Court of Queen's Bench of Alberta

Citation: R v Jeha, 2019 ABQB 44

Date: 20190121
Docket: 160537627Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Zaid Mohamed Jeha and Ibrahim Said Borhot

Accused

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s. 11(b) *Charter Voir Dire* Decision
of the
Honourable Mr. Justice D.A. Labrenz

Introduction

[1] The accused, Zaid Mohamed Jeha and Ibrahim Said Borhot apply to this Court for a stay of proceedings pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1082, c. 11* [*"Charter"*]. Both accused allege a violation of their right to be tried within a reasonable time under s. 11(b) of the *Charter.*

Background – Mr. Borhot

[2] The two accused, amongst several others, were the targets of a joint forces controlled drugs and substances investigation involving the Alberta Law Enforcement Response Team, the Royal Canadian Mounted Police, Calgary Police Service, as well as the Canada Border Service Agency. Broadly speaking, the investigation commenced in approximately May of 2015 and concluded in March of 2016.

[3] Mr. Borhot was originally arrested on January 11, 2016 and was initially charged with a number of *Criminal Code* and *Controlled Drug and Substances Act* offences on January 12, 2016. Mr. Borhot asks this Court to direct a stay of proceedings in relation to a number of criminal offences, including allegations that he conspired to traffic in controlled substances, contributed to the trafficking activities of a criminal organization, trafficked in controlled substances, and multiple offences relating to a handgun as a restricted firearm. The full chronology since Mr. Borhot's arrest reveals that Mr. Borhot faced additional charges as additional Informations were sworn by the Crown, and at other times replacement Informations consolidated the charges against Mr. Borhot. Eventually, one of the replacement Informations joined Mr. Borhot with Mr. Jeha, Mr. Jackson (now deceased), and Mrs. Chamseddine. Although counsel did not provide this Court with copies of the Provincial Court Informations and replacement Informations, it is evident from the transcriptions of the various Provincial Court appearances that the replacement Information charging Mr. Borhot jointly with the three other co-accused was before the Provincial Court as early as May 6, 2016.

[4] Mr. Borhot's trial is presently set to be heard in this Court from February 11, 2019 to March 1, 2019. The overall delay from when the Information was sworn on January 12, 2016 to the conclusion of his trial is 37 months and 21 days. As this delay exceeds the 30-month presumptive ceiling established by the Supreme Court of Canada in ***R v Jordan,*** 2016 SCC 27, this Court presumptively concludes that Mr. Borhot's right to be tried within a reasonable time under s. 11(b) of the *Charter* has been violated, subject to the Court determining that the net overall delay is under the 30 month presumptive ceiling because of defence waiver or defence delay.

Background – Mr. Jeha

[5] Mr. Jeha was initially arrested and charged on March 4, 2016 with a number of *Criminal Code* and *Controlled Drug and Substances Act* offences. He asks this Court to direct a stay of proceedings in relation to a number of criminal offences, including conspiracy to traffic in controlled drugs and substances, trafficking in controlled substances, contributing to the trafficking activities of a criminal organization, and multiple offences involving a handgun as a restricted firearm. As already noted, Mr. Jeha was joined with Mr. Borhot and two other accused on joint Information as early as May 6, 2016. At a subsequent Provincial Court appearance on December 7, 2017, the Crown withdrew charges against Mr. Jackson who had passed away in November of 2017, and at the same time stayed the offences faced by Mrs. Chamseddine. This left only Mr. Borhot and Mr. Jeha as accused before this Court. The overall time between the initiation of charges against Mr. Jeha and the anticipated end of his trial on March 1, 2019, is 35 months and 26 days, which is, once again, above the 30 month presumptive ceiling established in ***Jordan.***

The Chronology of the Proceedings

[6] The chronology of the proceedings against both accused is as follows:

- January 12, 2016 - initial charges are laid against Mr. Borhot.
- January 20 and January 24, 2016 - Mr. Borhot makes his first appearances with the assistance of defence counsel, Mr. J. Lutz.
- February 3, 2016 - Mr. Borhot speaks to judicial interim release with the assistance of Mr. Lutz and is detained on secondary grounds. The matter is adjourned to February 22, 2016 for Mr. Borhot's election. A series of adjournments occur until Mr. Borhot is joined with the three other co-accused on May 6, 2016.
- March 4, 2016 – Mr. Jeha is arrested and charged.
- March 7, 2016 – Mr. Jeha makes his first appearance in court.
- March 11, 2016 – Mr. Hersh Wolch, Q.C. is retained and appears on behalf Mr. Jeha. The matter is adjourned to March 16, 2016 for review of the bail disclosure package and to discuss the possibility of a consent release order. A number of adjournments follow.
- March 22 to April 5, 2016 – Mr. Jeha's judicial interim release hearing proceeds in stages until he is released on April 5, 2016.
- May 6, 2016 - Mr. Borhot, Mr. Jeha, Mr. Jackson and Mrs. Chamseddine are joined on the same Information.
- May 11, 2016 – the first substantial disclosure is provided to Mr. Wolch, Q.C. in relation to Mr. Jeha.
- June 3, 2016 - partial Crown disclosure is provided to Mr. Lutz.
- July 8, 2016 - Mr. Lutz on behalf of Mr. Borhot requests further adjournments to review disclosure, and further disclosure was promised. The Supreme Court of Canada releases its decision in ***R v Jordan***.
- July 15 and July 27, 2016 - Additional disclosure is provided, including a disc containing judicial authorizations and proposed judicial summaries, along with a flash drive containing the second significant disclosure release.
- August 24, 2016 - the matter is further adjourned in order that the defence can review an undertaking that the Crown requested to be signed before the provision of further Crown disclosure.
- September 23, 2016 - the Provincial Court is advised by the Crown that "massive" disclosure has been provided including Part VI wiretap evidence, and the matter is further adjourned to review the disclosure, and for the four defence counsel to discuss further steps. The Crown indicates that elections can be made and dates set, but the matter was further adjourned.

- October 7, 2016 - Mr. Lutz is present on behalf of Mr. Borhot, and is prepared to elect and set dates. Counsel for Mrs. Chamseddine is not prepared to set dates, and the matter is further adjourned. Mr. Wolch, Q.C. agrees to the adjournment.
- October 17, 2016 - the Crown repeats that it is ready to set dates, but an adjournment was granted to October 31, 2016 at the request of Mr. Borhot, as Mr. Lutz's agent indicated that there was likelihood that his retainer would not be fulfilled.
- October 31, 2016 - Mr. Lutz applies for, and is given, leave to withdraw as counsel of record. Mr. Jeha elected trial by judge alone and requested a preliminary inquiry date. The Provincial Court hears that counsel for Mr. Jeha, Mr. Wolch, Q.C. was available for a four week preliminary inquiry commencing October 12, 2017, but the Crown was not available. The Crown advises that it is available November 16 – December 18, 2017, but Mr. Wolch, Q.C. is not available. The Crown advises that it would endeavor to use s. 540(7) of the *Criminal Code* as much as it could, and would endeavour to have the s. 450(7) *Criminal Code* notice completed by the pre-preliminary hearing conference of February 2, 2017 in order to possibly shorten the length of the preliminary inquiry. The Crown indicates that it hoped to shorten the preliminary inquiry in order that it might get an earlier date. **The dates for the preliminary inquiry were fixed from March 12 to April 10, 2018.**
- December 9, 2016 – a flash drive of additional disclosure is provided.
- February 2, 2017 – the Crown indicates at the pre-preliminary inquiry hearing conference that it is exploring the possibility of a Direct Indictment and requests the hearing be adjourned to May 25, 2017. Mr. Borhot appears on his own and indicates that he is working on obtaining new counsel, and hopes that he would have counsel retained by May.
- February 9, 2017 – one disc of additional disclosure is provided, entitled Release 4.
- March 9, 2017 – a further disc of disclosure is provided containing numerous Tech Crime Reports.
- May 25, 2017 – the Crown again seeks an adjournment of the pre-preliminary hearing conference to September 7, 2017, as it continues to consider the use of a Direct Indictment. Mr. Borhot remains without legal counsel, but anticipates he would have a lawyer shortly. He is directed to return on June 22, 2017.
- June 20, 2017 – two discs of additional disclosure are provided, entitled Release 5 & 6.
- June 22, 2017 – Mr. Borhot appears without legal counsel. He asks for two more weeks to get counsel.

- June 23 & 28, 2017 – two more discs of disclosure are provided.
- July 14, 2017 – one disc of disclosure is provided, entitled Release 10.
- July 17, 2017 - Mr. Hersh Wolch, Q.C. passes away.
- July 27, 2017 – Mr. Borhot appears without legal counsel and his matters were adjourned further for him to obtain legal counsel.
- August 10, 2017 – Mr. Borhot does not have legal counsel, but indicates that he would have legal counsel by the time of the pre-preliminary hearing conference.
- August 17, 2017 – one disc of additional disclosure is provided, containing source binders.
- August 21, 2017 – one disc of additional disclosure is provided, containing call transcripts and surveillance notes.
- August 30, 2017 – two discs of additional disclosure, entitled Release 9 and Release 11, are provided.
- September 1 & 6, 2017 – discs of additional disclosure are provided.
- September 7, 2017 – at the pre-preliminary hearing conference, Mr. Gavin Wolch comes on the record, and the Crown indicates that the Direct Indictment is not forthcoming. The Crown suggest that it will be filing notice under s. 540(7) of the *Criminal Code*, and the Crown suggests a date in early December to prepare and perfect the s. 540(7) notice. Mr. Hepner, Q.C. appears by agent as new counsel for Mr. Borhot, and the Crown advises it will forward the disclosure to counsel to "get up to speed".
- September 12 and October 24, 2017 – disclosure is forwarded to Mr. Hepner, Q.C.
- September 22, 2017 – disc of additional disclosure is provided.
- October 19 and 30, 2017 – discs of additional disclosure are provided.
- November 10, 2017 – disc of disclosure is provided.
- December 7, 2017 – the charges are withdrawn against Mr. Jackson as he has passed away. The charges against Mrs. Chamseddine are stayed by the Crown. The Crown has completed a draft of the s. 540(7) *Criminal Code* notice, but wants to revise it to remove the evidence it would have led against Mr. Jackson and Mrs. Chamseddine. The Crown anticipates completing this task, and giving the defence wiretap notice under s.189(5) of the *Criminal Code*, within the next couple of weeks.
- December 8, 2017 – the Crown serves counsel for Mr. Jeha and Mr. Borhot with wiretap notice under s. 189(5) of the *Criminal Code.*

- December 15, 2017 - additional disclosure is provided, including an RCMP lab report, and three police will-say statements.
- January 19, 2018 – the Crown serves counsel for Mr. Jeha and Mr. Borhot with the s. 540(7) *Criminal Code* notice.
- February 1, 2018 – the Crown serves a supplementary s. 540(7) *Criminal Code* notice requesting counsel to advise if they would be making any applications under s. 540(9) of the *Criminal Code* to cross-examine witnesses.
- February 9, 2018 – the Court is advised that the parties are discussing changing the preliminary hearing into a trial.
- February 15, 2018 – the Court is advised that Mr. Jeha and Mr. Borhot will be waiving the preliminary hearing and consenting to a committal on a number of counts. The Crown withdrew counts against both accused to further streamline the proceedings. The Court is told that there had been discussions about converting the time for the preliminary hearing into a trial, but that the Crown would not consent. The Crown corrected that assertion indicating that legal counsel for Mr. Borhot indicated concern about whether the necessary notice alleging violations under the *Charter* could be perfected in such a short period of time. Counsel for Mr. Borhot did not take exception with that correction, but asserted that it was the late s. 540(7) *Criminal Code* notice that created the problem, and that it was only speculation as to whether the Crown could be prepared for a trial, or whether the defence could prepare and serve a *Charter* notice.
- March 16, 2018 – first appearance in the Court of Queen's Bench. The Crown sought a three week trial and indicated that the earliest availability was April 2019, but that the Associate Chief Justice had directed that the matter could be set as an enhanced protocol for cases in ***Jordan*** jeopardy in October 2018. The Crown advises it was available from October 22 – November 29, 2018, which were dates available to the Court. Mr. Hepner, Q.C., acting for Mr. Jeha, advises that he was not available due to another trial. His co-counsel was not available either. Nor, was Mr. Wolch available to assist Mr. Jeha during those dates. **The dates of February 11, 2019 to March 1, 2019 were settled upon and those are the dates presently set for trial.**

The Position of the Parties

[7] In the written submissions of Mr. Jeha and Mr. Borhot, filed in support of this application, each of the two accused asserted that 18 months should be the applicable ***Jordan*** ceiling because both made the suggestion that the Crown refused to consent under s. 561(1)(a) of the *Criminal Code* to a re-election to Provincial Court. The accused suggest that the preliminary inquiry dates of March 12 to April 10, 2018 should have been used for the trial of this matter in Provincial Court. In effect, both accused asserted that they made a concrete suggestion that would have served to minimize the delay, although both concede that any discussions about re-

election with the Crown followed service of the s. 540(7) notice by the Crown in January 19, 2018 and the supplemental notice on February 1, 2018. There is some evidence of this assertion, as the Provincial Court was told on February 9, 2018 that the parties were discussing transforming the presently scheduled preliminary inquiry into a trial. It is on this basis that both accused contend that the 18 month ***Jordan*** presumptive ceiling should apply.

[8] I need not decide the applicability of the 18 month presumptive ceiling on the facts of this case. The Crown steadfastly maintains that it did not refuse the defence overtures for a re-election to Provincial Court trial, but suggests instead that counsel for the accused ultimately decided not to re-elect due to concerns about their ability to provide intended *Charter* notices in a timely fashion.

[9] In oral argument before this Court, counsel for Mr. Jeha and Mr. Borhot retreated from the unqualified assertion made in their written materials. Neither counsel repeated the unqualified assertion that the Crown refused re-election, despite being questioned on this point by the Court. The transcript from the February 18, 2018 appearance in Provincial Court supports the Crown's position that it did not refuse to consent to a re-election. The Court concludes that neither accused has satisfied the onus on a *Charter* claimant to prove the factual underpinnings of this particular argument on a balance of probabilities.

Mr. Jeha's Position

[10] Counsel for Mr. Jeha highlights in his argument that the time from charge to the conclusion of his trial totals 35 months and 26 days, and suggests that his charges should be stayed because the ***Jordan*** 30 month presumptive ceiling for a two-stage proceeding has been exceeded in any event. Mr. Jeha argues that he has not waived any of the delay, either explicitly or implicitly, and makes the further point that delays of the co-accused cannot be attributed to him, in the sense that he cannot be held hostage by any suggestion of the dilatoriness of his co-accused.

[11] Mr. Jeha argues forcibly that the Crown was markedly inefficient in its prosecution of him. He stresses that the Crown set a late preliminary inquiry date, and failed to take up the suggestion of the Provincial Court that the preliminary inquiry could take place in stages, with an expectation that the Provincial Court would have earlier availability should the preliminary hearing be held in multiple shorter proceedings.

[12] Mr. Jeha was also critical about the pace of disclosure, and the slowness of the production of the s. 540(7) *Criminal Code* notice by Crown. Mr. Jeha suggests that the Crown would not have needed such a lengthy preliminary inquiry if it had completed these steps sooner, and that what occurred was "too little, too late". Mr. Jeha suggests that the Crown should be responsible for what he suggests was the lack of a concrete plan to address the Crown's disclosure obligations and the overall delay.

[13] Mr. Jeha further suggests that he is not responsible for any of the delays encountered, and that the Crown has not established any exceptional circumstances, such as may arise from the case complexity, that would permit the Court to deny his application for a stay.

[14] Mr. Jeha took issue with the Crown's argument that the net delay to the conclusion of his trial is under the 30 month presumptive ceiling on the basis that there are two periods that must be deducted from the total delays as attributed to one or both of the accused, due to their

unavailability for suggested earlier preliminary inquiry and trial dates. Mr. Jeha argues, that ***R v Godin,*** 2009 SCC 26 at para 23, supports his position that scheduling requires only his reasonable availability and reasonable cooperation; but it does not, for s. 11(b) purposes, require defence counsel to hold themselves in a state of perpetual availability.

Mr. Borhot's position

[15] Mr. Borhot agreed with Mr. Jeha's arguments generally, and more specifically agreed that defence counsel cannot hold themselves in a state of perpetual availability. Mr. Borhot further pointed out that should this Court decide to deduct the 3 months and 20 days between the earliest dates for trial available to the Crown and the Court, the net delay of 34 months, 1 day still exceeds the 30 month presumptive ceiling.

[16] Mr. Borhot contested the Crown argument that an exceptional circumstance arose because Mr. Borhot was without counsel from October 17, 2016 to September 7, 2017. Mr. Borhot observes that at the time Mr. Lutz was given leave to withdraw as counsel of record, the preliminary inquiry dates had already been set. As such, Mr. Borhot says that he did nothing to prevent the Crown from seeking to advance its case in a timelier fashion, nor did the period of his self-representation prevent the Crown from presenting the s. 540(7) *Criminal Code* notice in a timelier manner. In short, Mr. Borhot argues that nothing he did or did not do contributed to the overall delay.

[17] Mr. Borhot also took issue with the Crown assertion that an exceptional circumstance arose because of the complexity of the prosecution against him, suggesting instead that the prosecution against him is not particularly complex, at least for experienced legal counsel. Mr. Borhot suggests that the Crown has failed to demonstrate a link between the alleged complexity and the delay, and argues that in the absence of such a link, the Crown will not be able to justify exceeding the ceiling on the basis of complexity.

Analysis

[18] In July of 2016, in a 5:4 ruling, the Supreme Court of Canada held in ***R v Jordan,*** that a change of direction was required to ensure a more efficient criminal justice system. It is fair to say that the decision of the Supreme Court did not simply involve an evolutionary continuation of its prior s. 11(b) jurisprudence from ***R v Askov,*** [1990] 2 SCR 1199 and ***R v Morin,*** [1992] 1 SCR 771, but an entirely new framework for assessing delay. The new framework establishes a "presumptive ceiling" on the time that it should take a case to get to trial. The presumptive ceiling is 18 months for cases going to trial in a provincial court and 30 months for cases going to trial in a superior court or cases going to trial in a provincial court after a preliminary inquiry. The minority decision in ***Jordan,*** by contrast, held that the creation of a fixed or presumptive ceiling is a task better left to Parliament, and cautioned that reasonableness cannot be captured by a number; the *Charter* protects the right to trial in a reasonable time, but not the right to trial under a court-imposed ceiling.

[19] Although the Supreme Court instructed judges to apply the new framework contextually for existing cases within the system, as the new framework came unannounced, the Crown declined any reliance upon the transitional exception as discussed by the Supreme Court in ***Jordan,*** and later in ***R v Cody,*** 2017 SCC 31. This is presumably because the Crown felt that the release of ***Jordan*** in July of 2016 gave the Crown enough time to adjust and adapt to the changes

demanded by the new framework. At the time of the release of ***Jordan,*** Mr. Borhot had been under charge for approximately six months, and Mr. Jeha for approximately four months. Either way, as the Crown has disavowed any reliance on the transitional exception, this Court will consider it no further.

[20] The calculation of the net delay envisioned by the new ***Jordan*** framework, and the analytical approach to the overall delay has usefully and succinctly been summarized by the Ontario Court of Appeal in ***R v Coulter,*** 2016 ONCA 704 at paras 34-41. The Alberta Court of Appeal endorsed the analysis set out in ***Coulter,*** as helpful, in ***R v Mamouni,*** 2017 ABCA 347 at para 57 (leave to appeal to the SCC, denied September 27, 2018: [2018] SCCA No 176) The Ontario Court of appeal summarized the ***Jordan*** approach to delay as follows:

- Calculate the **total delay**, which is the period from the charge to the actual and anticipated end of trial (***Jordan,*** at para 47).
- Subtract defence delay from the total delay, which results in the **"Net Delay"** (***Jordan,*** at para 66).
- Compare the Net Delay to the presumptive ceiling (***Jordan***, at para 66).
- If the Net Delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of **exceptional circumstances** (***Jordan,*** para 47). If it cannot rebut the presumption, a stay will follow (***Jordan***, para 47). In general, exceptional circumstances fall into two categories: **discrete events** and **particularly complex cases** (***Jordan,*** para 71).
- Subtract delay caused by discrete events from the Net Delay (leaving the **"Remaining Delay"**) for the purpose of determining whether the presumptive ceiling has been reached (***Jordan,*** at para 80).
- If the **Remaining Delay falls below the presumptive ceiling,** the onus is on the defence to show that the delay is unreasonable (***Jordan,*** para 48).
- The new framework, including the presumptive ceiling, applies to cases already in the system when ***Jordan*** was released (the "**Transitional Cases**") (***Jordan,*** para 96). [emphasis in original]

[21] The Crown argues, that when calculating net delay, Mr. Jeha is responsible for the defence delay between November 16, 2017, when the Crown and the Court were ready to proceed to the preliminary inquiry and Mr. Jeha was not, and the scheduled date for preliminary inquiry of March 12, 2018. This is a period of 3 months, 27 days.

[22] Second, the Crown argues that Mr. Jeha is responsible for the delay between October 22, 2018 when the Crown and the Court were first ready for trial, and Mr. Jeha's first availability for trial on February 11, 2019. This delay, attributable to Mr. Jeha's calendar, is a period of 3 months, 20 days.

[23] The Crown points out that if you subtract these two time periods attributable to the unavailability of defence counsel, totalling 7 months, 16 days, the resulting net delay of 28 months, 10 days is under the 30 month presumptive ceiling imposed by ***Jordan***.

[24] Mr. Jeha disagrees and argues that nothing in Jordan requires defence counsel to hold themselves in a state of perpetual availability, and relies more specifically on ***R v Godin*** at para 23, and Cromwell J.'s oft quoted statement that, "scheduling requires reasonable availability and reasonable cooperation; it does not for s.11(b) purposes, require defence counsel to hold themselves in a state of perpetual availability".

[25] For the reasons that follow, this Court does not agree with Mr. Jeha's argument on this point.

[26] While the Court acknowledges that Mr. Jeha was available for a four week preliminary inquiry commencing on October 12, 2017 and the Crown was not, the proper approach to calculating the overall net delay would in my view be to add one month and one day to the net delay calculation, to properly account for the difference between Mr. Jeha's first availability for the preliminary hearing, and the Crown and the Court's availability on November 16, 2017.

[27] To be clear, I would add one month and one day to the net delay calculation to reflect the fact that Mr. Jeha was available for the preliminary inquiry when the Crown and the Court were not, and that period where Mr. Jeha was available cannot be properly viewed as defence delay in the circumstances.

[28] The addition of one month and one day to the net delay calculation results in a net delay of 29 months, 10 days, which is under the 30 month presumptive ceiling contemplated by the majority in ***Jordan.***

[29] The Court finds comfort in its approach by reviewing the majority's approach to a similar period of delay in ***Jordan.***

[30] While the facts are only briefly summarized by the majority in ***Jordan***, it is clear that a majority of the Court did not regard as defence delay the offer by the Crown of an earlier trial date in the absence of any evidence that the Crown and the court would have been able to accommodate the offer of an earlier date (***Jordan,*** at para 122). Similarly, the majority did not view the unavailability of defence counsel as defence delay in circumstances where the preliminary inquiry did not finish in time due to underestimation of the time needed for the preliminary inquiry by both the Crown and the defence. The majority found both parties to be equally culpable in this regard, and accordingly the difficulties occasioned by the defence calendar were not viewed as defence caused delay (***Jordan,*** paras 121-122).

[31] However, the majority did hold the defence responsible for the delay resulting from the adjournment of the preliminary inquiry, which was necessitated by defence counsel's calendar unavailability for closing submissions on the last day scheduled for the preliminary inquiry. The majority, however, attributed only a portion of the delay to defence, given the evidence that Crown counsel was unavailable for the first available continuation date (***Jordan***, para 123).

[32] The approach of the majority in ***Jordan*** to defence delay is consistent with the plain word meaning of the majority's decision, a decision which describes defence delay as consisting of a variety of conduct that either directly causes the delay or reveals a deliberate and calculated tactic to delay the trial such as frivolous applications and requests. More directly, the majority plainly asserts that when the court and the Crown are ready to proceed, but the defence is not, the defence will have directly caused the delay, unless the court and the Crown are unavailable (***Jordan,*** at para 64).

[33] I see nothing in the majority's approach to defence delay in ***Jordan,*** which would suggest that the defence delay is excused by the busy calendar of defence counsel. A plain ready of the majority's decision, and the approach the majority took to the periods of delay in ***Jordan*** would suggest the contrary.

[34] The Ontario Court of Appeal in ***R v Coulter,*** at paras 73-77 similarly, found that the defence was responsible for directly causing the delay, firstly, when the defence was not available for a pre-trial conference, and secondly, when not available for the trial, both in circumstances where the Court and the Crown were ready to proceed.

[35] More recently, the Ontario Court of Appeal in ***R v Albinowski,*** 2018 ONCA 1084, considered whether or not a trial judge miscategorised defence delay as institutional delay in circumstances where defence calendar unavailability resulted in a delay in scheduling three judicial pre-trials prior to the preliminary inquiry, and a delay in scheduling the three-week preliminary inquiry. The trial judge was of the view that the delays encountered were not attributable to the defence because of the statements made in ***Godin*** that defence counsel need not hold themselves in perpetual availability, and are therefore not required to take the first date available to the Crown and the defence.

[36] The Ontario Court of Appeal in response to the Crown's argument advanced on appeal suggesting that the ***Jordan*** analytical framework has overtaken the ***Godin*** principles, agreed that the trial judge erred in characterizing defence delay as institutional delay, and found that the reliance on ***Godin*** was misplaced (***Albinowski,*** at para 30). The Court of Appeal distinguished the facts considered by the Supreme Court of Canada in ***Godin,*** by noting that the Crown in ***Godin*** was responsible for the need to reschedule the preliminary inquiry date, and had effectively ignored defence efforts to expedite the proceedings (***Albinowski,*** at para 32).

[37] The Ontario Court of Appeal further observed in para 33, referring to ***Jordan*** at para 65, that unavailability of defence counsel due to other professional commitments, cannot be properly considered "defence actions legitimately taken to respond to the charges", such as "preparation time" and "defence applications and requests that are not frivolous" The Ontario Court of Appeal stated as follows:

> Thus, as ***Jordan*** further directs, at para. 64, their unavailability, when the Crown and the court were available, fell squarely within the category of delay that counts against the defence: *As another example, 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.*

[38] I agree with the approach taken by the Ontario Court of Appeal and agree that in circumstances where the Crown has not contributed to the delay in scheduling a matter, or is responsible for the re-scheduling of a matter, then defence calendar unavailability is properly categorized as defence delay under the ***Jordan*** analytical framework.

[39] I find further support for this conclusion in the Alberta Court of Appeal decision in ***R v Mamouni,*** which suggests that general defence unavailability, where the Crown and the Court are ready to proceed, constitutes defence delay. The majority in ***Mamouni*** considered the s. 11(b) implications of the unavailability of defence counsel's calendar as follows, at paras 64-66:

> Significantly, the trial judge offered to sit in the summer of 2013 to finish this matter. He said this in his 2014 reasons at para 84: "This Court even said it would

> make itself available over the summer of 2013 to complete this matter. Unfortunately, counsels' schedules did not permit this." Since the Crown counsel asserts, without dispute, that it would have also have accommodated such a special effort, the situation, says the Crown, falls into the category of defence delay because, as in *Jordan* at paras 64 and 65, consistent with the bright line philosophy of the *Jordan/Cody* approach, "the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not."
>
> Based on this reasoning, plus having regard to the exceptional circumstance of the family necessity for the trial judge, the Crown's calculation that the net delay falls under 30 months is persuasive, and the position should then shift under the *Jordan/Cody* analysis to the defence to show unreasonable delay despite no breach of the presumptive guideline. This conclusion the defence has failed to justify. There is also no indication of prejudice to the appellant apart, presumably, from inferred prejudice under the *Morin* analysis. The efforts of the defence to move the case along are, on the record before this Court, unenergetic and unpressing. To make a motion under s 11(b) is not itself a persistent effort to move the case along. In the end, and with due regard to the factors in this part of the analysis set out in *Coulter*, above, I am not persuaded that the delay was unreasonable on the facts.
>
> Even assuming that the full amount of the 10 months and 2 days should not be treated as defence delay, it is plain that at least some significant portion of it should be…

[40] I also agree with the approach taken by Michalyshyn, J., in ***R v Mullen,*** 2018 ABQB 831 at paras 21- 46, with respect to the general approach to be taken towards defence delay due to the unavailability of counsel, and more particularly that ***Jordan/Cody*** established and meant to establish a nearly bright line rule ascribing any unavailability of defence counsel as defence delay.

[41] To the extent that other courts have suggested that the approach to defence delay is other than a bright line rule, this Court respectfully does not agree. ***Jordan*** does not permit a court to excuse delay due to the unavailability of defence counsel when there is evidence the Crown and the Court are otherwise prepared to proceed.

[42] To approach the unavailability of defence counsel as anything other than a bright line rule, would have the ironic result of increasing litigation delay, a result that was not endorsed or contemplated by the majority of the Supreme Court of Canada in ***Jordan.*** A legal absurdity would arise if ***Jordan*** was viewed as endorsing an approach that would see the presumptive ceilings exceeded for those accused who could find legal counsel with limited or no availability in their litigation calendars, while at the same time permitting a successful s.11 (b) *Charter* application based upon the unavailability of counsel of choice. I agree, in this regard, with Watchuk J., in ***R v Wu,*** 2017 BCSC 2373 at para 64, when he stated, "...an accused cannot use counsel's unavailability for trial as both a sword for bring a delay application, and a shield against deductions of defence delay or exceptional circumstances in the application."

[43] Having determined that Mr. Jeha's net delay is under the 30 month presumptive ceiling as established in ***Jordan,*** it was open to Mr. Jeha to argue unreasonable delay before the ceiling had been reached. Mr. Jeha chose not to so, and his choice on the record before me is

understandable. Mr. Jeha has clearly not met his burden to demonstrate unreasonable delay in circumstances were the presumptive 30 month ceiling has not been exceeded.

[44] In particular, Mr. Jeha has not demonstrated that he took meaningful steps to expedite the proceedings, nor has he demonstrated that his prosecution took markedly longer than it reasonably should have. This is particularly so in these circumstances as I conclude that this is a particularly complex case, as will more fully considered when examining Mr. Borhot's s.11(b) complaints as discussed below.

[45] In conclusion, I find that Mr. Jeha has not met his onus to demonstrate any breach of his s. 11(b) *Charter* right to a speedy trial, and his application is therefore denied.

[46] For the reasons already provided, the Court approaches the calculation of Mr. Borhot's net delay in the same manner as Mr. Jeha, that is, by subtracting his counsel's unavailability for the first available trial date (when the Court and the Crown were ready to proceed) from the commencement of the scheduled trial date.

[47] Mr. Borhot's situation, however, differs markedly from that of Mr. Jeha because the net delay of 34 months and 1 day still exceeds the presumptive ceiling established by ***Jordan.*** Therefore, unless the Court determines that Mr. Borhot waived further periods of delay, was responsible for other delays, or finds the existence of exceptional circumstances, Mr. Borhot's charges should be stayed by reason of the violation of his right to trial within a reasonable period of time under s. 11(b) of the *Charter.*

[48] The Crown responded by arguing the existence of both a discrete event, based upon the period of time when Mr. Borhot was without legal counsel, and further argued that the prosecution delay was due to the particular complexity of the prosecution against both accused.

[49] The Crown suggests as a discrete event the period that Mr. Borhot was self-represented, and argues that it was hamstrung from moving the prosecution forward during that period of just over ten months when Mr. Borhot represented himself. Mr. Borhot was self-represented from when his previous counsel withdrew from the record on October 31, 2016, until Mr. Hepner, Q.C., became counsel of record on September 7, 2017.

[50] The Court cannot agree with this argument.

[51] The Crown's argument as to a discrete event, said to be occasioned by Mr. Borhot's self-represented status, is speculative at best. Although the Crown argues that it was hampered in bringing the preliminary inquiry forward because Mr. Borhot did not have a lawyer and wanted one, the Court notes that the Crown never made any attempt to do so. Nor did the Crown ever suggest on the record that the Crown had a plan to do so. I find, in the circumstances, that the explanation proffered by the Crown is nothing more than an after-the-fact justification.

[52] On the date Mr. Borhot became self-represented, the preliminary inquiry was concurrently scheduled for March 12, 2018. Mr. Borhot's decision to seek new legal counsel did not contribute in any fashion to the lengthy delay between that appearance on October 31, 2016 and the March 12, 2018 preliminary inquiry date. Mr. Borhot did not seek to delay the scheduling of the preliminary inquiry until he had retained new legal counsel. Had Mr. Borhot sought to delay the setting of a preliminary inquiry date until he had retained new legal counsel, that decision might well have breathed life into the Crown's argument of a discrete event.

[53] In reality, there is nothing in the chronology of proceedings or the evidence to suggest had Mr. Borhot remained represented by legal counsel, the Crown would have succeeded in obtaining admissions that would have permitted the shortening of the preliminary inquiry. Nor did Mr. Borhot's self-represented status prevent the Crown from engaging Mr. Borhot directly to negotiate any steps or admissions that the Crown felt might reasonably be required to expedite matters. Although unfortunate, self-represented criminal accused are a frequent occurrence in the criminal courts of this country, and the Crown's argument that it can be "excused" by the unrepresented nature of an accused cannot be reconciled with its obligations under ***Jordan*** to facilitate timely justice for all accused regardless of whether or not they are represented by legal counsel**.**

[54] Even if Mr. Borhot's unrepresented status created litigation management difficulties for the Crown, rather than doing nothing, the Crown should have enlisted the management powers of the court to assist. In particular at the pre-preliminary conference hearings, the Crown could have sought the assistance of the Provincial Court Judge to broker discussions about admissions and any other measures the Crown thought might reasonably expedite the proceedings.

[55] Instead of seeking such assistance, the Crown announced that it was considering a Direct Indictment to respond to the obvious concern it had with respect to delay, and after deciding against the direct indictment, the Crown continued to pursue an s. 540(7) *Criminal Code* "paper" preliminary hearing. In answer to any further suggestion that Mr. Borhot's unrepresented status contributed to delay, the Court would note that the first s. 540(7) *Criminal Code* notice was not served until well after Mr. Borhot had retained Mr. Hepner, Q.C. as new legal counsel.

[56] The Court does accept, however, that qualitatively the expected overall net delay of 34 months 1 day until the end of Mr. Borhot's trial is fairly attributed to case complexity, and agrees with the Crown the nature of the issues and the evidence here required an inordinate amount of preparation time. In reaching this conclusion, the Court specifically recognizes that voluminous disclosure alone does qualify this case as complex: ***R v Cody,*** 2017 SCC 31 at paras 64-65.

[57] The prosecution of the accused is particularly complex because the nature of the evidence and the nature of the issues are such that an inordinate amount of trial or preparation time is required. (***Jordan,*** at para 77). The Court notes the complexities posed by both the wiretap evidence, and the nature of the charges involving criminal organization and conspiracy offences.

[58] In coming to this conclusion, I am well aware that the Supreme Court has said that a typical murder trial is not particular complex (***Jordan,*** at para 78). Instead, the proper threshold for any proper consideration of case complexity as an exceptional circumstance is deliberately high, and for that reason it will practically operate to extend the presumptive ceiling in relatively rare cases.

[59] I am also of the view that the Crown had a reasonable plan to deal with the complexity caused by the case, and that it has a measured and appropriate plan to deal with the voluminous criminal disclosure produced by this investigation.

[60] The Crown's use of the provisions found in s. 540(7) of the *Criminal Code* was in my view an appropriate response to the difficulties that the complexity of this prosecution spawned. Unfortunately, it was the complexity of the prosecution itself that led to the delays in the giving of the s. 540(7) notice. In this regard, I conclude that the Crown was hampered in perfecting its s. 540(7) notice sooner because of the extreme volume of materials, and the fact that disclosure was

accomplished in many stages given the vast amount of disclosure and the careful vetting required, especially with respect to confidential informant evidence.

[61] Additionally, I cannot conclude on the facts before me that the Crown would have hastened the progress of the charges against either Mr. Jeha or Mr. Borhot had it elected to sever one from the other. In coming to this conclusion, I do not attribute delay from one accused to another in addressing the issues: ***R v Gopie,*** 2017 ONCA 728. I say this because the simple act of severance would not in my view, on these facts, have operated to speed up the process of the Crown's notice under s. 540(7) of the *Criminal Code.* Nor, do I conclude in these circumstances, that this is an appropriate case for the Court to conclude that the valid policy reasons for preferring joint trials as has been succinctly pointed out by Fairburn, J., as she then was, in ***R v Ny,*** 2016 ONSC 8031 at paras 42 and 46 should be overridden by the Court. Although, the choice to charge both accused jointly does, at the same time, operate to increase case complexity.

[62] In coming to the conclusion that this prosecution is particularly complex, I consider the following hallmarks to be particularly indicative of complexity, especially when they coexist:

- Voluminous disclosure
- A large number of witnesses
- Significant requirements for expert evidence
- Charges covering a long period of time
- A large number of charges and pre-trial applications
- Novel or complicated legal issues, and
- A large number of significant issues in dispute (see ***Jordan***, at para 77).

[63] This prosecution displays the majority of these hallmarks. The indictment involves 32 charges emerging from an investigation into a large-scale drug trafficking conspiracy, firearms trafficking, and money laundering, undertaken on behalf of a criminal organization over a 10 month period. The conspiracy and the criminal organization charges in the context of a wiretap investigation raise particularly complicated legal and evidentiary issues, and absent admissions, the trial will involve the Crown calling 49 witnesses, including 5 experts.

[64] The affidavit evidence, sworn by a Crown paralegal in defence of this application, further highlights the case complexity as follows:

- Three successive Part VI wiretap authorizations involving 23 telephone lines and 3 locations where probes were utilized
- Twenty-one separate Judicial Authorizations
- Intelligence reports from the Canada Border Services Agency
- The 18 confidential informants used in the investigation required careful review and redacting to protect informer privilege
- Total disclosure amounts to 61 gigabytes, or the equivalent of 6,672,546 pages of information if it were all in a Microsoft Word file, and

- The Crown used internal auditing procedures to disseminate disclosure in a timely fashion, and tracked disclosure on a spreadsheet

[65] The complexity of the disclosure is best demonstrated by the defence response to the organization of the disclosure as was done by the Crown in providing notice under s. 540(7) of the *Criminal Code*. The defence response was to waive the preliminary inquiry. Under the circumstances, I infer from the defence waiver of the preliminary hearing that the extensive organization of the evidence by the Crown provided the defence with a comprehensive understanding of the Crown evidence, such that the defence did not feel it was necessary to apply to cross examine any of the prosecution witnesses. It was complexity that caused the Crown difficulty in completing the s.540 (7) notice sooner, and it was complexity that caused the defence difficulty in deciding not to waive the preliminary inquiry sooner.

[66] In my view, although the overall complexity of the prosecution cannot be used to deduct specific periods of delay (and I have not done so), a "link" has been established between the complexity of this prosecution and the overall delay: ***R v Klassen,*** 2018 ABCA 258 at paras 101-104.

[67] It is notable that the defence waited from October 31, 2016 when the preliminary inquiry was set, until February 18, 2018, to make a decision to waive the preliminary inquiry. Although occurring after the Crown's notice under s. 540(7), the Court observes that the defence did not make a single application to cross-examine any witness under s. 540(9) of the *Criminal Code*, nor did it suggest that any of the "paper" prosecution evidence could not be received at the preliminary inquiry as unreliable.

[68] The lateness of the decision to waive the preliminary and the absence of any application to cross-examine even a single Crown witness, raises two distinct possibilities.

[69] The first possibility, which the Court accepts as having occurred, is that the preliminary hearing was scheduled by defence because the proceedings were complex, and it was not until the Crown organized the evidence and gave its s. 540(7) *Criminal Code* notice, that the defence felt it had an appropriate appreciation of the Crown's proposed trial case. That is, the defence felt confident enough to waive the discovery process afforded by the preliminary hearing after the Crown had organized the disclosure, and no application to cross-examine a single witness under s. 540(9) of the *Criminal Code* was necessary. The nature of the evidence and the vastness of the disclosure necessarily took time for the Crown to organize into the s.540 (7) *Criminal Code* notice, and it took time beyond that which ***Jordan*** contemplated in the 30 month ceiling. This case is unusual in its particular complexity.

[70] As a second possibility, and assuming that the delay in waiving the preliminary hearing by the accused had nothing to do with case complexity, it could be argued the defence were simply waiting for the Crown to fulfill the procedural requirement of notice under s. 540(7) of the *Criminal Code,* before the defence would waive the preliminary inquiry and not seek to cross examine a single witness. If this were the case, and the Court does not so conclude, such defence conduct would be viewed as illegitimate in the sense of being markedly inefficient or markedly indifferent to the prosecution delay now complained of (***Cody,*** at paras 29-35). As the Supreme Court of Canada has pointed out, illegitimacy may result from adherence to practices which, although formerly were commonplace or merely tolerated, are no longer compatible with the right guaranteed by s. 11(b) of the *Charter* (***Cody***, at para 35).

[71] In conclusion, Mr. Borhot has not met his onus to demonstrate any breach of his s. 11(b) *Charter* right to a speedy trial, and his application is therefore denied. As I earlier concluded that Mr. Jeha had not met his onus either, both applications are dismissed.

Heard on the 21st day of December, 2018.
Dated at the City of Calgary, Alberta this 21st day of January, 2019.

D.A. Labrenz
J.C.Q.B.A.

Appearances:

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Alain Hepner, Q.C.
Ross Hepner
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