SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Buckley*, 2018 NSSC 3

Date: 2018 01 17
Docket: CRBW No. 461375
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

John Buckley

DECISION: *VOIR DIRE* 3
Section 11(b) Delay Application

Restriction on Publication: Section 486.5 CC

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	January 9, 2018, in Bridgewater, Nova Scotia
Written Decision:	February 14, 2018
Counsel:	Leigh Ann Bryson, for the Crown Patrick MacEwen, for the Defence

By the Court:

Overview

[1] Victoria Rae Brauns-Buckley was killed on March 1, 2012. John Buckley, her then eighteen-year-old son, was charged with second-degree murder on March 13, 2012. He was remanded. His preliminary inquiry was scheduled for January 16, 17, 18, 21, and 24, 2013. On December 18, 2012, the Crown withdrew the charges against him. The Crown indicated that the investigation was ongoing and requested an extension to maintain possession of all exhibits.

[2] In 2015-2016, the police conducted a Mr. Big operation, called Operation Hackman. John Buckley was the target. During the final crime boss interview, Mr. Buckley confessed to killing his mother. He was then arrested and, during a cautioned statement, told the police he killed his mother. He was charged with first-degree murder on April 8, 2016. He has been remanded since that time and his trial is scheduled to run from January 22 to February 23, 2018.

[3] Mr. Buckley says that his s. 11(b) *Charter* right to be tried within a reasonable time has been infringed. He says that the time for calculating the delay in this case runs from the laying of the initial second-degree murder charge on March 13, 2012, includes the gap period between the charge being withdrawn on December 18, 2012, and the first-degree murder charge being laid on April 8, 2016, through to the scheduled completion of the trial on February 23, 2018. Mr. Buckley says that the entire delay, including the gap, is approximately seventy months. He requests the remedy of a stay of proceedings in accordance with s. 24(1) of the *Charter*.

[4] The Crown says that the gap period between the withdrawal of the second-degree murder charge and the laying of the first-degree murder charge is not included in a calculation of s. 11(b) delay. They say that the total period of delay is thirty-one months and twenty days, before any defence delay is subtracted. The Crown says that four months and twenty-eight days of defence delay can be subtracted from the entire delay and, therefore, the case is well within the guidelines enunciated in *R. v. Jordan*, 2016 SCC 27, and there is no s. 11(b) *Charter* violation.

Chronology

[5] **March 13, 2012 –** Information is laid alleging second-degree murder.

[6] **March 13, 2012** –Mr. Buckley arraigned on second degree murder charge. Defence waives formal reading of second degree murder charge. The matter is adjourned to receive disclosure.

[7] **April 11, 2012** – Appearance to set preliminary inquiry date. Defence received disclosure the day before and, therefore, the matter is adjourned to review disclosure.

[8] **May 17, 2012** – The Preliminary Inquiry is scheduled for January 16, 17, 18, 21 and 24, 2013, with a focus hearing scheduled for November 9, 2012.

[9] **December 18, 2012** – Crown withdraws charge. Crown application to extend detention of exhibits up to March 1, 2013, is granted. Mr. Buckley is released.

[10] **April 8, 2016** - Information is laid alleging first-degree murder.

[11] **April 11, 2016** – Mr. Buckley arraigned on first degree murder charge. Defence waives reading of first degree murder charge. Police still working on preparing further disclosure. Defence asks for matter to be set down in a month's time and court agrees.

[12] **May 11, 2016** – Defence counsel advises retainer not confirmed; has not received disclosure; Legal Aid should be determined within several days; and suggests returning June 8, 2016.

[13] **June 8, 2016** – Defence counsel advises he has been retained; received disclosure three weeks ago, estimates 7,000-10,000 pages; received copy of hard drive to give to Mr. Buckley to review; proposes seven days for Preliminary Inquiry and focus hearing. Clerk suggests March 20, 2017, for start of Preliminary Inquiry. Defence not available as is in court on another matter. Clerk suggests weeks of April 3 or 10, 2017. Defence not available as out of the country and asks about first two weeks of March, 2017. Clerk suggests starting March 8, 2017, for seven days. Defence agrees. December 8, 2016, scheduled for focus hearing.

[14] **December 8, 2016** – Focus Hearing. Counsel have been in discussions. Defence to confirm instructions with client. Adjourned to December 22, 2016.

[15] **December 22, 2016** – Focus Hearing continuation. Discussion regarding Statement of Issues filed by Defence and witnesses required. Crown confirms consent committal scenario and that they will produce small array of witnesses for examination. Defence agrees.

[16] **March 23, 2017** – Appearance to set dates for pre-trial conference. Defence confirms consent committal. Defence has not seen indictment yet, takes time to review and waives formal reading of charges. Defence advises concern about delay. Defence advises available first and last week of April and is in a jury trial the month of May and first two weeks of June. Defence says because of complexity, two weeks required for *voir dire* and three to five weeks for trial. Court offers April 11, 2017. Defence not available. Court offers May 19, 2017, for the pre-trial conference. Defence agrees. Pre-trial conference arranged via teleconference and video-link. Defence again notes concern about delay.

[17] **May 19, 2017** – Pre-trial conference. Crown discusses volume of material in relation to *voir dire* regarding Mr. Big operation and suggests a further in-person pre-trial. Crown suggests determining how the *Hart voir dire* is to be conducted before moving on to other *voir dires*. Defence says there is approximately one thousand hours of audio to be reviewed and that the *voir dire* could be longer than the trial. Defence confirms s. 11(b) issue is still on the table. Court indicates it has permission to conduct a special jury term to conduct the trial. Crown suggests court give counsel a couple more weeks to meet to review audio and narrow down what is relevant. Defence agrees. Court requests letter with results of meeting and providing time required for *voir dire* and trial. Pre-trial conference is put over to June 30, 2017.

[18] **June 30, 2017** – Pre-trial conference continuation. Crown explains why neither they nor the defence are ready to proceed. Crown is having transcripts of audio intercepts completed. Court notes concern about delay and pre-trial being put over twice. Crown advises that the police are preparing transcripts and are confident they will have transcripts ready before the next return date. Pre-trial conference is put over to July 20, 2017.

[19] **July 20, 2017** – Pre-trial conference continuation. Court says due to *Jordan* concerns, it has authority to start *voir dires* the next day (July 21, 2017) and trial on August 20, 2017. Regarding the *Hart* application, Crown confirms twelve out of seventy-seven transcripts are still to be transcribed and should be ready in the next several weeks. Court asks why transcripts had not already been completed,

since Mr. Buckley was charged in April 2016. Crown says it is not obligated to produce transcripts, but only audio recordings. Defence confirms no explicit waiver. Defence says counsel have been trying to narrow down the issues for the *Hart voir dire*. Crown estimates (and Defence agrees) two weeks for the *voir dire*. Crown is available the weeks of August 8 and 14, 2017, and any time from September to December, other than October 23-27, 2017. Defence is in a jury trial the week of August 7, 2017, and starts a five-week jury trial on September 11. Defence is available October 16, 17, and 18, 2017; the weeks of October 23 and 30, and the week of November 6, except for November 7. Court offers October 16 to 18, 2017; October 30 to November 3, and November 6 to 10, for the *Hart voir dire*. Both counsel agree. After the fact conduct evidence is to be dealt with at the end of the *Hart voir dire*. Defence asks for a date for trial before setting a date for a s. 11(b) application. Crown is not available in January and February, 2018. Defence is available week of December 18, 2017; the first two weeks of January 2018; January 15, 16, 18, and 19; the week of January 22; January 29 and 30; February 1, 2, 5, 6, 8, 9; the weeks of February 12 and 19; and generally any time thereafter. Counsel agrees to trial dates of January 8 to February 9, 2018. Defence says one day is needed for the s. 11(b) application and suggests the week of December 18, 2017. The application is scheduled for December 20, 2017. Any non-contentious issues are to be dealt with by Crown in writing to Defence before the trial.

[20] **October 16, 2017** – *Hart voir dire* commences. Counsel argue preliminary issue of burden. Court rules that the onus is on the Crown to prove that the probative value outweighs the prejudicial effect of the crime boss confession and the defence has no burden to narrow down the issues for the Crown more than they have in this case. Defence still missing transcripts for s. 11(b) application.

[21] **October 30 and 31, 2017, and November 1, 2, 3, 6, 8, 9 and 10, 2017** – *Hart voir dire* continuation. On November 6, issues are discussed regarding Mr. Buckley not having access to disclosure materials at the correctional facility. On November 9, a conference call is held with the correctional facility on the record as to why materials are not being made available to Mr. Buckley. Court time is used up allowing Mr. Buckley to review disclosure. On November 10, Defence confirms Mr. Buckley now has access to materials. *Hart voir dire* cannot be completed in time scheduled, nor can the *voir dire* on the voluntariness of the statement, nor the s. 11(b) delay application. Further dates are scheduled to complete the *voir dires* from January 2 to 10, 2018. Crown to file brief December 1, Defence reply December 15.

[22] **January 2 to 10, 2018** – *Voir dire* continuation. *Hart voir dire* completed on January 2, and warned statement *voir dire* commenced. Warned statement *voir dire* concludes on January 9. Section 11(b) *voir dire* also completed on January 9. Crown notes they will be filing an additional application regarding a publication ban. Counsel scheduled to return January 19, for the court's decisions. Jury trial scheduled to commence January 22.

[23] **January 6, 2018** – Crown files their closing written submissions on *Hart voir dire*.

[24] **January 12, 2018** – Defence files their closing written submissions on *Hart voir dire*.

Submissions of Counsel

Defence Position

[25] In his brief on this issue, counsel for Mr. Buckley argues in part:

> Mr. Buckley was first charged with second degree murder on an Information sworn March 13th, 2012. He was brought into custody that day and remanded until April 11th, 2012, while Defence counsel awaited disclosure. On April 11th, 2012, disclosure was still not complete and the matter was further adjourned to May 17th, 2012. On May 17th, 2012, Preliminary Inquiry dates were set for January 16th, 17th, 18th, 21st, and 24th, of 2013, with a Focus Hearing scheduled for November 9th, 2012. On December 18th, 2012, the matter was brought before the Court and the Crown announced that they did not believe there was sufficient evidence to commit Mr. Buckley to trial. The matter was withdrawn and Mr. Buckley was released from custody.
>
> Crown counsel indicated on the record that the investigation would continue and sought a continued Detention Order in relation to items seized from Mr. Buckley and in the Buckley residence. Mr. Buckley had remained in custody from March 13th, 2012 to December 18th, 2012, a period of nine months and five days. A Show Cause Hearing was not held and not requested.
>
> Mr. Buckley was again arrested and charged with the death of Victoria Brauns-Buckley on April 8th, 2016. He first appeared in Court on April 11th, 2016, at which time the matter was adjourned to May 11th, 2016, for the purpose of reviewing new disclosure. On May 11th, 2016, the matter was once again adjourned to June 8th, 2016, to allow the Crown to provide further disclosure relating to the major crime technique investigation used by members of the RCMP. On June 8th, 2016, Preliminary Inquiry dates were set for March 8th, 9th, 10th, 13th, 14th, 16th, and 17th, of 2017, with a Focus Hearing of December 8th,

> 2016. The Preliminary Inquiry was held on March 8th, 9th, and 13th, 2017, at which time Mr. Buckley was committed to stand trial in the Supreme Court of Nova Scotia.
>
> After several adjournments in the Supreme Court of Nova Scotia, trial dates have been set for January 8th through February 9th, 2018. More than seventy (70) months has passed since Mr. Buckley was first charged with the death of his mother, Victoria Brauns-Buckley. Clearly, this is above the "presumptive ceiling" of thirty (30) months for Supreme Court matters as outlined in *Jordan, supra*.

[26] On January 16, 2018, Defence filed the following chart, and submitted that none of the noted delay is attributable to the Defence:

Dates	**Occurrence**	**Days Until Next Appearance**	**Total**
March 13, 2012	Arraignment		
April 11, 2012	Adjourned to review disclosure	29	29
May 17, 2012	Preliminary Inquiry dates set	36	65
December 18, 2012	Charges withdrawn	215	280
April 11, 2016	Arraigned on new Information/ Adjourned to secure counsel and receive disclosure	1210	1490
May 11, 2016	Adjourned to secure counsel	30	1520
June 8, 2016	Preliminary Inquiry dates set	28	1548
December 8, 2016	Focus Hearing	183	1731
December 22, 2016	Focus Hearing	14	1745
March 8, 9, 10, 13, 14, 16, 17, 2017	Schedule Preliminary Inquiry dates - Mr. Buckley committed to stand trial	76	1821
March 23, 2017	First appearance in Supreme Court - Matter adjourned for a Pre-Trial Conference	6	1827
May 19, 2017	Pre-Trial Conference adjourned while transcripts are being prepared	57	1884
June 30, 2017	Pre-Trial Conference adjourned while transcripts are prepared	42	1926

July 20, 2017	Trial dates set	20	1946
January 8, 2018 - February 8, 2018	Dates later delayed two weeks for the completion of voir dire	172	2118

Crown Position

[27] On January 11, 2018, Crown counsel wrote to the court outlining their delay calculations with respect to this matter. They calculate the duration of the 2012 proceeding as nine months and five days and anticipate the 2016 proceeding to be twenty-two months and fifteen days, with the overall delay being thirty-one months and twenty days.

[28] Crown counsel submits that the following periods can be subtracted as delay caused or implied by the defence:

1. August 7 to October 16, 2017 (two months, defence counsel unavailable);
2. May 11 to June 8, 2016 (twenty-eight days, defence requested adjournment); and
3. May 19 to July 20, 2017 (two months, agreement to obtain transcripts).

Analysis

[29] Section 11(b) of the *Canadian Charter of Rights and Freedoms* states:

> 11. Any person charged with an offence has the right
>
> …
>
> (b) to be tried within a reasonable time; … [Emphasis added]

Calculating Delay with a "Gap"

[30] The issue of whether the gap period between the withdrawal of the second-degree murder charge and the laying of the first-degree murder charge has not been specifically answered by higher courts. However, the principles that govern this issue have been considered. In *R. v. Potvin*, [1993] 2 S.C.R. 880, [1993] S.C.J. No. 63, Sopinka J., speaking for the majority, discussed the gap period that occurs when an accused is acquitted, but the Crown appeals. In ruling that this gap period

does not factor into the overall calculation when considering delay, Sopinka J. stated:

> 61 If these purposes and objects were embodied in s. 11(b) without restriction, it would be difficult to argue that the section had no application to appeals. The section has, however, been interpreted in a manner that does not extend its protection of these interests against the consequences of delay at large, but only from the consequences of delay flowing from a formal charge. Short of a formal charge, similar consequences proceeding from other aspects of governmental activity in the criminal process do not trigger the protection of the provision. Accordingly, in *Kalanj, supra*, this Court dealt with a situation in which the accused were arrested after a lengthy investigation. On the day of the arrest the accused were fingerprinted and released but were advised not to leave town, that they would be charged and that a summons would issue. More than eight months later charges were laid. This Court was invited to hold that, because of the involvement of the interests that underlie s. 11(b), it should extend to the pre-charge delay. The invasion of the interests protected by s. 11 in the broad sense could certainly be equated to the consequences of a charge. The stigma and anxiety resulting from arrest and fingerprinting would exceed the consequences flowing from laying of a charge followed by a summons. The restraint on liberty was the equivalent to that which occurs when a charge is laid and the accused is released on bail. The pre-trial delay has the same effect on the freshness of the evidence as post-charge delay. Nonetheless, this Court held that the accused were not persons charged until a formal charge was laid and that s. 11(b) did not apply. This judgment has been applied to rule out review of pre-charge delay unless the accused can establish a breach under s. 7. See *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091.
>
> 62 It follows from *Kalanj* that s. 11(b) does not apply unless the restriction of the interests which the subsection protects results from an actual charge. Circumstances which produce the same consequences do not qualify for the protection of this provision unless those consequences proceed from a formal charge. The question which is in issue in this appeal is whether the consequences of delay resulting from an appeal from acquittal or conviction are distinguishable from pre-charge delay and can be attributed to the existence of a formal charge.
>
> 63 Clearly, during the period after an acquittal and the service of a notice of appeal, the person acquitted is not a person charged. No proceeding is on foot which seeks to charge the person acquitted. Upon the appeal's being filed there is a possibility, the strength of which will vary with each case, that the acquittal will be set aside and the charge will be revived. The plight of the acquitted person is that of one against whom governmental action is directed which may result in a charge. In this respect the former accused is like the suspect against whom an investigation has been completed and charges are contemplated awaiting a decision by the prosecutor. Indeed the acquitted accused is somewhat more removed from the prospect of being subject to a charge than the suspect. In the

> former case, no charge can be revived until the acquittal is set aside by reason of an error of law that a court determines with a reasonable degree of certainty affected the decision at trial. In the latter case, all that stands between the suspect and a charge is the *ex parte* decision of the prosecutor. It would be incongruous to extend protection to the acquitted accused pending appeal and not to the suspect awaiting a charge who knows he or she is awaiting the decision of the prosecutor.

[31] Justice Sopinka went on to discuss similar considerations undertaken by the Supreme Court of the United States:

> 67 A similar conclusion was reached by the Supreme Court of the United States. In *United States v. Loud Hawk*, 474 U.S. 302 (1986), it was argued that the speedy trial guarantee in the 6th Amendment applied to an appeal by the government from a dismissal of charges prior to a trial on the merits by reason of excessive delay in prosecuting the charges. The court stated, at pp. 311-12:
>
> > During much of the litigation, respondents were neither under indictment nor subject to bail. Further judicial proceedings would have been necessary to subject respondents to any actual restraints.... As we stated in *MacDonald*: "(W)ith no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, a citizen suffers no restraints on his liberty and is (no longer) the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer'." ...

[32] In concluding that the delay occasioned by an appeal is not subject to s. 11(b) *Charter* scrutiny, Sopinka J. stated:

> 69 The conclusion I have reached applies to appeals from acquittals and convictions. Furthermore, I see no valid reason to distinguish between an acquittal on the merits and a judicial stay. In light of the interest protected under s. 11(b), the differences between an acquittal and a judicial stay are purely technical. In both cases the accused can plead *autrefois acquit* and no proceedings may be brought in respect of the same charge unless the acquittal or stay is set aside on appeal. No restraints can be placed on the liberty of the former accused pending appeal. There is no basis on which to assume that the theoretical existence of a charge that has been stayed carries any greater stigma or causes greater anxiety to the respondent in an appeal from a judicial stay than an appeal from acquittal. Certainly there is no evidence on this point. I doubt that the public understands the difference. An unpopular acquittal generates as much public indignation as a stay. The degree of anxiety is dictated more by the strength of the grounds of appeal than by the form of the verdict. These observations were neatly summed up by Estey J. in *Amato v. The Queen*, [1982] 2 S.C.R. 418, at p. 457:

> While the charge may be said to hang over the head of the accused, this is a wholly theoretical observation because there is no forum for its further processing.

[33] This approach was followed in *R. v. Manasseri*, 2016 ONCA 703, application for leave to appeal dismissed, [2016] S.C.C.A. No. 513, where Watt J.A. stated:

> 335 As a result of the Crown's application for certiorari and subsequent appeal, Kenny was not a "person charged with an offence" from December 9, 2008 until at least June 2, 2010 and, more likely, until his formal committal on August 12, 2010. In accordance with previous authority, counsel exclude from the total delay the 18 month period during which *certiorari* and appellate proceedings were on foot. See: *R. v. Potvin*, [1993] 2 S.C.R. 880, at pp. 907-908.

[34] In *R. v. Carter*, [1986] 1 S.C.R. 981, [1986] S.C.J. No. 36, Lamer J. (as he then was) spoke for the majority when he explained that pre-charge delay should not be considered when calculating an alleged s. 11(b) *Charter* violation:

> 11 As I have indicated in *Mills v. The Queen*, [1986] 1 S.C.R. 863, which has been handed down this same day, the time frame to be considered in computing trial within a reasonable time generally runs only from the moment a person is charged. In passing, I might add that I say "generally" because there might be exceptional circumstances under which the time might run prior to the actual charge on which the accused will be tried. As an example, if the Crown withdraws the charge to substitute a different one but for the same transaction, the computation of time might well commence as of the first charge. This is not in issue here and reference to this situation is only illustrative of my resort to the word "generally". Consequently, the period running from April 3, 1980 to January 28, 1983, should not have been taken into consideration when assessing the reasonableness of the delay under s. 11(b).
>
> 12 Moreover, I must respectfully disagree with McKay J.'s suggestion that pre-information delay may be given some weight when assessing the reasonableness of post-charge delay. This is because prior to the charge, the liberty of the individual will not be subject to restraint nor will he or she stand accused before the community of committing a crime. Thus, those aspects of the liberty and security of the person which are protected by s. 11(b) (as opposed to those other aspects of the liberty and security of the person which are protected through s. 7 and s. 11(d)) will not be placed in jeopardy prior to the institution of judicial proceedings against the individual. Hence, pre-charge delay is irrelevant to those interests when they are protected by s. 11(b).

[35] The Supreme Court of Canada's decision in *Carter* was expanded upon in *R. v. Kalanj*, [1989] 1 S.C.R. 1594, [1989] S.C.J. No. 71, where McIntyre J. stated for the majority:

> 16 With all deference to contrary opinions, I am of the view that it cannot be said that this Court in *Carter* adopted the minority view in *Mills*, on the question of the extension of the meaning of the word "charged" developed by Lamer J. In *Carter*, Lamer J., with the agreement of seven judges who heard the case, clearly stated that an accused was charged upon the swearing of the information, and *Carter* supports the view that the pre-charge delay is not a factor for consideration under s. 11(b). To this extent, then, I am in agreement with the above quoted comments of Macfarlane J.A. in *Mackintosh* but, with respect, I do not agree with the majority in that case that "charged" has a flexible meaning varying with the circumstances of the case. I would therefore hold that a person is "charged with an offence" within the meaning of s. 11 of the *Charter* when an information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn. It would follow, then, that the reckoning of time in considering whether a person has been accorded a trial within a reasonable time under s. 11(b) will commence with the information or indictment, where no information has been laid, and will continue until the completion of the trial: see *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 633, where La Forest J. said:
>
> > The question of delay must be open to assessment at all stages of a criminal proceeding, <u>from the laying of the charge</u> to the rendering of judgment at trial. [Emphasis added.]

[36] Justice McIntyre went on to confirm that pre-information delay will not be a factor in considering total delay:

> 16. … and see, as well, *Argentina v. Mellino*, [1987] 1 S.C.R. 536, at p. 548, where the same judge said:
>
> > It gives a Charter remedy for delay <u>when a prosecution has been initiated</u>. [Emphasis added.]
>
> Pre-information delay will not be a factor.

[37] In discussing the reasoning for this conclusion, McIntyre J. explained:

> 19 The length of the pre-information or investigatory period is wholly unpredictable. No reasonable assessment of what is, or is not, a reasonable time can be readily made. Circumstances will differ from case to case and much information gathered in an investigation must, by its very nature, be confidential. A court will rarely, if ever, be able to fix in any realistic manner a time limit for the investigation of a given offence. It is notable that the law -- save for some limited statutory exceptions -- has never recognized a time limitation for the

> institution of criminal proceedings. Where, however, the investigation reveals evidence which would justify the swearing of an information, then for the first time the assessment of a reasonable period for the conclusion of the matter by trial becomes possible. It is for that reason that s. 11 limits its operation to the post-information period. Prior to the charge, the rights of the accused are protected by general law and guaranteed by ss. 7, 8, 9 and 10 of the *Charter*.
>
> 20 I acknowledge that in taking this position it may be said that I am departing from the earlier judgments of this Court which have said that there will be exceptional cases where pre-charge delays will be relevant under s. 11(b). In my view, however, the departure is more apparent than real. The exception referred to by Lamer J. in *Carter* -- where two indictments are preferred because of successful appeals after a first trial -- has been dealt with in *R. v. Antoine* (1983), 5 C.C.C. (3d) 97 (Ont. C.A.), and *Re Garton and Whelan* (1984), 14 C.C.C. (3d) 449 (Ont. H.C.) These cases support the proposition that pre-charge delay is not relevant under s. 11(b), by holding that the time commences to run from the date the original information was sworn.

[38] Justice McIntyre determined that since s. 11 refers to "any person charged with an offence…", including pre-charge delay in the calculations would distort the words of the *Charter*:

> 21. … In addition, given the broad wording of s. 7 and the other *Charter* provisions referred to above, it is not, in my view, necessary to distort the words of s. 11(b) in order to guard against a pre-charge delay. In my view, the concerns which have moved the Court to recognize the possibility of special circumstances which would justify a consideration of pre-charge delay under s. 11(b) will thus be met.

[39] More recently, in *R. v. Milani*, 2014 ONCA 536, application for leave to appeal dismissed, [2014] S.C.C.A. No. 426, van Rensburg J.A. considered a gap between an accused's information being discharged and the subsequent preferring of an indictment. Justice van Rensburg explored the issues when dealing with a "gap" case:

> 26 The time frame to be considered in computing trial within a reasonable time generally runs only from the moment a person is charged. A person is "charged" when an information is sworn or an indictment is preferred. Thus, delays occurring in the pre-charge period, including in the investigatory or pre-charge stage, are not subject to analysis under s. 11(b): *R. v. Carter*, [1986] 1 S.C.R. 981, at paras. 11, 13; *R. v. Kalanj*, [1989] 1 S.C.R. 1594, at para. 17; *R. v. Morin*, at para. 35.
>
> 27 The trial judge did not misstate the law with respect to when the constitutional clock in a s. 11(b) analysis begins to run. However, the conclusion

> that the laying of an information is the beginning of the period to be considered under s.11(b) is not determinative of whether the constitutional clock stopped running upon the respondent's discharge in 1989, and therefore whether the "gap" period is to be considered in the s. 11(b) analysis.
>
> 28 In cases where an accused proceeds to trial, s. 11(b) protects against delay until the trial is concluded. This is because, while the case is still pending, a determination of the accused's guilt or innocence has not occurred, and the accused is therefore subjected to stress and anxiety. The stigma of being an accused ends when the saga of a trial is at an end and the decision is rendered: *R. v. Rahey*, [1987] 1 S.C.R. 588, at para. 40.
>
> 29 But what of cases where an accused who has been charged does not proceed to trial? Put differently, in what circumstances other than those where an acquittal or conviction has been entered, will the constitutional clock stop running for the purposes of s. 11(b)?
>
> 30 In my view, the trial judge erred in answering this question by relying on the decision of this court in *R. v. Antoine*, and a case of the High Court citing *Antoine*, *Re Garton and Whelan*. The Supreme Court's jurisprudence on s. 11(b) has evolved significantly since the cases relied on by the trial judge were decided. A close examination of the more recent Supreme Court cases of *R. v. Kalanj* and *R. v. Potvin*, supports the conclusion that the "gap" period should not be included in the s. 11(b) analysis. These cases explain that s.11(b) protects against the harms that result from post-charge delay but not against the similar harms caused by pre-charge or appellate delay.

[40] The court in *Milani*, essentially dismissed many of the same arguments raised by Mr. Buckley in this case:

> 33 While the court in *R. v. Antoine* stated that "the preferable approach is to examine the entire period after the laying of the first information", it also found that the defects in the first indictment were technical in nature, did not result in prejudice to the accused and likely could have been cured through amendment.
>
> 34 The "gap" in *Antoine* was a period of only six days between the time the first information was quashed and the second, more particularized information was sworn. For all practical purposes, this was a single proceeding. Indeed, this is how the decision was interpreted when it was considered by this court in *R. v. Padfield*, [1992] O.J. No. 2813 (C.A.).
>
> 35 In *Padfield* the accused was initially charged with two counts of indecent assault and was committed to stand trial on the charges. A month later the Crown presented an indictment containing three charges. The trial court had stayed two of the three charges on the basis of unreasonable delay and directed that the third charge proceed to trial. The appeal court concluded that all three charges in the second indictment had their genesis in the first information, and stayed the third

charge. The court referred to Antoine as authority that where the charge in a second information is "no more than an amended version of the initial charge", the constitutional clock must tick from the laying of the first information.

[41] The court in *Milani* continued its analysis of the gap issue:

> 36 *Re Garton and Whelan* is a 1984 decision of the Ontario High Court of Justice, and arose in the context of an application by a private person under the *Criminal Code* for the consent of a justice to prefer an indictment. The accused had been discharged following a preliminary inquiry into a charge of murdering his spouse. The Crown had refused to prefer an indictment and seven years later, the family of the deceased applied for judicial consent to lay a preferred indictment.
>
> 37 The application judge, Evans C.J.H.C., after a thorough analysis of all the evidence provided in support of the application, declined judicial consent. Given this conclusion, he noted that it was unnecessary to consider the s. 11(b) argument raised by the accused, however he proceeded to do so. He concluded that the accused's s. 11(b) rights should be considered and had in fact been impaired.
>
> 38 There were three important factors identified by the court. First, the accused was aware throughout the intervening period of the ongoing efforts to have him prosecuted. Second, there had been no change in the evidence against the accused. Evans C.J.H.C. noted that this was not a case where a continuing investigation by the authorities had unearthed strong new evidence inculpating the respondent, and he characterized this as a circumstance to be taken into account in determining whether a trial of the respondent at this late stage would be reasonable. Third, the application judge found that the accused would suffer real prejudice should a trial be heard after the delay. Prejudice could be presumed in a case that would rely on witnesses' fading memories.
>
> 39 *Re Garton and Whelan* was referred to by this court in *R. v. G.W.R.*, [1996] O.J. No. 4277 (C.A.), a case involving an appeal from a decision staying charges under sections 7 and 11(b) of the *Charter*. There was evidence that the Crown had withdrawn a charge against the accused for contributing to juvenile delinquency many years earlier, and the accused relied on the entire period for his s. 11(b) argument. The court noted that there was nothing in the record to show that the earlier charge related to the same conduct that formed the basis of the later sexual assault charges against the accused. The court went on to state that there was no indication that once the purported charge of contributing was withdrawn, the respondent believed that he was still under investigation or in jeopardy in relation to this same conduct, and there was no evidence of oblique motive or bad faith on the part of the Crown in its discretion to withdraw the contributing charge. The court concluded that, accordingly the time from the withdrawal of the charge until the laying of the new charges did not continue to run for the purposes of s. 11(b) of the *Charter*. The court contrasted the situation with *Re Garton and Whelan* "where although the accused was discharged at the preliminary inquiry he was

> aware that the police and the deceased's parents were actively continuing the investigation" (at para. 10). While this court did not dispute the authority of *Re Garton and Whelan*, it interpreted the case to require some knowledge on the part of the accused that there was an active investigation underway, before the s. 11(b) clock would run in the absence of active charges.
>
> 40 As observed, *R. v. Antoine* and *Re Garton and Whelan* can be interpreted in such a way that they would not apply to the circumstances of this case. The respondent however relies on the fact that the Supreme Court of Canada in *R. v. Kalanj* referred to these decisions, albeit with little analysis, and stated: "these cases support the proposition that pre-charge delay is not relevant under s. 11(b), by holding that the time commences to run from the date the original information was sworn": at para. 20. To the extent that this statement, which was made in obiter and without analysis of the point, may appear to endorse a broader interpretation of these cases, I would agree with the appellant that any such interpretation has been overtaken by the court's reasoning in *R. v. Potvin*.

[42] In finding that the delay in most instances should not be calculated when an accused is not actively charged with an offence, the court in *Milani* stated:

> 47 Section 11(b) serves to protect the charged person's right to freedom and to be dealt with fairly and without delay within the court system. The objective is to have an efficient system for dealing with accused persons. The ambit of s. 11(b) does not extend on a societal level to the speedy investigation of crime. Extending the protection of s. 11(b) to persons who are not actively charged with an offence would not advance the objectives of this protection.
>
> 48 There is a caveat however. There are circumstances in which unilateral state action may control whether or not charges are withdrawn or relaid. In such circumstances, where the formal charge has been withdrawn with the intention of laying a new charge, or an information has been quashed with a new information laid, it makes sense to consider the entire period from when the first charges were laid as part of the s. 11(b) analysis. In such circumstances, the person, although not formally charged during the "gap" period, remains subject to the judicial process, and his s. 11(b) interests will continue to be affected by the knowledge or expectation that further charges are imminent. It is reasonable to conclude that he remains subject to the process of the court. That is precisely what occurred in *R. v. Antoine*.
>
> 49 For all of these reasons, I would interpret s. 11(b) as being engaged during any period that an accused person is in fact subject to charges, or when a person no longer actively charged remains subject to the very real prospect of new charges.

[43] Here, during the gap, Mr. Buckley was not “subject to the judicial process”, nor did he remain subject to the very real prospect of imminent further charges.

[44] In *R. v. Scott,* 2015 SKCA 144, the court examined another delay case with a "gap". Speaking for the court, Herauf J.A. explained the facts:

> 22 As noted in the factual background, the first information was sworn on October 21, 2010, and withdrawn on February 8, 2011. The second information was sworn on November 1, 2011. The evidence is undisputed that the only change to the second information from the first was that "sixteen years" was substituted for "fourteen years" as it relates to the s. 153 *Criminal Code* charge.

[45] In determining that the "gap" could be relied on by the defence, Herauf J.A. said:

> 23 In her conclusion that the time runs from when the first information was sworn, the trial judge relied upon *R v Carter*, [1986] 1 SCR 981 [Carter]; *R v Kalanj*, [1989] 1 SCR 1594 [Kalanj]; and *R v Antoine* (1983), 5 CCC (3d) 97 (Ont CA) [Antoine].
>
> 24 In *Carter*, the Supreme Court stated that the time frame "generally" runs only from the moment a person is charged with an offence…
>
> 25 The Supreme Court, in *Kalanj*, reiterated that time commences from the date the original information was sworn…
>
> 26 In *Antoine*, the Ontario Court of Appeal, for the purposes of a s. 11(b) application, included the time period from when the first information was sworn to the time of the trial on a second indictment. The first indictment had been successfully quashed due to the charge being inadequately worded.
>
> 27 The Crown here claims that the trial judge was wrong to rely on the cases that she did. It submits *Antoine* provides little support because, in that case, the accused was not subject to charges for only six days before a new information was sworn. In the case before us, eight months went by before a new information was sworn. *Kalanj*, according to the Crown, did not cast doubt on the issue as suggested by the trial judge, but rather confirmed that "charged with an offence" does not have a flexible meaning. A person is not charged with an offence until an information is sworn charging him.
>
> 28 I respectfully disagree with the Crown's attempt to distinguish the cases relied upon by the trial judge. The difference in the length of time between six days in *Antoine* and eight months in this case does not assist the Crown. In fact, taking eight months to replace a defective information with a minor change on one charge was never adequately explained by the Crown.
>
> 29 *Carter* and *Kalanj* confirmed that there are exceptions to the general proposition that the time begins to run when a person is charged with an offence. Substituting informations and indictments to correct defective wording is one of those exceptions. Therefore, I can find no reversible error in the trial judge's

> reliance on these cases to support her conclusion that the clock starts ticking on the day the first information was sworn.

[46] In distinguishing *Milani*, and concluding that the gap period could be relied on by the accused in calculating total delay, Herauf J.A. noted the court's statement in *Milani* that the original charges may be included where the accused remained subject to the judicial process. Herauf J.A. went on:

> 31 In this case, the trial judge found that the information had been withdrawn because of the defective wording; whereas, the Crown argues that it lacked crucial admissible evidence necessary to proceed. It is mischaracterization to say that the Crown lacked the critical DNA evidence. New DNA warrant documents were prepared only to cure the same defective wording as that found in the original information. In either case, it is clear that the Crown intended to swear a second information simply to replace the original.
>
> 32 The Crown then suggests that, "there must be evidence that the accused person was aware of the ongoing procedures and that they in fact had a real impact on him" (see para. 68 of the Crown factum). First, the respondent's knowledge may be inferred from the following facts. While this Court did not have the benefit of a court transcript, the accused appeared by video on the occasion the Crown withdrew the information because of the defective wording. The accused was also aware that he had provided a blood sample to the police. Further, the accused was required to give a second sample after the withdrawal of the initial information and months prior to the swearing of the second information. Second, *Milani* identifies that an accused's s. 11(b) interests will be affected by the knowledge or expectation that further charges are imminent and as discussed above, such prejudice may be inferred from the circumstances of the case. Thus, this is a case where the respondent remained subject to the judicial process and the trial judge was correct to include in her analysis the entire period from when the first information was sworn.

[47] In this case, the second-degree murder charge naming Mr. Buckley was withdrawn on December 18, 2012. Mr. Buckley was aware that the Crown requested an extension on the detention of exhibits and that the investigation was ongoing. There was no indication that new charges against Mr. Buckley were imminent. The information with respect to the first-degree murder charge was sworn on April 8, 2016, after Mr. Buckley told the police he had killed his mother during the crime boss interview on April 6, 2016, and confessed to having killed her during a cautioned confession to the police on April 8, 2016.

[48] The gap period between the withdrawal of the second-degree murder charge and the laying of the first-degree murder charge cannot be used in calculating the

overall delay that occurred in this case. During that time no charges were active against Mr. Buckley and he was not subject to any judicial process. He may have felt the police were interested in him, but charges were not imminent. He was not subject to any restriction on his liberty. He was free to go about his life unimpeded by any court process.

Defence Delay

[49] The Crown says that almost five months of the total thirty-one months of delay are attributable to the defence. Mr. Buckley says that none of the delay is attributable to him. In *R. v. Jordan,* 2016 SCC 27, the court explained how to consider defence delay:

> 60 Application of this framework, as under the *Morin* framework, begins with calculating the total delay from the charge to the actual or anticipated end of trial. Once that is determined, delay attributable to the defence must be subtracted. The defence should not be allowed to benefit from its own delay-causing conduct. As Sopinka J. wrote in *Morin*: "The purpose of s. 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits" (p. 802).
>
> 61 Defence delay has two components. The first is delay waived by the defence (*Askov*, at pp. 1228-29; *Morin*, at pp. 790-91). 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. However, as in the past, "[i]n considering the issue of 'waiver' in the context of s. 11(b), it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness" (*R. v. Conway*, [1989] 1 S.C.R. 1659, per L'Heureux-Dubé J., at p. 1686).
>
> 62 Accused persons sometimes, either before or during their preliminary hearing, wish to re-elect from a superior court trial to a provincial court trial for legitimate reasons. To do so, the Crown's consent must be obtained (*Criminal Code*, R.S.C. 1985, c. C-46, s. 561). Of course, it would generally be open to the Crown to ask the accused to waive the delay stemming from the re-election as a condition of its consent.
>
> 63 The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises "those situations where the accused's acts either directly caused the delay ... or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial" (*Askov*, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.

> 64 As another example, 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. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable. This should discourage unnecessary inquiries into defence counsel availability at each appearance. Beyond defence unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay ...
>
> 65 To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.
>
> 66 To summarize, as a first step, total delay must be calculated, and defence delay must be deducted. Defence delay comprises delays waived by the defence, and delays caused solely or directly by the defence's conduct. Defence actions legitimately taken to respond to the charges do not constitute defence delay.
>
> 67 The next step of the analysis depends upon whether the remaining delay -- that is, the delay which was not caused by the defence -- is above or below the presumptive ceiling.

[50] Subsequently, in *R. v. Cody*, 2017 SCC 31, the court again examined defence delay, particularly the second statement:

> 28 In broad terms, the second component is concerned with defence conduct and is intended to prevent the defence from benefitting from "its own delay-causing action or inaction" (*Jordan*, at para. 113)…
>
> 29 However, not all delay caused by defence conduct should be deducted under this component. In setting the presumptive ceilings, this Court recognized that an accused person's right to make full answer and defence requires that the defence be permitted time to prepare and present its case...
>
> 30 The only deductible defence delay under this component is, therefore, that which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate insomuch as it is not taken to respond to the charges. As we said in *Jordan*, the most straightforward example is "[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests" (*Jordan*, at para. 63). Similarly, where the court and Crown are ready to proceed, but the defence is not, the resulting delay should also

be deducted (*Jordan*, at para. 64). These examples were, however, just that -- examples. They were not stated in *Jordan*, nor should they be taken now, as exhaustively defining deductible defence delay. Again, as was made clear in *Jordan*, it remains "open to trial judges to find that other defence actions or conduct have caused delay" warranting a deduction (para. 64).

31 The determination of whether defence conduct is legitimate is "by no means an exact science" and is something that "first instance judges are uniquely positioned to gauge" (*Jordan*, at para. 65). It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.

32 Defence conduct encompasses both substance and procedure -- the decision to take a step, as well as the manner in which it is conducted, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.

33 As well, inaction may amount to defence conduct that is not legitimate (*Jordan*, at paras. 113 and 121). Illegitimacy may extend to omissions as well as acts (see, for example in another context, *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 37). Accused persons must bear in mind that a corollary of the s. 11(b) right "to be tried within a reasonable time" is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to "actively advanc[e] their clients' right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and ... us[e] court time efficiently" (*Jordan*, at para. 138).

34 This understanding of illegitimate defence conduct should not be taken as diminishing an accused person's right to make full answer and defence. Defence counsel may still pursue all available substantive and procedural means to defend their clients. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count towards the *Jordan* ceiling. In this regard, while we recognize the potential tension between the right to make full answer and defence and the right to be tried within a reasonable time -- and the need to balance both -- in our view, neither right is diminished by the deduction of delay caused by illegitimate defence conduct.

35 We stress that illegitimacy in this context does not necessarily amount to professional or ethical misconduct on the part of defence counsel. A finding of illegitimate defence conduct need not be tantamount to a finding of professional

> misconduct. Instead, legitimacy takes its meaning from the culture change demanded in *Jordan*. All justice system 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*.

[51] Mr. Buckley initially appeared in Provincial Court on the first-degree murder charge on April 11, 2016. Mr. MacEwen appeared with him and requested that the matter be adjourned for one month in order to obtain disclosure. The matter was next in court on May 11, 2016, ostensibly to schedule dates for the Preliminary Inquiry. Mr. MacEwen again requested an adjournment to June 8, 2016, because he had not yet confirmed his retainer and did not want to review the disclosure if he had not been retained. The 28-day delay between May 11 and June 8, 2016, is attributable to Mr. Buckley.

[52] By May 19, 2017, the matter was in Supreme Court. On that date, during a recorded pre-trial telephone conference, both Crown and defence requested that the matter be adjourned prior to setting trial dates and dates for pre-trial motions, because they had not discussed and considered all of the issues. Mr. MacEwen indicated that he had been busy with other matters and had not had time to address all necessary considerations regarding Mr. Buckley's case. Mr. MacEwen suggested returning June 30, 2017, to discuss the matter. The 42-day delay between May 19 and June 30, 2017, was inferentially waived by the defence.

[53] On June 30, 2017, both Crown and defence requested an adjournment of the pre-trial hearing in order to provide the Crown time to complete the transcription of some of the audio recordings relating to a Mr. Big operation. The Crown suggested that transcripts were not required as the audio had been disclosed, however, transcripts would make discussing and preparing for the matter more efficient. The matter was set over to July 20, 2017, to allow the Crown and defence time to obtain and review the Mr. Big transcripts. The 20-day delay between June 30 and July 20, 2017, was inferentially waived by the defence.

[54] On July 20, 2017, all parties appeared in court to schedule trial dates as well as dates for the pre-trial motions. The court advised counsel that it was prepared to start pre-trial motions immediately (July 21, 2017) and also confirmed that a special jury term had been approved such that the trial could start as early as August 20, 2017, or thereafter whenever counsel was available. Mr. MacEwen advised the court that he was unable to start the pre-trial motions right away. The Crown and the court were available in August 2017, for pre-trial motions. Mr.

MacEwen was not available in August. The Crown and the court were available in September 2017. Mr. MacEwen was not available in September. Mr. MacEwen was available October 16, 17, 18 and the week of October 23. The Crown was not available the week of October 23. Mr. MacEwen was available October 30-November 3, 2017, along with most of the week of November 6-10, 2017. The pre-trial motions were scheduled for October 16, 17, 18, 30, 31 and November 6, 8, 9 and 10, 2017.

[55] Although *Cody* suggests that trial date availability should be put by the court to the Crown first, in this case because of some comments made by the Crown as to his own unavailability due to other previously scheduled trials, the order of asking counsels' availability became slightly confused. The Crown suggested that the trial would take approximately one month. They said that they were not available from January to mid-February 2018, due to another trial. They also indicated that they had another trial "pretty much on the heels of that one." Mr. MacEwen was then asked about his availability for trial. Mr. MacEwen said his first available dates started on December 18, 2017. He also indicated that he was available most of January and February 2018 and had lots of availability after February 2018.

[56] The court was not comfortable starting a month long jury trial mid-December due to Christmas. The matter was therefore scheduled by the court to start January 8, 2018, and to conclude February 9, 2018.

[57] Mr. MacEwen was not available in August, September or part of October to conduct the trial. Although counsel need time to prepare, Mr. MacEwen essentially had the case since Mr. Buckley was charged in April 2016. Those two and one half months can be categorized as being defence delay.

Calculations

[58] Because of a miscalculation as to the length of time required for pre-trial motions, on November 10, 2017, counsel agreed that pre-trial motions would continue from January 2 to January 10, 2018. The court would deliver decisions on January 19, 2018, in relation to the delay motion, the admissibility of the Mr. Big confession and the admissibility of Mr. Buckley's cautioned statement. The jury trial was then scheduled to start on January 22, 2018, and to conclude on February 23, 2018.

[59] During an unrecorded telephone conference, the Crown indicated that if the Mr. Big confession was excluded the trial would be one week shorter than scheduled. The Crown also advised that if the cautioned statement was excluded the trial would be three days shorter.

[60] In *R. v. Buckley*, 2018 NSSC 1, the Mr. Big confession was excluded. In *R. v. Buckley*, 2018 NSSC 2, the cautioned statement was excluded. The trial should therefore now conclude on February 13, 2018.

[61] In *Cody*, the unanimous court reiterated the thirty-month guideline as laid out in *Jordan*:

> 20 The new framework established in *Jordan* for analyzing whether an accused person's right to a trial within a reasonable time has been breached centres on two presumptive ceilings: 18 months for cases tried in provincial courts and 30 months for cases tried in superior courts (*Jordan*, at para. 46).

[62] Excluding the gap period, the total delay in this case was thirty-one months and twenty days. Defence delay is three and one half months. Inferred defence waiver is two months. When defence waiver and/or defence delay resulting in a total defence delay of five and one half months is subtracted from the thirty-one months and twenty days, the remaining total delay is twenty-six months.

[63] The matter is within the thirty month guideline established in *Jordan* and *Cody*.

Conclusion

[64] Mr. Buckley's s. 11(b) *Charter* right has not been violated. His trial will conclude within a reasonable time.

[65] Mr. Buckley's application for a s. 24(1) *Charter* stay of proceedings due to delay is dismissed.

Arnold, J.