	The Honourable Justice C. Richard Coughlan
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Written Release:	March 5, 2020
Counsel:	Susan Y. Bour, for the Crown
	Stanley W. MacDonald, Q.C. and J. Paul Niefer for the Accused

By the Court:

[1] Jeffrey Michael Boyer says his right to be tried within a reasonable time pursuant to s. 11(b) of the *Canadian Charter of Rights and Freedoms* has been breached and applies for a stay of the charges against him. The Crown opposes the application.

[2] The facts of this proceeding are as follows:

[3] The Information charging Mr. Boyer was laid October 26, 2015. He was arrested and held in custody for transport from British Columbia to Halifax. On November 30, 2015, Mr. Boyer appeared in court. Although Mr. Boyer's release was arranged on cash bail of $25,000 and conditions including a curfew and reporting in person to police, due to arrest and jurisdictional issues, Mr. Boyer was not released until November 2, 2015. He had been in custody since October 28, a total of six days. Not having received disclosure, Mr. Boyer's counsel wrote to the Crown on January 5, 2016, asking when disclosure would be made. The Crown responded disclosure would be made in a number of "waves".

[4] On January 20, 2016, a court appearance was made for Mr. Boyer. No disclosure besides the two-page summary had been received. The election and plea was adjourned to March 30, 2016 and the reporting conditions in Mr. Boyer's recognizance was varied.

[5] The Defence received four binders of disclosure on February 2, 2016. A great deal of disclosure remained outstanding.

[6] On March 10, 2016, counsel for Mr. Boyer wrote to the Crown acknowledging receipt of the binders and inquired when full and complete disclosure would be made. Receiving no reply, Mr. Boyer's counsel again wrote to the Crown on March 28 making the same inquiry.

[7] A court appearance was made on behalf of Mr. Boyer on March 30, 2016. Five other co-accused appeared in court on the same day. Crown counsel advised the Court the second wave of disclosure was in the process of being made, it was being copied and the Crown Attorney hoped to have it that day. The Crown Attorney explained that the third wave of disclosure would include the results of analyses of electronic devises. He advised the Court there was an eight-month waiting queue for the device analyses. The matter was adjourned to May 12, 2016 for disclosure.

[8] Having no further disclosure, on April 28, 2016, Mr. Boyer's counsel wrote to the Crown seeking additional disclosure. On May 6, 2016, the Defence received a hard drive containing a great deal of disclosure materials.

[9] On May 12, 2016, a court appearance was made on behalf of Mr. Boyer. A new Information was before the Court. Time was required to review the disclosure materials. The undertaking provided with the disclosure hard drive required

counsel to review the disclosure while disconnected from the internet and precluded counsel from giving the disclosure hard drive to Mr. Boyer. These issues had to be resolved. No ITOs or affidavits had been disclosed at this point. The Crown was still awaiting electronic devise analyses. The matter was adjourned to June 9, 2016 for election/plea.

[10] Mr. Boyer's recognizance was varied on May 17, 2016, and the new Information addressed.

[11] On June 1, 2016, Mr. Boyer's counsel wrote to the Crown requesting full and complete disclosure advising that numerous aspects of anticipated disclosure were still outstanding.

[12] On June 9, 2016, counsel appeared in Court for Mr. Boyer. Disclosure remained outstanding included the affidavit and support of the Part VI authorization. The matter was adjourned to July 5, 2016 for election/plea.

[13] On July 5, 2016, counsel appeared in court and an election was made on behalf of Mr. Boyer to be tried in the Supreme Court before a judge alone. Mr. Boyer requested a preliminary inquiry and suggested one full day would be required. The Crown Attorney thought the preliminary inquiry would require at least a day. He did not know how many witnesses the Defence would like to hear from and whether it would be a contested preliminary. The Crown Attorney stated it would be proceeding, pursuant to s. 540 of the *Criminal Code*. Both Defence and Crown counsel requested, if possible, the preliminary inquiry be scheduled for a day and a half. The Court offered one day first on August 15, 2016, the Crown had a problem with that date, Mr. Boyer's counsel could have been available. The Court then offered September 21, 2016. Mr. Boyer's counsel had another trial that day. The Court then offered September 22, 2016, and the preliminary inquiry was scheduled for September 22, 2016, and a focus hearing for August 29, 2016. Mr. Boyer's recognizance was further varied on July 5, 2016.

[14] The Supreme Court of Canada released the decision in **R. v. Jordan,** 2016 SCC 27.

[15] The focus hearing was held on August 29, 2016. The judge inquired if enough time had been scheduled as there was a "fairly lengthy list of items on the request list", referring to Mr. Boyer's statement of issues and witnesses. The Crown counsel advised counsel had discussed the time required and were not

entirely sure whether a day would be sufficient. The Crown was arranging witnesses for September 22 and exploring the possibility of witnesses appearing by videolink. Crown counsel confirmed a s. 540 notice been served on Defence counsel.

[16] On September 22, 2016, the preliminary inquiry began. It commenced at 12:03 p.m. as a result of British Columbia witnesses testifying in British Columbia via videolink. The evidence concluded at 3:47 p.m. as no other witnesses were available. The judge inquired how many more witnesses Mr. Boyer's counsel required to testify. Defence counsel stated he would review the witness list. The Crown Attorney stated the Defence counsel was not consenting to a committal. The Crown was proceeding by way of s. 540 which involves calling the lead investigator whose evidence would probably take a day. The matter was adjourned to September 28, 2016 to set a date for the continuation of the preliminary inquiry.

[17] Before ending on September 22, 2016, Mr. Boyer's recognizance was varied again. In addition, the Crown asked about court availability for the purpose of scheduling witnesses and the Court advised the afternoon of November 24 and December 19 and 20 were available. Mr. Boyer's counsel stated: "Right now those days are, - I'm in Supreme Court on all those days, Your Honour, but …". The Judge interrupted and said: "Well, if we're looking for the new year and people -- and if everyone consents to that, we've got many more days available". Defence counsel said: "Yeah, okay". The matter was left at that time to return on September 28 to set more time.

[18] As a result of the discussion between counsel, the Court was advised one and one half days were required to complete the preliminary inquiry. November 17, 2016 was offered for a full day, but Defence counsel was not available as a result of a jury trial. Defence counsel was prepared to offer available dates to the Court, but was advised by the court clerk that there were no other full days until January 2017. The Court set January 10 and 12, 2017 for the continuation of the preliminary inquiry.

[19] On January 10, 2017, the lead investigator, Sgt. Nancy Mason, testified on direct examination for the entire day. At the conclusion of the direct examination at approximately 4:55 p.m. the following exchange took place:

THE COURT:	So, you're not going to conclude the cross-examination of this witness?
DEFENCE COUNSEL:	Today?
THE COURT:	Sorry, is that the end of the direct testimony?
DEFENCE COUNSEL:	Sorry?
CROWN COUNSEL:	Yes.
THE COURT:	All right.
DEFENCE COUNSEL:	I would prefer not to cross-examine her now.
THE COURT:	You mean this coming afternoon?
DEFENCE COUNSEL:	Yeah, I would like to do cross-examination. …
THE COURT:	Yes.
DEFENCE COUNSEL:	No, we'll do cross-examination on Thursday afternoon. …

[20] The preliminary inquiry continued on January 12, 2017, with the cross examination of Sgt. Mason and the testimony of two witnesses by videolink from British Columbia. At the end of the day, Defence counsel suggested another half day be booked which he thought "would take us to the end of this". The date of March 14, 2017 was offered. Defence counsel was not available. Crown counsel was not available on March 15 or 16. The continuation of the preliminary inquiry was set for March 20, 2017 with a focus hearing set for February 9, 2017.

[21] At the focus hearing on February 9, 2017, the continuation of the preliminary inquiry for March 20, 2017 was confirmed. Defence counsel stated he wished to hear from three additional witnesses. Those witnesses would be testifying by videolink from British Columbia and Mr. Boyer would be present by videolink. Mr. Boyer's recognizance was varied. The following exchange took place:

> THE COURT: Yeah. It's the same preliminary, the same process. So, what's happening on the committal argument? Have you worked it out as to what's taking place?
>
> DEFENCE COUNSEL: We haven't resolved that yet. There's some case law that needs to go back and forth on that. But certainly, that's on the radar.

[22] Crown counsel wrote to the Defence counsel on February 22, 2017 advising the three remaining RCMP witnesses from British Columbia were all unavailable on March 20, 2017. Defence counsel wrote to Crown counsel on February 23, 2017 advising he would be available to conduct a continuation of Mr. Boyer's preliminary inquiry on March 8 and 17, 2017. Alternate April dates were offered by Defence counsel.

[23] On February 27, 2017 there was correspondence between counsel and the Court to arrange a continuation date. The Court's earliest date was March 23, 2017. Crown counsel was available, but Defence counsel was not. There was no indication police witnesses were available on March 23, 2017. Defence counsel offered March 8, 13, 14 and 17, 2017. No reply was received.

[24] On March 7, 2017 correspondence was exchanged between counsel and the Court confirming the preliminary inquiry would continue on April 24, 2017. Defence counsel confirmed no waiver of delay.

[25] At the hearing on April 24, 2017 Mr. Boyer consented to his committal. The matter was set for Crownside on May 4, 2017.

[26] At Crownside on May 4, 2017 Defence counsel referred to pre-trial conference dates which had been offered other counsel stating he would be away from May 4, 2017 until May 17, 2017 and requested the pre-trial conference be set for June 2, 2017. Pre-trial conference dates of May 16, 19 and June 2, 2017 had been offered to other counsel. The pre-trial conference was set for June 2, 2017 at 9 a.m. The Court offered a return to Crownside on June 8, 2017, but Defence counsel was not available. The return to Crownside was scheduled for June 15, 2017.

[27] Defence counsel's sister died on May 30, 2017. His assistant wrote to the Crown and the Court requesting the pre-trial conference date and return to

Crownside be rescheduled at Crownside on June 15, 2017. The Crown properly agreed to the request.

[28] At Crownside on June 15, 2017 Defence counsel stated he was not available on June 20, 2017, and the first available date that coincided with his schedule was July 7. The pre-trial conference was scheduled for July 7, 2017 with a return to Crownside scheduled for July 13, 2017. Defence counsel wrote to the Crown counsel on June 15, 2017, suggesting that counsel meet before July 7 to discuss agreements regarding potential trial evidence.

[29] A pre-trial conference was held on July 7, 2017 and the proceeding returned to Crownside on July 13, 2017. Counsel stated they needed 10 days for trial and one day in advance for an application. The trial was scheduled for November 17 to 30, 2017. Counsel were asked to contact the trial judge to obtain a date for the pre-trial application. Mr. Boyer's recognizance was varied. On October 12, 2017 Mr. Boyer's counsel gave notice of Mr. Boyer's intention to challenge the authorization to intercept private communications. During a telephone conference between counsel and the trial judge, dates were set for the application. The leave to examine the affiant hearing was set for November 1, 2017 and the validity of the authorization hearing was set for November 9, 2017. Defence counsel advised by letter dated October 27, 2017 that Mr. Boyer was no longer seeking to cross-examine the affiant, Constable Dinsdale, on his affidavit to obtain authorization to intercept private communication. The *Charter* application concerning the validity of the authorization was withdrawn by letter from Defence counsel dated November 8, 2017.

[30] In a letter dated November 14, 2017, Defence counsel notified the Court Mr. Boyer was seeking an adjournment of his trial. Defence counsel submitted he required the adjournment because of late delivery of a proposed agreed statement of facts by the Crown. Counsel had agreed to work on a possible agreed statement of facts concerning activities in Nova Scotia so as to reduce the time requirements for the trial. The Crown presented a draft proposed agreed statement of facts to Defence counsel on July 6, 2017. The draft was not acceptable to Mr. Boyer. A second draft of the proposed agreed statement of facts was given to Defence counsel on November 10, 2017. Defence counsel stated he did not have time to review the material required to determine if he should agree to the facts to commence the trial on November 17, 2017.

[31] On November 17, 2017, counsel appeared in court and the trial was adjourned to commence on November 22, 2017.

[32] The trial commenced on November 22, 2017 and continued to and including December 1, 2017. The trial not being completed, it was scheduled to continue on January 23, 24, 25, 30, 31 and February 1 and 2, 2018.

[33] On January 18, 2018, the Crown made disclosure of the contents of several cell phones, which had been seized by the police on October 28, 2015 and had been analyzed. The Crown had received the analyses on January 18, 2017 (sic) and made disclosure the same day. The Crown stated it would not be relying on the telephone analyses. On January 22, 2017, the Crown provided Defence counsel a large hard drive containing evidence from the telephones.

[34] Defence counsel sought an adjournment to review the disclosure and the continuation of the trial was adjourned from January 23, 2018 to January 25, 2018 for a status check to determine if the trial could proceed the following week.

[35] On January 25, 2018, Defence counsel confirmed he required additional time to review the late disclosure, so the dates scheduled in January and February were lost. The Court was informed the Crown would be disclosing the contents of two telephones of a Mr. Oldford to Defence counsel and expected to disclose that material on January 29, 2018. Crown counsel estimated the trial would take another five to seven days to complete.

[36] The Court offered the following dates for the continuation of the trial, seven days commencing February 5, 2018 to February 13, 2018. The Crown was available, Defence counsel was not. The week of February 12, 2018 was offered. The Crown was available, the Defence was not. The dates of March 7, 8, 9, 12, 13, 14 and 15, 2018 were offered, the Crown was available, the Defence was not sure if it was available as Defence counsel had other matters scheduled and could not guarantee the dates would work. The week of March 19, 2018 was offered. The Crown was available, the Defence was not. The trial was scheduled to continue on March 26, 27, 28, 29, April 3, 4, and 5, 2018.

[37] The trial resumed on March 26, 2018. The Crown did not conclude its case by April 5, 2018. An additional five days of trial was set for May 1 to May 7, 2018. May 8, 2018 was also offered and accepted by the Crown, but Defence counsel was not available due to a personal commitment.

[38] On April 16, 2018, Mr. Boyer provided notice to the Court and the Crown of the need for a hearing on a s. 11(b) *Charter* application for delay as the continuation of the trial on May 1, 2018, would be 30 months and six days from the date the Information was laid. Mr. Boyer remained flexible on the hearing date and did not make an application to have the hearing held before the evidence at trial was complete.

[39] To proceed with the *Charter* application for the delay in the most efficient manner possible, on April 30, 2018, counsel for Mr. Boyer provided transcripts to the Crown of various proceedings in the Provincial Court and Supreme Court.

[40] The trial continued on May 1, 2018, as scheduled, and the Crown closed its case on May 4, 2018. The Defence called one witness. The Defence attempted to enter documentary evidence, which did not comply with the requirements of the *Canada Evidence Act*, as the document was not certified. The Defence was given time to obtain a certified copy and the trial was adjourned to May 7, 2018. The date of May 8, 2018 was offered to continue the trial, the Crown was available, but Defence counsel was not.

[41] The trial was adjourned to May 14, 2018 and the delay application was scheduled for May 28, 2018. Counsel for Mr. Boyer provided additional transcripts to the Crown to assist with preparation for the delay hearing.

[42] The presentation of evidence concluded on May 14, 2018. Closing submissions were made on May 14, 28, and 29, 2018 and judgment was reserved.

[43] The s. 11 (b) *Charter* application was heard on May 29, 2018 and judgment was reserved.

[44] The date of July 19, 2018 was offered as a date for the judgment to be given in the trial and the *Charter* application, but Defence counsel was not available. The judgment in both the trial and s. 11 (b) *Charter* application was scheduled to be delivered on July 26, 2018.

[45] In **R. v. Jordan** the Supreme Court of Canada established a new framework to deal with s. 11(b) applications. The majority summarized the framework at paragraphs 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 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 that it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.

[46] A trial judge dealing with such an application is first to determine the total delay between the laying of the charges and the end of the trial. Next, any delay attributable to the Defence is to be deducted. If the remaining delay is above the presumptive ceiling, the onus shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. If the delay is below the presumptive ceiling, the burden shifts to the Defence to show the delay is unreasonable.

[47] For cases in the system when the **Jordan** decision was released, the presumptive ceiling applies, but the Judge is to consider the particular circumstances of the case as described in **Jordan**.

[48] The first issue I must determine is the total delay between the laying of charges and the end of trial.

[49] Mr. Boyer submits the end of trial includes the time taken by the trial judge to render a reserved decision. The Crown submits the time taken to render a reserved decision should not be counted against the presumptive ceiling set out in **Jordan**.

[50] In support of his position, Mr. Boyer cites **Rahey v. R**. [1987] 1 S.C.R. 588 in which Lamer, J. (as he then was) in giving a judgment, Dickson, C.J.C. concurring, stated at paragraph 40:

> … To terminate the protection afforded by s. 11(b) as of the moment the trial is commenced without also considering as relevant the delay that may occur thereafter would be to disregard the purpose of that provision and would unduly emasculate the protection it was sought to afford. The stigma of being an accused does not end when the person is brought to trial but rather when the trial is at an end and the decision is rendered. The computation cannot end as of the moment the trial begins, but rather must continue until the end of the saga, all of which must be within a reasonable time.

[51] And, La Forest, J. with MacIntyre, J. concurring, stated at paragraph 95:

> Quite apart from what may be gleaned from a parsing of the language of s. 11(b) and analogous provisions, however, it seems obvious to me that the counts, as custodians of the principles enshrined in the Charter, must themselves be subject to Charter scrutiny in the administration of their duties. In my view, the fact that the delay in this case was caused by the judge himself makes it all the more unacceptable both to the accused and to the society in general. It could be cold comfort to an accused to be brought promptly to trial if the trial itself might be indefinitely prolonged by the judge. The question of delay must be open to assessment at all stages of a criminal proceeding, from the laying of the charge to the rendering of judgment at trial. It was quite proper, therefore, for Glube, C.J.T.D. to consider whether Judge MacIntyre's decision was given within a reasonable time. …

[52] Mr. Boyer submits that *stare decisis* mandates that judicial deliberations are included in total delay.

[53] **Rahey,** which predates **Jordan**, was a case in which the Defence moved for a directed verdict on December 13, 1982, a decision was scheduled to be given on January 21, 1983, for a decision on the directed verdict and then adjourned 19 times with a decision finally rendered on November 18, 1983.

[54] In **Jordan** the Supreme Court of Canada set up a framework to ensure timely trials to protect the s. 11(b) of accused persons as well as victims of crime, their families, witnesses, as well as maintaining overall public confidence in the administration of justice. The Court was correcting a system which had come to tolerate excessive delays.

[55] In setting out the new framework in **Jordan** the majority judgment stated at paragraph 5: "At the center of this new framework is a presumptive ceiling on the time it should take to bring an accused to trial ...".

[56] Neither **Jordan** nor the subsequent decision of the Court in **R. v. Cody,** 2017 SCC 31 mention the time a judge requires to render a reserved decision.

[57] There are practical problems including reserve time in calculating the presumptive ceiling.

[58] In dealing with the issue as to whether reserved time should be included in calculating the **Jordan** ceiling in **R. v. Gambilla,** 2007 ABCA 347, Slatter, J. A. stated in his judgment at paragraph 90:

> This issue was helpfully canvassed in **R. v. Kehler**, 2017 MBQB 96, which concluded at paragraph 60:
>
> > 60 To summarize, judicial delay should not be assessed and accounted for by including it under the new *Jordan* framework and measuring it against the stark and associated presumptive ceilings. Not only does the *Jordan* framework not provide a mechanism for adequately balancing and reconciling the relevant constitutional principles at play, the framework – if applied to judicial delay – would give rise to practical problems that would have the paradoxical effect of compromising much of the predictable and certain efficiency and accountability that *Jordan* was attempting to bring.
>
> **Kehler** noted at para. 44 that both judicial independence and the right to a trial within a reasonable time are important constitutional values. Reconciling these competing principles requires a more purposeful and contextual analysis than a reflexive imposition of the presumptive ceilings set out in **Jordan** (at para.47). Judicial independence requires considerable judicial discretion (at para. 51). This discretion extends beyond independent decision making and includes a judge's capacity to prioritize his or her own workloads. A bright-line presumption does not provide a sufficiently nuanced

> mechanism to resolve the tension between these constitutional principles (at para. 54). Requiring judges to assess the constitutional implications of their own delay is inappropriate (at para. 59).

[59] It would mean the presumptive ceiling for the taking of evidence and argument would be reduced in the provincial court to 12 months and in the superior court to 24 months, as time for the trial judge to render a decision would have to be added. As Joyal, C.J.Q.B. stated in giving judgment in **R. v. K.G.K.,** 2017 MBQB 96 at paragraph 78:

> The Canadian Judicial Council ('CJC') in its 'Ethical Principles for Judges' notes that as an aspect of the principle of 'diligence', judges should deliver reserve judgments within six months, barring special circumstances. Those special circumstances include 'illness, the length or complexity of the case, an unusually heavy workload, or other facts making it impossible to give judgments sooner'. See CJC Ethical Principles for Judges, p. 21.

[60] That does not mean that there are no circumstances in which judicial delay in rendering a decision can violate an accused's *Charter* right to be tried within a reasonable time. If appropriate circumstances exist, a Court can deal with the delay as the Supreme Court of Canada did in **Rahey**. It is just that judicial decision-making time should be excluded from the calculation of the presumptive ceiling under **Jordan** framework.

[61] Subsequent to writing the above, the Court of Appeal released its judgment in **R. v. Brown,** 2018 NSCA 62, in which Derrick, J.A., in giving the judgment confirmed the time it takes a judge to render a decision is not to be included in the s. 11 (b) analysis under the **Jordan** framework.

[62] In this case, the Information was laid October 26, 2015 and the end of the trial was May 29, 2015 (sic). The total delay was 31 months and 3 days.

[63] Is there any delay attributable which should be deducted?

[64] In discussing what constitutes defence unavailability in **R. v. Spears**, 2017 NSPC 51, Derrick, Prov. Ct. J. (as she then was), stated at paragraphs 54 and 55:

> [54] Notwithstanding Mr. Casey's able submissions on the point, I think *Cody* puts the issue of defence unavailability to rest and establishes the issue as one of availability and not readiness. In other words, if the Court and the Crown are available to proceed and the Defence is not available, the *Jordan* clock stops. The Supreme Court of Canada has not concerned itself with the issue of why the Defence is unavailable.
>
> [55] I place reliance on the Supreme Court's statement in *Cody* that '…where the court and Crown are ready to proceed but the defence is not, the resulting delay should also be deducted.' (para. 30) The Court cites *Jordan* in making this statement where the following was said: '… the defence will have 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.' (*Jordan, para. 64, emphasis added)*

[65] The **Jordan** framework has changed the way s. 11(b) delay applications proceed. A sharp presumptive ceiling regime has been established. If the Court and the Crown are ready to proceed, but the Defence is not, the period of delay from that unavailability will be attributed to the Defence.

[66] On September 28, 2016, counsel appeared in Provincial Court to schedule continuation of the preliminary inquiry. The date of November 17, 2016 was offered. Defence counsel was not available. After November 17, the next full days available were in January 2017. The Defence counsel was available January 10, 2017 and the continuation was scheduled for that date. However there is nothing in the record to show that the Crown was available on November 17, 2016.

[67] The following are periods of Defence delay:

[68] May 16, 2017 to June 2, 2017, a period of 17 days. The parties attended Crownside on May 4, 2017 to set dates for a pre-trial conference and a return to Crownside. Prior to this matter being addressed, another case was offered a pre-trial conference on May 16, 2017. The Defence counsel in the other case was not available. The Crown counsel in the other case was available and is also the Crown counsel in the Boyer case. When the Boyer case was called, Defence counsel stated he was not available until June 2, 2017, for the pre-trial conference. The pre-trial conference was scheduled for June 2, 2017. A return to Crownside was offered for June 8, 2017, but Defence counsel was not available, so the return to Crownside was scheduled for June 15, 2017.

[69] June 2, 2017 to July 7, 2017, a period of 31 days. Unfortunately, Defence counsel's sister died on May 31, 2017, and he was unable to attend the pre-trial conference scheduled for June 2, 2017. The attendance at Crownside on June 15, 2017, was used to reschedule the pre-trial conference. June 20, 2017 was offered, but Defence counsel was not available and the conference was held on July 7, 2017, with a return to Crownside on July 13, 2017.

[70] February 12, 2018 to March 26, 2018, a period of 42 days. On January 18, 2018, the Crown made disclosure of the contents of several cell phones which had been seized by the police on October 28, 2015, and had been analyzed. The Crown had received the analyses on January 18, 2017 (sic) and made disclosure the same day. The Crown stated they would not be relying on the telephone analyses. On January 22, 2018, the Crown provided Defence counsel with a large hard drive containing evidence from the cell phones.

[71] Defence counsel sought an adjournment to review the disclosure and the continuation of the trial was adjourned from January 23, 2018 to January 25, 2018 for a status check to determine if the trial could continue the following week.

[72] On January 25, 2018, Defence counsel confirmed he required additional time to review the late disclosure so the dates scheduled from January 25, 2018 to February 2, 2018 were lost. They were available for review of the disclosure. At the hearing on January 25, 2018, the Court was informed the Crown would be disclosing the contents of two telephones of a Mr. Oldford to Defence counsel and expected to make the disclosure on January 29, 2018.

[73] The Crown estimated that the trial would take another five to seven days and the Court offered February 5, 2018 to February 13, 2018. Crown was available, but Defence was counsel was not available. Defence counsel stated he doubted that he would be able to review the disclosure before February 5, 2018. The week of February 12, 2018 was offered, the Crown was available, but Defence counsel was not available. After discussion of other dates for which the Crown was available, Defence counsel was unable to confirm his availability as it would be contingent on contacting other clients and crown attorneys to determine if matters could be moved. Defence counsel stated he was prepared to try but could not

guarantee it would work. The continuation of the trial was scheduled for March 26, 27, 28, 29, April 3, 4 and 5, 2018.

[74] After deducting the delay which was caused by the Defence, which totals 94 days, the total delay in this case was 28 months.

[75] The total delay being below the presumptive ceiling of 30 months, the burden is on the Defence to show the delay is unreasonable.

[76] In describing what occurs when total delay is below the presumptive ceiling, the authors of the majority judgment in **Jordan**, stated at paragraphs 82 and 83:

> 82. A delay may be unreasonable even if it falls below the presumptive ceiling. If the total delay from the charge to the actual or anticipated end of trial (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) is less than 18 months for cases going to trial in the provincial court, or 30 months for cases going to trial in the superior court, then the defence bears the onus to show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; *and* (2) the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(b) application must fail.
>
> 83. We expect stays beneath the ceiling to be granted only in clear cases. As we have said, in setting the ceiling, we factored in the tolerance for reasonable institutional delay established in *Morin*, as well as the inherent needs and the increased complexity of most cases.

[77] In this case, the Defence took steps to reduce the time needed for trial, such as agreeing to certain facts to reduce the number of witnesses, agreeing to the admission of certain documents, including photographs and flight records without the need of calling witnesses to prove it. The Defence took meaningful steps to expedite the proceedings.

[78] The Defence must show the time the case took markedly exceeded the reasonable time requirements. This case involved an alleged interprovincial conspiracy with wiretaps and surveillance in British Columbia and Nova Scotia. It is a case of moderate complexity. At the preliminary inquiry, some of the witnesses and Mr. Boyer appeared by videolink from British Columbia, which reduced available court time because of the time difference between Nova Scotia and British Columbia.

[79] Counsel, when scheduling the trial, greatly underestimated the time required - stating 10 days were required, when in fact, the trial took 19 days.

[80] Adopting a bird's-eye view of the case as I am instructed to do, (**Jordan**, paragraph 91), and considering the nature and complexity of the case, I find the case did not markedly exceed the reasonable time requirements of the case.

[81] Mr. Boyer, not having established the case took markedly longer than it reasonably should have, the application fails. I dismiss the application.

Coughlan, J.