Court File No. 37310

IN THE SUPREME COURT OF CANADA

(On Appeal from the Supreme Court of Newfoundland and Labrador, Court of Appeal)

B E T W E E N:

JAMES CODY

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This intervention focuses on how delays related to disclosure should be allocated under the *Jordan* framework. Time spent on disclosure applications that are brought without due diligence should be attributed to the defence even if they cannot be characterized as frivolous or deliberately aimed at delaying proceedings The "due diligence" standard comes from this Honourable Court's decision in *Dixon* about disclosure remedies under s. 7 of the *Charter*. The consistent application of this standard would contribute to the efficiency goals in *Jordan* and s. 11(b). The continued application of *Dixon* would remove from the presumptive ceilings time consumed by defence disclosure applications that are tardy, unfocused, duplicative, do not recognize third party interests or fail to make the best use of disclosure technology.

R. v. Jordan, 2016 SCC 27, [2016] 1 S.C.R. 631
R. v. Dixon, [1998] 1 S.C.R. 244
Canadian Charter of Rights and Freedoms, s. 7, s. 11(b)

2. The facts of this case illustrate the difficulties posed by disclosure in modern investigations: the difficulty of estimating disclosure volumes at the outset (from 10,000 to 20,000 pages), massive police overtime, confidential informant privilege vetting, disputes about accessing electronic disclosure (the undertaking issue); *McNeil* disclosure, and "tangly" disclosure applications. A realistic assessment of the complexities of disclosure is the best way to evaluate how delays are attributed under *Jordan*.

Respondent's Factum, pp. 3-5, paras. 11-15, pp. 8-9, paras. 24-26
R. v. Cody, 2016 NLCA 57, at paras. 26, 29
R. v. McNeil, 2009 SCC 3, [2009] 1 S.C.R. 66

3. Delays associated with disclosure will be compounded if the Court follows the suggestion of the Intervener Criminal Lawyers' Association of Ontario (CLA) to open up legitimate areas of Crown decision-making to judicial review under the cover of s. 11(b). This will generate subsidiary disclosure applications for privileged materials about the exercise of Crown discretion and result in more delays. It will take the criminal process one step further away from a determination of the merits of the case.

PART II – QUESTIONS IN ISSUE

4. This appeal raises the issue of whether a stay of proceedings should have been granted due to an infringement of the Appellant's right to be tried within a reasonable time as guaranteed by s. 11(b) of the *Canadian Charter of Rights and Freedoms*.

5. The Intervener AGBC submits the *Jordan* framework should apply the pre-existing criteria of due diligence to defence disclosure requests and to the time consumed by them. Trial judges should have the flexibility to attribute disclosure-related delays based on the facts of the case and at the point when it is most appropriate to do so. This will ensure that the new model achieves its goals of speedier trials and just outcomes.

PART III - BRIEF OF ARGUMENT

6. Disclosure issues were not especially prominent in the facts of either *Jordan* or its companion case *Williamson*. This appeal therefore represents the first opportunity for this Court to evaluate the challenges posed by timely disclosure in the context of the s. 11(b) analytical framework. The Intervener AGBC proposes to first look at the similarities between existing disclosure and delay cases to demonstrate how the "due diligence" test applies naturally to the *Jordan* analysis. The focus will then turn to the need for a case-by-case consideration of disclosure-related delays. Finally, the additional delays that would flow from widening judicial review of Crown discretion will be considered.

Jordan, supra, at paras. 125-26
R. v. Williamson, 2016 SCC 28, [2016] 1 S.C.R. 741, at p. 751, para. 28

A. Time spent on disclosure: applying defence due diligence to the s. 11(b) analysis

7. The disclosure obligation under s. 7 encompasses two related obligations. The first is that the Crown disclose all materials that are not clearly irrelevant or protected by privilege. The second is that defence counsel should be diligent in pursuing disclosure. This formulation arises from a case about the effect of non-disclosure on appeal (*Dixon*) but it has wider application to how courts assess time spent on litigating and obtaining additional disclosure.

8. The due diligence threshold prevents ill-conceived or badly executed defence disclosure applications from derailing proceedings and wasting time. That obviously dovetails with the

purpose behind the delay guarantee under s. 11(b), as restated in the *Jordan* framework. The overlapping approaches can be seen side-by-side:

> This framework is intended to focus the s. 11(b) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(b)'s important objectives.
>
> *Jordan*, *supra*, at para. 5
> [emphasis added]

> The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. … As officers of the court, defence counsel have an obligation to pursue disclosure diligently.
>
> *Dixon*, *supra*, at para. 37
> [emphasis added]

9. The *Dixon* test catches precisely what this Court in *Jordan* called "unnecessary procedural steps and inefficient advocacy […] weighing down the entire system." It is no surprise that recent cases have already started to consider how the two cases interact.

> *Jordan*, *supra*, at para. 43
> *R. v. Giles*, 2017 BCSC 73, at para. 209 [part of case complexity]
> *R. v. Apostol*, 2016 NSSC 241, 377 N.S.R. (2d) 212, at para. 66 [considered but delay not attributed to defence]
> *R. v. D.M.S*, 2016 NBCA 71, at para. 27 [issue not resolved]

10. Although formulated under s. 7 and s. 11(b) respectively, the principles of *Jordan* and *Dixon* can be applied consistently. To achieve this, it is important that "frivolous" not be the only standard that results in time being attributed to the defence especially in the disclosure context. In the aftermath of *Jordan*, the Ontario Court of Appeal was quick to specify that frivolous applications are only "the most straightforward examples of defence delay" but there are others.

> *Jordan*, *supra*, at paras. 63-65
> *R. v. Coulter*, 2016 ONCA 704, 340 C.C.C.(3d) 429, at para. 44

11. Indeed, the majority in *Jordan* offered up, in various contexts, other criteria for defence action, both positive and negative: "unnecessary", "improperly taken" as opposed to "legitimately taken", "reasonably and expeditiously", "actively advancing their clients' right to a trial within a reasonable time" and "using court time efficiently". For *Jordan* applications brought under the presumptive ceilings, there is even a passing reference to defence having

obligations beyond due diligence. The minority opinion also used a variety of descriptors to capture the notion of defence efficiency.

> *Jordan, supra,* at paras. 43, 63-65, 86, 138 [*per* Moldaver, Karakatsanis & Brown JJ.]
> *Jordan, supra,* at paras. 178, 193-94 [*per* Cromwell JJ.] ["unnecessary", "vexatious" and "unreasonable actions" versus "reasonable steps" and "timely"]

12. If frivolousness becomes the sole criteria for allocating defence time under s. 11(b), lengthy disclosure applications could be dismissed as lacking in diligence or merit but never count towards defence delay unless also found to be "frivolous." A weak disclosure application would still strengthen the accused's hand on the delay front. This would provide the accused with a perverse incentive to multiply disclosure applications with an eye to the clock. It would play to the very danger the Court warned about in *Jordan*:

> Indeed, there are incentives for them to remain passive in the face of delay. Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(b) was not intended to be a sword to frustrate the ends of justice.
>
> *Jordan, supra,* at para. 21
> *R. v. Serban,* 2017 BCSC 17 at para. 46 ["long shot" but that was not frivolous]

13. This danger arises acutely in the disclosure context. As specified in *Dixon*, "the threshold requirement for disclosure is set quite low." The accused gets any non-privileged material that is not "clearly irrelevant", including "material which may have only marginal value to the ultimate issues at trial." The scope of disclosable material is such that it opens the door to a plethora of possible additional disclosure requests. However, under *Dixon*, a countervailing pressure (the due diligence norm) is applied to the defence which helps the whole system function. Altering only one variable in this equation but not changing another can actually contribute to delay. In this context, maintaining the very broad scope of disclosure under s. 7 but limiting defence accountability for delay to frivolous disclosure applications under s. 11(b) will only aggravate delays.

> *Dixon, supra,* at paras. 21, 23, 27

14. One early academic commentary expressed concern that *Jordan* might "encourage defence counsel to advance modestly arguable claims whenever the delay in a case is approaching the applicable ceiling" but also stated that "Jordan can also be read to grant trial

judges greater discretion in characterizing defence applications as illegitimate." While recommending restraint, Professor Sherrin wrote that courts "will have to gauge the legitimacy of defence applications".

> Christopher Sherrin, "Understanding and Applying the New Approach to Charter Claims of Unreasonable Delay" (2017), 22 *Canadian Criminal Law Review* 1, at pp. 9-11, 28

15. When it comes to disclosure applications, *Dixon* offers up a tested, ready gauge for doing just that. Its continued application under *Jordan* will further contribute to the Court's goal of reducing unpredictability when evaluating delays under s. 11(b). Maintaining the existing due diligence standard within the new matrix would be one of the "preventative measures to address inefficient practices" engaged in by both sides. It would also interpret two *Charter* rights with shared goals symbiotically instead of having one undercutting the other.

> *Jordan*, *supra*, at paras. 32, 41, 107, 112, 113, 117
> *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at paras. 72-73 [uniform proportionality test as between s. 7 and s. 12]

16. The Intervener AGBC submits that, in this context, the evaluation of due diligence and its impact on delay involves the following considerations:

a. **Proper timing**: Applications for disclosure should be brought in a timely manner, as soon as the defence is aware of the avenue of inquiry, not at the last minute or on dates already set for other aspects of the case.

> *Dixon*, *supra*, at paras. 37-38
> *R. v. MacPherson*, 1999 BCCA 403, 127 B.C.A.C. 49, at paras. 17-18
> *R. v. McKinnon*, 2014 BCSC 749, at para. 38
> *R. v. Sanghera*, 2014 BCCA 249, 313 C.C.C. (3d) 113, at para. 118, affirmed 2015 SCC 13, [2015] 1 S.C.R. 691,

b. **Well defined in scope:** Applications should be focused and clearly identify how the materials that are sought are relevant, in the context of disclosure that has already been made. As noted in *McNeil*:

> it is important for the effective administration of justice that criminal trials remain focussed on the issues to be tried and that scarce judicial resources not be squandered in "fishing expeditions" for irrelevant evidence.

> *McNeil*, *supra*, at para. 28
> *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32
> *Jordan*, *supra*, at para. 178 [*per* Cromwell J.]

World Bank Group v. Wallace, 2016 SCC 15, [2016] 1 S.C.R. 207, at paras. 133-34
Trapani c. D.P.C.P., 2016 QCCS 6230, at paras. 88-89
R. v. Girimonte (1997), 37 O.R. (3d) 617, 121 C.C.C. (3d) 33

c. **Proper third party proceedings engaged:** Defence should identify any third party interests as promptly as possible and adhere to the applicable procedures including notice.

McNeil, supra, at para. 59
R. v. Herman, 2017 BCSC 215, at para. 98
R. v. J.E.K., 2016 ABCA 171, 337 C.C.C. (3d) 222, at paras. 39, 58

d. **Correct thresholds identified:** Pleadings should address any special, heightened "likely" or "obvious" relevance thresholds that may apply since these are designed to reduce "disruptive, unmeritorious, obstructive and time-consuming" requests.

R. v. O'Connor, [1995] 4 S.C.R. 411, at para. 137;
McNeil, supra at paras. 28-29, 59;
World Bank Group v. Wallace, supra, at para. 124

e. **Technological tools to be accepted:** Defence should not apply for paper disclosure or fail to make use of software to process disclosure and still expect that any related delays will count towards the presumptive ceilings.

R. v. Beckett, 2014 BCSC 731, at para. 13
Cody, supra, at para. 29

f. **Guarding against duplication**: requests should not be made for material substantially available in alternative sources that have already been disclosed.

R. v. Skinner, [1998] 1 S.C.R. 298, at para. 14
J.E.K., supra, at para. 38

These are just some of the problems the jurisprudence has identified in relation to current disclosure litigation. Whether there are more or different considerations will depend on the facts of the particular case.

B. Attribution of disclosure delay requires careful factual analysis

17. The need for case-specific evaluations is made repeatedly in *Jordan,* including the need to make factual findings about how disclosure was handled by both sides. On this point, the majority expressly adopted the minority opinion:

> As our colleague acknowledges, pursuant to our framework, "the judge must look at the circumstances of the particular case at hand" in assessing the reasonableness of a delay.
>
> *Jordan, supra,* at para. 58 [*per* Moldaver, Karakatsanis & Brown JJ.]
> *Jordan, supra,* at paras. 149, 151, 158, 301 [*per* Cromwell J.]

18. The stated bedrock for the application of *Jordan* combines "the trial judge's good sense and experience" or "expertise" and "the practical realities of trials". There is no reason to remove disclosure litigation and its delays from that real world analysis.

> *Jordan, supra,* at paras. 72, 74, 79

19. Complex disclosure is likely to be a challenge for the type of cases that will come up against the presumptive ceilings, including those deemed exceptional. As noted in the wake of *Jordan* by the Court of Appeal for British Columbia, "voluminous disclosure" is one of the hallmarks of a complex case. The *Singh* case involved a drug conspiracy and the initial disclosure was summarized as follows:

> [36] The disclosure consisted of a hard drive containing approximately 37,755 pages of investigation reports, 5,353 pages of surveillance, approximately 10,000 pages of warrants and ITOs (Information to Obtain), approximately 2,000 pages of Part VI affidavits, 4,780 pages of photos, and 53 hours of surveillance/search warrant videos. The disclosure hard drive in total contained approximately 60,000 pages.
>
> [37] In addition, there was a second hard drive which contained approximately 250,000 calls intercepted during the investigation. Many of the calls were in Cantonese or Punjabi and required translation.
>
> *R. v. Singh*, 2016 BCCA 427, at paras. 20, 36-37
> *Cody, supra*, at para. 26

20. Disclosure volume and complications of this sort are not unusual. The challenges this poses are are compounded by increasingly complex legal considerations. In addition to the s. 7 disclosure obligations, there is a minefield of third party interests in clinical records, police misconduct reports, and the protection of confidential informants. That means the Crown must

produce disclosure as promptly as possible but also avoid making mistakes that will affect third parties, broader privacy interests and any number of recognized privileges.

> *Jordan, supra*, at para. 22 [*per* Moldaver, Karakatsanis & Brown JJ.]
> *Jordan, supra*, at paras. 153, 156 [*per* Cromwell J.]
> *Cody, supra*, at paras. 42-44, 62 [*McNeil* disclosure]
> *R. v. J.E.K., supra*, at para. 29 [*O'Connor*-type disclosure]
> *R. v. McManus*, 2017 ONCA 188, at paras. 41-44 [confidential informants identified in disclosure]

21. These competing pressures mean that police and prosecution disclosure teams cannot simply be increased in size without sacrificing consistency in the coding of necessary redactions and quality control. As noted by the Respondent, this "takes time" but it also takes care. Simply pouring more resources into the disclosure of complex cases is not a panacea. The disclosure team has to be sufficiently knowledgeable, properly coordinated and senior enough to make the right decisions. Creating larger and larger disclosure teams does not achieve that. In addition, in confidential informer cases, the circle of privilege has to be as restrained as possible and this restricts the number of persons able to work on redacting disclosure.

> *Respondent's Factum,* p. 23, para. 74, p. 24, para. 79
> *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General),* 2005 FCA 213, [2006] 1 F.C.R. 53, at para. 46
> *British Columbia (Police Complaint Commissioner) v. The Abbotsford Police Department,* 2015 BCCA 523, 381 B.C.A.C. 110, at para. 81, leave to appeal dismissed (September 15, 2016)

22. Without engaging in hindsight about how investigators, Crown and even defence handled disclosure, judicial pronouncements under *Jordan* may consider the conduct of prior disclosure applications and the nature of any evidence requested or obtained. Given the stated objective of *Jordan* to reduce delay, a realistic assessment of the conduct of the parties and the application of existing legal thresholds are appropriate.

> *Jordan*, *supra*, at para. 85
> *Herman*, *supra*, at para. 98 [prior disclosure ruling informing *Jordan* analysis]

23. Procedurally, initial disclosure is generally followed by supplemental packages that are produced as new material is processed or in response to defence requests. The rolling nature of this process may mean that the full picture is not available when a *Jordan* application is first made. Though delay applications have generally been considered pre-trial, the court retains the

right to hold off ruling on a s. 11(b) motion until the effect of the disclosure applications (or of any resulting evidence) can be determined.

R. v. Byron, 2001 MBCA 81, 156 C.C.C. (3d) 312, at paras. 12-27
R. v. Cisar, 2014 ONCA 151, 307 C.C.C. (3d) 336, at para. 32
R. v. Taillefer; R. v. Duguay, 2003 SCC 70, [2003] 3 S.C.R. 307, at paras. 122-24

C. Disclosure delays compounded if review of Crown discretion expanded

24. In its application for leave to intervene, the Intervener CLA submitted that the courts should be able to enquire more broadly about the exercise of Crown discretion under *Jordan*. However, this would run contrary to *Jordan* itself which held that the consequences of Crown decisions may be evaluated but that "the court plays no supervisory role for such decisions". Professor Sherrin expressed the view that post-*Jordan* courts would be wise to "tread very cautiously" in reviewing specific Crown decisions as part of a delay application.

Affidavit of Michael Lacy, p. 11, paras. 24-26, Motion for Leave to Intervene by the Criminal Lawyers' Association of Ontario, dated February 16, 2017 [as of the time of writing the Intervener AGBC does not have the CLA's factum]
Jordan, supra, at para. 79
C. Sherrin, at pp. 19-20
R. v. Nguyen, 2013 ONCA 169, 2 C.R.(7^{th}) 70, at paras. 61, 70
Sanghera, supra, at para. 134

25. This Court in *Anderson* held that "prosecutorial discretion is a necessary part of a properly functioning criminal justice system" and so its rationale is entirely consistent with the efficiency goals of *Jordan*. What the CLA proposes would amount to an improper "routine second-guessing by the courts" of prosecutorial decisions without the flagrant abuse and evidentiary thresholds set out in a long line of cases. It would subjugate one constitutional principle (prosecutorial independence) to another (trial within a reasonable time). The proper administration of justice requires that the two co-exist. There is no compelling reason to cast aside this Court's careful definition of protected areas of prosecutorial discretion.

R. v. Anderson, 2014 SCC 41, [2014] 2 S.C.R. 167, at paras. 37, 44-46
R. v. Cawthorne, 2016 SCC 32, [2016] 1 S.C.R. 983, at paras. 23-24, 28
Krieger v. Law Society of Alberta, 2002 SCC 65, [2002] 3 S.C.R. 372, at paras. 43-49, 64-68
R. v. Nixon, 2011 SCC 34, [2011] 2 S.C.R. 566, at paras. 61-62
Jordan, supra, at para. 45

26. The line of enquiry proposed by the CLA would generate supplemental and collateral disclosure proceedings seeking access to privileged information about internal Crown processes or even to compel testimony from Crown counsel. It would also invite defence re-litigation of failed abuse of process applications in an effort to at least attribute delay to the Crown. In sum, it would impose another layer of procedural arguments over the basic mission of the courts to adjudicate criminal accusations on their merits. It would trade the "unduly complex" *Morin* framework for an even more unpredictable and litigious one. The proposal should be rejected as a diversion that would "compound the problem of delay."

Jordan, *supra*, at paras. 32, 37, 111

PART IV – SUBMISSIONS CONCERNING COSTS

28. The Intervener AGBC makes no application for costs.

PART V – PERMISSION TO PRESENT ORAL ARGUMENT

29. The Intervener AGBC has been granted permission to present oral arguments at the hearing of this appeal in accordance with the Court Order made on March 7, 2017 by Mr. Justice Wagner.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April, 2017

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Trevor Shaw
Counsel for the Attorney General for British Columbia

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