SCC Court File No.: 38532

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA)

B E T W E E N:

K.G.K.

APPELLANT
(Appellant)

- and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

- and –

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PART I – OVERVIEW AND POSITION ON QUESTIONS ON APPEAL

1. This appeal is about whether the time a judge takes to render a decision is included within the framework established by this Court in *R. v. Jordan*.[1] There is no question that the entire period from charge to sentencing is subject to scrutiny under s. 11(b) of the *Canadian Charter of Rights and Freedoms*.[2] The stigma, stress, and anxiety of being an accused person does not end when the person is brought to trial but rather when the trial judge has delivered the verdict and, where the accused is found guilty, has imposed the sentence.[3] The question for this Court is what form s. 11(b) scrutiny should take at different stages of the process. Here, the Appellant waited nine months after closing submissions for the trial judge's verdict. Is such judicial deliberation time properly counted as part of the delay subject to the 18- and 30-month ceilings established in *Jordan* or is it governed by a separate test?

2. The CLA takes no position on the facts. With respect to the issue on appeal, the CLA submits that judicial decision-making time is part of an accused person's trial and should be included in the *Jordan* ceilings.[4] A trial only ends when the verdict has been rendered. In support of this position, the CLA submits as follows: (i) including judicial decision-making time within the ceilings is consistent with *Jordan*; (ii) including judicial decision-making time within the ceilings enhances the clarity and predictability introduced by *Jordan*; (iii) practical difficulties highlighted by the Respondent are not determinative; and (iv) including judicial decision-making time within the ceilings is consistent with the judicial role prescribed by *Jordan* and does not threaten judicial independence.

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[1] 2016 SCC 27, [2016] 1 S.C.R. 631 [*Jordan*].

[2] *R. v. Rahey*, [1987] 1 S.C.R. 588, at pp. 610-611 (per Lamer J.), 632-633 (per La Forest J.) [*Rahey*]; *R. v. MacDougall*, [1998] 3 S.C.R. 45, at paras. 19-27 [*MacDougall*].

[3] *Rahey*, *supra* note 2, at p. 611 (per Lamer J.); *MacDougall*, *supra* note 2, at para. 19.

[4] The CLA submits that all judicial decision-making time – both before and at the verdict stage – should be included within the *Jordan* ceilings as part of an accused person's trial. The Appellant submits that the sentencing process should also fall under the *Jordan* ceilings. The CLA's position is that the *Jordan* framework includes *at least* the time it takes for a matter to reach the verdict stage, leaving the question of sentencing delay to a case in which that issue was addressed by the courts below.

3. For the first time in these proceedings, the Respondent proposes an alternative remedy – a sentence reduction – in the event this Court finds that the Appellant's right to be tried within a reasonable time was breached. The CLA takes the position that this Court should not entertain the Respondent's alternative remedy argument in the absence of a record below and fully realized written submissions from the Appellant and other interested parties. In the event that this Court decides to consider the Respondent's new request for an alternative remedy, the CLA takes the position that a stay of proceedings should remain the only appropriate and available remedy for a breach of s. 11(b) of the *Charter*.

PART II – STATEMENT OF ARGUMENT

A. Judicial decision-making time should be included within the *Jordan* ceilings

i) Including judicial decision-making time within the ceilings is consistent with Jordan

4. The *Jordan* decision was transformative. While the issue of decision-making delay was not expressly addressed in *Jordan*, including this delay within the presumptive ceilings is consistent with the *Jordan* majority's treatment of the "actual or anticipated end of trial"[5] as the point of reference for delay analysis. In Mr. Jordan's case, his "trial…eventually concluded in February 2013 with his conviction." This implies that a trial ends when the verdict is rendered, not when the evidence has been heard and submissions made.[6] The *Jordan* majority also explicitly left the question of post-*conviction* delay to another day: "we make no comment about how this ceiling should apply to s. 11 (*b*) applications brought after a conviction is entered, or whether additional time should be added to the ceiling in such cases."[7] In *Jordan*, it is the *verdict* that represents the relevant divide between trial and sentencing. The presumptive ceilings established there apply *at least* to the end of an accused person's trial. As long as an accused person is waiting to learn whether or not they will be convicted and sentenced, their trial cannot be said to be over. [8]

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[5] *Jordan*, *supra* note 1, at para. 47 (per Moldaver, Karakatsanis, and Brown JJ.).
[6] *Ibid*, at para. 12.
[7] *Ibid*, at para. 49 (footnote 2) (emphasis added).

[8] As La Forest J. said in *Rahey*, *supra* note 2, at p. 633, "[i]t would be cold comfort to an accused to be brought promptly to trial if the trial itself might be indefinitely prolonged by the judge."

5. Reaching a verdict is a key step in every case. Indeed, the whole trial process is the means to this end. The previous *Morin*[9] framework recognized that decision-making time is an inherent part of every case.[10] In choosing the 18- and 30-month markers, *Jordan* explicitly factored in inherent time requirements.[11] Judicial decision-making, as a necessary part of the proceeding, more logically fits with periods of delay that make up the 'net delay' (including the time it takes other system participants to take necessary steps) than it does with the type of delay subtracted at the outset: delay waived by or attributable to the conduct of the defence.[12] The rationale for subtracting defence delay from the total delay – that the defence should not be able to benefit from its own delay-causing conduct[13] – does not apply in the case of judicial decision-making delay. Including judicial decision-making time within the ceilings is consistent with *Jordan*'s approach to the calculation of 'net delay' and the onus of proof that results.

ii) Including judicial decision-making time within the ceilings enhances the clarity and predictability introduced by Jordan

6. Including judicial decision-making within the ceilings enhances clarity. The *Jordan* framework tells all participants in advance the "bounds of reasonableness" so that they know what to expect and can take proactive measures to avoid unreasonable delay.[14] An accused person, acting diligently, can now expect their trial to end within 18 or 30 months, absent exceptional circumstances.[15] The same clarity benefits victims and their families, witnesses, and public confidence in the administration of justice.[16] Allowing a trial to extend a further five months and three weeks beyond the ceilings to accommodate judicial decision-making time – a timeframe still within the Canadian Judicial Council's ethical guidelines[17] – would render the 18- and 30-month ceilings meaningless. This could extend the bounds of reasonableness to 23 months and three weeks in provincial courts and 35 months and three weeks in superior courts.

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[9] *R. v. Morin*, [1992] 1 S.C.R. 771.
[10] *R. v. MacIsaac*, 2018 ONCA 650, 141 O.R. (3d) 721, at para. 35.
[11] *Jordan*, *supra* note 1, at paras. 53, 83 (per Moldaver, Karakatsanis, and Brown JJ.).
[12] See *Ibid*, at paras. 66-67.
[13] *Ibid*, at para. 60.
[14] *Ibid*, at paras. 41, 107-108, 112.
[15] *Ibid*, at paras. 50, 56.
[16] *Ibid*, at paras. 50, 55.
[17] Canadian Judicial Council, "Ethical Principles for Judges" (Ottawa, 2004) at p. 21 [Canadian Judicial Council].

This undermines *Jordan*'s clear assurance that trials should be completed within 18 or 30 months.

7. Including judicial decision-making within the ceilings also reinforces the predictability sought by *Jordan*. The *Jordan* framework introduced presumptive ceilings to make it easier for courts and litigants to determine whether a breach has occurred.[18] The framework then balances the simplicity of these ceilings with a case-specific consideration of exceptional circumstances that might justify delay beyond the ceilings.[19] Judicial decision-making time should be subject to this same balance between simplicity and case-specific flexibility. In a case where the net delay exceeds the ceilings, the Crown may point to exceptional circumstances. [20] Exceptional circumstances may explain lengthy judicial deliberations taken in a case or a particular period of such delay. For example, the complexity of the case or an illness on the part of the judge may excuse one or more lengthy reserve periods.[21] Ensuring that the balance between simplicity and case-specific flexibility struck in *Jordan* is applied to the entire trial, from charge to verdict, furthers *Jordan*'s goal of enhancing predictability. Conversely, subjecting judicial decision-making time to a separate test increases complexity and undermines predictability.

iii) Practical difficulties highlighted by the Respondent are not determinative

8. The Respondent argues that including judicial decision-making time within the 18- and 30-month ceilings creates the following practical difficulties: (1) the evidence and submissions in a case will have to be scheduled to conclude in advance of the *Jordan* ceilings to accommodate potential judicial decision-making time; (2) in a pre-trial s. 11(b) application, the trial judge will not know whether any deliberation time will be necessary, forcing judges to speculate about the 'actual or anticipated end of trial'; (3) accused persons will be encouraged to wait until all delay has accrued before bringing a s. 11(b) application, resulting in later applications; (4) in a mid-deliberation or post-conviction s. 11(b) application, the defence may seek to have the application

[18] *Jordan*, *supra* note 1, at para. 32 (per Moldaver, Karakatsanis, and Brown JJ.).
[19] *Ibid*, at para. 51.
[20] *Ibid*, at paras. 69-81.
[21] See, for example, Watson J.A.'s treatment of judicial delay in *R. v. Mamouni*, 2017 ABCA 347, 356 C.C.C. (3d) 153, at paras. 55-56: the nearly four-month delay is justified as an exceptional circumstance based on the complexity of the evidence and submissions.

heard by a different judge, adding complexity and delay; and (5) in a mid-deliberation or post-conviction s. 11(b) application, the Crown may be unable to explain the cause of judicial decision-making delay.[22]

9. First, the CLA accepts that including potential judicial decision-making time within the *Jordan* ceilings will require that trial dates be scheduled below the ceiling to accommodate this stage of the trial process. This should be seen as a positive development, not a practical difficulty. The 18- and 30-month markers in *Jordan* are ceilings, not standards. They should not be reached in the vast majority of cases.[23] As the majority acknowledged, 18 months in provincial court or 30 months in superior court is a long time to wait for justice.[24] In his criticism of the majority's framework, Cromwell J. held that "[f]or the vast majority of cases, the ceilings are so high that they risk being meaningless".[25] Ensuring that evidence and submissions will be completed below the ceilings respects this Court's direction in *Jordan* that the ceilings not become an "aspirational target," and it provides time for judicial deliberation. It also creates a buffer zone in the event that the parties have underestimated the time needed for trial or an issue arises that requires a trial continuation. It is in no party's interest that trials be scheduled to conclude at the ceiling. Scarce resources are part of the problem. But they must not dictate an unconstitutional solution.[26]

10. Second, the CLA does not propose that, in a pre-trial s. 11(b) application, judges speculate about whether they will reserve their decision and, if so, for how long. Instead, judges hearing a s. 11(b) application before any verdict deliberation delay has accrued should use the final date scheduled for trial as the "anticipated" end of trial. If the application is unsuccessful, it can be dismissed without prejudice to a further application being brought in the event further delay accumulates, whether from judicial decision-making time or otherwise.

11. The third, fourth, and fifth practical difficulties stem from s. 11(b) scrutiny itself, not from whether judicial decision-time is considered within or without the *Jordan* ceiling. In cases

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[22] Respondent's Factum, at paras. 57-65.
[23] *Jordan*, *supra* note 1, at para. 56 (per Moldaver, Karakatsanis, and Brown JJ.); *R. v. Rice*, 2018 QCCA 198, 44 C.R. (7th) 83, at para. 42.
[24] *Jordan*, *supra* note 1, at para. 57 (per Moldaver, Karakatsanis, and Brown JJ.).
[25] *Ibid*, at para. 276 (per Cromwell J.).
[26] *Ibid*, at paras. 116-117 (per Moldaver, Karakatsanis, and Brown JJ.).

where concerns about s. 11(b) crystallize during the trial judge's deliberation or post-conviction, the s. 11(b) application will be brought at that later time no matter how this Court decides the issue in this appeal. A recusal motion may accompany any s. 11(b) application that centres on the trial judge's delay-causing actions. Finally, the Crown may have limited access to the reason for decision-making delay, regardless of the test applied. In cases where the explanation is clear, where the delay can be inferred from the complex nature of the case, or where another exceptional circumstance applies, the *Jordan* framework provides tools the Crown may use to argue the presumption of unreasonableness is rebutted.

iv) Including judicial decision-making time within the ceilings is consistent with the judicial role prescribed by Jordan *and does not threaten judicial independence*

12. *Jordan* called upon all justice system participants to play a role in reducing delay.[27] A culture shift was required: the existing "culture of complacency", characterized by unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources, was undermining confidence in the criminal justice system.[28] Trial judges are not exempt from this culture shift.[29] This Court has directed trial judges to make reasonable efforts to control and manage the conduct of trials to ensure the expeditious movement of cases through the justice system.[30] Asking judges to prioritize deciding cases where the accused's right to be tried within a reasonable time is in jeopardy is consistent with the judicial role prescribed by *Jordan*.[31]

13. Including judicial decision-making time within the *Jordan* ceilings does not threaten judicial independence. Respect for judicial independence means freedom from outside interference, not freedom from the context in which judges work. Even absent the *Jordan* ceilings, trial judges necessarily face some time constraints in rendering their judgments. They do not decide cases in a vacuum. Time constraints do not threaten judicial independence.

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[27] *Ibid*, at para. 137.
[28] *Ibid*, at para. 40.
[29] *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at paras. 36-39 [*Cody*]; Christopher Sherrin, "*R. v. Cody*: What Does *Cody* Add to *Jordan*?" (2017) 37 C.R. (7th) 289, at p. 3 [CLA Book of Authorities, Tab 1].
[30] *Jordan*, *supra* note 1, at para. 139 (per Moldaver, Karakatsanis, and Brown JJ.); see also *Rahey*, *supra* note 2, at p. 633 (per La Forest J.).
[31] *Jordan*, *supra* note 1, at paras. 112-117 (per Moldaver, Karakatsanis, and Brown JJ.).

14. A looming *Jordan* deadline is simply one part of the context in which judges make decisions. Judges are often required to produce mid-trial rulings on tight timelines. The Canadian Judicial Council directs federally-appointed judges to produce their reasons as soon as reasonably possible, within six months at the outside, except in special circumstances.[32] Knowing that delay is an issue in a case is simply another factor for trial judges to weigh in managing their workloads. These factors do not impair a judge's ability to act independently and impartially. We can trust judges not to allow an upcoming *Jordan* deadline to unduly influence the way they deliberate.

15. Judges are not insulated from s. 11(b) scrutiny.[33] Whether captured within the *Jordan* framework or subject to a separate test, judicial decision-making time will necessarily be part of determining whether an accused person has been tried within a reasonable time. And deliberation is not the only judicial function that may be scrutinized under s. 11(b): many decisions a judge makes throughout the trial process impact on the time a case takes to progress from charge to verdict. Indeed, *Jordan* encouraged judges to make decisions with efficiency in mind.[34] To exempt a judge's decision to reserve judgment (and the delay that ensues) from the *Jordan* ceiling would unjustifiably isolate and treat differently this single judicial function. This Court has established a framework to better protect an accused's right to be tried within a reasonable time. Asking judges to play an active role in this project does not threaten judicial independence.

B. This Court should reject the Respondent's submission that a sentence reduction be considered as an alternative remedy for a s. 11(b) breach

i) This Court should not exercise its discretion to hear this issue, raised for the first time in these proceedings

16. New issues are generally not entertained on appeal.[35] While a respondent may raise any argument that supports the order appealed from, this Court may exercise its discretion not to hear

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[32] Canadian Judicial Council, *supra* note 17, at p. 21.
[33] See *MacDougall*, *supra* note 2, at para. 52.
[34] *Jordan*, *supra* note 1, at para. 139 (per Moldaver, Karakatsanis, and Brown JJ.); *Cody*, *supra* note 29, at paras. 36-39.
[35] *R. v. Reid*, 2016 ONCA 524, 132 O.R. (3d) 26, at para. 39 (per Watt J.A.), citing *R. v. Warsing*, [1998] 3 S.C.R. 579, at para. 16 (per L'Heureux-Dubé J., dissenting in part); *R. v. Brown*, [1993] 2 S.C.R. 918, at pp. 923-924, (per L'Heureux-Dubé J., dissenting).

a new argument that lacks an appropriate evidentiary basis.[36] Where there is no record below, this Court will normally choose not to hear the argument.[37] It should do so in this case.

17. The Respondent raises its alternative remedy argument for the first time before this Court. There is no evidentiary record on this issue either in the trial court or at the Court of Appeal. Neither the judge hearing the Appellant's 11(b) application nor the panel hearing the Appellant's first appeal have had an opportunity to weigh in. This is problematic in a case like this one, where the appeal is focused on a narrow issue: the Appellant's right to be tried within a reasonable time. Without a live sentence appeal before it, this Court is not in a position to assess what reduction would be appropriate in light of the seriousness of the Appellant's offence and his culpability.[38]

18. When the issue being raised for the first time on appeal is one that would encourage this Court to disturb an enduring precedent,[39] it is even more important for the Court to have before it a comprehensive record and to hear all sides before makings its decision. Because this issue was raised for the first time in the Respondent's factum, the Appellant has not had the opportunity to address the issue in his factum. Fairness dictates that he be given an opportunity to respond fully. Furthermore, given the significance of changing the remedial landscape for s. 11(b), the CLA expects more and other parties would have been interested in intervening. Unfortunately, by the time the Respondent raised this new issue, other potential interveners were out of time to seek leave. This Court should wait to decide this issue when it has the benefit of a complete record in the courts below and can weigh the fully fleshed out arguments of all interested parties.

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[36] *R. v. Keegstra*, [1995] 2 S.C.R. 381, at para. 23 [*Keegstra*]; *Rules of the Supreme Court of Canada*, SOR/2002-156, s. 29(3). The CLA notes that this new issue stretches the bounds of what may be permissible under s. 29(3) of the Supreme Court's *Rules*. While denying a stay and reducing the Appellant's sentence would uphold the Court of Appeal's order dismissing the conviction appeal, it also calls upon this Court to grant a remedy the court below did not. The Respondent, as the successful party below, would have been barred from cross-appealing to raise this issue: *Criminal Code*, R.S.C. 1985, c. C-46, s. 693.

[37] *Keegstra*, *supra* note 36, at para. 26, citing *Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 240.

[38] See *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 47-48, 55, 63-64.

[39] *Jordan*, *supra* note 1, at para. 35 (per Moldaver, Karakatsanis and Brown JJ.); *Rahey*, *supra* note 2, at pp. 614-615 (per Lamer J.), 617-618 (per Le Dain J.), 618-619 (per Wilson J.).

ii) In the alternative, this Court should again endorse a stay of proceedings as the minimum remedy for a s. 11(b) breach

19. This Court should reject the Respondent's invitation to find that a remedy other than a stay is available where an accused's s. 11(b) right has been breached. This Court's reasoning in *Rahey* was simple and persuasive: after the passage of an unreasonable period of time, to allow any trial to proceed "would be to participate in a further violation of the Charter."[40] While the language of s. 24(1) confers broad discretion to craft remedies for *Charter* breaches, this does not mean that all remedies will be available for the violation of all rights. For the violation of some rights, there may be only one appropriate and just remedy. This is not inconsistent with s. 24(1).[41]

20. The CLA offers three reasons why this Court should reject the Respondent's call for an alternative remedy. First, the drastic nature of the existing minimum remedy helps to spur the culture shift mandated by *Jordan*. The threat of a stay of proceedings should motivate justice system participants to take the proactive steps necessary to combat the culture of complacency.[42] Second, allowing for a panoply of remedies for s. 11(b) violations would create precisely the litigation uncertainty that *Jordan* was trying to eliminate. *Jordan* recognized that the unpredictability of the pre-*Jordan* law turned s. 11(b) into "something of a dice roll", which encouraged lengthy and often complex s. 11(b) applications that further burdened the system.[43] Litigating the remedy in every s. 11(b) application would result in protracted litigation at the very point in time when swiftness and certainly ought to be most prized. This would exacerbate, rather than relieve, the burdens on the justice system.

21. Third, the Respondent's proposal would require a wholesale reimagining of how s. 11(b) operates. A stay is unquestionably an extreme remedy, which is why courts have been so

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[40] *Ibid*, at pp. 614-615 (per Lamer J.), 619-620 (per Wilson J.).
[41] *Ibid*, at pp. 617-619 (per Wilson J.).
[42] Oren Bick, "Remedial Sentence Reduction: A Restrictive Rule for an Effective Charter Remedy", (2006) 51:2 Crim. L.Q. 199, at p. 11 [CLA Book of Authorities Tab 2]: "Put simply, sentence reduction is simply not as strong a deterrent against illegal state action as are remedies such as stays of proceedings or exclusion of evidence, which are effectively acquittals."
[43] *Jordan*, *supra* note 1, at para. 32 (per Moldaver, Karakatsanis and Brown JJ.).

parsimonious in defining the contours of what constitutes a breach. *Jordan* itself recognized that the presumptive ceilings were an imperfect compromise.[44] If the threat of a stay did not loom, however, there would be good reason to make the ceilings even shorter and the test more stringent. Furthermore, *Jordan* fundamentally changed the s. 11(b) analysis by no longer calling on courts to assess prejudice, preferring instead to rely on presumptive ceilings that account for the prejudice inherent in unreasonable delay.[45] Asking courts to assess any delay's impact on the individual accused's interests when choosing a remedy, as the Respondent suggests,[46] runs counter to *Jordan*'s treatment of prejudice. For these reasons, if the question of remedy is to be reopened, so too must be the contours of what constitutes a breach of the right to a timely trial.

PART III – SUBMISSIONS ON COSTS

22. The CLA makes no submissions as to costs.

PART IV – ORDER SOUGHT

23. The CLA takes no position on the proper disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF JULY, 2019.

JRM. as agent for.

Jill R. Presser and Colleen McKeown
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[44] See *Rahey*, *supra* note 2, at p. 618 (per Le Dain J.).
[45] *Jordan*, *supra* note 1, at para. 54 (per Moldaver, Karakatsanis and Brown JJ.).
[46] Respondent's Factum, at paras. 121, 127, 130; see also Christopher Sherrin, "Reconsidering the Charter Remedy for Unreasonable Delay in Criminal Cases" (2016) 20 Can. Crim. L. Rev. 263, at p. 6 [Respondent's Book of Authorities, Tab 2], relied on by the Respondent, which pairs criticism of the limited remedial options with criticism of *Jordan*'s reduced focus on the impact of the breach.

PART V – AUTHORITIES RELIED ON

Jurisprudence **Paragraph(s)**

Secondary Sources

Legislative Authorities