Court File No. 37310

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Newfoundland and Labrador)

B E T W E E N:

JAMES CODY

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

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ATTORNEY GENERAL OF ALBERTA,
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Interveners

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(Pursuant to Rules 37 and 55 of the *Rules of the Supreme Court of Canada)*

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PART I
OVERVIEW AND STATEMENT OF FACTS

1. In *Morin*, in order to dissuade courts from applying a rigid upper limit as the measure of the reasonableness of time to trial, this Court made clear that the factors as outlined in *Smith* were to be flexibly employed in determining whether time to trial was unreasonable. The approach to the question of reasonableness of delay was not to be "the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay."[1] In addition to the protection of individual rights of accused persons, the balancing exercise included regard for society's interest in enforcement of the law. Beyond attributing a cause to each portion of delay along the timeline of a prosecution, critical to the judicial balancing exercise was consideration of the seriousness of the alleged offence and whether any prejudice to the accused arose from the delay.

2. In the twenty-five years following the release of the *Morin* decision, a body of jurisprudence developed in which periods of delay were subtracted from the overall delay period to trial, characterized as "part of the inherent time requirements of the case" or "neutral" within the Section 11(b) calculus. In *Jordan*,[2] this Court held that parallel to these jurisprudential developments arose a "culture of complacency" in that attributing delay to various categories at the "back end" did nothing to encourage cooperation and efficient practice amongst the parties at the "front end". Consequently the new framework was provided, wherein delay is presumed to be unreasonable once fixed ceilings are reached. The seriousness of the offence and any actual or presumed prejudice to the accused were removed from consideration insofar as either had

[1] *Morin* at paras. 31; 50-53; 61-64
[2] 2016 SCC 220

previously been relied upon to justify lengthier delay.

3. In crafting the new framework, this Court was plainly mindful of the potential impact of the change, making specific reference to the fallout occasioned by the *Askov* decision. Acknowledging that "such swift and drastic consequences risk undermining the integrity of the administration of justice,"[3] it was held that for cases "still in the system" on the date of the release of the *Jordan* decision, consideration must be given to whether the matter would be subject to a transitional exception. Where a case has exceeded the presumptive ceiling, the exception "will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed".[4] In the instant case, the majority of the Court of Appeal of Newfoundland and Labrador properly held that the time before counsel for the Crown was ready for trial was neutral under the old framework and that the Crown had reasonably relied upon this characterization.

PART II
POINTS IN ISSUE

4. Ontario advances argument on the proper application of the *Jordan* framework to cases that were in the system before *Jordan'*s release, and are therefore potentially subject to the transitional exception. Ontario raises three points:

i. Prior to *Jordan*, trial readiness delays were treated as inherent neutral time;

ii. Assessment of whether the parties' reliance on the previous state of the law was reasonable under the new framework in *Jordan* is not to be assessed by reference

[3] *Jordan* at para. 92
[4] *Jordan* at para. 96

to the law as it stands today, but "on the law as it previously existed". Where the Crown can demonstrate that the law as it existed pre-*Jordan* would have characterized delay as neutral or otherwise attributable to the inherent time requirements of the case, the Crown's reliance on it could only have been reasonable. To hold otherwise is to judge the parties "against a standard of which they had no notice", which *Jordan* specifically prohibits;[5] and

iii. In cases above the *Jordan* ceiling, a stand-alone application of the *Morin* framework must be undertaken, without regard to the *Jordan* framework. To import aspects of the *Jordan* framework into the *Morin* analysis for transitional cases is to: risk holding the parties up against a standard they could not have been aware of; denude the significance of prejudice and the seriousness of the charge as part of the analysis on reasonable reliance; and ignore that some jurisdictions require time to bring delay times in line with *Jordan* principles. To apply a modified version of *Morin* is also unnecessary. Over time, transitional cases will present with far less of the delay time having taken place in the period before *Jordan*'s release. The extent to which it will have been reasonable for the parties to have relied on *Morin* will consequently lessen.

[5] *Jordan* at paras. 94-96

PART III
BRIEF OF ARGUMENT

I. The unavailability of Crown counsel for trial was neutral time under *Morin*:

5. In the case at bar, the parties appeared for the purpose of setting a trial date on April 2, 2012. The parties indicated they were seeking to set a date in the fall. As the trial Crown was set to complete two lengthy jury trials in the fall, she sought a trial date in late November though the court and accused were available two months sooner. The judge on the stay application attributed this time to Crown-caused delay under *Morin*.[6]

6. The majority for the Newfoundland Court of Appeal held that the trial judge erred in attributing this delay to the Crown. Hoegg J.A. for the majority, wrote as follows:

> …I read *Jordan* as attributing readiness delays to the party unavailable to proceed when the opposite party and the Court are ready, subject to the defence being allowed sufficient preparation time (*Jordan* paragraph 65) (I presume the Crown would be accorded the same courtesy). Accordingly, under *Jordan*, there would be no deduction of this delay from the total delay as the Crown was requesting it and would be responsible for it (*Jordan* paragraphs 64-65). To my mind, however, this situation invokes the transitional exception, for it would be unfair for this two-month delay to count against the Crown in this case. The Crown was relying on the law as it existed at the time (paragraph 94), and had no notice that readiness delays would be assessed on a new standard which did not incorporate evaluating the reasons why a party is not ready to proceed (*Jordan* paragraph 96).[7]

7. White J.A., in the dissenting judgment, held that the majority was wrong to "draw an analogy" between *Tran* and *Godin* and Crown unavailability, holding that where the Crown is not available for the first offered dates, this must be attributed to lack of resources for which the state bears responsibility.[8]

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[6] *R. v. Cody*, 2014 NLTD(G) 161 at para. 85
[7] *R. v. Cody*, 2016 NLCA 57 at paras. 34-38
[8] *Cody* at paras. 131-133

8. Properly considered, the time required for the Crown to prepare and clear its schedule was neutral time under the *Morin* framework. This point of law was well established by a long line of jurisprudence, and indeed, was first outlined in the *Morin* decision. In his review of the law on this point in *Lahiry*, Code J. noted:

> …As Sopinka J. put it in *R. v. Morin*… systemic or institutional delay is "the period that starts to run when the parties are ready for trial but the system cannot accommodate them". He had noted, earlier in his reasons, that "time is required for counsel to prepare" and that "**counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case**". Sopinka J. held that this time, for counsel to prepare and to clear their calendars when taking on a new case, is part of the inherent time requirements of the case.[9]

9. The majority of the Newfoundland Court of Appeal in *Cody* was not "drawing an analogy" as between the case before it and that in *Tran* and *Godin*. The *Morin* decision itself, and the jurisprudence subsequent thereto, plainly afforded both the defence and the Crown a period of time to prepare and clear their calendars in setting a date for trial. That the Crown was not immediately available for trial due to other obligations was not evidence of a lack of institutional resources, but accords with the oft-quoted passage by Doherty J.A. in *R. v. Allen* that, "No case is an island to be treated as if it were the only case with a legitimate demand on court resources",[10] and in *Morin*, wherein Sopinka J. made clear that "[a]ccount must also be taken of the fact that counsel for the prosecution and defence cannot be expected to devote their time exclusively to one case".[11] To the extent that there may have been any confusion on this point of law, by the time this matter reached the Court of Appeal, it was cleared up. The minority decision in *Jordan* made plain that *Godin* stood for the proposition that "the time required for

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[9] *R. v. Lahiry*, 2011 ONSC 6780 at paras. 25-30; *R. v. Tran*, 2012 ONCA 18 at para. 32; *R. v. Godin*, 2009 SCC 26 at para. 23; *R v. Gendron*, 2017 ONSC 1436 at para. 10
[10] *R. v. Allen*, 92 O.A.C. 345 at para. 27; affirmed [1997] 3 S.C.R. 700
[11] *Morin* at para. 41

counsel, **both Crown and defence**, to be available…"[12] was part of the inherent time requirements of the case under *Morin* [emphasis added]. While in the instant case this period represents two months, in other cases, where factors such as a complex, ongoing investigation or the comfort of a vulnerable complainant requires Crown assignment at the outset of proceedings, this period may be longer.[13]

2. Reasonable Reliance on the pre-*Jordan* law can only be assessed against the *Morin* Framework:

10. This Court made clear that for cases that were in the system at the time of the release of the *Jordan* decision the presumptive ceilings are applicable. However a transitional exceptional circumstance "will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed".[14] There can still be findings of breaches of 11(b) of the *Charter* for pre-*Jordan* cases on application of the new framework. This Court pointed to the circumstance where "the delay in a simple case vastly exceeds the ceiling because of repeated mistakes or missteps of the Crown" as an example of an instance where the transitional exception would be inapplicable though the parties relied upon *Morin*.[15] This Court also held that, "Ultimately, for **most cases** that are already in the system, the release of **this decision should not automatically transform what would previously have been considered a reasonable delay into an unreasonable one**".[16] [emphasis added]

[12] *Jordan* per Cromwell J. at para. 179
[13] *R. v. Picard*, 2016 ONSC 7061 at paras. 63-72
[14] *Jordan* at para. 96
[15] *Jordan* at para. 98
[16] *Jordan* at para. 102

11. It is submitted that the above-noted passages stand for the following propositions:

(1) For cases where most of the procedural steps took place prior to the release of *Jordan*, and where on application of the *Morin* calculus the case would have survived a stay application, there can be no stay under the *Jordan* framework; and

(2) Unless the Crown can be taken to have, through "repeated mistakes or missteps"[17] caused substantial delay, the expectation that the period related to each procedural step will be characterized by application of the previous law is reasonable.

3. How is the Transitional Exception to be Applied?

12. It is submitted that a contextual application of *Jordan* to transitional cases must include a stand-alone application of the *Morin* framework. This is particularly so where most of the procedural steps undertaken by the parties took place under the old framework. To do otherwise is to hold the parties to a standard that did not exist at the time of their conduct. A contextual approach to *Jordan* where the transitional exception is invoked requires an answer to the guiding question: did the parties reasonably rely on the previous state of the law? To answer this question necessarily requires application of the *Morin* framework, with correct characterizations of each of the procedural steps. It also requires a proper balancing informed by both prejudice and the seriousness of the offence. Avoiding the transformation of what would have been found to be reasonable delay under the old framework, into unreasonable delay under the new framework, necessitates that this step be taken.[18] Further, determination of whether front-end mistakes or

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[17] See: *R. v. Williamson*, 2016 SCC 28 at paras. 25-29; *R. v, Vassell*, 2016 SCC 26 at paras.6-12; *R. v. Manasseri*, 2016 ONCA 703 at paras. 375-377

[18] *R. v. McManus*, *supra* at para. 48; *R. v. Singh*, 2016 BCCA 427 at para. 78; *R. v. Hackett*, 2017 ONSC 300 at paras. 19-29; *R. v. Brissette*, 2017 ONSC 401 per Code J. at paras. 4; 36; 38-42; *R. v. Ching*, 2016 ONSC 7533 per Ducharme J. at para. 26; *R. v. Richards*, 2016 ONSC 6372 at para. 18; *R. v. Maione*, 2016 ONSC 7207 at para. 45; *R. v. Porter*, 2016 ONSC 7173 at paras. 5-9; 62-68; *R. v. Isaacs and Hussain*, 2016 ONSC 6214 at paras. 167-194; 198-200; *R. v. Gandhi*, 2016 ONSC 5612 per Code J. at paras 51-54; *R. v. Cristoferi-Paolucci*, 2016 ONSC 6923 at paras. 28-41

missteps were made by the Crown (leading to delay that in all likelihood would not have been excused *under either regime* at any rate) necessarily requires that the *Morin* analysis be applied. Whether Crown action (or inaction) is to be characterized as a misstep or mistake cannot rely on whether such actions accorded with what *Jordan* now requires. A fair assessment requires consideration of how such action would have been treated in the context of a *Morin* analysis.

13. Decisions in some cases since the release of *Jordan* signal the need for clarification in this regard. Some courts have approached the analysis by applying the *Jordan* framework and in effect determining that where the ceiling has been reached, to have relied on *Morin* in relation to the periods of delay beyond that point was necessarily unreasonable. This has occurred notwithstanding that *Morin* would have treated the periods of delay at the front end of the proceedings as inherent time or attributable to the actions of the accused.[19] It is submitted that the reasonableness of the Crown's reliance on the framework that would have characterized some period of later delay as neutral has to be assessed against how the delay that preceded it would have been characterized. Further, in addition to fairness considerations, in approaching the assessment of reasonable reliance as a strict function of the passing of time, the presence or absence of prejudice, seriousness of the charge before the court, and previously tolerated delay in a given jurisdiction, are denuded to the point of irrelevance. Such approach does not line up with

[19] See: *Picard*, at paras. 61-82 – Here the trial judge, though acknowledging that the institutional delay amounted to 19 months in total (and was therefore only a month above the *Morin* guidelines) determined that a further 7 months was attributable to the Crown due to unavailability of the Crowns for the first available trial date 5 months hence. Though the delay to that point was entirely attributable to neutral inherent time, or caused by the accused having failed to retain counsel for the trial, firing what counsel he did have when he did not receive bail, and to conflicts with new counsel, and notwithstanding that *Morin* treated such time as neutral, the trial judge held that "…the Crown could not rely on that delay forever to justify their lack of effort to fast track this matter". A complex first degree murder prosecution where institutional delay exceeded the *Morin* guidelines by a month was stayed, and notwithstanding a prior ruling that the Crown could not have been replaced to obtain an earlier trial date due to the complexity the matter. See also: *R. v. Zammit*, 2016 ONSC 5098 at para. 28; *R. v. Regan*, 2016 ABQB 561 at paras. 52; 97-110

this Court's plain direction that reasonable reliance is necessarily informed by these factors.[20]

14. Such an approach likewise undermines the stated purpose of the transitional exception. The exception is meant to avoid a recurrence of *Askov* and the disrepute to the administration of justice that arose from its aftermath.[21] For serious charges to be stayed, where on application of the framework under which the parties were operating there was no chance of such a result, this can only bring the administration of justice into disrepute.

15. There should be no concern that applying the *Jordan* framework in the manner suggested will preserve the *status quo*. Not quite a year has passed since the release of the *Jordan* decision. With the passage of time, transitional cases appearing before the courts will be fewer, and those that remain will present with more and more of the delay time having occurred beyond the *Jordan* release date, with fewer of the procedural steps having taken place under the old regime. Whether the parties reasonably relied on the old framework will be informed by how much of the proceedings took place within the new framework and culture. As the number of steps occurring under the *Jordan* framework increases, the extent to which reliance on the old framework can be said to have been reasonable will necessarily lessen.[22] In this way, the measure of what is reasonable will self-calibrate over time. Application of a modified version of *Morin* that somehow incorporates *Jordan* principles is not needed to achieve this result.

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[20] *Jordan* at para. 96
[21] *Jordan* at paras. 92; 94; 97
[22] *Jordan* at para. 96

PART IV
SUBMISSIONS CONCERNING COSTS

16. The Attorney General for Ontario makes no submission as to costs.

PART V
REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

17. The Attorney General for Ontario respectfully requests that the appeal be resolved in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of April, 2017

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PART VI
TABLE OF AUTHORITIES

Tab		**Paragraphs**
	Cases	
	R. v. Askov, [1990] 2 S.C.R. 1199	
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	R. v. Jordan, 2016 SCC 220	92, 94-96, 98, 101, 179
	R. v. Cody, 2014 NLTD(G) 161	85
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2	*R. v. Godin*, 2009 SCC 26	23
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5	*R. v. Picard*, 2016 ONSC 7061	61-82
6	*R. v. Williamson*, 2016 SCC 28	25-29
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15	*R. v. Porter*, 2016 ONSC 7173	5-9, 62-68
16	*R. v. Isaacs and Hussain*, 2016 ONSC 6214	167-194
17	*R. v. Gandhi*, 2016 ONSC 5612	51-54
18	*R. v. Cristoferi-Paolucci*, 2016 ONSC 6923	28-41
19	*R. v. Zammit*, 2016 ONSC 5098	28
20	*R. v. Regan*, 2016 ABQB 561	52, 97-110

PART VII
STATUTORY PROVISIONS

***Canadian Charter of Rights and Freedoms*, Section 11(b)**

11. Any person charged with an offence has the right	11. Tout inculpé a le droit :
(b) to be tried within a reasonable time;	b) d'être jugé dans un délai raisonnable;