IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Executive Flight Centre Fuel Services Ltd.,* 2018 BCSC 2212

Date: 20181213
Docket: 25268
Registry: Nelson

Regina

v.

Executive Flight Centre Fuel Services Ltd.

Before: The Honourable Madam Justice Donegan

On appeal from: An order of the Provincial Court of British Columbia, dated October 30, 2017 (*R. v. HMTQ, Executive Flight Centre, and others*, (unreported) Nelson Registry Action No. 25268-1)

Reasons for Judgment

Counsel for the Appellant:	C. Greenwood A. Clarkson
Counsel for the Respondent:	J. Ruttan S. Rodgers
Counsel for the Intervenor:	L. Lysenko
Place and Date of Hearing:	Kamloops, B.C. June 28-29, 2018
Place and Date of Judgment:	Nelson, B.C. December 13, 2018

INTRODUCTION

[1] This is a Crown appeal from a judicial stay of proceedings granted on the grounds of unreasonable delay contrary to s. 11(b) of the *Canadian Charter of Rights and Freedoms* [*Charter*].

[2] The respondent, Executive Flight Centre Fuel Services Ltd. (“Executive”), is a corporation that was charged with a number of regulatory offences in relation to a fuel spill in the Slocan Valley in 2013. When an initial investigation into the incident did not lead to charges against Executive, a concerned citizen commenced a private prosecution against the company. The Crown subsequently intervened and stayed the proceedings to permit a re-opened investigation into the spill to complete. Six months later, the Crown laid an information charging Executive in relation to the incident.

[3] Thirty-eight months would have elapsed from the commencement of the private prosecution to the anticipated completion of trial in the Crown prosecution.

[4] The trial judge stayed the Crown prosecution on the basis of delay. While she deducted the period the private prosecution was extant from the overall delay as an exceptional circumstance, the trial judge concluded that the six month period between the Crown stay of proceedings and the commencement of new charges should count towards delay. The overall delay therefore exceeded the 18-month ceiling prescribed in *R. v. Jordan*, 2016 SCC 27 and a stay of proceedings followed.

[5] This appeal raises novel issues about the application of *Jordan* principles to proceedings involving a private prosecution.

OVERVIEW OF PROCEEDINGS

[6] On July 26, 2013, a tanker truck operated by an employee of Executive was transporting aviation fuel to a helicopter staging area when it overturned into Lemon Creek, spilling approximately 30,000 litres of aviation fuel into the water. The provincial Ministry of Forests, Lands and Natural Resources (the “Province”), which operated the staging area, had contracted with Executive for the delivery of fuel to

service helicopters fighting forest fires in the area. As a result of the incident, an evacuation order and water use restriction were issued.

[7] The British Columbia Conservation Officer Service initially investigated the spill. Their investigation closed in early 2014 and no charges were brought.

The Private Prosecution and Re-Opening of the Investigation

[8] On September 29, 2014 Marilyn Burgoon, a private citizen, swore an information charging both Executive and the Province with depositing a deleterious substance, jet fuel, into waters frequented by fish, contrary to s. 36(3) of the *Fisheries Act*, R.S.C. 1985, c. F-14, thereby committing an offence under s. 78(b) of the *Fisheries Act*. After the charges were laid, the British Columbia Conservation Officer Service reopened its investigation into the incident.

[9] On November 27, 2014 Ms. Burgoon appeared for a pre-enquete (process) hearing pursuant to s. 507.1(2) of the *Criminal Code*, R.S.C., 1985, c. C-46 [*Code*] and gave evidence in support of the three charges. Federal Crown counsel also appeared and cross-examined Ms. Burgoon. At the conclusion of the hearing, Crown counsel agreed with Ms. Burgoon that there was evidence of a *prima facie* case against Executive, but did not agree as against the Province.

[10] In reasons delivered December 12, 2014, McKimm P.C.J. agreed with the private prosecutor that there was sufficient evidence to issue process for both accused, and he proceeded to do so. On December 23, 2014, a summons was issued for Executive to attend court on February 3, 2015.

[11] Thereafter followed a number of appearances in the Provincial Court between February and May 2015 attended by the private prosecutor, Executive and the Province. Federal Crown counsel also attended as a courtesy to the Court.

[12] At the first appearance in February, federal Crown counsel advised that the Attorney General of Canada had not yet made a decision regarding intervention in the prosecution. At the second appearance on March 31, he again informed the

Court that no decision had yet been made since the investigation was still ongoing and needed to first complete. He added that he suspected the decision was some distance off, possibly two months. Executive was arraigned and not guilty pleas recorded. The matter was adjourned to May 19, 2015.

[13] At the May 19, 2015 appearance, federal Crown counsel advised the Court that the investigation was not yet complete. Counsel explained that the decision whether the federal Crown would intervene depended on a completed investigation and he did not know when that would be. The presiding judge indicated that he was not inclined to continue waiting, and adjourned the matter to allow a trial date to be set. The private prosecutor indicated that at least two weeks would be required for trial.

[14] On June 16, 2015, the fifth court appearance, trial dates were set for a two-week trial beginning on April 18, 2016.

The Federal Crown Enters a Stay

[15] On January 25, 2016, the federal Crown intervened and stayed the private prosecution. Federal Crown counsel then had the following exchange with the presiding judge:

> MR. GERHART: Thank you, Your Honour. And If I may, I'd just say three further things. Firstly this stay of proceedings on behalf of the Crown has been done to allow an ongoing investigation at the instance of the Conservation Officer Service of British Columbia and Environment Canada to complete. Secondly, that that investigation is expected to be completed soon. And thirdly, upon completion I expect a report to Crown counsel will be submitted to my office and reviewed for charge approval upon, as I say, submission of that report to Crown counsel.
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> THE COURT: So to reduce that to – because we have a large – a large number of people here with a demonstrated interest in this particular proceeding. You are saying, in simple English that while the Director of Public Prosecutions for Canada is staying the matter now, they have a year to reinstate these proceedings and if federal Crown approve charges after the investigation is concluded, that's exactly what would happen.
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> MR. GERHART: I'll say an additional point. Yes, Your Honour is correct, that would be an option available, if the – if the federal Crown chose to reinstitute with this Information. I can also say that there is a five-year limitation period applicable under the *Fisheries Act*, so it would also be open

> to the Crown to proceed by way of a new Information summarily, without getting into the question of proceeding by indictment.

[16] As a result of the stay, the April trial dates were cancelled "unless and until" (to use the words of the presiding judge) the federal Crown brought the matter forward in the future.

[17] Between January 25, 2016 and July 22, 2016 (the "Stay Period"), there were no charges before the court against any accused in relation to the spill in Lemon Creek.

[18] The Supreme Court of Canada released its decision in *Jordan* on July 8, 2016.

The Crown Prosecution

[19] On July 22, 2016, the federal Crown approved an eight count information in relation to the unlawful introduction of aviation fuel into Lemon Creek, charging Executive, the Province and now the driver of the vehicle, Mr. Lasante, with offences under both the *Fisheries Act* and the *Environmental Management Act,* S.B.C. 2003, c. 53. Counts 1 and 2 of the information alleged offences under s. 36(3) of the *Fisheries Act*, contrary to s. 40(2). The remaining six counts alleged violations of s. 6(2),(3) and (4) of the *Environmental Management Act*, contrary to s. 120(3)(a).

[20] In response to a summons, the accused made their first appearance on the new information on September 13, 2016.

[21] At that appearance, the case was adjourned for the Crown to provide disclosure. The Crown provided the initial disclosure package, comprised of ten binders of material, to Executive on October 5, 2016.

[22] At the next court appearance on October 11, 2016, the Crown advised the Court that the case was "a relatively large regulatory prosecution", and that in the absence of admissions it would be calling approximately 65 witnesses.

[23] On November 8, 2016 the Crown advised the Court that the disclosure process was ongoing and the case was adjourned to December 6, 2016. On that day, the Crown advised the Court that it required more time to get further disclosure to the defence and the case was adjourned again to January 10, 2017.

[24] The Crown provided a supplemental disclosure package, comprised of three binders of materials, to Executive on January 9, 2017. At the next appearance the following day, Executive requested that the case be adjourned for a month or two to allow counsel time to review the disclosure. The presiding judge declined to adjourn for two months, stating that complete disclosure was not necessary for the purpose of entering a plea and arraignment. The case was then adjourned about a month for arraignment.

[25] On February 7, 2017, the federal Crown made its election to proceed summarily and the Province entered not guilty pleas. Executive advised that it was not ready to enter a plea and applied to adjourn the arraignment hearing. There was discussion about the possibility of admissions, trial time estimates and disclosure issues. With respect to admissions, Crown counsel indicated that he was prepared to draft some if the parties were seriously interested in considering them; otherwise, he indicated that to do so would be a “waste of time”. He further indicated that in the absence of admissions, there could be up to 60 witnesses for the Crown and that the trial would take four to six weeks. Executive advised that it did not wish to start working on admissions until it had finishing working through the disclosure. The Province took the position that the trial would take a minimum of six weeks and that it was premature to be discussing admissions before Executive and the driver had even entered pleas. The case was adjourned another month for arraignment of Executive and the driver.

[26] On March 7, 2017 Executive entered pleas of not guilty to all counts. Counsel had further discussion about admissions and the anticipated length of trial and the matter was ultimately adjourned again for the Court to arrange the assignment of a trial judge for a five to six week trial.

[27] On April 11, 2017, trial dates were fixed, to take place over four separate weeks between September and November 2017, with the trial concluding on November 30, 2017.

[28] The assigned trial judge held five pre-trial conferences between May and September 2017. Admissions and disclosure were the predominant topics of discussion. Additional disclosure was also provided on various occasions over this five month period.

[29] At a pre-trial conference in July, Executive advised for the first time that there would be pre-trial applications in the first scheduled week of trial. At a pre-trial conference in August, Crown counsel advised the trial judge that he was "very mindful of *Jordan*" and the age of the case, and was "very concerned to get the matter on".

[30] By September 13, 2017, Executive had filed two separate applications; one alleging an infringement of s. 7 of the *Charter* for late disclosure and seeking an adjournment of the trial, and the other alleging an infringement of s. 11(b) of the *Charter* and seeking a judicial stay of proceedings. The trial judge directed that these applications proceed during the first week of trial, with the adjournment application heard first, followed by the stay application. Although they were pre-trial applications, the parties and the trial judge considered the trial commenced and, by agreement, the parties filed six documentary exhibits, which were used in both applications. The two applications took three days to be heard.

[31] With respect it's s. 7 application, Executive (joined by Mr. Lasante), argued that as a result of the Crown's late disclosure, its right to make full answer and defence was impaired, largely because it's expert had insufficient time to prepare an opinion and its cross-examination of the Crown's witnesses could be undermined. It sought an adjournment of the trial for eight months, which would allow its expert sufficient time to prepare a report. After hearing all submissions, the trial judge, aware that her decision on the adjournment application might impact the stay application to be heard the following day, advised counsel that she would not be

granting the application for an adjournment (with written reasons to follow) and asked counsel to discuss adding other dates to the trial.

[32] The trial judge heard Executive's application for a stay the next day. Executive took the position that the total period, from the time the private information was sworn until the anticipated earliest conclusion of trial (November 30, 2017), was 38 months. As there was no defence delay or discrete exceptional circumstances to reduce the overall delay below the 18 month ceiling prescribed by *Jordan*, Executive urged the trial judge to find a breach of s. 11(b) of the *Charter* and grant a stay of proceedings.

[33] The Crown argued that the delay was not unreasonable and should be assessed from the commencement of the Crown prosecution until the expected end of trial, a period amounting to 16 months, below the *Jordan* ceiling. As its basis for excluding the time the private prosecution was extant from the calculation of total delay, the Crown argued that the *Charter* did not apply to private prosecutions and, as such, Executive had no s. 11(b) protections during the time the private prosecution was alive. It further argued that the Stay Period should be considered "pre-charge delay", to which s. 11(b) did not apply.

[34] In the alternative, the Crown took the position that if the *Charter* was found to apply to private prosecutions and that all of the time was to be included in the calculation of delay, then the period from the swearing of the private information to the swearing of the Crown information should all be characterized as a discrete exceptional circumstance and therefore deducted from the total delay. With this deduction, the *Jordan* ceiling would not be exceeded.

[35] After submissions were complete, the trial judge directed counsel to attend the office of the case manager to fix additional dates for trial. Earlier dates in all of the remaining months of 2017, including weeks before the scheduled end of trial, were offered by the court. Crown counsel was available, but counsel for Executive was not, so the week of January 29 to February 1, 2018 was added.

[36] The trial judge ruled on both applications on October 30, 2017.

[37] First, the trial judge provided her reasons for dismissing Executive's (and Mr. Lasante's) application for an adjournment of the trial. She summarized her conclusion in the following terms:

> In the end, I am not convinced, even though certain documents have been delivered on the eve of trial, that these are of such a nature as to deprive the defendants of their Section 7 right to make full answer and defence if this matter is not adjourned at this time. On balance, I accept that for the moment at least other, less significant measures can be taken in the course of the trial to mitigate this late disclosure. Of course, if, as the trial proceeds, it becomes apparent that such remedies are insufficient, any one of the defendants can reinvigorate this application to adjourn.

[38] The trial judge then delivered her delay ruling.

THE DELAY DECISION

[39] The trial judge began her analysis by focussing on the question of whether the *Charter* applied to private prosecutions and concluded that it did. She reasoned that private prosecutions are authorized by s. 504 of the *Code*, thus are processes enabled by the state. Moreover, the private prosecutor has a role parallel to that of the Attorney General. Accordingly, she held that the time taken by the private prosecution in this case counted against the Crown for the purposes of s. 11(b), unless it was determined to be an exceptional circumstance under the *Jordan* framework.

[40] The trial judge next turned to consider whether the six month period between the Crown's stay of the private prosecution and the laying of the new Crown charges, the Stay Period, should also count in the calculation of total delay. She concluded that it did.

[41] Citing *R. v. Milani*, 2014 ONCA 536, the trial judge noted the general rule that delays occurring in the pre-charge period are not subject to analysis under s. 11(b); but as recognized in *Milani*, she also identified that s. 11(b) is engaged in circumstances where a charge has been withdrawn or quashed but the individual remains subject to the very real prospect of new charges. The trial judge found that

to be case here and concluded that the Stay Period should be included in the calculation of overall delay because Executive would have been "labouring under the very real prospect of new charges" during the Stay Period.

[42] In making this finding, the trial judge identified two representations made by federal Crown counsel: one at the pre-enquete hearing and the other at the time of the stay of the private prosecution. At the time of the pre-enquete hearing, Crown counsel advised the presiding judge that he believed the private prosecutor had established a *prima facie* case against Executive. At the time of the stay, Crown counsel advised the presiding judge that the purpose of the stay was to allow the investigation to complete, at which time he anticipated the submission of a report to Crown counsel for review for charge approval.

[43] The trial judge reasoned that these two representations left little doubt that Executive would have been labouring under the very real prospect of new charges during the Stay Period and that this period should be included in the calculation of delay for the purposes of determining whether Executive's s. 11(b) rights had been infringed.

[44] The result of this conclusion was that even if the period the private prosecution was extant was excluded from the calculation of delay, the overall delay was still 22 months, four months in excess of the 18 month presumptive ceiling.

[45] The trial judge then went on to consider whether there was any defence delay to be deducted and concluded there was not.

[46] The trial judge next considered whether some or all of the time during which the private prosecution was alive should be deducted as an exceptional circumstance under *Jordan* and concluded it should be. However, critical to this appeal, she then concluded that the balance of the time – the Stay Period and the Crown prosecution – was not an exceptional circumstance as it was delay "well within the control of the Crown". She found that the Crown had failed to take steps to mitigate delay, citing the collapse of the initial trial dates, expansion of the time

required for the subsequent Crown-initiated prosecution, desultory disclosure and the failure to draft admissions.

[47] Finally, although not argued by the Crown, the trial judge addressed whether any of the delay was justified as a transitional exceptional circumstance. She concluded that it was not. In so finding, the trial judge found the Crown "did not move matters along" because of it's view that s. 11(b) did not apply until the Crown charges were laid. While she found it difficult to filter the pre-*Jordan* period of delay through the lens of the previous legal framework under *R. v. Morin*, [1992] 1 S.C.R. 771, she nevertheless found that Executive had suffered delay and prejudice of the kind described in *Morin*.

[48] In the end, by including the Stay Period in the calculation of overall delay and then not deducting it as an exceptional circumstance, the trial judge found the *Jordan* ceiling was well exceeded and that the Crown had not rebutted the presumption of unreasonableness. The proceeding, as against Executive, was stayed.

THE ISSUES

[49] The Crown submits that this judicial stay of proceedings should be set aside and a new trial ordered because the trial judge erred in the following ways:

a) by applying *Jordan* principles to a corporate accused in the absence of evidence of prejudice to Executive's fair trial interests;

b) by including the Stay Period in the calculation of overall delay;

c) by failing to find that the entire period of delay attributable to the private prosecution, including the Stay Period, was an "exceptional circumstance" that should have been deducted from the overall delay; and

d) by failing to find that the delay was justified as a transitional exceptional circumstance.

[50] Executive responds that this Court should summarily dismiss grounds (a) and (d) because they are raised for the first time on appeal. It submits that the Crown's failure to raise these arguments at trial has deprived it of the ability to lead evidence regarding the prejudice to its fair trial interests, and thus has deprived the Court of the necessary evidentiary foundation to determine these issues. If allowed to raise these novel arguments now on appeal, Executive submits the Court would be improperly allowing the Crown, having lost the application on its initial position that the *Charter* did not apply to private prosecutions, to engage in a "do-over" on the basis of a different argument that it could have advanced at trial.

[51] I propose to first address grounds (b) and (c), as an outcome in favour of the appellant on either will be determinative of this appeal. In the event I dismiss both, however, I will go on to consider whether to grant the Crown leave to raise the other two grounds of appeal.

GENERAL GOVERNING LEGAL PRINCIPLES

A. Standard of Review

[52] The decision of a judge to impose a judicial stay of proceedings for unreasonable delay involves a question of law to be reviewed against the standard of correctness. The characterization and allocation of various periods of delay is also reviewable on a correctness standard. The underlying findings of fact, however, are subject to review on a standard of palpable and overriding error: *R. v. K.N.*, 2018 BCCA 246 at para.13.

B. Section 11(b) of the *Charter*

[53] Section 11(b) of the *Charter* guarantees to any person charged with an offence the right to be tried within a reasonable time.

[54] As the Court explained in *Jordan*, a timely trial is essential in protecting an accused's interests in liberty, security of the person, and a fair trial:

> [20] Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the

> person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.

[55] Importantly, timely trials also benefit other parties who play a role in and are affected by criminal trials, such as victims and witnesses, and contribute to public confidence in the administration of justice. In this latter regard, the Court said the following in *Jordan*, citing several of its earlier s. 11(b) decisions:

> [25] … timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin*, "delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice" (p. 810). Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice (see *Askov*, at p. 1220). Failure "to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (p. 1221).
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> [26] Extended delays undermine public confidence in the system. And public confidence is essential to the survival of the system itself, as "a fair and balanced criminal justice system simply cannot exist without the support of the community" (*Askov*, at p. 1221).
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> [27] Canadians therefore rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner. Fairness and timeliness are sometimes thought to be in mutual tension, but this is not so. As D. Geoffrey Cowper, Q.C., wrote in a report commissioned by the B.C. Justice Reform Initiative:
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> > . . . the widely perceived conflict between justice and efficiency goals is not based in reason or sound analysis. The real experience of the system is that both must be pursued in order for each to be realised: they are, in practice, interdependent.
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> (A Criminal Justice System for the 21st Century (2012), at p. 75)
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> [28] In short, timely trials further the interests of justice. They ensure that the system functions in a fair and efficient manner; tolerating trials after long delays does not. Swift, predictable justice, “the most powerful deterrent of crime” is seriously undermined and in some cases rendered illusory by delayed trials (McLachlin C.J., “The Challenges We Face”, remarks to the Empire Club of Canada, published in (2007), 40 U.B.C. L. Rev. 819, at p. 825

[56] The majority in *Jordan* found compelling reasons to revise the analytical framework for determining whether an accused's right to a trial within a reasonable time has been infringed, citing several doctrinal shortcomings in the previous framework fostering a "culture of complacency towards delay" (at paras. 31-45). This new analytic framework was reaffirmed in *R. v. Cody*, 2017 SCC 31.

[57] In brief, the *Jordan* analysis centres on two ceilings beyond which delay is presumptively unreasonable: 18 months for cases tried in provincial courts and 30 months for cases tried in superior courts (or cases going to trial in the provincial court after a preliminary inquiry). *Jordan* dictates that the court is to first calculate the total or overall delay, which is the period from the charge to the actual or anticipated end of trial. From this, delay attributable to or waived by the defence is to be deducted, which results in the net delay. Net delay is then compared to the applicable ceiling. Net delay that is above the ceiling is presumptively unreasonable, unless the Crown is able to rebut the presumption by establishing the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow. If the net delay falls below the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that it took meaningful steps that show a sustained effort to expedite the case and that the case took markedly longer than it reasonably should have (at paras. 46-48).

[58] Exceptional circumstances are those that lie outside the Crown's ability to control in the sense that they are circumstances that are reasonably unforeseen or reasonably unavoidable and which the Crown cannot reasonably remedy the delays arising from them once they arise. Exceptional circumstances need not be rare (at para. 69).

[59] It is not sufficient for the Crown, once the ceiling is breached, to point to a past difficulty. Rather, it must also demonstrate that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling, such as utilizing case management processes, seeking cooperation from the defence to

streamline evidence and other procedural means. The Crown is not required to show that that the steps it took were ultimately successful; just that it took reasonable steps in an attempt to avoid the delay (at para. 70).

[60] The Court in *Jordan* did not establish an exhaustive list of circumstances that qualify as exceptional in this context, instead leaving that determination to "the trial judge's good sense and experience" (at para. 71). Nevertheless, the Court held that exceptional circumstances generally fall into two categories: discrete events and particularly complex cases.

[61] Discrete events that lead to delay may arise either outside or within the trial. The delay caused by discrete events or circumstances that are reasonably unforeseeable or unavoidable is deducted to the extent it could not be reasonably mitigated by the Crown and the justice system (at para. 75).

[62] A particularly complex case is one that because of the nature of the evidence or of the issues requires an inordinate amount of trial or preparation time (at para. 77).

[63] Finally, for those cases already in the system when *Jordan* was released, the Supreme Court held that the new s. 11(b) framework applies, but it allowed for a transitional exception where the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed (at paras. 95-96).

[64] This exception recognizes that the parties' behaviour cannot be judged strictly against a standard of which they had no notice. In *Cody*, the Supreme Court clarified that the assessment of the transitional exception is a "qualitative exercise", which "presum[es] that the Crown and defence relied on the previous law until *Jordan* was released". It is a contextual assessment which requires the court to be "sensitive to the manner in which the previous framework was applied" and be mindful that under the old *Morin* framework, "prejudice and seriousness of the offence often played a decisive role in whether delay was unreasonable": *Cody* at para. 69.

[65] I will turn now to consider the appellant's second ground of appeal - whether the trial judge erred in including the Stay Period in the calculation of total delay.

ANALYSIS

1. Should the six-month Stay Period be included in the calculation of total delay?

a. Summary of the Positions of the Parties

[66] The parties and the intervenor provided detailed written and oral submissions. By outlining only a brief summary of their positions, I do not mean to detract from their thorough presentations. I have considered all of their submissions.

[67] In brief, the appellant does not take issue with the conclusion of the trial judge that the *Charter* applies to private prosecutions. Rather, it submits that where the trial judge erred was in her inclusion of the Stay Period in the calculation of total delay.

[68] The appellant says that the right guaranteed by s. 11(b) is only granted to persons who are "charged with an offence", and that Executive was not charged with an offence during the Stay Period. Accordingly, even if the private and Crown prosecutions could be considered the same proceeding, the constitutional clock should have stopped running during the duration of the Stay Period.

[69] The intervenor (Marilyn Burgoon, who initiated the private prosecution) shares the view of the appellant, and contends that there are important public policy considerations that militate against inclusion of the Stay Period in the calculation of delay. She argues that inclusion may lead the Crown in future to decline to intervene and prosecute proceedings that begin as private prosecutions, even those that are in the public interest and more appropriately conducted by the Crown, leaving them in the hands of private individuals without the institutional resources of the Crown. Moreover, she submits that private individuals could abuse the private prosecution process to compromise a subsequent public prosecution by starting the

constitutional clock, thus limiting the Crown's ability to investigate and properly prosecute offences.

[70] The respondent counters that the trial judge's conclusion on this issue was sound and consistent with not only with the law as set out in *Milani* and *R. v. Lanteigne*, 2010 NBCA 91, but also the objectives of s. 11(b). It argues that if the Crown does not inherit the delay occasioned by the stay, which was entered to enable a state investigation into the incident to complete, then accused subject to private prosecutions are effectively denied the protection of s. 11(b).

b. Discussion

[71] On January 25, 2016, the federal Crown intervened and took conduct of the private prosecution against Executive and the Province, pursuant s. 579.1 of the *Code*. Its first action was to immediately direct a stay of proceedings to permit the ongoing investigation into the spill incident to complete. At the time of the stay, Crown counsel advised the Court that he expected the investigation to complete soon and that he expected a report to be submitted to the Crown office for charge approval review.

[72] Ultimately, the stayed proceedings were not resumed. Instead, a new information in relation to the spill incident was sworn against Executive, the Province and the driver of fuel truck on July 22, 2016, adding new charges under different legislation to that which had originally been charged by the private prosecutor.

[73] Not surprisingly, there do not appear to be any authorities that have addressed whether the time between a Crown stay of a private prosecution information and the laying of a new information engages an accused's rights under s. 11(b).

[74] As a starting point, s. 11(b) guarantees the right of any person "charged with an offence" to be tried within a reasonable time. This means, as a general rule, that the protection of s. 11(b) begins when an information is sworn and continues until the conclusion (or anticipated conclusion) of trial: *Jordan* at para. 49.

[75] Various courts have discussed this concept in the context of pre-charge, appellate and “gap” period delays that have occurred within public prosecutions. The Supreme Court has repeatedly held that neither pre-charge delay (see *R. v. Kalanj*, [1989] 1 S.C.R. 1594)) nor appellate delay (see *R. v. Potvin,* [1993] 2 S.C.R 880) engages the protections of s. 11(b) because the defendant is not charged with an offence during these periods. Appellate and trial courts have reached different conclusions on the engagement of s. 11(b) during “gap” periods, depending on the circumstances of the particular case. A review of these authorities, and the principles that informed their conclusions, will be instructive.

[76] I will first consider the authorities considering pre-charge delay.

[77] The Supreme Court has discussed, in several cases, why the protections of s. 11(b) are limited to those who have been formally charged and are not to be extended into the investigative phase.

[78] In *R. v. Mills*, [1986] 1 S.C.R. 863, Lamer J. (as he then was) in dissent, held that pre-charge delay is not relevant under s. 11(b), but can be relevant under ss. 7 or 11(d) of the *Charter* and under the abuse of process doctrine. He explained this conclusion as follows:

> [230] I agree, rather, with the view that the time frame to be considered in computing trial within a reasonable time only runs from the moment a person is charged. Pre-charge delay will in no way impair those interests with which s. 11(b) is concerned. Prior to the charge, the individual will not normally 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 protected by s. 11(b) will not be placed in jeopardy prior to the institution of judicial proceedings against the individual by means of the charge
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> [231] Pre-charge delay is relevant, however, to the right to a fair trial protected by ss. 7 and 11(d) of the Charter. I am in substantial agreement with the following passage from McKay J.'s judgment in *Attorney General of British Columbia v. Craig* Prov. J. (1983), 36 C.R. (3d) 346 (B.C.S.C.) in which he stated, at p. 353:
>
> > I have no doubt that relief is available under s. 11(d) or s. 7 and possibly by way of a finding of abuse of process if it is demonstrated that pre-information or pre-indictment delay would cause substantial prejudice to an accused's right to a fair trial and that the delay was caused by the police or the Crown for an oblique purpose.

> [232] Pre-charge delay is relevant under ss. 7 and 11(d) because it is not the length of the delay which matters but rather the effect of that delay upon the fairness of the trial. Pre-charge delay is as relevant as any other form of pre-charge or post-charge conduct which has a bearing upon the fairness of the trial. In other words, pre-charge delay is relevant to those interests which are protected by the right to a fair trial whereas it is irrelevant to those which are protected by s. 11(b). Similarly, pre-charge delay may be a relevant consideration under the doctrine of abuse of process in the same manner as any other conduct by the police or the Crown which may be held to constitute an abuse of process. [Emphasis added.]

[79] This same view was expressed by the Court in *Kalanj.* In concluding the pre-charge delay could not be considered under s. 11(b), McIntyre J. discussed some of the policy reasons behind limiting the protection of s. 11(b) to those under actual charge and not extending it to the pre-charge or investigative phase:

> [18] In dealing with s. 11, it must first be recognized that it is limited in its terms to a special group of persons, those "charged with an offence". It deals primarily with matters relating to the trial. It is to be noted that s. 11 is distinct from s. 10 and serves a different purpose: the two sections must not be equated. The framers of the *Charter* made a clear distinction between the rights guaranteed to a person arrested and those of a person upon charge. Sections 8 and 9, as well, guarantee essential rights ordinarily of significance in the investigatory period, separate and distinct from those covered in s. 11. It has been said that the purpose of s. 11 should be considered in deciding upon the extent of its application. This purpose, it has been said, is to afford protection for the liberty and security interests of persons accused of crime. While it is true that s. 11 operates for this purpose, I emphasize that it does so within its own sphere. It is not, nor was it intended to be, the sole guarantor and protector of such rights. As stated above, s. 7 affords broad protection for liberty and security, while the other sections, particularly those dealing with legal rights, apply to protect those rights in certain stated circumstances. Section 11 affords its protection after an accused is charged with an offence. The specific language of s. 11 should not be ignored and the meaning of the word "charged" should not be twisted in an attempt to extend the operation of the section into the pre-charge period. The purpose of s. 11(b) is clear. It is concerned with the period between the laying of the charge and the conclusion of the trial and it provides that a person charged with an offence will be promptly dealt with.
>
> [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*. [Emphasis added.]

[80] The Court re-affirmed these principles again in a different, but related, context in *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091 where a charge had been stayed under ss. 7 and 11(d) of the *Charter* on the basis of the lengthy pre-charge delay apparent on the face of the indictment. In upholding the Court of Appeal's decision to set aside the stay, Stevenson, J. discussed the necessity for courts to avoid monitoring investigations for efficiency:

> [22] Delay in charging and prosecuting an individual cannot, without more, justify staying the proceedings as an abuse of process at common law. In *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, Laskin C.J. (with whom the majority agreed on this point) stated that (at pp. 1040-41):
>
> > Absent any contention that the delay in apprehending the accused had some ulterior purpose, courts are in no position to tell the police that they did not proceed expeditiously enough with their investigation, and then impose a sanction of a stay when prosecution is initiated. The time lapse between the commission of an offence and the laying of a charge following apprehension of an accused cannot be monitored by Courts by fitting investigations into a standard mould or moulds. Witnesses and evidence may disappear in the short run as well as in the long, and the accused too may have to be sought for a long or short period of time. Subject to such controls as are prescribed by the *Criminal Code*, prosecutions initiated a lengthy period after the alleged commission of an offence must be left to take their course and to be dealt with by the Court on the evidence, which judges are entitled to weigh for cogency as well as credibility. The Court can call for an explanation of any untoward delay in prosecution and may be in a position, accordingly to assess the weight of some of the evidence.
>
> [23] Does the *Charter* now insulate accused persons from prosecution solely on the basis of the time that has passed between the commission of the offence and the laying of the charge? In my view, it does not.
>
> [24] Staying proceedings based on the mere passage of time would be the equivalent of imposing a judicially created limitation period for a criminal offence. In Canada, except in rare circumstances, there are no limitation periods in criminal law. The comments of Laskin C.J. in *Rourke* are equally applicable under the *Charter*. [Emphasis added]

[81] Court scrutiny of the operation and efficiency of investigations was recently again discouraged in *R. v. Hunt*, 2017 SCC 25, where the trial judge stayed charges of fraud, falsifying books and documents and circulating a false prospectus against four accused under s. 7 of the *Charter*. He did so largely on the basis of the 10 year pre-charge delay that had resulted from a lengthy police investigation and his finding that the Crown had the ability to file charges earlier than it did.

[82] A majority of the Court of Appeal of Newfoundland and Labrador dismissed the Crown appeal (indexed as 2016 NLCA 61), but the Supreme Court allowed the appeal and directed a new trial, for the reasons of Hoegg J.A. in dissent. Although in the context of s. 7, Hoegg J.A.'s analysis and review the authorities is helpful for present purposes, as he explained why it is inappropriate for a court to scrutinize the operation and efficiency of investigations or the exercise of prosecutorial discretion, absent an allegation of abuse of process:

> [71] In *R. v. Rourke*, [1978] 1 S.C.R. 1021, the Supreme Court held that courts are not authorized to supervise the operation and efficiency of police investigations. Laskin C.J., agreed, although he dissented on other issues, saying there remained a judicial discretion to stay a proceeding on the basis of abuse of process if the Crown were improperly motivated by an ulterior purpose in carrying out an investigation (at 1040-1041). In *R. v. Young* (1984), 46 O.R. (2d) 520 (Ont. C.A.), Dubin J.A. similarly reasoned, saying that "courts cannot undertake the supervision of the operation or the efficiency of police departments and to be asked to determine whether the police proceeded as expeditiously as they should have in any given case". Furthermore, he stated that to compel the police or Crown counsel to institute proceedings before they have reason to believe they will be able to establish the accused's guilt beyond a reasonable doubt "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself."
>
> [72] As noted above, *Kalanj* concerned the relevance of pre-charge delay to an analysis under section 11(b) of the *Charter*. In deciding that pre-charge delay concerned section 7 rather than section 11(b), McIntyre J. said that assessment of a reasonable time for conclusion of a trial under section 11(b) begins when an Information is sworn. The Court's ruling stipulates that the time period to be considered in a section 11(b) analysis is after a charge is laid up to the conclusion of trial. *Kalanj* does not stand for the proposition that the courts are authorized to assess the efficiency of a police investigation or determine when the Crown was in a position to lay charges. Neither does it set out a method of evaluating conduct involved in pre-charge delay.

[83] Hoegg J.A. went on to discuss why the trial judge should not have engaged in a review of when the Crown ought to have laid charges. In this regard, he held:

> [104] The Judge's remarks about when the Crown ought to have laid charges against the Respondents show that he engaged in a review of the efficiency of the Crown's investigation. While some review of Crown conduct in an investigation is required if abuse of process is alleged, judicial scrutinizing of an investigation for efficiency is, in my view, neither required nor appropriate. In my opinion, it is not part of the judicial role, as *Rourke*, *Mills*, *L.(W.K.)* and *Young* make clear. The reason why it is not the Judge's role to scrutinize an investigation for efficiency is because doing so conflates the roles of the judicial and executive branches of government.
>
> [105] The Supreme Court discussed the roles of the executive, legislative and judicial branches of government in our constitutional democracy in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, where the issue was whether the courts could use their inherent jurisdiction to set compensation rates for court-appointed *amicus curiae*. In ruling that they could not, McLachlin C.J. explained:
>
> > [27] This Court has long recognized that our constitutional framework prescribes different roles for the executive, legislative and judicial branches (see *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70). The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 49-52).
> >
> > [28] ... The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the Charter.
> >
> > [29] All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia* (*Speaker of the House of Assembly*), [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i] t is fundamental to the working of government as a whole that all these parts play

> their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389).[3].

[84] As with reviewing investigations for efficiency, the authorities are clear that, absent an allegation of abuse of process, it is also inappropriate for a court to review the exercise of prosecutorial discretion: *Krieger v. Law Society of Alberta*, 2002 SCC 65; *R. v. Anderson*, 2014 SCC 41.

[85] “Prosecutorial discretion” is an expansive term that “covers all decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it”: *Krieger* at para. 47; *Anderson* at para. 49. Decisions whether to stay a private prosecution and whether to bring a prosecution are both core elements of prosecutorial discretion: *Kreiger* at paras. 46-47.

[86] Authorities considering appellate delay are also instructive with respect to the issue at hand.

[87] In *Potvin,* the Supreme Court held that the s. 11(b) clock stops once the accused is acquitted or convicted, even where the Crown actively seeks to overturn the acquittal or the convicted person is subject to appeal bail restrictions.

[88] Relying on the reasoning in *Kalanj*, the majority in *Potvin* emphasized that s. 11(b) does not protect against the consequences of delay at large, but only from those flowing from an actual charge. Writing for the majority, Sopinka J. reasoned:

> [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.

[89] I turn now to the so-called "gap" cases.

[90] Several courts have considered whether an accused's s. 11(b) right is engaged during a gap between a Crown stay of proceedings and a new or revived charge. In each case, the Crown directed a stay of proceedings in its own prosecution for various reasons and then later recommenced the proceeding or re-laid the charges. None involved the stay of a private prosecution.

[91] The trial judge relied on some of these cases in her analysis, as does the respondent on this appeal. With advance apologies to the reader for the level of detail that follows, I find it necessary to explore the circumstances of those cases in order to understand the analysis informing their conclusions.

[92] A good place to start is *Milani*, a case relied upon heavily by the trial judge.

[93] Mr. Milani was charged in December 1987 in relation to five home invasion sexual assaults and was discharged on all but one allegation following a preliminary inquiry in November 1989. He was acquitted at trial on that charge. The advancement of DNA science in the intervening years led the Crown to prefer an indictment against Mr. Milani in July 2010, and in August 2010, he was arrested and charged with 19 counts relating to the four home invasion sexual assaults for which he had been previously discharged. He was released on bail, and his trial was scheduled for January 2013.

[94] In his application for a stay of proceedings on the basis of delay, Mr. Milani did not claim that the entire gap period constituted an unreasonable delay, accepting

that the period from 1987 to 1995 was inherent time necessary to permit the advancement of DNA science. However, he did contend that the period from 1995 to the time the new indictment was preferred in 2010 constituted unreasonable delay attributable to the Crown for its delay in submitting exhibits and samples for analysis and other similar shortcomings.

[95] The trial judge stayed the proceedings, finding that the time for assessing delay for the purpose of s. 11(b) ran from the date of the laying of the first information. In reaching this conclusion, she relied upon *Re Garton and Whelan* (1984), 47 O.R. (2d) 672 (H.C.) and *R. v. Antoine* (1983), 41 O.R. (2d) 607 (C.A.) for the proposition that, in cases where an accused has been discharged after a preliminary inquiry and a preferred indictment is subsequently brought, the time for assessing s. 11(b) delay runs from the date of the initial information. The trial judge went on to note that there were contradictory trial level authorities on the treatment of the gap period for the s. 11(b) purposes, but she ultimately concluded that *Antoine* remained the governing authority and that it had not been affected by the Supreme Court's decision in *Potvin* that appellate delay did not engage s. 11(b).

[96] The trial judge then reviewed the delay from the time the charges were first laid against Mr. Milani and concluded that its length (some 24 years) warranted inquiry into the reasons for the delay. The trial judge ultimately rejected the Crown's position that the investigatory period prior to the preferred indictment should be considered as "pre-charge investigation delay" and not accounted for in the s. 11(b) analysis. She found 32 months (later agreed to be 26 months) of the gap period to be unreasonable delay attributable to the Crown for delay arising from its handling of exhibits.

[97] The Court of Appeal allowed the Crown appeal, finding that the trial judge had erred in including the gap period in the delay analysis. The Court concluded that an accused's s. 11(b) right is not engaged during the gap between a Crown stay and a new or revived charge and should therefore not be counted toward delay, unless the formal charge has been withdrawn with the intention of laying a new charge. Writing

for the Court, van Rensburg J.A. held that a close examination of *Kalanj* and *Potvin* supported the conclusion that the gap period, with one caveat, should not be included in the s. 11(b) analysis. He held:

> [46] Accordingly, the reasoning of the court in *R. v. Potvin* suggests that the period that is relevant for a s. 11(b) analysis is the period when there is a proceeding "on foot"; that is, there must be active charges outstanding against the person. In the words of Sopinka J., "s. 11(b) does not apply unless the restriction of the interests which the subsection protects results from an actual charge" -- thus, "[c]ircumstances which produce the same consequences do not qualify for the protection of this provision unless those consequences proceed from a formal charge": at para. 62. *R. v. Potvin* therefore suggests that charges must be pending and not anticipated or spent in order to attract the protection of s. 11(b).
>
> **(iii) Conclusion**
>
> [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] <u>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</u>. <u>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*.</u>
>
> [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. [Emphasis added.]

[98] Ultimately, van Rensburg J.A. concluded that the trial judge had erred in including the gap period between the accused's discharge on the original charges in 1989 and the time the indictment was preferred in 2010. As a practical matter, the accused was not subject to charge during this time. Moreover, there was nothing in the court system while the science of DNA analysis progressed or while the police continued the investigation, and the accused was also unaware of any ongoing

investigation. Accordingly, the relevant period for s. 11(b) purposes started when the accused was first charged in 1987, it stopped upon his discharge in 1989 and only began to run again when the indictment was preferred in 2010.

[99] It was the caveat identified in *Milani* upon which the trial judge in the case at bar relied in concluding that the Stay Period was to be included in the calculation of delay.

[100] The British Columbia Court of Appeal recently referenced *Milani* in *R. v. D.N.*, 2018 BCCA 18, an historical sexual assault case in which the Crown stayed proceedings in 1990 and laid new charges (encompassing the former charges and adding new ones) in 2009.

[101] D.N. appealed his conviction and the dismissal of his s. 11(b) stay application. The appeal was heard following the release of *Jordan* and the trial judge's decision on delay was upheld on the basis of the transitional exception. While the Court found it unnecessary to determine whether the gap between the Crown stay and the new charges should be included in the calculation of total delay under the *Jordan* framework, it did reference *Milani* and summarized its conclusions this way:

> [45] …In *Milani CA*, the Ontario Court of Appeal held that an accused's s. 11(b) *Charter* right is not engaged during the "gap" between a Crown stay and a new or revived charge, and therefore that period of time should not be counted in calculating the length of the delay. In support of that position, the Court, at paras. 44–47, relied on *R. v. Potvin*, [1993] 2 S.C.R. 880, where the Supreme Court held that appellate delay does not apply to s. 11(b), which requires that active charges be outstanding against the person. In *Milani CA,* (at para. 50), the Court concluded that for the purposes of s. 11(b), the delay clock begins to run when the initial charges are laid, stops during the "gap", and begins to run again when the charges are re-laid. Parenthetically, I would observe that it is unclear whether the Court is saying that the clock completely restarts, or picks up again from where it left off. This issue was not raised in this appeal and therefore I find it unnecessary to decide.

[102] In the present case, the trial judge referred to another gap case, *Lanteigne*.

[103] Mr. Lanteigne had been charged in July 2006 with three offences arising out of a motor vehicle accident. In June 2008, the Crown advised his counsel that it would be withdrawing two of the more serious charges as a result of new information

suggesting that the currently identified victim, rather than Mr. Lanteigne, may have caused the accident. However, rather than withdraw the charges, the Attorney General instead directed a stay of proceedings. The expressed purpose of the stay was to permit the Crown to direct further investigation into certain aspects of its case, including the search of two businesses. For reasons that were not explained, these search warrant applications were not made until nine months into the stay period.

[104] Seven days before the expiry of the one-year limitation period to recommence, the Attorney General lifted the stay and recommenced the proceedings and trial dates were ultimately set. The total lapsed time from the laying of the original information to the conclusion of the trial would have been three and a half years.

[105] In contesting the accused's application for a stay on the basis of delay, the Crown argued that the accused was not in jeopardy during the 51 weeks the Crown stay was in effect and that the period should, therefore, not count against it in the delay analysis. Following a two-day hearing, the trial judge concluded the Crown had violated the respondent's *Charter* right to be tried within a reasonable time under the framework in existence at the time, and that the appropriate remedy was a stay of proceedings. The trial judge concluded the Crown was responsible for 19 months of the 42-month delay, namely, the 12 months during the stay and the additional seven months necessary to bring the matter to trial following the stay. The Crown appealed.

[106] On appeal, Bell J.A., writing for the Court, rejected the Crown's submission on two bases. First, the Court relied upon several decisions where courts held the time between a stay imposed by the Crown and the recommencement of proceedings under s. 579 is attributable to the Crown, reasoning that by virtue of s. 579(2), the accused remained in jeopardy during the duration of the stay because the Crown could at any time within the one-year period resume the proceedings, as it in fact did.

[107] The second "pressing" reason for rejecting the Crown's submission was that not including the stay period in the delay calculation in these circumstances would effectively permit the Attorney General to usurp the role of the court. In this regard, the Bell J.A. wrote:

> [14] …In the present case, the Crown prosecutor (not counsel on appeal) concluded he needed more time to investigate the matter. Rather than instruct Crown counsel to request an adjournment, which would have permitted the Court to judicially weigh the merits of the request and consider the potential s. 11(b) ramifications, the Attorney General chose to act unilaterally. To endorse the position advanced by the Crown would permit the Attorney General to use s. 579 to avoid his or her s. 11(b) *Charter* responsibility to bring accused persons to trial within a reasonable time.

[108] Some of the authorities cited in *Lanteigne* for the proposition that the time between a stay and a recommencement counts against the Crown for the purpose of s. 11(b), and which are relied upon by the respondent here, include *R. v. Durack* (1997), 159 Sask. R. 244; *R. v. Condello*, [1997] O.J. No. 3798 (C.J.); and *R. v. A.S.*, [2008] O.J. No. 3738 (S.C.J.).

[109] In *Durack*, the accused was charged with sexual assault and unlawful confinement. On the day his rescheduled preliminary inquiry was to begin, a social worker involved with the complainant's care advised the Crown that the complainant was in no emotional condition to travel or give evidence and asked the Crown to seek an adjournment of the preliminary inquiry. Instead of seeking the adjournment, the Crown chose to direct a stay of proceedings pursuant to s. 579 of the *Code* and advised the defence he was doing so because of the complainant's emotional health.

[110] When the Crown recommenced the proceedings eight months later, Mr. Durack applied for a stay on the basis of delay. Although the application was dismissed through an analysis of the legal framework in place at the time, the trial judge did include the eight month period between the stay and recommencement in the calculation of delay in the circumstances.

[111] In *A.S.*, the applicant was charged with attempted murder, armed robbery and possession of a firearm following a robbery and shooting several weeks earlier. The Crown initially believed that A.S. was the shooter and expected that two others who had been present at the scene, D and L, would provide statements implicating him. When these statements were not forthcoming, the Crown reassessed the evidence against A.S. and stayed the charges against him on the first day of his preliminary inquiry on August 28, 2006.

[112] Circumstances changed on May 1, 2007 when L pleaded guilty to robbery and admitted facts which implicated A.S. and D provided a statement also implicating A.S. The following day, the Crown lifted the stay and recommenced the proceedings against A.S., not only on the reinstated charges but on three additional charges as well. Following a preliminary inquiry that concluded in December 2007, A.S. was discharged on the attempted murder charge but was committed to stand trial on the remaining five charges. In due course, a trial date was set for September 2008 and A.S. applied for a stay under s. 11(b).

[113] Although the trial judge dismissed the stay application, he did attribute the eight month gap period to the Crown. In doing so, he observed the lack of any appellate authority on the topic and was ultimately persuaded to follow the policy analysis in *Durack* and *R. v. Keevik*, [1996] N.W.T.J. No. 32.

[114] In *Keevik*, the accused was charged with sexual assault on February 7, 1994. The charge arose from events that occurred at a house party the previous day. On July 20, 1994, the day his preliminary inquiry was set to begin, the Crown directed a stay of proceedings pursuant to s. 579(1) of the *Code*. Crown counsel did so because he had recently received a witness statement that seemed to undermine the strength of the Crown's case, and he determined the Crown no longer had a reasonable prospect of conviction.

[115] The Crown reassessed its position on Mr. Kreevik's case after this particular witness testified in September of that same year in another proceeding related to the same incident. Several months later, on May 1, 1995, the Crown recommenced the

proceedings against Mr. Keevik and a trial date was ultimately scheduled for May 1, 1996.

[116] The trial judge granted a stay on the basis of delay. In determining that the s. 11(b) clock continued to run during the nine month gap period, the court was critical of the Crown's inaction during those months, in particular in the seven months following the testimony of the critical witness on the related case. The Court held:

> [11] …With respect, I do not view this as a satisfactory or adequate explanation in justification of a further delay of 9 1/2 months (i.e. in addition to the first and third periods of delay mentioned above). I should not be taken as being critical of the Crown's decision on July 20, 1994 to, in light of the Crown's then most recent information, direct a stay of proceedings on the basis of the test enunciated by then Crown counsel -- indeed that decision of the Crown I find commendable. However, on the information provided with respect to the ensuing months, it appears the Crown thereafter simply sat back and awaited developments. There is no evidence that the Crown sought to interview the potential witness Mr. Louis. From the information provided, it appears it was a mere happenstance that Crown counsel had an opportunity to observe Mr. Louis testify in the witness box (he having been called as a defence witness on the Gruben trial) in September 1994. But what of the seven months following this observation in September 1994? There is no evidence, or information, concerning this further delay before recommencing proceedings on May 1, 1995.
>
> [12] While it is true that Parliament has afforded the Crown, in s. 579(2) C.C., the right to recommence criminal proceedings against an accused person within one year after the entry of a stay of proceedings, the intervening time is nonetheless "delay" prejudicing an accused's right to a speedy trial. The s. 11(b) clock is still running during the period of the stay.

[117] In *Condello*, the accused was charged with drug-related offences in October 1993. He was committed to stand trial following a preliminary hearing and a trial date was eventually set for May 1995. About two weeks before trial, the Crown directed a stay of proceedings under s. 579 of the *Code* and advised that there was a "strong likelihood the matters would be re-commenced within one year" (para. 26). Defence counsel objected to the procedure being employed by the Crown. He advised the presiding judge that the defence wanted to proceed as scheduled and submitted that the stay was "nothing more than an adjournment for which no reasons need be given" (para. 27). He argued that that the s. 11(b) clock should be seen as still running.

[118] On April 24, 1996, the Crown filed a notice to recommence the charges under s. 579(2) of the *Code*. A trial date was eventually scheduled for December 1996, although the defence sought earlier dates. Mr. Condollo's application for a stay on the basis of delay was brought shortly before trial and was eventually granted about six months later.

[119] In concluding the stay period (nearly one year) was attributable to the Crown, Scime J. held:

> [30] Canadian courts have held that the time between a Crown stay and re-commencement of proceedings under section 579 of the *Criminal Code of Canada* is attributable to the Crown on applications for an infringement of section 11(b) *Charter* rights. See *R. v. Mills*, [1993] N.S.J. No. 204, a decision of the Supreme Court of Nova Scotia, tab C of the material filed; *R. v. Pasini*, 1991 63 C.C.C. (3d) 436, a decision of the Quebec Court of Appeal; and *R. v. Durette* (19920 72 C.C.C. (3d) 421, a decision of the Ontario Court of Appeal.
>
> …
>
> [32] On the application before me, there is no allegation of an abuse of process, or other prosecutorial misconduct or bad faith on the part of the Crown.
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> [33] The court is entitled to assume that the Crown exercised its discretion properly and not for improper or arbitrary motives.
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> [34] We are not concerned with fault but with the reasonableness of the over-all delays in bringing the accused to justice.
>
> [35] I find that the Crown must answer for the fact of the delay which resulted by the decision taken by the Crown. This was a unilateral decision in which the accused played no part and could not in any way oppose. The one year delay resulted entirely from the Crown's decision to direct a stay of proceedings, and is a delay totally attributed to the, Crown.

[120] Although not referred to by the parties on appeal, the parties did refer the trial judge in the present case to another gap case, *R. v. Curry*, 2016 BCSC 1435.

[121] Mr. Curry was charged in January 2013 with drug-related offences. The Crown directed a stay of proceedings in April 2013, and a new information was sworn in August charging the accused and a co-accused jointly. At the hearing of the accused's application for a stay for a breach of s. 11(b) (the trial concluded in July 2016), the Crown admitted that its purpose in directing the stay of proceedings was to stop the s. 11(b) clock from running. The Crown also admitted that at the time of

the stay, it held the view that it was very likely the proceedings would be re-commenced by way of a re-laid information once the Crown received from the RCMP a redacted version of the information to obtain and determined it could be properly vetted for disclosure.

[122] Justice Holmes, as she then was, included the stay period in her calculation of overall delay in these circumstances. On the agreed facts, she found that the accused had every reason to believe that the proceedings would be re-commenced and, indeed, it was the Crown's admission that it intended to re-commence if the information to obtain could be suitably redacted, as it eventually was. In these circumstances, she concluded there was no reason to find that the stay of proceedings had put an end to the "stress, anxiety and stigma" flowing from the charges that *Jordan* recognized affected an accused's right to the security of the person.

[123] In consideration of all of the foregoing, I conclude that the trial judge in the present case erred by including the six month Stay Period in the calculation of overall delay.

[124] The respondent was charged with an offence in relation to the fuel spill during the time of the private prosecution. The protections of s. 11(b) were therefore engaged during that time. However, it was not charged with an offence in relation to the fuel spill during the Stay Period. The respondent knew the spill was being investigated and that the investigation was ongoing at the time of the stay. It knew that once the investigation wrapped up and the Crown charge assessment process was completed, charges might result. In this way, the company's position during the Stay Period was analogous to either an offender facing a post-conviction Crown appeal or, more pointedly, a suspect awaiting the completion of a police investigation and the decision by the Crown whether to lay charges. The Supreme Court of Canada has been clear that s. 11(b) is not engaged in either of these scenarios.

[125] Many of the policy reasons for limiting the protections of s. 11(b) to those charged with an offence apply to the present context. During the Stay Period, an investigation by a provincial regulatory body was continuing and then completed, and a charge assessment review was subsequently conducted by the federal Crown. It is not for the court to assess either the operation and efficiency of the investigation or the exercise of the Crown's discretion in approving charges (unless there is a claim of abuse of process, which is not the case here).

[126] I accept the reasoning in *Milani* and am of the view that the general rule as outlined by the Ontario Court of Appeal applies in the present case; that is, that the relevant period for the purposes of s. 11(b) is when there are active charges outstanding against an accused. Accordingly, I find that s. 11(b) was not engaged during the Stay Period and that the trial judge erred in considering the present case an exception to this general rule.

[127] In concluding that the Stay Period came within the caveat identified in *Milani*, the trial judge found that by virtue of Crown counsel's acknowledgement of a *prima facie* case against Executive at the pre-enquete hearing and his statements at the stay appearance, Executive would have been "labouring under the very real prospect of new charges". There are several problems with this conclusion.

[128] While the Court in *Milani* held that s. 11(b) was engaged during any period that an accused person is subject to charges or when a person no longer actively charged remains subject to the "the very real prospect of new charges", I am of the view that the trial judge failed to appreciate the narrow scope of the Court's latter remarks.

[129] The caveat identified in *Milani* addressed a situation that had arisen in *Antoine*. In that case, the indictment charging Ms. Antoine with fraud was quashed by the Court because of a technical defect. Six days later, the Crown preferred a second indictment alleging the same offence but curing the defect. In these circumstances, Martin J.A. held that in determining whether an accused's s. 11(b) rights had been violated, the entire period after the laying of the first information

should be considered. The gap was only six days, and for all practical purposes, it was a single proceeding.

[130] In light of these facts, I incline to the view that the Court in *Milani* had in mind a much narrower application of the caveat than the facts presented in the case at bar. The Court in *Milani* was addressing the unique situation where a "formal charge has been withdrawn with the intention of laying a new charge, or an information has been quashed with a new information laid" (at para. 48). It makes sense in these narrow circumstances, the Court held, to consider the entire period in analyzing the delay under s. 11(b).

[131] The facts in the present case do not support the conclusion that the Crown stayed the charges initiated by the private prosecutor with the intention of laying a new charge. As the appellant emphasizes, there is a fundamental difference between the acknowledgement of a *prima facie* case based upon evidence adduced by a private prosecutor at a pre-enquete hearing (evidence, which I observe, was based upon an incomplete investigation and included materials that were publicly available at the time, such as the pleadings from a civil action commenced by a citizen on behalf of himself and other citizens from the Slocan Valley seeking damages arising from the spill) and the Crown charge assessment standard.

[132] A *prima facie* case at a process hearing requires the presider to find there is evidence of each essential element of the offences charged and that the proceeding is not vexatious, frivolous or an abuse of process: *R. v. Nenchev*, 2014 ONSC 3892; *Ambrosi v. British Columbia (Attorney General)* 2014 BCCA 123. The Crown charge approval standard is a much higher standard of a reasonable prospect of conviction and consideration of the public interest. The Crown is required to consider all of the fruits of a completed investigation, inculpatory and exculpatory, including potential defences, in its exercise of one of the core elements of prosecutorial discretion.

[133] The evidentiary record showed that the private prosecution, commenced in 2014, prompted investigators to re-open the investigation into the Lemon Creek spill. The federal Crown, although not a party to the private prosecution, attended court

appearances as a courtesy to the court. Crown counsel consistently advised the court that the regulatory investigation was ongoing and that the Crown was not yet in a position to determine whether to intervene. The record showed that investigators continued to gather evidence during the time of the private prosecution. Following the Crown's exercise of its prosecutorial discretion in staying the private prosecution, the record also showed that the investigation continued to carry on and further evidence was gathered.

[134] As the Courts in *Kalanji* and *Hunt* emphasized respectively, it is not the role of the court to assess either the reasonableness of the investigation or the exercise of Crown discretion absent an abuse of process claim.

[135] *Lanteigne, Durack, Curry* and other decisions referred to by the respondent are distinguishable from the case at bar. Most obviously, none of them involved the stay of a private prosecution over which the Crown had no control in initiating. Moreover, the Crown in those other cases exercised its discretion to stay its own prosecution for very different purposes than the appellant exercised its discretion here. They involved, in essence, a manipulation by the Crown of its own proceedings, which is clearly not the case here.

[136] The very real concerns identified in those decisions, such as the Crown usurping the role of the court by using a stay of proceedings to indirectly obtain an adjournment of the trial (*Lanteigne*, *Durack*), or curing a defect on its indictment (*Antoine*), or deliberately "stopping the s. 11(b) clock from running" while it determined whether it could redact an information to obtain sufficiently for disclosure in its case (*Curry*) are not present in the case at bar. In the language of *Milani*, those cases all involved situations where the accused remained subject to the "the very real prospect of new charges".

[137] Here, however, the appellant did not stay the private prosecution with the expectation or intention that charges would be necessarily be recommenced or re-laid. The Crown exercised its discretion under s. 579.1 of the *Code* to stay the private prosecution because it was aware of the ongoing investigation into the spill

and determined it necessary for that investigation to complete. New charges were far from a foregone conclusion at the time of the stay as charge assessment, to a much higher standard than a *prima facie* case and on all of the fruits of a completed investigation, had yet to take place.

[138] In the end, it cannot be said in the circumstances of this case that the federal Crown's intervention and staying of the private information was done "with the intention of laying a new charge", to again use the language in *Milani*.

[139] In all of these circumstances, it is my view that s. 11(b) was not engaged during the Stay Period.

[140] The trial judge's erroneous inclusion of the Stay Period in the calculation of delay was critical to the result she reached. Without its inclusion, the total delay, after the deduction of the duration of the private prosecution as an exceptional circumstance, would have been within the time limit set out in *Jordan*. I would grant the appeal on this basis and order a new trial.

[141] Although this is sufficient to dispose of the appeal in the appellant's favour, I will go on to consider the next ground, as I would allow the appeal on this basis as well.

2. Was the entire private prosecution, including the Stay Period, an exceptional circumstance that should have been deducted from the total delay?

a. Positions of the Parties

[142] In the event the Stay Period were to be included in the calculation of total delay (and I say it should not), the appellant submits that the trial judge erred in failing to find that the entire period attributable to the private prosecution, including the Stay Period, was an exceptional circumstance under *Jordan*. It says that it had no control over (a) the decision to initiate the private prosecution; (b) the decision to reopen the investigation into the spill; or (c) the time taken to complete the investigation. In this latter regard, the appellant submits that it had no control over

the investigative steps being taken or preparation of the Report to Crown Counsel. Consequently, the timing of the new charges was equally something that lay outside the Crown's control and was unavoidable because the investigation was ongoing.

[143] The appellant, supported by the intervenor, also raises policy concerns. It argues that by including the Stay Period in the delay calculus risks undermining the important role of the private prosecutor, a role described as "a valuable constitutional safeguard against inertia or partiality on the part of authority": *Gouriet v. Union of Post Office Workers*, [1978] AC 435 at 477 (H.L.).

[144] In this regard, the appellant points to a private prosecution initiated against a particular mining company in October 2016, prior to completion of the investigation into the spill of mining waste. The Attorney General stayed the charges in January 2017, and the investigation remains ongoing. The appellant submits that if the stay period is to be included in the calculation of total delay and is not deducted as an exceptional circumstance in these types of circumstances, then proceedings could be subject to a judicial stay on the grounds of delay even before the investigation completes or the Crown has the opportunity to consider whether to approve charges.

[145] The respondent takes the position that there was no error in the trial judge's analysis, and that neither the Stay Period nor the preceding 16 months during which the private prosecution was extant constitute exceptional circumstances. It contends that although the Crown had no control over the laying of the private information, it had the opportunity to intervene long before it did, and that the entire 16 month period is therefore not properly an exceptional circumstance. Executive further submits that the Crown failed to tender any evidence in support of its submission that it had no control over the decision to reopen the investigation or the time it took to complete.

b. Discussion

[146] The trial judge found that the Crown had established that the commencement of the private prosecution was unavoidable from the Crown's perspective, and that the Crown was also entitled to a reasonable period to properly assess whether to

intervene in the proceeding in some capacity. Accordingly, she accepted that "the private prosecution qualifies as an exceptional circumstance in this case such that some or all of the time the prosecution was extant should be excluded from the time calculated for the delay" (at para. 55). She then determined that the calculation of delay from charge to trial should include the six-month stay period. Although she calculated this total period as 24 months, it is in fact closer 22 months: January 25, 2016 to the anticipated end of trial on November 30, 2017.

[147] Thus, the trial judge effectively deducted the entire 16 months of the private prosecution from the total delay as a discrete exceptional circumstance. I am of the view she was correct in doing so for the reasons she set forth.

[148] The trial judge then found that having taken the prosecution over and directed a stay of proceedings, the balance of time, including the Stay Period, was "well within the control of the Crown". She found that by staying the proceedings, the Crown caused the initial trial dates to collapse and also expanded the scope of the trial from two weeks to a five-week trial with 50 witnesses. She further found that even after July 2016 when the Crown laid the new charges, it did not move matters along expeditiously, notwithstanding that it had ample time to adjust to the impact of *Jordan*. She was critical of the pace of disclosure, and also referred to the Crown's refusal to draft an agreed statement of facts. The trial judge ultimately concluded that the entirety of the Stay Period was well within the control of the Crown and should count towards delay in the case.

[149] Given the trial judge's deduction of the period the private prosecution was extant from the overall delay as an exceptional circumstance, the only issue is whether she erred in failing to find that the Stay Period (if it were to be included in the calculation of total delay) was also an exceptional circumstance.

[150] Under the *Jordan* framework, delay is presumptively unreasonable if it exceeds the applicable ceiling. The Crown bears the burden of rebutting the presumption by demonstrating that the Stay Period constituted an exceptional

circumstance. Exceptional circumstances lie outside the control of the Crown in that they are reasonably unforeseen or are unavoidable.

[151] Central to the trial judge's determination that the Stay Period was not an exceptional circumstance was her conclusion that this time period was "well within the control of the Crown". In my respectful view, this finding constitutes a palpable and overriding error.

[152] The respondent submits that the Crown failed to meet its burden by not adducing any evidence that the events during the Stay Period were outside the Crown's control and the trial judge's conclusion reflects that insufficiency in the evidence. While I agree that there must be some evidence before the court to establish that the events during the Stay Period were outside the Crown's control, where I disagree with the respondent is in its view that there was none in this case.

[153] As the substantial appeal books show, transcripts of all of the prior court appearances, where counsel described what was taking place, as it was taking place, were before the trial judge. These included statements made by Crown counsel throughout the time the private prosecution was extant and at the time of the stay appearance regarding the ongoing investigation. The trial judge also had the benefit of a large body of evidence detailing the disclosure that had been made during the duration of the Crown prosecution.

[154] The cumulative effect of all of this evidence establishes, in my view, that just as the laying of the private prosecution was outside of the Crown's control (something the trial judge recognized), so too was the investigation outside of its control, both during the private prosecution and during the Stay Period. There is evidence in the record that the investigation into the spill continued during the Stay Period; for example, investigators obtained a new expert report in February 2016 and a supplemental report in March of 2016 (the stay was entered in January 2016). This compels the conclusion that because the investigation was clearly ongoing during the Stay Period, the timing of any potential new charges arising from the spill was outside the Crown's control and the delay was therefore unavoidable.

[155] The Crown having no control over the investigative steps that were being taken before and after the stay, for the reasons recognized in *Rourke, Kalanj* and other cases, the trial judge was in no position to assess the efficiency of the investigation or assess what a reasonable time period might be for it to conclude. Similarly, as there was no suggestion that the Crown had exercised its discretion improperly in this case, the trial judge was in no position to assess whether the Crown should have laid charges sooner than it did.

[156] Accordingly, I agree with the appellant that the trial judge erred in failing to find the time taken was reasonably unavoidable, and that the entire period attributable to the private prosecution and the investigation, including the Stay Period (if it is to be included in the calculation of total delay), should have been characterized as a discrete exceptional event. I would allow the appeal on this basis as well.

DISPOSITION

[157] In the result, it is unnecessary to consider whether to grant the appellant leave to raise the other two grounds of appeal. For the reasons I have outlined, I would allow the appeal, set aside the stay of proceedings and order a new trial.

"S.A. Donegan J."

DONEGAN J.