File Number: 37310

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

BETWEEN:

JAMES CODY,

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN,

RESPONDENT
(Appellant)

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES DU QUÉBEC, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO,

INTERVENERS

FACTUM OF THE INTERVENER
THE ATTORNEY GENERAL OF MANITOBA
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

AMI KOTLER
Counsel for the Intervener,
Attorney General of Manitoba

DEPARTMENT OF JUSTICE
Prosecution Services
510 - 405 Broadway
Winnipeg, MB R3C 3L6

Tel: (204) 945-0833
Fax: (204) 945-1260
E-mail: Ami.Kotler@gov.mb.ca

D. LYNNE WATT
Ottawa Agent for Counsel for the Intervener,
Attorney General of Manitoba

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

ERIN BREEN
HEATHER CROSS
Counsel for the Appellant, James Cody

Sullivan Breen King Defence
Suite 300, Haymarket Square
223 – 233 Duckworth Street
St. John's, NFLD A1C 6N1

Tel: (709) 739-4141
Fax: (709) 739-4145
E-mail: ebreen@sbkdefence.com

MICHAEL A. CRYSTAL
Ottawa Agent for the Appellant, James Cody

Spiteri & Ursulak LLP
1010 – 141 Laurier Avenue West
Ottawa, ON K1P 5J3

Tel: (613) 563-1010
Fax: (613) 563-1011
E-mail: mac@sulaw.ca

CROFT MICHAELSON, Q.C.
VANITA GOELA
Counsel for the Respondent, Her Majesty the Queen

Ontario Regional Office
PO Box 36, Exchange Tower
3400 – 130 King Street West
Toronto, ON M5K 1K6

Tel: (416) 952-7261
Fax: (416) 973-8253
E-mail: croft.michaelson@ppsc-sppc.gc.ca

FRANCOIS LACASSE
Ottawa Agent for the Respondent, Her Majesty the Queen

Director of Public Prosecutions of Canada
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8

Tel: (613) 957-4770
Fax: (613) 941-7865
E-mail: francois.lacasse@ppsc-sppc.gc.ca

TRACY KOZLOWSKI
HOWARD LEIBOVITCH
Counsel for the Intervener, Attorney General of Ontario

Ministry of the Attorney General of Ontario
10th Floor, 720 Bay Street
Toronto, ON M7A 2S9

Tel: (416) 326-4600
Fax: (416) 326-4656
E-mail: tracy.kozlowki@ontario.ca

ROBERT E. HOUSTON, Q.C.
Ottawa Agent for the Intervener, Attorney General of Ontario

Burke-Robertson LLP
Barristers & Solicitors
441 MacLaren Street
Ottawa, ON K2P 2H3

Tel: (613) 236-9665
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

DAVID A. LABRENZ, Q.C.
Counsel for the Intervener,
Attorney General of Alberta

Justice and Solicitor General
Appeals, Education & Prosecution Policy Branch
3rd Floor, Centrium Place
300, 332 – 6 Avenue S.W.
Calgary, AB T2P 0B2

Tel: (403) 297-6005
Fax: (403) 297-3453
E-mail: david.labrenz@gov.ab.ca

D. LYNNE WATT
Ottawa Agent for the Intervener,
Attorney General of Alberta

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

TREVOR SHAW
Counsel for the Intervener,
Attorney General of British Columbia

Attorney General of British Columbia
865 Hornby Street
Vancouver, BC V6Z 2G3

Tel: (604) 660-4085
Fax: (604) 660-3433
Email: trevor.shaw@gov.bc.ca

ROBERT E. HOUSTON, Q.C.
Ottawa Agent for the Intervener,
Attorney General of British Columbia

Burke-Robertson LLP
Barristers & Solicitors
441 MacLaren Street
Ottawa, ON K2P 2H3

Tel: (613) 236-9665
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

ABDOU THIAW
STEPHANE ROCHETTE
Counsel for the Intervener,
Attorney General of Québec

Attorney General of Québec
1200, route de l'églisde, 4e étage
Québec, QC G1V 4M1

Tel: (418) 643-6552 ext. 21307
Fax: (418) 643-9749
E-mail: abdou.thiaw@justice.gouv.qc.ca

PIERRE LANDRY
Ottawa Agent for the Intervener,
Attorney General of Québec

Noël & Associés
111, rue Champlain
Gatineau, QC J8X 3R1

Tel: (819) 771-7393
Fax: (819) 771-5397
E-mail: p.landry@noelassocies.com

NICOLAS ABRAN
DANIEL ROYER
Counsel for the Intervener,
Directeur des poursuites criminelles et pénales du Québec

Directeur des poursuites criminelles et pénales du Québec
2828, boulevard Laurier, Tour 1, Bureau 500
Quebec, QC G1V 0B9

Tel: (418) 643-9059 ext. 20934
Fax: (418) 644-3428
E-mail: nicolas.abran@dpcp.gouv.qc.ca

EMILY K. MOREAU
Ottawa Agent for the Intervener,
Directeur des poursuites criminelles et pénales du Québec

Directeur des poursuites criminelles et pénales du Québec
17, rue Laurier, Bureau 1.230
Gatineau, QC J8X 4C1

Tel: (819) 776-8111 ext. 60412
Fax: (819) 772-3986
E-mail: emily-k.moreau@dpcp.gouv.qc.ca

MEGAN SAVARD
Counsel for the Intervener,
Criminal Lawyers' Association of Ontario

Addario Law Group
171 John Street, Suite 101
Toronto, ON M5T 1X3

Tel: (416) 979-6446
Fax: (866) 714-1196
E-mail: msavard@addario.ca

COLLEEN BAUMAN
Ottawa Agent for the Intervener,
Criminal Lawyers' Association of Ontario

Goldblatt Partners LLP
500-30 Metcalfe Street
Ottawa, ON K1P 5L4

Tel: (613) 482-2463
Fax: (613) 235-3041
E-mail: cbauman@goldblattpartners.com

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IN THE SUPREME COURT OF CANADA
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BETWEEN:

JAMES CODY,

(Applicant)
Respondent,

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ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES DU QUÉBEC, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO,

Interveners.

TABLE OF CONTENTS

Page No.

PART I
OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. *R. v. Jordan*[1] represented an intentional break from Canada's previous approach to pre-trial delay. As the majority observed, "our system has come to tolerate excessive delays," creating a "culture of complacency."[2] This was not simply a violation of an accused's *Charter* s. 11(b) right to a timely trial. It went to the heart of the justice system, affecting defendants, victims and their families and public confidence in the administration of justice.[3]

2. Presumptive timelines for criminal trials were a "change of direction" meant to address this culture of complacency. "All participants in the criminal justice system" were directed to reconsider their handling of cases in light of the high social costs and significant dangers associated with delay.[4]

3. Governments across the country have undertaken this cultural change. In Manitoba, sweeping reforms are underway aimed at not only reducing delay, but creating the "efficient criminal justice system" contemplated by this Honourable Court.[5] Pursuant to Manitoba's Intensive Case Assessment Process, teams of prosecutors now carefully screen cases to determine whether they require prosecution, and, if so, whether they can be quickly resolved. Restorative justice policies encourage the use of community programming as an alternative to formal charges. For matters requiring trial, mandatory case plans require aggressive steps to reduce delay and streamline issues. The Courts have undertaken their own review, and have adopted procedures to ensure that matters remain within *Jordan* timelines.

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[1] *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 **[Attorney General of Manitoba's Book of Authorities, TAB 3]**.

[2] *Jordan*, at paras. 3-4, 40-41.

[3] *Jordan*, at paras. 2-3. See also *Jordan*, at para. 19: "An unreasonable delay denies justice to the accused, victims and their families and the public as a whole."

[4] *Jordan*, at paras. 5, 107. As the Court observed, lengthy delays can also result in lost or degraded evidence, affecting the ability of either side to fully present the case. See *Jordan*, at paras. 20, 24.

[5] *Jordan*, at para. 3. Indeed, a number of these changes pre-dated the decision in *Jordan*. The Intensive Case Assessment Process, for example, was initiated in June of 2015.

4. There are, however, areas that governments cannot control. The defence has primary responsibility for its handling of a case. A system that asks counsel to avoid unnecessary motions but allows a stay of proceedings based on the time spent bringing them sends mixed messages and runs contrary to *Jordan*'s observation that reducing delay is the responsibility of all participants in the criminal justice system.

5. Just as the Crown cannot prosecute every possible file while still providing everyone a timely trial, the accused may not be able to pursue every available motion – even where there is some basis for them – while simultaneously insisting that his or her trial take place within 18 or 30 months. Consistent with this Honourable Court's earlier jurisprudence, this is not a question of forcing the accused to choose between rights, but simply a matter of common sense. Requiring that motions be found "frivolous" before they are excluded from presumptive timelines[6] sets too high a bar and, with respect, will not change the culture of delay rejected by this Honourable Court.

B. Statement of Facts

6. Manitoba Justice accepts the facts as set out in the *facta* of the parties.

PART II
POINTS IN ISSUE

7. Did the Newfoundland and Labrador Court of Appeal err in concluding that the delay in the Appellant's case was reasonable according to *Charter* s. 11(b)?

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[6] See *Jordan*, at paras. 63, 65.

PART III
ARGUMENT

A. This Honourable Court has Directed All Justice System Participants to Reconsider Their Approaches

8. The majority concluded unambiguously in *Jordan* that the prior framework for assessing delay had failed to prevent a "culture of complacency" in which justice system participants lacked encouragement to prevent delay and address inefficient practices. As a result, Moldaver J. wrote, "a change in courtroom culture is needed."[7] He continued:

> A presumptive ceiling is required in order to give meaningful direction to the state on its constitutional obligations and to those who play an important role in ensuring that the trial concludes within a reasonable time: court administration, the police Crown prosecutors, accused persons and their counsel and judges.[8]

9. The goal of imposing presumptive ceilings was thus broader than simply reducing pre-trial delay. On the contrary, it was intended to address the approach – on all sides of the aisle – that led to these delays. As Moldaver J. observed, "this Court has a role to play in changing courtroom culture and facilitating a more efficient criminal justice system, thereby protecting the right to trial within a reasonable time."[9]

10. Courts, prosecutors and defence counsel were challenged to revisit their practices and find better, more efficient ways of fulfilling their responsibilities.[10] As argued below, governments across the country have taken on this challenge.

B. Manitoba's Response to Jordan

11. This Honourable Court observed that it would be necessary for the Crown to make "reasonable and responsible decisions regarding who to prosecute and for what[.]"[11] Manitoba

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[7] *Jordan*, at paras. 44-45.

[8] *Jordan*, at para. 50 (emphasis added).

[9] *Jordan*, at para. 45.

[10] See *Jordan*, at para. 107 ("[T]he ceiling will not permit the parties or the courts to operate business as usual. [It] is designed to encourage conduct and the allocations of resources that promote timely trials.") (Emphasis added.)

Justice has undertaken a series of initiatives aimed at assessing every case through the lens of two fundamental questions:

(i) Does prosecution represent the best use of the criminal justice system?
(ii) If so, how can the system best be applied in relation to that case?

12. This is a broad re-examination of the justice system. It goes beyond a concern for speedy trials and requires prosecutors to consider whether criminal charges are necessary at all; whether it is in the public interest to proceed through the criminal courts; what other types of resources might be brought to bear on the matter;[12] and how the matter might be resolved so as to reduce reliance on traditional criminal law responses. Where charges are appropriate, it requires an assessment of the fairest and most efficient way to proceed in light of the various interests involved. In other words, it eschews reflexive application of the law in favour of a contextual analysis that seeks the best response to a given case in all the circumstances, including, *inter alia*, the finite nature of justice resources.[13]

13. Pursuant to the Intensive Case Assessment Process, this analysis is now carried out by dedicated teams of prosecutors in relation to most new files before they are assigned for prosecution.[14] Where charges do not meet the standard described above, they are not laid. If they have already been laid, they are withdrawn, even where evidence exists that could technically support them.

> Manitoba Justice Scope Statement (Intensive Case Assessment Process), June 1, 2015 ["ICAP Scope Statement"], at pp. 1-4.

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[11] *Jordan*, at para. 138.

[12] Pursuant to Manitoba's *Restorative Justice Act*, C.C.S.M. c. R119.6 **[Attorney General of Manitoba's Book of Authorities, TAB 8]**, current prosecutorial policy "emphasizes Manitoba's commitment to address certain criminal matters through resolutions that promote healing, reparation and re-integration into the community." Manitoba Justice Policy Directive No. 5:COM:1.1**[Attorney General of Manitoba's Book of Authorities, TAB 17]**. A variety of community-based programs offer alternatives to prosecution, including mediation, counselling and engagement. Specific programs deal with youths and/or Aboriginal communities. Where one of these programs represents the most appropriate response, cases will be diverted, reducing the burden on the criminal courts and alleviating delay.

[13] This approach is consistent with not only *Jordan*, but also *Criminal Code* s. 718.2(e) and the Calls to Action of the recent *Truth and Reconciliation Commission*. In *The Path to Reconciliation Act*, C.C.S.M. c. R30.5 s. 2 **[Attorney General of Manitoba's Book of Authorities, TAB 9]**, the Manitoba government directed all departments – including Justice – to take "concrete and constructive action" to address the challenges faced by Indigenous Canadians. Applying a proportionate response to criminal activity is not only more efficient, it is also fairer and helps advance these goals.

[14] The program is currently being applied to files originating within Winnipeg. Expansion to circuit points throughout the province is anticipated as the program continues to develop. See ICAP Scope Statement, at p. 2 **[Attorney General of Manitoba's Book of Authorities, TAB 10]**.

14. This intensive review serves an important practical function as well. Where files are incomplete, or require additional follow-up, these issues are addressed immediately, before they can lead to delay further down the road. When the file is complete and a determination is made that charges are necessary, efforts are made to resolve the matter without a trial. Only where the parties are unable to reach an agreement do matters proceed to a hearing.

ICAP Scope Statement, at p. 1.

15. In serious cases where matters cannot be resolved, prosecutors will be required to complete detailed case plans ensuring that the matter is completed within *Jordan* timelines. These case plans include, *inter alia*, (i) details of disclosure, including any particulars that are still outstanding and the anticipated date of delivery; (ii) the Crown's anticipated case, along with agreements that the Crown believes are possible; and (iii) a detailed timetable for each step in the proceedings, including time-frames for defence responses, motions and arguments.

See Sample Case Plan, at pp. 1-3 **[Attorney General of Manitoba's Book of Authorities, TAB 11]**.

16. The goal of these plans is to identify issues well in advance of trial and ensure a schedule that allows enough time to deal with them properly while still completing the case within the presumptive timeline. While *Jordan* allows for unforeseen circumstances, public confidence is best supported by a justice system that minimizes the risk of such eventualities by scheduling efficiently and properly managing its resources.

17. Manitoba courts have also taken steps to bring about the "real change" mandated by this Honourable Court. In Provincial Court, additional opportunities have been provided for both trials/preliminary inquiries and case management conferences aimed at streamlining issues. Mandatory case readiness forms ensure that counsel are properly prepared for these conferences, and the expectation is that trial dates will be set early in the case management process. The "remand culture" in which matters are repeatedly adjourned is being eliminated.

Notice to Profession, Manitoba Provincial Court Chief Judge Margaret Wiebe, December 15, 2016 **[Attorney General of Manitoba's Book of Authorities, TAB 12]**.

> Notice to Profession, Manitoba Provincial Court Chief Judge Margaret Wiebe, January 9, 2017 **[Attorney General of Manitoba's Book of Authorities, TAB 13]**.

18. Similarly, in Superior Court, strict new rules ensure that in most cases, hearing dates are set that comply with *Jordan* timelines. As in Provincial Court, dates are set after an initial pre-trial conference where counsel are expected to provide a timeline for any necessary pre-trial applications or *voir dires*.[15]

> Practice Direction, Manitoba Court of Queen's Bench Chief Justice Glenn Joyal, October 20, 2016 **[Attorney General of Manitoba's Book of Authorities, TAB 14]**.

C. Making the Defence a Meaningful Participant in the Solution

19. This Honourable Court made it clear that reducing delay is the responsibility of "all justice system participants." As the facts of this case illustrate, however, some clarification may help ensure that all parties play a meaningful part in achieving this goal.

20. At paragraphs 63-66 of *Jordan*, this Honourable Court describes "defence delay" *inter alia* as "deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests." Time spent bringing and adjudicating non-frivolous applications and requests are excluded, and thus continue to count towards the presumptive timeline. With respect, this raises several concerns.

21. First, at a practical level, "frivolousness" is a high bar. The Gage *Canadian Dictionary* defines "frivolous" in strong terms as "of little worth or importance" or as "silly."[16] In *Walsh v. Johnson*, the Newfoundland and Labrador Court of Appeal described a "frivolous" appeal as "one that has no substance" or "no arguable merit."[17] *Jordan* goes even further and links it to

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[15] Recent decisions also signal Manitoba courts' seriousness about streamlining procedures and eliminating unnecessary delay. See, *e.g.*, *R. v. Martin*, 2017 MBQB 34, 2017 CarswellMan 99, at paras. 58-60 **[Attorney General of Manitoba's Book of Authorities, TAB 4]**.

[16] Dodds de Wolf, Gregg, Harris and Scargill, *Canadian Dictionary* (Toronto: Gage Publishing, 2000), at p. 621 **[Attorney General of Manitoba's Book of Authorities, TAB 15]**.

[17] *Walsh v. Johnson*, 2010 NLCA 6, 293 Nfld. & P.E.I.R. 101, at paras. 19, 21 **[Attorney General of Manitoba's Book of Authorities, TAB 7]**.

"deliberate . . . tactics" whose goal is simply to illegitimately delay the trial.[18] Common sense suggests that few motions will be so clearly colourable and devoid of merit that trial judges can comfortably label them in this way.[19]

22. On the contrary, most defence delay will be caused by motions that have at least some *prima facie* basis, no matter how unsuccessful they ultimately turn out to be. Given the right to make full answer and defence, it is, again, unlikely that trial judges will readily declare such motions "frivolous."

23. Even where such a declaration is possible, moreover, it is by no means clear that it will happen quickly. *Jordan* contemplates swift dismissal of defence motions "the moment it becomes apparent they are frivolous."[20] Conscious of the right to a defence, however, judges will likely wish to give the parties an opportunity to make their case and, in many cases, to reflect on the merits of those submissions. In other words, it is unlikely that much time will be saved or that delays will be substantially reduced.[21]

24. Further to that, trials are dynamic and applications often arise out of proceedings as they unfold. The closer to the presumptive timeline proceedings get, the greater the incentive to bring motions that fall short of being frivolous but have little actual merit, all in the hope of carrying the trial past the deadline and engaging the possibility of a judicial stay. This is the opposite of what *Jordan* intended[22] – rather than enlisting all parties in the fight against delay, it encourages defence conduct that prolongs proceedings while adding little actual value. [23]

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[18] *Jordan*, at para. 63.

[19] Indeed, defence counsel are discouraged from initiating such proceedings, even when pressed to do so by the client. See *e.g., R. v. Faulkner*, 2013 ONSC 2373, at paras. 39-41, and cases cited therein **[Attorney General of Manitoba's Book of Authorities, TAB 2]**.

[20] *Jordan*, at para. 63.

[21] This is not to say that truly frivolous motions are never filed. Where they are, the Intervener agrees that they should be quickly dismissed. As argued below, however, cultural change is best achieved by giving the defence a stake in the fight against delay and reducing the incentive to bring unnecessary motions.

[22] See, *e.g.*, *Jordan*, at para. 113 ("[T]he deduction of defence delay from total delay . . . indicates that the defence cannot benefit from its own delay-causing action or inaction.").

[23] Even if defence motions delay proceedings to the point where the presumptive timeline could never have been satisfied – no matter how quickly the justice system responded – *Jordan* still assesses this delay against the Crown. Characterization of the motions as frivolous is a pre-requisite for assessing <u>any</u> of this time to the defence.

25. Moreover, it requires trial judges – and Crown attorneys – to take uncomfortable positions regarding defence counsel's handling of a case. The Canadian legal tradition rests on a foundation of mutual respect for all parties in the justice system. This respectful atmosphere is not fostered by having to routinely accuse opposing counsel of motions that are hopeless or, worse, aimed merely at delaying proceedings. Without direct evidence, lawyers are understandably likely to be reluctant to take such positions.[24]

26. Finally, contrary to this Honourable Court's call to action, such an approach does not engage the defence as a meaningful participant in cultural change. On the contrary, it contemplates "business as usual" for defence counsel and requires trial judges and the Crown to ensure that all defence motions are dealt with within the presumptive timeline. There is no s. 11(b) accountability for the defence's handling of the case.[25]

27. The Intervener respectfully submits that this does not reflect this Honourable Court's observation that "prolonged delays cause prejudice to not just specific accused persons, but also victims, witnesses and the system of justice as a whole."[26] As *Jordan* states repeatedly, delay is everyone's problem and it is up to everyone to help address it.

28. The Intervener respectfully submits that instead, *Jordan*'s goal is best achieved by removing the incentive to bring unnecessary motions and treating time spent addressing defence motions as defence delay. As Sopinka J. observed in *R. v. Morin*, this both avoids the need to impugn counsel's motives and gives the accused a stake in delay-related considerations:

> This . . . should not be read as putting the "blame" on the accused for certain portions of delay. There is no necessity to impute improper motives to the accused in considering this factor. Included under this heading [*i.e.* defence

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[24] See, *e.g.*, Manitoba Lawyers' Code of Professional Conduct, Rule 7.2-1, Commentary 3: "A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers[.]" **[Attorney General of Manitoba's Book of Authorities, TAB 16]**.

[25] *Jordan* seems to contemplate a "typical" amount of time that will be spent on defence motions, stating at paragraph 65 that "[w]e have already accounted for procedural requirements in setting the ceiling." See also *Jordan*, para. 78. Additional time must be justified by the Crown as an "exceptional circumstance." *Jordan*, at paras. 77-78. As an initial matter, the variety and creativity of possible defence arguments make it difficult to identify a "typical" amount of time such motions may require. More fundamentally, there is nothing "exceptional" about seeking to improve an accused's position at trial as much as possible, even if doing so prolongs proceedings. Indeed, under a "frivolous" standard, this should be expected.

[26] *Jordan*, at para. 110.

> delay] are all actions taken by the accused which may have caused delay. . . Actions which could be included in this category include change of venue motions, attacks on wiretap packets, adjournments which do not amount to waiver, attacks on search warrants, *etc*. I do not wish to be interpreted as advocating that the accused sacrifice all preliminary procedures and strategy, but simply point out that if the accused chooses to take such action, this will be taken into account in determining what length of delay is reasonable.
>
> *R. v. Morin*, [1992] 1 S.C.R. 771, 12 C.R. (4th) 1, at para. 39 (emphasis added)[27] **[Attorney General of Manitoba's Book of Authorities, TAB 5]**.

29. With respect, making the defence responsible for the time spent on its own motions does not "run contrary to the accused's right to make full answer and defence."[28] The fact that two interests have each received constitutional protection does not mean that they will never conflict in the facts of a particular case. An accused has the right to remain silent. He also enjoys a right to testify if he chooses to. But the fact that he must choose one or the other is not a violation of either – it is simply a reflection of the fact that he cannot rely on both at once.

30. Similarly, an accused has some constitutional right to be represented by counsel of choice.[29] But where that lawyer is not available for trial dates within the presumptive timeline, her rights are not violated by the fact that she must choose whether to retain that lawyer and wait for their services or proceed to trial with a different lawyer. It is, again, simply a reflection of reality.[30]

31. It is no different here. The accused has a right to a trial date prescribed by the presumptive timelines. He also has the right to defend himself against the charges through available substantive and procedural mechanisms, even if they require more time than the timeline allows.

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[27] This followed Cory J.'s Reasons in *R. v. Askov*, [1990] 2 S.C.R. 1199, 79 C.R. (3d) 273, at para. 95 **[Attorney General of Manitoba's Book of Authorities, TAB 1]**, which defined defence delay as including "situations where the accused's acts . . . directly caused the delay." Both *Askov* and *Morin* referred explicitly in this regard to *R. v. Conway*, [1989] 1 S.C.R. 1659, 70 C.R. (3d) 209, in which the accused had brought a number of pre-trial motions and applications. As Sopinka J. observed in *Morin* (at para. 40), "while the type of action of the accused [in that case] . . . was unquestionably *bona fide*, each action contributed to the delay and must therefore be taken into consideration[.]" While these cases were decided under pre-*Jordan* rules, these principles remain relevant.

[28] *Jordan*, at para. 65.

[29] See, *e.g.*, *R. v. Vernon*, 2016 ONCA 11, 129 W.C.B. (2d) 110 **[Attorney General of Manitoba's Book of Authorities, TAB 6]**.

[30] The Manitoba Court of Queen's Bench requires criminal defendants to make just such a choice in cases where counsel are not available within the prescribed timeline. See Practice Direction, Manitoba Court of Queen's Bench Chief Justice Glenn Joyal, October 20, 2016.

But surely he cannot insist on both at the same time. He cannot take steps that prolong proceedings while simultaneously complaining that they are being prolonged.

32. The point of *Jordan* was to force all participants in the system to make choices. Manitoba submits that these choices provide an opportunity for a justice system that is not only more efficient, but also fairer and more focused on the real needs of the community. But the defence is part of that system. It is neither unfair nor unconstitutional to recognize this under s. 11(b).

PART IV
ORDER SOUGHT CONCERNING COSTS

33. The Intervener takes no position on costs.

PART V
ORDER SOUGHT

34. The Intervener takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Ami Kotler,
Counsel for the Intervener,
The Attorney General of Manitoba

Dated at Winnipeg, Manitoba, this 11th day of April, 2017.

PART VI

TABLE OF AUTHORITIES

TAB NO.	CASES	CITED AT PARAGRAPH NO(S).
1	*R. v. Askov*, [1990] 2 S.C.R. 1199, 79 C.R. (3d) 273	28
2	*R. v. Faulkner*, 2013 ONSC 2373	21
3	*R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631	1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 21, 24, 25, 27, 28, 30, 31, 32
4	*R. v. Martin*, 2017 MBQB 34, 2017 CarswellMan 99	18
5	*R. v. Morin*, [1992] 1 S.C.R. 771, 12 C.R. (4th) 1	28
6	*R. v. Vernon*, 2016 ONCA 211, 129 W.C.B. (2d) 110	30
7	*Walsh v. Johnson*, 2010 NLCA 6, 293 Nfld. & P.E.I.R. 101	20, 21
	ARTICLES AND OTHER SUPPORTING DOCUMENTS:	
8	*Restorative Justice Act*, C.C.S.M. c. R119.6	3, 12
9	*The Path to Reconciliation Act*, C.C.S.M. c. R30.5 s. 2	12
10	Manitoba Justice Scope Statement (Intensive Case Assessment Process), June 1, 2015	13, 14
11	Sample Case Plan	15
12	Notice to Profession, Manitoba Provincial Court Chief Judge Margaret Wiebe, December 15, 2016	17
13	Notice to Profession, Manitoba Provincial Court Chief Judge Margaret Wiebe, January 9, 2017	17
14	Practice Direction, Manitoba Court of Queen's Bench Chief Justice Glenn Joyal, October 20, 2016	18, 30
15	Dodds de Wolf, Gregg, Harris and Scargill, *Canadian Dictionary* (Toronto: Gage Publishing, 2000), at p. 621	21
16	Manitoba Lawyers' Code of Professional Conduct, Rule 7.2-1, Commentary 3	25

17	Manitoba Justice Policy Directive No. 5: COM: 1.1, May 2015	12