IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Spears, 2017 NSPC 51

DATE: September 25, 2017

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REGISTRY: Halifax

BETWEEN:

Her Majesty the Queen

v.

R. v. Darrell Spears, Spears Framing Limited, Spears Concrete Formwork, Inc., and SCF Services Incorporated

DECISION ON SECTION 11(b) DELAY APPLICATION

JUDGE:	The Honourable Judge Anne S. Derrick
HEARD:	June 12, 2017 (additional written submissions June 19 and 20)
DECISION:	September 25, 2017
CHARGES:	section 380(1)(a) of the *Criminal Code* (Darrell Spears); section 327(1)(c) x 3 of the *Excise Tax Act* (Spears Framing Limited and Darrell Spears as an officer, director or agent; Spears Concrete Formwork Inc. and Darrell Spears as an officer, director or agent; and SCF Services Incorporated and Darrell Spears, as an officer, director or agent); and section 239(1)(d) of the *Income Tax Act* (Darrell Spears)
COUNSEL:	Mark Donohue, for the Crown
	Brian Casey, Q.C. and Edward Sawa, for the Defendants

By the Court:

Introduction

[1] In a formal Notice of Application dated May 8, 2017, the defendants indicated their intention to seek a stay of proceedings for post-charge delay based on *R. v. Jordan, 2016 SCC 27*.

[2] On March 22, 2017, the Defence, having indicated their intention to file a formal notice of application, argued for the application to be heard mid-trial, a request I denied. (*R. Spears, et al., 2017 NSPC 17*) Subsequently I agreed to hear the delay argument on dates set for final submissions in the case provided counsel were agreeable to new dates for those submissions. As a result, I heard the *Jordan* application on June 12. This was consistent with my decision not to hear the application mid-trial before the evidence-taking aspect of the trial was to conclude (and did conclude) on June 15 and 16.

[3] The *Jordan* application was argued by colleagues of the Crown and Defence counsel acting at the trial. David Bright, Q.C. and Ted Sawa have been defending at trial; their colleague, Brian Casey, Q.C. carried the delay application brief for the defendants. Constantin Draghici-Vasilescu has been prosecuting; his colleague from the Public Prosecution Service of Canada, Mark Donohue, conducted the Crown's response to the delay application.

[4] In the submission of the defendants, the *Jordan* ceiling of 18-months for a trial in Provincial Court has been far exceeded in this case, is delay the Defence is not responsible for and is not mitigated by exceptional circumstances.

[5] Presumptively unreasonable delay can be rebutted by the Crown establishing exceptional circumstances. *Jordan* organized exceptional circumstances in to two categories: discrete events and particularly complex cases. (*Jordan, para. 71*)

[6] The defendants submit this case is not complex, the delay is unreasonable and a stay should be imposed. (*Jordan, para. 47*)

The "Jordan" Framework

[7] In *R. v. Jordan*, the Supreme Court of Canada developed a "new framework" with a ceiling of 18-months for Provincial Court trials, "beyond which delay is presumptively unreasonable." (*para. 46*) Delay is calculated from the date of the charges to the actual or anticipated last date for trial.

[8] The roadmap to be followed for determining delay according to the *Jordan* principles is as follows:

1) Calculate Total Delay.

2) Deduct delay attributable to the Defence. (This can be delay waived by the Defence and/or delay caused solely by Defence conduct.) (*Jordan, paras. 61 and 63*)

3) Determine if the remaining Delay – the Net Delay – is above the presumptive ceiling.

4) If the Net Delay is above the presumptive ceiling, has the Crown shown exceptional circumstances?

5) If there are exceptional circumstances, which the Crown could not mitigate, that caused delay, this delay gets deducted from the Net Delay.

6) If the Delay that remains is below the presumptive ceiling, the burden shifts to the Defence to show that the delay is unreasonable.

7) If the Delay remains above the presumptive ceiling, a stay is warranted.

The Total Delay

[9] This was originally conceived of as a 3-week trial. It went part heard over 14 days in the period from January 12 to February 5, 2016. Early on it became apparent that 3-weeks was not going to be sufficient and additional dates were added. The evidence-taking portion of the trial finally concluded on June 16, 2017. The evidence would have been finished on June 13 but for the fact that the parties agreed the delay application would be heard on June 12 and 13. (Ultimately only June 12 was required.)

[10] I will note that the final submissions are scheduled for August 2017 – August 25 (Crown) and August 31 (Defence). When I offered to displace final submissions in June to hear this delay application the Defence agreed the trial-end date for the purposes of the application would be June 16, 2017 not August 31.

[11] Crown and Defence agreed that the total delay spans March 6, 2013, when the charges were laid to June 16, 2017, when the evidence concluded – 51-months and 10 days.

Net Delay

[12] The critical issue is the net delay. The net delay is calculated by assessing what portion of the total delay is attributable to the Defence as a result of Defence waiver, unavailability, and conduct of the case.

[13] *Jordan* made it clear that, "The defence should not be allowed to benefit from its own delay-causing conduct." (*para. 60*) Defence counsel are expected to "actively advance their clients' rights to a trial within a reasonable time…" (*Jordan, para. 138; R. v. Cody, 2017 SCC 31, para. 33*)

Defence Delay – Waiver

[14] The first component of Defence delay is waiver. "Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights." (*Jordan, para. 61*) If waiver has occurred, it is in relation to "the inclusion of specific periods in the overall assessment of reasonableness." (*Jordan, para. 61, citing R. v. Conway, [1989] 1 S.C.R. 1659 at p. 1686*)

Implicit Waiver

[15] The Crown has conceded that the 9-months and 3-weeks from March 6, 2013, to the date – December 30, 2013 – when trial dates were set counts toward the Jordan "ceiling." In the Crown's submission, the *Jordan* "clock" was stopped on December 30 due to implicit Defence waiver.

[16] The Crown contends the Defence implicitly waived the 13-month delay between the trial-setting date (December 30, 2013) and the original trial start-date (January 25, 2015) because on December 30, 2013, the judge setting the trial dates, Judge Flora Buchan, offered to explore whether earlier dates might be available in the court where the trial was eventually held – Courtroom #6, the Halifax Long Trial Court. Judge Buchan floated the option of making an inquiry to see if there might be earlier dates in Courtroom #6, but left counsel the choice of staying with the dates she had offered - "or if you're okay with the January date…" – (*Transcript for December 30, 2013, Tab 4, page 40*)

[17] Mr. Bright chose to stick with the trial dates offered in Judge Buchan's court – January 25 to February 13, 2015. He indicated he would be unavailable from September (2014) due to a lengthy case in Newfoundland. Judge Buchan responded: "All right. So, we'll leave it then, the three weeks here?" to which Mr. Bright agreed. (*Transcript for December 30, 2013, Tab 4, page 40*)

[18] The absence of anything in the record indicating whether the Crown was available or if there may have been earlier dates in Courtroom #6 is not material in my view. What is material is that the Defence showed no interest in having the issue of possible earlier trial dates explored. Judge Buchan extended an offer to look into earlier dates and the Defence chose to accept the trial dates in her court. I find this constituted an implicit waiver of the delay between December 30, 2013, and the scheduled start of the trial on January 25, 2015. It amounted to considerably more than merely agreeing to trial dates which in *R. v. Askov*, [1990] S.C.J. No. 106, was viewed as potentially sufficient, by itself, to constitute waiver. (*para. 65*)

[19] In *R. v. Melvin*, 2017 NSSC 149, Gabriel, J. reasoning out a section 11(b) application took note of Mr. Melvin's "eminently well qualified and experienced criminal lawyer, through whom the accused can be taken to have been well aware of his Charter rights and the implications of one course of action over another." (*para. 47*) The same confidence is justified in the case of Mr. Bright, an eminently well qualified and experienced criminal lawyer whose clients, it can be assumed, will have been well-informed about the rights available to them throughout and the implications of exercising or not exercising them.

[20] The Defence decision to stay with the 2015 trial dates cannot be characterized as "mere acquiescence in the inevitable" (*R. v. Morin, [1992] S.C.J. No. 25, para. 38*) as there was the opportunity to find out if earlier trial dates could be secured. It was an opportunity the Defence turned down, and in doing so, implicitly waived the delay.

Explicit Waiver

[21] The trial dates were looming when on January 20, 2015, at a pre-trial conference Judge Buchan was advised that Crown and Defence wished to return on February 3, 2015, to advise if the trial would be proceeding. (*Transcript for January 20, 2015, Tab 13, page 101*) On February 3, Mr. Bright indicated he was seeking to have the trial adjourned and explicitly waived the delay. (*Transcript for February 3, 2015, Tab 14, page 106*) New trial dates were set: January 11 – 15;

January 25 – 29; and February 1 – 5, 2016. It was subsequently agreed the trial would be heard on these dates in the Halifax Long-Trial Court, Courtroom #6.

[22] I find due to waiver by the defendants, the *Jordan* "clock" remained stopped at the 9-months and 3-weeks it had reached on December 30, 2013. The delay between December 30, 2013, and February 5, 2016, is Defence delay.

[23] The explicit waiver by the Defence was in relation to the delay in starting and completing the trial, which the Defence accepted, would now not be finished until February 5, 2016.

Defence Unavailability

[24] The trial did not conclude on February 5, 2016, and the *Jordan* clock started running again. What I must now address is the categorization of the time from February 5, 2016, to when the trial did eventually end on June 16, 2017. Taken with the 9-months and 3-weeks in delay already, this additional period adds 16-months and 10 days. In other words, with the time periods implicitly and explicitly waived by Defence taken out, the delay stands at 26-months. The question is this: does any of this time get deducted for Defence unavailability and/or conduct?

[25] The issue of defence unavailability must be considered with regard to the submissions of counsel and the decisions from the Supreme Court of Canada in *Jordan* and *Cody*.

[26] The defence unavailability in this case has been a function of Mr. Bright's very busy schedule. It is apparent that he is much in demand and has a heavy practice load. He characterized his cases as requiring "big blocks of time" with significant disclosure and the commensurate time requirements for preparation. (*Transcript for January 25, 2016, Tab 25, page 256*)

[27] The defence links Mr. Bright's unavailability for continuation dates to the failure of the Crown to accurately estimate the amount of time needed for the trial. In the Defence submission, had the Crown not significantly underestimated the time for trial, all the dates required would have been scheduled when the trial was set down. The Defence says that by the time additional dates had to be added, Mr. Bright's calendar had filled up and dates he may have had available previously were gone. In short, the Defence submits that if seven weeks had been requested at the time the trial dates were being set, instead of only three, this trial would have concluded before June 16, 2017.

[28] The Crown says this argument is an exercise in crystal-ball gazing. In the Crown's submission, there is no evidence of what availability Mr. Bright may have had in 2016 at the time when the trial was re-scheduled on February 3, 2015, to January and February 2016.

Estimating the Amount of Trial Time Needed

[29] The trial was originally expected to take 15 days. It ultimately needed 36 days. It started a day later than scheduled – January 12, 2016, rather than January 11, 2016, – at the request of the Defence. It didn't use April 28 or June 13, 2017, which were scheduled dates.

[30] At both the original trial-setting date – December 30, 2015 – and when new trial dates were sought due to a Defence request for an adjournment – February 3, 2015 – the estimate of trial time required was three weeks.

[31] The amount of trial time required was discussed between Crown and Defence prior to the original setting of trial dates on December 30, 2013. At that appearance before Judge Buchan, Mr. Bright spoke first and said, "Speaking with my learned friend, the Federal Crown, it would appear that three weeks would be appropriate…" Mr. Draghici-Vasilescu noted that this was a tax prosecution which "tend to be lengthy." He identified there would be 20 Crown witnesses. (*Transcript for December 30, 2013, Tab 4, page 39*) Three weeks is a lengthy trial in Provincial Court.

[32] It is apparent from the record that during 2014, Crown and Defence were discussing outstanding issues and reporting to the Court on their progress. Pre-trial conferences/status reports occurred on February 3, April 17, May 29, July 30, November 10, 17 and 24 and December 17. (*Transcripts, Tabs 5 to 11*) On February 3, 2015 when Mr. Bright requested the adjournment of the trial he said: "I still think we're going to need three weeks." Notwithstanding the pre-trial discussions undertaken by Crown and Defence there was no change suggested on February 3, 2015 by either counsel to the amount of time required for the trial.

[33] It was once the trial got underway in January 2016 that the need for additional dates beyond the scheduled 15 came into sharp relief. The progress of the trial was raised by me on Day 5, January 25, 2016: "So, Mr. Draghici-Vasilescu, it does seem as though we're moving at a slower pace than had been anticipated." Mr. Draghici-Vasilescu acknowledged he was "behind schedule." (*Transcript for January 25, 2016, Tab 22, page 221*)

[34] The record indicates that neither Mr. Draghici-Vasilescu nor Mr. Bright predicted the trial was going to overflow its banks. With the trial in its 13th day, Mr. Bright said: "…I never in a million years anticipated the length of time for this case. You know it happens…" (*Transcript for February 4, 2016, Tab 25, page 256*)

[35] I find that Crown and defence share responsibility for estimating trial time. (*R. v. J.M., 2017 ONCJ 4, para. 52*) That principle of shared responsibility is reflected in the Supreme Court of Canada's emphasis on "every actor in the justice system [having] a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with an accused person's right to a trial within a reasonable time." (*Cody, para. 1*) That responsibility however does not amount to counsel being measured against "a standard of perfection." (*Jordan, paras. 86 and 90*) That is relevant to the Defence submission that the Crown is at fault for under-estimating the amount of time required for trial.

[36] For its part, the Crown had an overly optimistic view of the amount of time the trial would take. But it does amount to crystal-ball gazing to suggest the Crown should have reasonably expected the trial to take 7-weeks. And once it became apparent that more trial time was needed, Mr. Draghici-Vasilescu made it clear he and Crown witnesses could be flexible and available.

Evolving Trial Time Requirements

[37] When it became apparent on January 25, 2016, that additional trial time would be required, Mr. Bright noted that the nature of his practice - the "big blocks of time" his cases required - complicated the setting of continuation dates. (*Transcript for January 25, 2016, Tab 25, page 256*)

[38] Mr. Draghici-Vasilescu indicated on January 25, 2016, that he was "desperately aiming to complete" the Crown's case in the remaining time (*Transcript for January 25, 2016, Tab 22, page 225*) and attention turned to finding dates for the Defence case. The week of July 18 to 22, 2016 was reserved to complete the trial with Defence evidence. (*Transcript for January 25, 2016, Tab 22, page 228*)

[39] The July dates were settled upon after earlier options were eliminated. Mr. Bright was not available in March or April and had "almost nothing in May" other than May 26, 27 and 30 when the Court had another matter scheduled. (*Transcript for January 25, 2016, Tab 22, pages 222 – 224*) Mr. Bright and the Court were unavailable in June. (*Transcript for January 25, 2016, Tab 22, page 224 – 225*)

[40] The optimism of January 25 about concluding the trial in July had vanished by January 29, Day 9 of the trial. It had become apparent the Crown's case would consume the July dates as well. (*Transcript for January 29, 2016, Tab 23, page 2*33) New dates of August 22 to 26, 2016 were confirmed for the Defence case. (*Transcript for January 25, 2016, Tab 22, page 236*)

[41] On January 25, 2016, when setting the July and August continuation dates, Mr. Bright confirmed what had been indicated in recent email correspondence, that he did not have any availability between February 5 (the date when the trial had been scheduled to conclude) and the July dates. (*Transcript for January 25, 2016, Tab 22, page 233*)

[42] By Day 13 of the trial, February 4, it was clear the Crown's case would not be finished in July and would need the August dates as well. It was agreed that further dates would be arranged through email. (*Transcript for February 4, 2016, Tab 25, pages 255 and 257*)

[43] As I will discuss shortly, finding additional dates before returning to continue the trial in July 2016 proved elusive.

[44] When the trial resumed in July, Mr. Draghici-Vasilescu advised that in addition to the time scheduled, the Crown required "a solid block of one week" to finish its case. A discussion about adding further dates led to scheduling continuation dates in 2017 - April 18, 19, 24 to 27; May 15 to 17; and June 12 and 13. These further 11 days took into account Mr. Bright's suggestion on July 21 that "we look to two weeks for trial continuation." (*Transcript for July 21, 2016, Tab 27, page 275*)

[45] In the course of looking for additional dates, I had advised counsel that the Courtroom #6 docket was scheduled into April 2017. (*Transcript for July 18, 2016, Tab 26, page 265*)

Offering Trial Continuation Dates

[46] But prior to that, in the period of February to May, 2016, some dates had opened up in the CR#6 docket. I advised counsel about dates in March (March 22, 23, 24, 29, 30 and 31), April (April 11 – 14), October (October 11 – 13, 17 – 21 and 31), November (November 1 – 4). (*Exhibit 59, Emails from the Court dated February 8, 10, and March 4, 2016*) I also subsequently offered October 24 – 27, November 7 – 10 and November 14 – 18. (*Exhibit 59, Email from the Court dated March 24, 2016*)

[47] Crown unavailability is not a factor in this case. On February 8, 2016, Mr. Draghici-Vasilescu advised by email: "I am likely to be able to accommodate earlier dates on fairly short notice using the flexibility some of the Crown witnesses can offer." He had also suggested scheduling "a couple of brief pre-trial conferences at some regular interval" for the purposes of exploring available dates in the Court's docket. (*Exhibit 59, Email from Mr. Draghici-Vasilescu dated February 8, 2016*)

[48] Mr. Draghici-Vasilescu indicated availability on all the dates the Court offered in emails during February and March. (*Exhibit 59, Email from Mr. Draghici-Vasilescu dated March 24, 2016*)

[49] Email responses from Mr. Sawa in March, April and May 2016 advised that Mr. Bright was not available for the offered dates. (*Exhibit 59*) Mr. Bright had advised he would be away in March and not accessing email. Dates that became available in Courtroom #6 - October 11 to 13 and October 17 to 21 – became unavailable again before the beginning of April and Mr. Bright's return.

[50] Mr. Draghici-Vasilescu emailed on May 13, 2016, to say that he was "wide open now in 2017." (*Exhibit 59*) A little later that day Mr. Sawa indicated: "We will discuss possible dates in 2017 with Mr. Draghici-Vasilescu to determine if we should arrange for an appearance to discuss additional dates." (*Exhibit 59*)

[51] In my email response to Mr. Sawa, copied to Mr. Bright and Mr. Draghici-Vasilescu, I said: "You and Mr. Draghici-Vasilescu know how to reach me if you want to appear for a discussion about future dates." (*Exhibit 59*)

[52] After the trial was adjourned on February 5, 2016, it ended up needing 22 additional days. Had the Defence been available for any 12 of the dates offered by the Court in 2016, with the July and August dates, the evidence-taking portion of the trial would have been concluded, at the latest by November 18, 2016, 7-months sooner than it did.

What Constitutes Defence Unavailability

[53] The Defence argued vigorously that Defence unavailability stops the *Jordan* clock running only when Defence counsel is not ready to proceed and the Court and the Crown are. I received further written submissions on this issue following the Supreme Court of Canada's decision in *R. v. Cody* released on June 16, 2017, four days after I had heard oral argument on the delay application.

[54] Notwithstanding Mr. Casey's able submissions on the point, I think *Cody* puts the issue of defence unavailability to rest and establishes the issue as one of availability and not readiness. In other words, if the Court and the Crown are available to proceed and the Defence is not available, the *Jordan* clock stops. The Supreme Court of Canada has not concerned itself with the issue of why the Defence is unavailable.

[55] I place reliance on the Supreme Court's statement in *Cody* that "…where the court and Crown are ready to proceed but the defence is not, the resulting delay should also be deducted." (*para. 30*) The Court cites *Jordan* in making this statement where the following was said: "…the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from *that unavailability* will be attributed to the defence." (*Jordan, para. 64, emphasis added*)

[56] It is also relevant to my analysis that in *Cody*, the Supreme Court held that "…one month of delay…caused by defence counsel's unavailability (Jordan, at para. 64) and not preparation time necessary to respond to the charges (Jordan, at para. 65)…" was to be deducted from the total delay in that case. It is apparent from this treatment of defence unavailability that the Court has declined to create any space for defence counsel having other commitments. While this seems harsh and perhaps can be criticized for being unrealistic, it is, at least to this point in the Supreme Court's section 11(b) jurisprudence, consistent with the following emphasis in *Cody*: "*All* justice participants – defence counsel included – must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11(b) of the *Charter*." (*Cody, para. 35, emphasis in the original*)

[57] *Jordan* and *Cody* could have, but do not, reflect on the Court's observation in *R. v. Godin* that, "Scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(b) purposes, require defence counsel to hold themselves in a state of perpetual availability." (*R. v. Godin, [2009] S.C.J. No. 26, para. 23*) The *Jordan* and *Cody* Courts are silent on *Godin*. In *Cody* the Court emphasizes that "marked indifference toward delay" and "inaction" by defence counsel will have implications for a delay application and, reiterate the ruling in *Jordan*: "Defence counsel are therefore expected to "actively advanc[e] their clients' right to a trial within a reasonable time…" (*para. 33, citing Jordan, para. 138*)

[58] It is in this context the *Jordan* and *Cody* Courts make no mention of *Godin*.

[59] *Godin* was unanimous decision, delivered by Cromwell, J. *Cody* is also a unanimous decision. Only Abella, J. sat on both appeals. Cromwell, J., now retired from the Court, strongly dissented in *Jordan*. Perhaps the issue will be revisited by the Court at some point but right now, defence unavailability due to other commitments reduces the total delay.

[60] One final comment about *Godin*: its facts may have made the Court sympathetic to defence counsel as the Court observed that the "only person who appears to have moved the matter ahead more quickly was defence counsel." (*para. 27*)

[61] I find the Supreme Court of Canada has explicitly held that defence unavailability for reasons unrelated to preparation for the case reduces the total delay. The implications are that Mr. Bright's calendar and his unavailability for dates that were offered in 2016 must be taken into account in assessing the net delay. As I mentioned, some combination of the dates offered would have, with the ten days in July and August, concluded the trial by November 18, 2016 at the latest.

[62] *Jordan* and *Cody* do not allow for defence unavailability to be neutralized because the original trial time estimates were incorrect. Underestimation by the Crown, acting in good faith, of the trial time required for the trial is not a relevant consideration where the issue is defence unavailability. And furthermore, there would need to be evidence the Defence was available for the trial dates set by a more accurate time estimation.

Calculating Net Delay

[63] In keeping with my determination that, but for defence unavailability, evidence-taking in this trial would have concluded by November 18, 2016, I find the period following that, through to June 16, 2017 - a period of 7-months - must be deducted from the total delay. This delay of 7-months is delay that must be attributed to the Defence.

[64] Due to Defence implicit and explicit waiver, I have already found that the delay was 26-months before I embarked upon considering defence unavailability. The deduction of a further 7-months of delay caused by Defence unavailability in 2016 reduces the net delay to 19-months, just over the *Jordan* ceiling of 18-months.

Date Allocation by Crown and Defence on this Application

[65] There may be more than one way to calculate the amount of delay. Both Mr. Donohue and Mr. Casey prepared charts parsing the dates from March 6, 2013, to June 16, 2017. In its chart the Crown concluded the trial would have finished by October 27, 2016, but for defence delay and exceptional circumstances.

[66] Mr. Casey's "Date Allocation" chart identified a total of 499 days (approximately 16-months) counted toward the ceiling by agreement of Crown and Defence. As an example, the March 6 to December 30, 2013 period (charges laid to trial date setting) totals 299 days. Other periods of delay in Mr. Casey's chart going to the ceiling include the actual dates of trial and various interregnum dates. Mr. Casey also indicates on the chart the defendants' dispute with the Crown over the allocation of dates between March 22 and July 18, 2016; July 25 and August 22, 2016; and October 24, 2016 and April 18, 2017. Mr. Casey notes these are periods of delay the Crown attributes to the defence.

[67] Had I mapped my analysis against Mr. Casey's chart, I would have still held the Defence responsible, based on Exhibit 59 - the email exchanges from February to May 2016 - for periods of the delay in 2016.

Minimizing Micro-Accounting When Determining Net Delay

[68] I have taken a different approach in my analysis of defence unavailability than either Crown or Defence. I believe it more closely resembles the direction of the Supreme Court in *Jordan*. The *Jordan* court clearly wants trial judges to get away from "micro-accounting". (*para. 37*) And although expressed in the context of what the Defence must do to establish unreasonable delay in cases where the delay falls below the ceiling, (which is not in issue here), what the Court has said is broadly applicable to how section 11(b) applications are to be approached:

> **91** Determining whether the time the case has taken markedly exceeds what was reasonably required is not a matter of precise calculation. Trial judges should not parse each day or month, as has been the common practice since *Morin*, to determine whether each step was reasonably required. Instead, trial judges should step back from the minutiae and adopt a bird's-eye view of the case. All this said, this determination is a question of fact falling well within the expertise of the trial judge (*Morin*, per Sopinka J., at pp. 791-92).

Defence Conduct and the Three Days at the Start of the Trial

[69] *Jordan* establishes that "delay attributable to the defence" (*para. 60*), which I have been discussing, has two components. I have dealt with Defence waiver, the first component, and will now address Defence conduct in relation to a *Charter* motion at the start of the trial as that too was raised in argument.

[70] The Supreme Court in *Jordan* was critical of Defence conduct that creates delay. *Jordan* recognized that in some cases Defence will engage in "deliberate and calculated defence tactics aimed at causing delay…" (*Jordan, paragraph 63*) There is no suggestion that occurred here. However, the Crown has argued the Defence conduct at the start of the trial got proceedings off to a slower start. As I will discuss, I find this did not have a measurable impact on the overall progress of the trial.

[71] The Supreme Court of Canada has not exhaustively catalogued what actions can constitute defence delay. "Defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay." (*Jordan, para. 66*) Defence must be afforded time to prepare and "…defence applications and requests that are not frivolous will also generally not count against the defence." (*para. 65*) The *Jordan* court recognized that trial judges are "uniquely positioned to gauge the legitimacy of defence actions." (*para. 65*)

[72] When this trial commenced on January 12, 2016, a day later than its original start-time due to a Defence request, the first order of business was a section 8 *Charter* application by Darrell Spears. The Defence had given notice of its application on November 23, 2015. Mr. Bright intended the application to be heard at the start of the trial as he had no available time in his calendar beforehand. After being advised of that, the Court also indicated no availability. (*Transcript for November 23, 2015, Tab 20, pages 165 – 166*)

[73] The application raised the issue of Mr. Spears' standing to challenge a search warrant for financial records of a company in which he had no ownership interest. I found that Mr. Spears, who had earlier divested himself of any legal

status in relation to the company and was now only an employee, had no standing. (*R. v. Spears, et al., 2016 NSPC 5, paras. 34 – 38*) The Crown says this outcome was predictable based on well-settled law and suggested the application fell close to what *Jordan* has criticized as "frivolous applications and requests…" (*Jordan, para. 63*)

[74] After rendering my decision on January 13, the Defence asked for an adjournment until the next day. This delayed the start of the Crown's first witness to January 14.

[75] As a consequence of the Defence request not to start the trial until January 12 and the hearing of the section 8 *Charter* application, the evidence-taking did not get underway until three days into the 15 days set aside for the trial.

[76] I am unable to see how the "loss" of these three days had much impact on the progress of the trial as it ended up requiring 21 days more than the original 15-day estimate. Had these three days been in the evidence-taking mix, the trial would have still needed 18 days to conclude all the evidence. As I noted earlier, neither Crown nor Defence anticipated the trial requiring so much time.

[77] I think judges should be careful not to second-guess Defence counsel too readily. The *Charter* challenge brought here was not unnecessarily protracted and furthermore did not have any discernible impact on the length of the trial. I find the Defence conduct at the start of the trial had no real *Jordan* implications.

Exceptional Circumstances – A Complex Case

[78] My assessment of "delay attributable to the defence" - waiver and Defence unavailability – produces a net delay that comes in just over the *Jordan* ceiling. I am now required to examine whether there are factors that satisfy the "exceptional circumstances" the Crown must show to rebut presumptively unreasonable delay. I find there are.

[79] *Jordan* establishes that exceptional circumstances that rebut the presumption of unreasonable delay are circumstances that "lie outside the Crown's control…" They include particularly complex cases.

[80] There is no definition for a complex case although *Jordan* provides some "hallmarks". (*para. 77*) An assessment of the proceedings has to be made. Trial judges are considered well-equipped to determine if "the net delay is reasonable in view of the case's overall complexity." (*Cody, para. 64 citing Jordan, para. 79*)

[81] The Supreme Court of Canada has held that complexity "requires a qualitative, not quantitative, assessment." It constitutes an exceptional circumstance,

> …only where the case as a whole is particularly complex. Complexity cannot be used to deduct specific periods of delay. Instead, once any applicable quantitative deductions are made, and where the net delay still exceeds the presumptive ceiling, the case's complexity as a whole may be relied upon to justify the time that the case has taken and rebut the presumption that the delay was unreasonable. (*Cody, para. 64, citing Jordan, para. 80*)

[82] Crown and Defence do not agree on whether this case should be characterized as complex. Mr. Casey says it is not a complex case although there are clear indications that trial counsel thinks it is.

[83] Disclosure was voluminous (15,000 pages of accounting and banking records, contracts, tax filings, and incorporation documents) and trial counsel for the defendants said it took some time to "digest." (*Transcript for February 25, 2015, Tab 15, page 119*)

[84] In *Cody*, the Court observed that despite "extensive disclosure…the balance of the proceedings appear to have been relatively straightforward." (*para. 65*) That does not describe the defendants' trial. It has not been straightforward. The Crown has made allegations of a convoluted scheme to evade tax obligations. And it is not just tax evasion that is being alleged: Darrell Spears has been charged with a fraud of nearly $800,000 as well as offences under the *Income Tax Act* and *Excise Tax Act.* And while I am mindful that *Jordan* requires more than just serious charges for a case to be labeled complex (*para. 81*), in this case there is more. There were 18 Crown witnesses including two CRA auditors, three CRA trust examiners, a handwriting expert, and civilian witnesses. The Crown was unable to speak for the purposes of trial preparation with a couple of significant witnesses – Mr. Spears' bookkeeper and his ex-wife, Joanne Spears. There have been over 100 documentary exhibits entered by the Crown, some containing hundreds of pages, which have been the subject of considerable cross-referencing. The Crown's opening statement, which Mr. Draghici-Vasilescu described as "a road map" took approximately 45 minutes. (*Record of Proceedings, January 13, 2016*)

[85] As *Jordan* notes, "trials are not well-oiled machines" and in this case, the trial certainly did not slide smoothly along its scheduled track. It was beset by various unforeseeable developments: for example, Crown witnesses taking longer than anticipated and testimony from Ms. Spears that led to the Crown retaining a handwriting expert. The trial has taken longer "than reasonably expected – even where the parties [had] made a good faith effort to establish realistic time estimates…" (*Jordan, para. 73*)

[86] Trial counsel has described the case as "complex". For example, on December 3, 2015, before the trial had started, Mr. Bright said it was "quite a fairly complex case" and referred to the fact that there were 20 Crown witnesses listed. (*Transcript for December 3, 2015, Tab 21, page 202*) On July 21, 2016, the 18th day of trial, in a discussion about the need for additional time to hear evidence and final submissions, Mr. Bright said: "…I mean this isn't a typical break and enter or something like that…I find it more complex…" In this context, Mr. Bright proposed proceeding with Defence evidence after taking a break following the conclusion of the Crown's case and was in favour of a further hiatus before final submissions. Mr. Bright was concerned to ensure there would be time to prepare for final submissions: "…Then we'll need submissions and I anticipate those will be somewhat difficult in the sense of we've heard a lot of evidence. We've looked at a lot of documents. And there's an obligation on counsel to assist you in bringing this together…" (*Transcript for July 21, 2016, Tab 27, pages 273 – 276 and 283*)

[87] Mr. Bright's assessment of the case was not the assessment of a newly-minted lawyer doing his first lengthy case. Mr. Bright is one of the most senior members of the criminal defence bar. His decades-long career has involved many big cases and his opinion about the complexity of a case is an opinion forged from experience. It is consistent with the prosecutor's view of the case. And after the 35 days of evidence I have heard, I agree: describing this case as "complex" is apt.

[88] According to *Jordan*, this is sufficient to justify delay above the ceiling: "Where the trial judge finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No further analysis is required." (*para. 80*)

[89] I will make a final observation about complex cases. Common sense tells me the time requirements for a complex trial are going to be harder to predict.

[90] I am satisfied that the complexity of this case rebuts the presumptively unreasonable delay, the delay that exceeds the *Jordan* ceiling.

Transitional Cases

[91] The "transitional case" factor only comes into play in a delay analysis if the net delay remains above the *Jordan* ceiling and "excess delay cannot be justified based on case complexity." (*Cody, para. 67*) As I have found that the complexity of the case justifies the additional delay, I will not be examining the "transitional exceptional circumstance." (*Cody, para. 67*)

[90] I will however say this: Defence efforts to expedite the proceedings was a factor in the *Jordan* companion case of *R. v. Williamson, 2016 SCC 28* where the Supreme Court took into account how the parties conducted themselves in the pre-*Jordan* context. (*para. 29*) As the Court stated in *Cody* the determination in *Williamson* "…highlights that the parties' general level of diligence may also be an important transitional consideration." (*para. 70*) The record in this case indicates the defendants made no particular effort to expedite their trial and did not act in a manner consistent with "a desire for a timely trial." (*Jordan, para. 99*) That is my assessment as the trial judge taking "a bird's-eye view" of the case. (*Jordan, para. 91*)

Conclusion

[91] In summary, I find that the net delay in this case is 19 months, just over the *Jordan* ceiling. I am satisfied the complexity of the case constitutes an exceptional circumstance that rebuts the presumption of unreasonable delay. The record does not indicate the defendants were anxious to achieve a timely conclusion to their trial. Their section 11(b) application for a stay of proceedings is denied.

Derrick, P.C.J.