Dear [Redacted]

Re: Your request for access to information under Part II of the Access to Information and Protection of Privacy Act [JPS/114/2016]

On September 2, 2016, the Department of Justice and Public Safety received your request for access to the following records:

"Any records related to the impact of the Supreme Court of Canada decision in the Jordan and Williamson cases on the justice system in Newfoundland and Labrador. In that case, the Supreme Court of Canada set new rules for an accused’s right to be tried within a reasonable time frame (source: cbc.ca/1.3670079). Request includes any correspondence, memoranda, or analysis on the impact of these new rules in this province. Date range of request is July 1, 2016 to the present."

I am pleased to inform you that a decision has been made by the Deputy Minister for the Department of Justice and Public Safety to provide access to the most of the requested records. Please note that access to the remaining records, and/or information contained within the records, has been refused in accordance with the following exceptions to disclosure, as specified in the Access to Information and Protection of Privacy Act (the Act):

5. (1) This Act applies to all records in the custody of or under the control of a public body but does not apply to
   (j) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

29. (1) The head of a public body may refuse to disclose to an applicant information that would reveal
   (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;

31. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to
   (g) reveal information relating to or used in the exercise of prosecutorial discretion;
(n) adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;

34. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the government of the province of relations between that government and the following or their agencies

40. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where

(c) the personal information relates to employment or educational history;

As required by 8(2) of the Act, we have severed information that is unable to be disclosed and have provided you with as much information as possible. Please note that pages 16 through 21, 41 through 50, 59 through 79, 85 through 96, and 100 have been severed entirely under section 5(1)(j). Additionally, pages 6, 23, 80 through 84, 97, 133, 134, and 136 through to 139 have been severed entirely under section 29(1)(c). Finally, pages 34 through 39 have also been severed entirely under section 34(1)(a). In accordance with your request for a copy of the records, the appropriate copies have been enclosed.

Please be advised that you may ask the Information and Privacy Commissioner to review the processing of your access request as set out in section 42 of the Act (a copy of this section of the Act has been enclosed for your reference). A request to the Commissioner must be made in writing within 15 business days of the date of this letter or within a longer period that may be allowed by the Commissioner.

The appeal may be addressed to the Information and Privacy Commissioner as follows:

Office of the Information and Privacy Commissioner
2 Canada Drive
P. O. Box 13004, Stn. A
St. John's, NL. A1B 3V8

Telephone: (709) 729-6309
Toll-Free: 1-877-729-6309
Facsimile: (709) 729-6500

You may also appeal directly to the Supreme Court Trial Division within 15 business days after you receive the decision of the public body, pursuant to section 52 of the Act (a copy of this section of the Act has been enclosed for your reference).
If you have any questions, please contact me by telephone at 729-7906 or by email ncroke@gov.nl.ca.

Sincerely,

[Signature]

Neil Croke
ATIPP Coordinator
Access or correction complaint

42. (1) A person who makes a request under this Act for access to a record or for correction of personal information may file a complaint with the commissioner respecting a decision, act or failure to act of the head of the public body that relates to the request.

(2) A complaint under subsection (1) shall be filed in writing not later than 15 business days

(a) after the applicant is notified of the decision of the head of the public body, or the date of the act or failure to act; or

(b) after the date the head of the public body is considered to have refused the request under subsection 16 (2).

(3) A third party informed under section 19 of a decision of the head of a public body to grant access to a record or part of a record in response to a request may file a complaint with the commissioner respecting that decision.

(4) A complaint under subsection (3) shall be filed in writing not later than 15 business days after the third party is informed of the decision of the head of the public body.

(5) The commissioner may allow a longer time period for the filing of a complaint under this section.

(6) A person or third party who has appealed directly to the Trial Division under subsection 52 (1) or 53 (1) shall not file a complaint with the commissioner.

(7) The commissioner shall refuse to investigate a complaint where an appeal has been commenced in the Trial Division.

(8) A complaint shall not be filed under this section with respect to

(a) a request that is disregarded under section 21;

(b) a decision respecting an extension of time under section 23;

(c) a variation of a procedure under section 24; or

(d) an estimate of costs or a decision not to waive a cost under section 26.

(9) The commissioner shall provide a copy of the complaint to the head of the public body concerned.
Direct appeal to Trial Division by an applicant

52. (1) Where an applicant has made a request to a public body for access to a record or correction of personal information and has not filed a complaint with the commissioner under section 42, the applicant may appeal the decision, act or failure to act of the head of the public body that relates to the request directly to the Trial Division.

(2) An appeal shall be commenced under subsection (1) not later than 15 business days

(a) after the applicant is notified of the decision of the head of the public body, or the date of the act or failure to act; or

(b) after the date the head of the public body is considered to have refused the request under subsection 16 (2).

(3) Where an applicant has filed a complaint with the commissioner under section 42 and the commissioner has refused to investigate the complaint, the applicant may commence an appeal in the Trial Division of the decision, act or failure to act of the head of the public body that relates to the request for access to a record or for correction of personal information.

(4) An appeal shall be commenced under subsection (3) not later than 15 business days after the applicant is notified of the commissioner's refusal under subsection 45 (2).
Kenny, Haley

From: Reid, Elaine M
Sent: Monday, September 19, 2016 9:34 AM
To: Croke, Neil
Subject: Jordan – possible ATIPP material.

From: Knickle, Frances J.
Sent: Wednesday, July 13, 2016 3:29 PM
To: Molloy, Donovan; Reid, Elaine M; Lefevre, Phil M.A
Subject: RE: On Direct Indictments, my thoughts:

DIRECT INDICTMENTS
Guidebook (GB) already includes concerns of 11(b) as a reason to file direct indictment. (While GB refers to BCCA describing it as a power “not to be exercised generally”)

Another 11b consideration is the status of an accused’s JIR. If an accused is in custody, or bound by strict conditions, the matter must be brought to trial as early as possible. Prejudice suffered by accused because of bail status was of significant concern to the SCC.
From: Molloy, Donovan  
Sent: Wednesday, July 13, 2016 3:28 PM  
To: Knickle, Frances J.; Lefeuvre, Phil M.A; Mercer, Jennifer; Reid, Elaine M; Simms, Trina; Walsh, Tina M.  
Subject: RE: -  

Just so you know I have not lost my mind, the degree of work/time/resources we put into any will be part of our group discussion re Jordan once we have an estimate of current cases with issues.

Donovan Molloy, QC  
Director of Public Prosecutions  
Assistant Deputy Minister (Criminal Division)  
Department of Justice and Public Safety  
St. John's, NL  
709-729-3877 (t)  
709-729-2129 (f)  

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From: Molloy, Donovan  
Sent: Wednesday, July 13, 2016 2:51 PM  
To: Knickle, Frances J.; Lefeuvre, Phil M.A; Mercer, Jennifer; Reid, Elaine M; Simms, Trina; Walsh, Tina M.  
Subject: FW:  

Advice provided to RCMP and RNC

From: Molloy, Donovan  
Sent: Wednesday, July 13, 2016 2:50 PM  
To: Chris Fitzgerald; 'Stephanie Sachsse'  
Cc: Cooper, Kim  
Subject:  

Good afternoon,  

Prosecutions position is we cannot take a blanket position with respect to tickets issued to registered owners based on the observations of ordinary persons.
If you want to meet Kim will arrange an agreeable time.

Thanks,

Donovan Molloy, QC
Director of Public Prosecutions
Assistant Deputy Minister (Criminal Division)
Department of Justice and Public Safety
St. John's, NL
709-729-3877 (t)
709-729-2129 (f)

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Jordan – possible ATIPP material.

http://www.canadianlawyermag.com/6095/Its-been-25-years-since-Askov-but-little-has-changed.html
From: Knickle, Frances J.
Sent: Wednesday, July 13, 2016 9:48 AM
To: Lefevre, Phil M.A; Molloy, Donovan
Cc: Reid, Elaine M
Subject: RE: Brainstorming - R v Jordan the decision to prosecute

Some thoughts:

**THE DECISION TO PROSECUTE**

1) Reasonable likelihood of conviction

The standard in NL is presently, *reasonable likelihood of conviction.*

2) The Public Interest

The general rule, is that the more serious, the more it is in the public interest.

As well, the level of moral blameworthiness is a legitimate consideration.
Kenny, Haley

From: Reid, Elaine M
Sent: Monday, September 19, 2016 9:46 AM
To: Croke, Neil
Subject: FW: Brainstorming - R v Jordan

Jordan – possible ATIPP material.

From: Molloy, Donovan
Sent: Monday, July 18, 2016 3:36 PM
To: Reid, Elaine M
Subject: FW: Brainstorming - R v Jordan

Donovan Molloy, QC
Director of Public Prosecutions
Assistant Deputy Minister (Criminal Division)
Department of Justice and Public Safety
St. John's, NL
709-729-3877 (t)
709-729-2129 (f)

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From: Lefevre, Phil M.A
Sent: Tuesday, July 12, 2016 3:54 PM
To: Molloy, Donovan; Knickle, Frances J.
Subject: Brainstorming - R v Jordan

Donovan and Frances, here are some things I noted as possible responses to Jordan.

- 
- 
- 
- 
- 
- 
- 
- S29(1)(a)
Thanks,

Phil LeFeuvre
Senior Crown Attorney, Eastern Region
Department of Justice and Public Safety
St. John's, NL
709-729-2897 (t)
709-729-0716 (f)
Kenny, Haley

From: Reid, Elaine M
Sent: Monday, September 19, 2016 9:46 AM
To: Croke, Neil
Subject: FW: Implications, practice and protocol.docx

Jordan – possible ATIPP material.

From: Molloy, Donovan
Sent: Monday, July 18, 2016 3:36 PM
To: Reid, Elaine M
Subject: FW: Implications, practice and protocol.docx

Donovan Molloy, QC
Director of Public Prosecutions
Assistant Deputy Minister (Criminal Division)
Department of Justice and Public Safety
St. John’s, NL
709-729-3877 (t)
709-729-2129 (f)

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From: Knickle, Frances J.
Sent: Tuesday, July 12, 2016 3:57 PM
To: Molloy, Donovan; Lefevre, Phil M.A
Subject: Implications, practice and protocol.docx

~IN OFFICE.docx

PL - I have added your suggestions.
Jordan – possible ATIPP material.

Many of these involve systemic delays (lack of Court time/available dates/disclosure/loss of time to bail hearings, etc.)

Some involve delays attributable to the defence.

How these will be assessed in light of Jordan’s ‘transitional provisions’ remains to be seen however we are at risk of having many serious charges stayed.
From: Molloy, Donovan  
Sent: Friday, July 15, 2016 12:23 PM  
To: Reid, Elaine M  
Subject: FW: Jordan, SCC

Donovan Molloy, QC  
Director of Public Prosecutions  
Assistant Deputy Minister (Criminal Division)  
Department of Justice and Public Safety  
St. John's, NL  
709-729-3877 (t)  
709-729-2129 (f)  

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From: Gallant, Susan  
Sent: Friday, July 15, 2016 11:56 AM  
To: Molloy, Donovan; Sparkes, Adam J. (Crown Attorney)  
Subject: FW: Jordan, SCC
From: Molloy, Donovan  
Sent: Tuesday, July 12, 2016 3:39 PM  
To: St. Croix, Lori-Lee M; Gallant, Susan; Pike, Kari; Dwyer, Alana; Noseworthy, John; Sparkes, Adam J. (Crown Attorney)  
Cc: Simms, Trina  
Subject: Jordan, SCC  

Good afternoon,

As Trina and Adam are away I write directly to you to instruct that you identify all Major Cases you currently have carriage of that either are:

1. presently outside of; or,
2. appear will not likely be heard within,

the presumptive timelines set out in Jordan.

This information is needed by Friday unless you are presently on leave.

Thanks,

Donovan Molloy, QC  
Director of Public Prosecutions  
Assistant Deputy Minister (Criminal Division)  
Department of Justice and Public Safety  
St. John's, NL  
709-729-3877 (t)  
709-729-2129 (f)  

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Subject: FW: Jordan, SCC

Jordan – possible ATIPP material.

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From: Molloy, Donovan
Sent: Friday, July 15, 2016 2:47 PM
To: Reid, Elaine M
Subject: FW: Jordan, SCC

fyl

---

From: Gallant, Susan
Sent: Friday, July 15, 2016 1:20 PM
To: Molloy, Donovan
Cc: Sparkes, Adam J. (Crown Attorney)
Subject: RE: Jordan, SCC

Donovan,

Susan

---

From: Molloy, Donovan
Sent: Friday, July 15, 2016 12:23 PM
To: Gallant, Susan; Sparkes, Adam J. (Crown Attorney)
Subject: RE: Jordan, SCC

S31(1)(g)(n)
Donovan Molloy, QC  
Director of Public Prosecutions  
Assistant Deputy Minister (Criminal Division)  
Department of Justice and Public Safety  
St. John's, NL  
709-729-3877 (t)  
709-729-2129 (f)  
This email is PRIVILEGED and contains confidential information intended only for the person(s) named above. Any other distribution, copying or disclosure is strictly prohibited. If you have received this email in error, please notify us immediately by return email and delete the original message.

From: Gallant, Susan  
Sent: Friday, July 15, 2016 11:56 AM  
To: Molloy, Donovan; Sparkes, Adam J. (Crown Attorney)  
Subject: FW: Jordan, SCC

Susan

From: Molloy, Donovan  
Sent: Tuesday, July 12, 2016 3:39 PM  
To: St. Croix, Lori-Lee M; Gallant, Susan; Pike, Karl; Dwyer, Alana; Noseworthy, John; Sparkes, Adam J. (Crown Attorney)  
Cc: Simms, Trina  
Subject: Jordan, SCC

Good afternoon,

As Trina and Adam are away I write directly to you to instruct that you identify all Major Cases you currently have carriage of that either are:

1. presently outside of; or,
2. appear will not likely be heard within,
the presumptive timelines set out in *Jordan*.

This information is needed by Friday unless you are presently on leave.

Thanks,

Donovan Molloy, QC
Director of Public Prosecutions
Assistant Deputy Minister (Criminal Division)
Department of Justice and Public Safety
St. John's, NL
709-729-3877 (t)
709-729-2129 (f)

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From: Kenny, Haley

Subject: Jordan - possible ATIPP material.

Attachments: Summary Chart.docx

From: Mercer, Jennifer

Sent: Monday, July 18, 2016 12:36 PM
To: Molloy, Donovan; Reid, Elaine M
Subject: Jordan timeline summaries Major Cases Labrador

As attached ~ I summarized the work that we did last week in a table noting concerns.
We have timelines for each file saved in our shared drive – let me know if you would like those.

Jen

Jennifer L. Mercer, B.A., LL.B.
Senior Crown Attorney ~ Labrador (Acting)
Public Prosecutions ~ Office of the Attorney General
Government of Newfoundland Labrador
PO Box 856
Wabush, NL
A0R 1BO
709.282.3033 (t)
709.282.3045 (f)
Kenny, Haley

From: Reid, Elaine M
Sent: Monday, September 19, 2016 9:46 AM
To: Croke, Neil
Subject: FW: pre-charge screening

Jordan – possible ATIPP material.

From: Knickle, Frances J.
Sent: Tuesday, July 19, 2016 12:02 PM
To: Molloy, Donovan; Reid, Elaine M
Subject: RE: pre-charge screening

Interesting.

From: Molloy, Donovan
Sent: Tuesday, July 19, 2016 12:01 PM
To: Knickle, Frances J.; Reid, Elaine M
Subject: RE: pre-charge screening

That having been said it is only a discussion point. The lack of a dedicated policy person restricts us in our ability to actively and continuously move many of these forward.

Donovan Molloy, QC
Director of Public Prosecutions
Assistant Deputy Minister (Criminal Division)
Department of Justice and Public Safety
St. John's, NL
From: Knickle, Frances J.
Sent: Tuesday, July 19, 2016 11:12 AM
To: Molloy, Donovan; Reid, Elaine M
Subject: pre-charge screening

Just my thoughts.

Frances Knickle, Q.C.,


Ph:(709) 729-4299
Fax: (709) 729-1135
email: francesknickle@gov.nl.ca

Avis de confidentialité. Ce message est confidentiel. Il est à l'usage exclusif du destinataire ci-dessus. Toute autre personne est par les présentes avisée qu'il est strictement interdit de le diffuser, de le distribuer ou de le reproduire. Si le
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Kenny, Haley

From: Knickle, Frances J.
Sent: Monday, July 18, 2016 1:24 PM
To: Molloy, Donovan; Lefeuvre, Phil M.A; Mercer, Jennifer; Reid, Elaine M; Simms, Trina; Walsh, Tina M.
Subject: RE: Prov Court, Jordan

Gee, except for GFW....that actually pretty good!

From: Molloy, Donovan
Sent: Monday, July 18, 2016 1:23 PM
To: Knickle, Frances J.; Lefeuvre, Phil M.A; Mercer, Jennifer; Reid, Elaine M; Simms, Trina; Walsh, Tina M.
Subject: Prov Court, Jordan

Good afternoon,

The following information was provided from Provincial Court with respect to the earliest possible available dates should someone appear on September 1, 2016 and request a 2 week trial:

- Grand Bank - September 2016
- St. John's - October 2016
- Corner Brook – November 2016
- Clarenville – December 2016
- Gander - January 2017
- HVGB - Feb 2017
- Stephenville – Feb 2017
- GFW – March 2017

Assuming this to be correct, and considering the estimates provided by SCTD, this delay problems in NL would appear to be significantly related to delays associated with obtaining complete disclosure from the police.

Donovan Molloy, QC
Director of Public Prosecutions
Assistant Deputy Minister (Criminal Division)
Department of Justice and Public Safety
St. John's, NL
709-729-3877 (t)
709-729-2129 (f)
This email is PRIVILEGED and contains confidential information intended only for the person(s) named above. Any other distribution, copying or disclosure is strictly prohibited. If you have received this email in error, please notify us immediately by return email and delete the original message.
Good afternoon,

R. v. Jordan was released by the SCC on Friday, July 8, 2016. Please ensure you read the attached summary (adapted from AB) and the case itself.

For now, please ensure that all present and future 11(b) Charter Applications are immediately brought to the attention of the DPP’s office through your Senior Crown.

Regards,

Donovan Molloy, QC
Director of Public Prosecutions
Assistant Deputy Minister (Criminal Division)
Department of Justice and Public Safety
St. John’s, NL
709-729-3877 (t)
709-729-2129 (f)

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Kenny, Haley

From: Reid, Elaine M
Sent: Monday, September 19, 2016 9:44 AM
To: Croke, Neil
Subject: Jordan – possible ATIPP material.

From: Faulkner, Glynne
Sent: Monday, September 19, 2016 9:44 AM
To: Croke, Neil
Subject: FW: Review of Timelines in Response to R v Jordan

Jordan – possible ATIPP material.

From: Faulkner, Glynne
Sent: Monday, July 18, 2016 11:00 AM
To: Lefeuvre, Phil M.A
Cc: Ivany, Elizabeth J.
Subject: RE: Review of Timelines in Response to R v Jordan

Phil,

Thanks Glynne

Glynne B. Faulkner

Crown Attorney
Crown Attorneys' Office
6th Floor, Atlantic Place
215 Water Street
St. John's, NL A1B 4J6

Phone: 709 729-2897
Facsimile: 709 729-0716

From: Lefeuvre, Phil M.A
Sent: Friday, July 15, 2016 5:01 PM
To: Faulkner, Glynne
Cc: Ivany, Elizabeth J.
Subject: Review of Timelines in Response to R v Jordan
Importance: High

Glynne,

Did you send a response to this? I have to send this information to the DPP's office today.

Thanks, Phil

From: Lefeuvre, Phil M.A
Sent: Tuesday, July 12, 2016 3:44 PM
To: Carpenter, Patricia; Chapman, Holly; Colford, Jennifer; Faulkner, Glynne; Gallant, Jessica; Hall, Jude; House, Jason; Iskandar, Mina; Ivany, Elizabeth J.; King, Tannis; Lundrigan, Jennifer; Matthews, Erin; McCarthy, Chris; McCarthy, Trisha;
Good afternoon.

Further to Donovan's email below and his memo (attached), I want to reiterate the importance of reading this decision. This decision is going to have significant ramifications across Canada.

We also need to immediately assess our exposure to judicial stays for delay. How many cases do we have that are near or over the 18/30 month limit? Please review your cases and let me know by the end of this week. Please look at your Major Cases first. This review has been mandated by the DPP's office. I need to get back to him before the end of the week.

For those currently at Crown School, please make this a priority for early next week.

Thanks, Phil

Phil LeFeuvre
Senior Crown Attorney, Eastern Region
Department of Justice and Public Safety
St. John's, NL
709-729-2897 (t)
709-729-0716 (f)

From: Molloy, Donovan
Sent: Monday, July 11, 2016 1:26 PM
To: Knickle, Frances J.; Lefeuvre, Phil M.A; Mercer, Jennifer; Reid, Elaine M; Simms, Trina; Walsh, Tina M.; Anstey, Stephen; Breckley, Clare; Carpenter, Patricia; Chapman, Holly; Colford, Jennifer; Duffy, Brenda; Dwyer, Alana; Faulkner, Glynne; Gallant, Jessica; Gallant, Susan; Hall, Jude; Hiscock, Amanda; Hollett, Iain; House, Jason; Howell, Douglas; Iskandar, Mina; Ivany, Elizabeth J.; Khaladkar, Vikas; King, Tannis; Lundrigan, Jennifer; Manning, Alison; Matthews, Erin; McCarthy, Chris; McCarthy, Trisha; Murray, Mike; Noseworthy, John; O'Reilly, Karen J.; Palmer, Rochelle; Patten, Shawn; Payne, Natalie A; Pike, Kari; Roberts, Stephanie; Singleton, Robin; Smith, Lisa; Sparkes, Adam; St. Croix, Lori-Lee M; Standen, Jennifer; Stead, Lisa; Steeves, Sheldon B. J.; Strickland, Lloyd; Sullivan, Dana E.; Summers, Jeffrey; Thistle, Paul; Vavasour, Danny
Subject: R v Jordan 2016 SCC 27.pdf
Importance: High

Good afternoon,

R. v. Jordan was released by the SCC on Friday, July 8, 2016. Please ensure you read the attached summary (adapted from AB) and the case itself.

For now, please ensure that all present and future 11(b) Charter Applications are immediately brought to the attention of the DPP's office through your Senior Crown.
Regards,

Donovan Molloy, QC  
Director of Public Prosecutions  
Assistant Deputy Minister (Criminal Division)  
Department of Justice and Public Safety  
St. John's, NL  
709-729-3877 (t)  
709-729-2129 (f)  

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From: Molloy, Donovan
Sent: Saturday, July 09, 2016 10:17 PM
To: Knickle, Frances J.; Simms, Trina; Reid, Elaine M; Walsh, Tina M.; Lefeuvre, Phil M.A; Mercer, Jennifer
Subject: Fwd: SCC Decision R v. Jordan

FYI

Begin forwarded message:

From: "Molloy, Donovan" <DonovanMolloy@gov.nl.ca>
Date: July 8, 2016 at 7:25:26 PM NDT
To: Stephanie Sachsse <Stephanie.Sachsse@rcmp-grc.gc.ca>, "Janes, Bill (RNC)" <billji@rcn.gov.nl.ca>
Subject: SCC Decision R v. Jordan

The SCC decision this morning in R v Jordan fundamentally changes the landscape with respect to delay. I will be participating in a national prosecutions meeting on Monday to discuss how prosecution services (and police services) will have to adapt.

I would like to meet with you both next week to discuss:

S34(1)(a)
Kenny, Haley

From: Lefeuvre, Phil M.A
Sent: Monday, September 19, 2016 9:37 AM
To: Croke, Neil
Subject: FW: Timelines - Active Cases - Eastern Region

Jordan – possible ATIPP material.

From: Lefeuvre, Phil M.A
Sent: Friday, July 15, 2016 5:27 PM
To: Molloy, Donovan; Reid, Elaine M
Subject: Timelines - Active Cases - Eastern Region

Donovan and Elaine,

We are waiting on responses from 8 crowns (all at Crown School except Glynne and Natalie.

Also, am waiting on additional details from some of the crowns.

Thanks

Timelines - Active Cases - Eastern Region

Phil LeFeuvre
No cases Identified

Jessica Gallant
Crown School – Waiting – No Cases Expected

Tannis King
Major Case:
Kenny, Haley

From: Reid, Elaine M
Sent: Monday, September 19, 2016 9:35 AM
To: Croke, Neil
Subject: FW: Trial Dates (SCTD)
Importance: High

Jordan – possible ATIPP material.

From: Molloy, Donovan
Sent: Friday, July 15, 2016 9:52 AM
To: Parsons, Andrew; Jacobs, Heather
Cc: Lake-Kavanagh, Jackie; Samms, John; Stanley, Todd
Subject: FW: Trial Dates (SCTD)
Importance: High

Sorry, everywhere outside of St. John’s is great! St. John’s is putting us near the limit so we will pursue CJ Whelan’s invitation to discuss.

From: Molloy, Donovan
Sent: Friday, July 15, 2016 9:49 AM
To: Knickle, Frances J.; Lefevre, Phil M.A; Mercer, Jennifer; Reid, Elaine M; Simms, Trina; Walsh, Tina M.
Subject: FW: Trial Dates (SCTD)
Importance: High

Obviously, I cannot do MATH, the correct dates are:

Based on an arraignment date of September 1, 2016, the earliest possible date for a 4 week jury trial in the various SCTD judicial centers means an automatic delay of:

   St. John’s – 12 months
   Corner Brook – 9 months
   Grand Bank – 4 months
   Gander – 5 months
   GFW – 6 months
   HVGB – 4 months

Given the ceiling of 30 months to get a matter concluded in SCTD, including murder trials, and the time it takes for disclosure and to get these matters through preliminary in Provincial Court, our primary area of concern is St. John’s.

We will be talking with Supreme Court and about St. John’s and possibly Corner Brook.

In the interim, please continue to work on the list of present cases at risk or approaching risk.

From: Organ, Shelley L.
Sent: Thursday, July 14, 2016 2:59 PM
To: Molloy, Donovan
Cc: Ryder-Lahey, Pamela  
Subject: RE: Trial Dates

Donovan,

See below for earliest dates for a Jury Trial in each of our Judicial Centres.

<table>
<thead>
<tr>
<th>Judicial Centre</th>
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</table>

Let me know if you have any questions.

Shelley

---

Shelley Organ  
Registrar  
Supreme Court of Newfoundland and Labrador  
Trial Division  
P.O. Box 937, 309 Duckworth Street  
St. John's, NL A1C 5M3  
Direct Line: 709-729-1099  
Fax Line: 709-729-6623  
Email: shelleyorgan@supreme.court.nl.ca

---

From: Molloy, Donovan  
Sent: Tuesday, July 12, 2016 10:32 AM  
To: Ryder-Lahey, Pamela; Organ, Shelley L.  
Subject: RE: Trial Dates

Context of request

The recent decision of the SCC in Jordan (http://www.canlii.org/en/ca/sc/cac/doc/2016/2016scc27/2016scc27.pdf) has generated a lot of activity across Canada in terms of assessing current capacity of courts and prosecution services to bring matters to trial:

At the heart of this new framework is a presumptive ceiling beyond which delay — from the charge to the actual or anticipated end of trial — is presumed to be unreasonable, unless exceptional circumstances justify it. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Delay attributable to or waived by the defence does not count towards the presumptive ceiling.
Good morning,

If I were to appear at any of your centers on September 1st, 2016 requesting the earliest date for a 4 week jury trial, what would the earliest dates be based on current cases scheduled?

Thanks,

Donovan Molloy, QC
Director of Public Prosecutions
Assistant Deputy Minister (Criminal Division)
Department of Justice and Public Safety
St. John’s, NL
709-729-3877 (t)
709-729-2129 (f)
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**Kenny, Haley**

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<td>Sent:</td>
<td>Monday, September 19, 2016 9:37 AM</td>
</tr>
<tr>
<td>To:</td>
<td>Croke, Neil</td>
</tr>
<tr>
<td>Subject:</td>
<td>FW: Trial Dates (SCTD)</td>
</tr>
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<td>Importance:</td>
<td>High</td>
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Jordan – possible ATIPP material.

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<th>From:</th>
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<tr>
<td>Sent:</td>
<td>Friday, July 15, 2016 9:17 AM</td>
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<tr>
<td>To:</td>
<td>Molloy, Donovan; Reid, Elaine M</td>
</tr>
<tr>
<td>Subject:</td>
<td>FW: Trial Dates (SCTD)</td>
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FYI, only.

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<tr>
<td>Sent:</td>
<td>Friday, July 15, 2016 9:16 AM</td>
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<tr>
<td>To:</td>
<td>Strickland, Lloyd; Hollett, Iain; Stead, Lisa; Khaladkar, Vikas</td>
</tr>
<tr>
<td>Cc:</td>
<td>Malone, Tara</td>
</tr>
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FYI. See below.

In terms of **outstanding forensics**, while I understand Elaine is going to contact labs and meet with police directly regarding the pressure the Jordan decision puts on preparation of forensic evidence, it would behoove you to contact your investigator directly on any file with outstanding forensics and the pressing need for timely receipt of same. It cannot be stressed enough how explicit our efforts to move matters along must be.

Whatever your diligent practice was in the past regarding compliance with 11b, it must be even more overt as a result of Jordan. The presence of a “record” showing the efforts the crown has made, (outside what we can show from the court record) falls to us. I know we are often beating our heads against the wall on 11b concerns...but with Jordan, we now have to show our injuries.

Thank you.

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<th>Molloy, Donovan</th>
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<tr>
<td>Sent:</td>
<td>Friday, July 15, 2016 8:47 AM</td>
</tr>
<tr>
<td>To:</td>
<td>Knickle, Frances J.; Lefeuvre, Phil M.A; Mercer, Jennifer; Reid, Elaine M; Simms, Trina; Walsh, Tina M.</td>
</tr>
<tr>
<td>Subject:</td>
<td>FW: Trial Dates (SCTD)</td>
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Based on an arraignment date of September 1, 2016, the earliest possible date for a 4 week jury trial in the various SCTD judicial centers means an automatic delay of:

- St. John’s 12 months
Given the ceiling of 30 months to get a matter concluded in SCTD, including murder trials, and the time it takes for disclosure and to get these matters through preliminary in Provincial Court, we are facing significant issues.

We will be talking with the Executive and Supreme Court about these matters.

In the interim, please continue to work on the list of present cases at risk or approaching risk.

From: Organ, Shelley L.
Sent: Thursday, July 14, 2016 2:59 PM
To: Molloy, Donovan
Cc: Ryder-Lahey, Pamela
Subject: RE: Trial Dates

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Shelley

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Trial Division
P.O. Box 937, 309 Duckworth Street
St. John’s, NL A1C 5M3
Direct Line: 709-729-1099
Fax Line: 709-729-6623
Email: shelleyorgan@supreme.court.nl.ca
From: Molloy, Donovan  
Sent: Tuesday, July 12, 2016 10:32 AM  
To: Ryder-Lahey, Pamela; Organ, Shelley L.  
Subject: RE: Trial Dates

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At the heart of this new framework is a presumptive ceiling beyond which delay — from the charge to the actual or anticipated end of trial — is presumed to be unreasonable, unless exceptional circumstances justify it. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Delay attributable to or waived by the defence does not count towards the presumptive ceiling.

Donovan Molloy, QC  
Director of Public Prosecutions  
Assistant Deputy Minister (Criminal Division)  
Department of Justice and Public Safety  
St. John's, NL  
709-729-3877 (t)  
709-729-2129 (f)  

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From: Molloy, Donovan  
Sent: Tuesday, July 12, 2016 9:32 AM  
To: Ryder-Lahey, Pamela; Organ, Shelley L.  
Subject: Trial Dates

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Thanks,

Donovan Molloy, QC  
Director of Public Prosecutions  
Assistant Deputy Minister (Criminal Division)  
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From: Reid, Elaine M
Sent: Monday, September 19, 2016 9:34 AM
To: Croke, Neil
Subject: FW: Trial files drop dead dates

Jordan – possible ATIPP material.

From: Hollett, Iain
Sent: Thursday, July 14, 2016 9:51 AM
To: Knickle, Frances J.
Subject: RE: Trial files drop dead dates

If you have not read Jordan. Please read. << File: R. v. Jordan.pdf >>

Please then, go through your pending trial files, if you have any, that are major cases, and assess whether or not your timelines are approaching the deadlines applying the framework established by the SCC Jordan (e.g., deduct defence waivers, defence delay).

Please identify to me by the end of the week those files, if any, that may be approaching (or past) the presumptive deadline for a violation under 11b (18mos provincial court, 30 months SC) Please include and identify those time periods caused by or waived by defence that have been deducted before counting the time.

From: Knickle, Frances J.
Sent: Tuesday, July 12, 2016 3:26 PM
To: Strickland, Lloyd; Stead, Lisa; Hollett, Iain; Khaladkar, Vikas
Subject: Trial files drop dead dates

Importance: High
Please include this in your next major case report as well.

Thank you all. Stay Tuned.

Frances Knickle, Q.C.,


Ph:(709) 729-4299
Fax: (709) 729-1135
email: francesknickle@gov.nl.ca

Avis de confidentialité. Ce message est confidentiel. Il est à l'usage exclusif du destinataire ci-dessus. Toute autre personne est par les présentes avisée qu'il est strictement interdit de le diffuser, de le distribuer ou de le reproduire. Si le destinataire ne peut être joint ou vous est inconnu, nous vous prions d'en informer immédiatement l'expéditeur par courrier électronique et de détruire ce message et toute copie de celui-ci.
And then I need the same thing for M419-2016 on the Supreme Court closure in Grand Falls – Windsor, which we announced the reversal of on 24 June.

I need letters of response on M557-2016, M531-2016 and M380-2016 (in my basket) for the Minister's signature that all go as follows:

I am writing in response to your letter of ***, expressing your concerns regarding the imminent closure (at that time) of the Provincial Court judicial centre in Harbour Grace.

As I am sure you are aware, on 22 July the Government announced a reversal of the decision to close the judicial centre in Harbour Grace. This decision was a result of a number of factors, including the negotiation of better terms for the continuation of the Provincial Court in its current location, and the potential implications of the recently Supreme Court of Canada decision in R. v. Jordan, which has the potential to significantly affect the requirements on the court system in the handling the criminal trials.

I want to thank you for taking the time to write to express your opinions and concerns on such an important issue of public policy.

Also, have a look at each letter to see if there is anything that needs to be specifically raised or responded to by the Minister.
Kenny, Haley

From: Jacobs, Heather
Sent: Thursday, July 14, 2016 5:09 PM
To: Stanley, Todd; Parsons, Andrew; Samms, John
Subject: Re: GFW court

Another item we need to chat about!

Sent from my BlackBerry 10 smartphone on the Bell network.

From: Molloy, Donovan
Sent: Thursday, July 14, 2016 4:43 PM
To: Stanley, Todd; Jacobs, Heather
Subject: Fw: GFW court

Fyi

Sent from my BlackBerry 10 smartphone on the Bell network.

From: Walsh, Tina M. <tinawalsh@goy.nl.ca>
Sent: Thursday, July 14, 2016 4:08 PM
To: Molloy, Donovan; Reid, Elaine M
Subject: GFW court

FYI
Kenny, Haley

From: Knickle, Frances J.
Sent: Tuesday, September 27, 2016 9:39 AM
To: Jacobs, Heather; Langor, Fiona; Stanley, Todd; Howard, Jacqualyn
Subject: FW: Prov Court, Jordan - stats

Importance: High

Go to bottom of email.

From: Molloy, Donovan
Sent: Monday, July 18, 2016 1:53 PM
To: Jacobs, Heather
Subject: Re: Prov Court, Jordan

2 minutes

Sent from my BlackBerry 10 smartphone on the Bell network.

From: Jacobs, Heather
Sent: Monday, July 18, 2016 1:49 PM
To: Molloy, Donovan
Subject: RE: Prov Court, Jordan

Can you come see John and me in my office

From: Molloy, Donovan
Sent: Monday, July 18, 2016 1:48 PM
To: Jacobs, Heather
Subject: Re: Prov Court, Jordan

In building

Sent from my BlackBerry 10 smartphone on the Bell network.

From: Jacobs, Heather
Sent: Monday, July 18, 2016 1:46 PM
To: Molloy, Donovan
Subject: RE: Prov Court, Jordan

Where r u

From: Molloy, Donovan
Sent: Monday, July 18, 2016 1:46 PM
To: Jacobs, Heather
Subject: Re: Prov Court, Jordan

Yes

Sent from my BlackBerry 10 smartphone on the Bell network.
From: Jacobs, Heather  
Sent: Monday, July 18, 2016 1:38 PM  
To: Molloy, Donovan  
Subject: RE: Prov Court, Jordan

This is good isn’t it?

From: Molloy, Donovan  
Sent: Monday, July 18, 2016 1:24 PM  
To: Stanley, Todd; Lake-Kavanagh, Jackie  
Cc: Jacobs, Heather; Parsons, Andrew  
Subject: Prov Court, Jordan

Good afternoon,

The following information was provided from Provincial Court with respect to the earliest possible available dates should someone appear on September 1, 2016 and request a 2 week trial:

Grand Bank - September 2016  
St. John’s - October 2016  
Corner Brook – November 2016  
Clareville – December 2016  
Gander - January 2017  
HVGB – Feb 2017  
Stephenville – Feb 2017  
GFW – March 2017

Donovan Molloy, QC  
Director of Public Prosecutions  
Assistant Deputy Minister (Criminal Division)  
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JORDAN
A NEW FRAMEWORK FOR ASSESSING DELAY UNDER S. 11(b) OF THE CHARTER

The Previous Framework
- The general approach to a determination of whether the s. 11(b) right has been denied was not by the application of a mathematical or administrative formula.
- 4 Factors had to be weighed to determine if delay was unreasonable:
  1. The Length of the delay
  2. Waiver
  3. The reasons for the delay
  4. Prejudice

The Morin Time Frames
- 8 to 10 months in the Provincial Courts
- A further 6 to 8 months in the Supreme Court
- Outer limit of 18 months to resolve criminal proceedings before the Supreme Court
- However,
  - This guideline was neither a limitation period nor a fixed ceiling on delay. It was not to be applied in mechanical fashion but instead was to yield to other factors when required.
The Criticisms of Morin

- Trial courts found themselves immersed in the meticulous work of assigning responsibility for each adjournment.
- How do you assess “prejudice”?
- Unwieldy framework = Uncertainty


The background

- Mr. Jordan was arrested and charged in December 2008 for trafficking in a controlled substance. His trial was completed in February 2013.
- The delay was nearly 50 months.
- Applying the framework established in R. v. Morin (SCC 1992), the BC Supreme Court found his s.11(b) rights to trial within a reasonable time had not been breached, dismissed his application for a stay of proceedings.
- The BC Court of Appeal upheld that ruling.

A Culture of Complacency


- 46. At the heart of the new framework is a ceiling beyond which delay is presumptively unreasonable. The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry).
47. If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.

48. If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) 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 (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.

Accounting for Defence Delay:
2 Components

51. The first is delay waived by the defence. Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the past, "[i]n considering the issue of 'waiver' in the context of s. 11(b), it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness".
63. The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises "those situations where the accused's acts either directly caused the delay . . . or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial". Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.

66. To summarize, as a first step, total delay must be calculated, and defence delay must be deducted. Defence delay comprises delays waived by the defence, and delays caused solely or directly by the defence's conduct. Defence actions legitimately taken to respond to the charges do not constitute defence delay.

EXCEPTIONAL CIRCUMSTANCES
69. Exceptional circumstances lie outside the Crown's control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.

70. It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful — rather, just that it took reasonable steps in an attempt to avoid the delay.

72. ...exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration. Particularly complex cases are cases that, because of the nature of the evidence or the nature of the issues, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time.
Does it matter if the charges are especially serious?

NO

Not even a "typical" murder case will be considered exceptional

Available Remedies under s.24(1)?

- Only one remedy ..... And it is impose automatically upon finding there was a breach of s.11(b) of the Charter

Judicial stay of proceedings

- Transition Cases


- 91 ..... In jurisdictions where prolonged delays are the norm, it will take time for these incentives to shift the culture. As well, the administration of justice cannot tolerate a recurrence of what transpired after the release of Askov, and this contextual application of the framework is intended to ensure that the post-Askov situation is not repeated.

103. For cases already in the system, the presumptive ceiling still applies; however, "the behaviour of the accused and the authorities" — which is an important consideration in the new framework — "must be evaluated in its proper context" (Mills, at p. 948). The reasonableness of a period of time to prosecute a case takes its colour from the surrounding circumstances. Reliance on the law as it then stood is one such circumstance.


- Total Delay = 49.5 months
- Defence Delay: 5 1/2 months; including delay caused when Jordan changed counsel just before trial, leading to a postponement.
- No other delay caused solely by action or inaction of the defence.


121. The more difficult assessment is whether any of the remaining delay was caused solely by the action or inaction of the defence. The Crown argues that the trial judge erred by failing to attribute significant periods of delay to the defence, and that the defence was equally culpable in the delay in bringing this matter to trial. The Crown cited several examples: the defence consented to numerous adjournments; defence counsel initially suggested the four-day estimate for the preliminary inquiry; defence counsel's unavailability resulted in the preliminary inquiry not being completed as scheduled in December 2010; defence counsel failed to respond to the Crown's offer in July 2011 of an earlier trial; and there was no evidence that defence counsel would have been available for trial earlier than June 2012.
**R. v. Jordan, 2016 SCC**

- 122. While these instances that the Crown admits are symptomatic of the systemic complacency towards delay that we have described, most of them are not attributable solely to the defence. The Crown and defence both share responsibility for the preliminary inquiry underestimation. Similarly, responsibility for the delay resulting from consent adjournments and to the defence's failure to respond to the Crown's offer of a shorter trial time in July 2011 should not be borne solely by the defence. These adjournments were part of the legitimate procedural requirements of the case, and there is no evidence that the defence responded to the Crown's offer of an earlier trial. The Crown and the court would have been able to accommodate an earlier date. Rather, the only evidence before the trial judge was that the earliest available trial dates were in September 2012.

**R. v. Williamson 2016 SCC 28**

- Released by the SCC the same day as Jordan
- Charged in Jan. 2009 with historical sexual offences.
- Preliminary inquiry twice had to be re-scheduled and when it did proceed, required only one witness... the complainant.
- Judge and jury trial proceed in December, 2011.
- 35 ½ months - defence delay of 1 ½ months = 34 months
- Transitional case... only 4 months beyond ceiling....
- No problem?


- Transitional Framework:

  - 128...a total delay of 44 months... is simply unreasonable regardless of the framework...

**R. v. Williamson 2016 SCC 28**

- Majority concluded the delay was unreasonable.
- Case was straightforward
- Crown made no effort to mitigate delay while defence counsel did raise concerns
- The seriousness of the charges is immaterial: the fact Mr. Williamson was actually convicted by a jury is immaterial
Mr. Zammit was charged in August, 2013 and his trial was set to complete on August, 2016. The total delay was 36 months.

The preliminary inquiry proceeded; the Crown finished its case in 1 day, but the defence wanted 1 day to examine witnesses. One year elapsed between 1st day of preliminary inquiry and the second.

The Court determined that this delay was not caused by the defence; the examination of those witnesses at the P.I. was legitimate.

Though there were several more adjournments, the Court could not attribute those delays to the defence:

- Typically the availability of the parties and the court is recorded on a trial verification form, but that was not done in this case.
- There is very little in the way of discussion on the record as to exactly what dates were being offered by the court.

No time subtracted for defence delay
No exceptional circumstances
Transitional analysis applied, but the case was straightforward. That there were co-accused does not justify the delay.

The Crown argued the matter would have been handled differently if the Jordan framework had been in place from the beginning of proceedings. This argument was rejected.

Stay of proceedings ordered.
Think Positive

- The Jordan framework does enlarge the presumptively reasonable time frames.
- In the Provincial Court, from 10 to 18 months
- In the Supreme Court, 18 to 30 months.

Think Positive

- Prejudice is no longer a factor.

Think Positive

- The majority in Jordan seemed to imply that preliminary inquiries are superfluous and encouraged Parliament to consider scrapping them altogether.

  - Consider Direct Indictments

Think Positive

- And... according to the majority in Jordan, the new framework creates "incentives for both sides, it seeks to enhance accountability by fostering proactive, preventative problem solving."
The Jordan Framework:

Tips on Avoiding Unreasonable Delay under the new Supreme Court of Canada Regime

REMEMBER:

The focus will be on the actions of the Crown before and after a delay in the proceedings.
FOLLOWING ANY DELAY:

- "[...]the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events."

- Jordan, majority, at para. 75.

PRIOR:

"It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling."

- Jordan, majority, at para. 70.

Key questions under the new Framework

- In complex cases, did the Crown take procedural steps to reduce the length of the proceeding?

- What delay did the Crown foresee, and how did it act to prevent the delay from occurring?

- Once an unexpected delay became inevitable, what did the Crown do to remedy the situation or minimize the delay?
Options: Early Intervention

- Upon initial review of the file:
  - Address disclosure issues with the police immediately
  - Identify additional investigation to be done, and write the investigator for follow-up before the next court date
  - Ensure all physical exhibits subject to forensic testing are sent to the labs and diary dates are obtained

What can we do to streamline proceedings?

- Sever co-accused or charges
- Reduce the number of co-accused or charges
- Prefer a direct indictment (s.577 CCC)
- Seek admissions on facts that are not contentious
- Reduce the number of experts required
- If requested, agree to a defence re-election to Provincial Court or to Trial by Judge Alone
Take Additional Steps Outside Court to Reduce the Delay

When a section 11(b) argument seems inevitable, be proactive in reducing the delay, and be sure to record these efforts for use in court at the stay application.
In **R. v. COULTER**, 2016 ONCA 704, SEPTEMBER 28, 2016, the accused was charged with a number of child pornography offences. Almost twenty-nine months later, he was convicted of those offences. His application for a stay of proceedings pursuant 11(b) of the *Charter* based upon unreasonable delay was dismissed. He appealed to the Ontario Court of Appeal.

The appeal was dismissed. The Ontario Court of Appeal concluded that as a “transition” case, the delay was not unreasonable (at paragraphs 105 to 107):

The majority in *Jordan* cautions that “given the level of institutional delay tolerated under the previous approach, a stay of proceedings [where the Remaining Delay is] below the ceiling will be even more difficult to obtain for cases currently in the system” (para. 101). It also warns that the contextual approach to Transitional Cases is necessary to ensure that the post-*Askov* situation, where tens of thousands of cases were stayed in Ontario alone, is not repeated (*Jordan*, paras. 92-94).

The Remaining Delay of 17 months is below the presumptive ceiling. The figure of 17 months was arrived at without a consideration for the particular complexity of the case (if any) or for the level of tolerance for institutional delay in the jurisdiction in which this
case was tried. The trial judge’s findings – reviewed with due recognition for the parties’ reliance on the then-existing state of the law – do not assist the appellant.

In the circumstances, as informed by the cautions stressed by the majority and discussed above, I have no difficulty in concluding that the appellant has not rebutted the presumption that the Remaining Delay was reasonable.

In reaching this conclusion, the Ontario Court of Appeal set out the following “legal framework” for applying Jordan (at paragraphs 34 to 41):

Calculate the total delay, which is the period from the charge to the actual or anticipated end of trial (Jordan, at para. 47).

Subtract defence delay from the total delay, which results in the “Net Delay” (Jordan, at para. 66).

Compare the Net Delay to the presumptive ceiling (Jordan, at para. 66).

If the Net Delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of exceptional circumstances (Jordan, para. 47). If it cannot rebut the presumption, a stay will follow (Jordan, para. 47). In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases (Jordan, para. 71).

Subtract delay caused by discrete events from the Net Delay (leaving the “Remaining Delay”) for the purpose of determining whether the presumptive ceiling has been reached (Jordan, para. 75).

If the Remaining Delay exceeds the presumptive ceiling, the court must consider whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable (Jordan, at para. 80).

If the Remaining Delay falls below the presumptive ceiling, the onus is on the defence to show that the delay is unreasonable (Jordan, para. 48).

The new framework, including the presumptive ceiling, applies to cases already in the system when Jordan was released (the “Transitional Cases”) (Jordan, para. 96).
TOEWS J. (Orally)

[1] (the accused) are charged with a number of serious offences related to a violent home invasion which allegedly occurred on or about February 11, 2014. The accused have pled not guilty and elected
trial by judge and jury. The preliminary hearing took place before a provincial judge in May 2015, as a result of which the accused were committed to stand trial.

[2] The jury selection date is September 29, 2016, while the trial itself is set for October 17 to 28, 2016 inclusive.

[3] Following the release of the decision of the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, 398 D.L.R. (4th) 381 (QL), the accused brought an application alleging a violation of s. 11(b) of the *Canadian Charter of Rights and Freedoms* (the "Charter") and requesting a stay of proceedings. The accused served his application on August 15, 2016, while the accused formally brought a similar application on September 15, 2016.

[4] At the pre-trial conference on September 13, 2016, I set a hearing for both applications for September 22, 2016. Both applications are being heard together.

[5] As the jury selection date is September 29, 2016, and the trial itself is set for October 17 to 28, 2016, this motion was heard on an expedited basis so that these reasons could be delivered before the jury was selected.

[6] The issues raised by this application are as follows:

A. *Is the delay in bringing this matter to trial in the Queen’s Bench below the presumptive ceiling of 30 months established by Jordan?*

B. *If the delay is above the presumptive ceiling of 30 months, can the Crown rely on the law as it was prior to the decision in Jordan in order to successfully argue that a stay of proceeding should not be ordered?*

[7] Both of the accused and the Crown have filed affidavit evidence in support of their respective positions.
A. Is the delay in bringing this matter to trial below the presumptive ceiling of 30 months established by Jordan?

[8] The parties are agreed that the time that has elapsed from the filing of the charges to the conclusion of the trial is 32.5 months. However, the parties disagree that this entire time period should be taken into account in determining whether the presumptive ceiling has been breached or whether, owing to delay attributable to the accused, the delay is below the presumptive ceiling of 30 months. Jordan is clear that any delay attributable to the accused is excluded from the calculation of the 30 months necessary to reach the presumptive ceiling.

[9] The accused take the position were it not for the Crown's schedule, it may have been possible to have a preliminary hearing in the summer or fall of 2014 rather than in May 2015. In turn, they argue, that this would have meant that the trial in the Court of Queen's Bench would have occurred sooner.

[10] The accused state that there was no consent in the delay in setting the preliminary hearing and that there was no reason for such a delay since the case is not a complicated one.

[11] The Crown takes the position that on the basis of Jordan, the delay does not exceed 30 months and therefore the presumptive ceiling of 30 months established in Jordan has not been breached. It argues that having regard to this time frame, the accused have not meet their burden in establishing that the delay is unreasonable.

[12] The Crown argues that there are certain periods which ought to be deducted from the total delay.
[13] The first of these periods of time which it states ought to be attributed to the accused, is when a prior counsel for one of the accused took the file and then on April 14, 2014, withdrew because of a conflict, resulting in a two-month delay. The other accused did not retain counsel until May of 2014. This delay in retaining counsel, the Crown argues, should not be attributable to Crown delay.

[14] Secondly, the Crown argues that the evidence filed by the accused indicates that when his counsel appeared in the provincial court on May 14, 2014, she was offered preliminary hearing dates, but she was not prepared to set dates and requested a further remand until June 13, 2014. This resulted in a two-week delay.

[15] Third, the Crown states that the evidence establishes that the court and the Crown were available for a number of dates in April 2015, but that counsel for the accused was not available until May 11, 2015. The Crown states that this resulted in a delay of one month and four days which on the basis of Jordan, should be attributable to the accused.

[16] Finally, in this context, the Crown states that counsel for the accused advised the court on May 12, 2015, the first day of the preliminary hearing, that they would not be contesting the voluntariness of the statements of the accused for the purposes of the preliminary hearing. According to the Crown, the significance of this admission was that the preliminary hearing could have been scheduled for one day only had the defence made this known earlier, and consequently it would have been easier to schedule an earlier preliminary hearing date.
The Crown states that, even without taking into account the delay that occurred as a result of having to set a lengthier preliminary hearing than was ultimately necessary, subtracting three months and two weeks from the delay as a result of the specific examples cited by the Crown, the delay falls below the presumptive period of 30 months.

After reviewing the affidavit evidence and considering the submissions of the parties, I find it very difficult to determine what, if any, aspect of the 32.5 months is attributable to the accused. In my opinion, the record in respect of the proceedings in the provincial court regarding this issue is not clear, while the record before the Court of Queen's Bench relevant to this issue is virtually non-existent. Perhaps that is not surprising given that the first indication of any concern about delay appears to have arisen only with the filing of the accused’s s. 11(b) Charter motion in August of this year, just over a month ago, and notably, after the decision of the Supreme Court of Canada in Jordan was rendered.

As the conference judge for this case in this court, I am unaware of any party raising delay as a concern at any time prior to the filing of the first motion for delay in August of this year. If there was any concern with respect to delay about the selection of the trial dates in this case, the pre-trial conference memorandum does not reflect any such concern being expressed, nor have counsel been able to direct me to any other evidence that indicates this issue being brought to my attention.
[20] The first pre-trial conference took place before me on September 22, 2015. This date was set by McKelvey J. following an unsuccessful resolution conference on July 30, 2015.

[21] Although a number of issues were still outstanding on September 22, 2015, including, the defence position on the voluntariness of the statements of the accused, the defence position on the admissibility of a firearm seized as a result of a statement made by one of the accused, whether defence counsel were relying on s. 24(2) of the *Charter* in respect of the admissibility of certain evidence, and the analysis by the police of phone records obtained from a phone seized from an accused, the present trial date was nevertheless set.

[22] No concern was expressed in respect of delay on September 22, 2015, and I considered it prudent to move ahead with setting the trial date despite the fact that a number of substantive and relatively complex, pre-trial issues had not been resolved.

[23] I would note that it was not until June 16, 2016, that I was notified by a letter from counsel for the accused that she was conceding the voluntariness of the statements she gave and therefore would not be proceeding with the two-day *voir dire* scheduled for June 20 and 21, 2016.

[24] The difficulty of having to properly categorize all of the reasons for delay in an after-the-fact review of this nature has been neatly summarized in the observations of the majority in *Jordan* when it states, in part (at para. 35):

... This after-the-fact review of past delay is understandably frustrating for trial judges, who have only one remedial tool at their disposal — a stay of proceedings. ...
And at para. 36 of that decision:

The retrospective analysis required by Morin also encourages parties to quibble over rationalizations for vast periods of pre-trial delay. ...

Some sense of the frustration and quibbling generated by the R. v. Morin, [1992] 1 S.C.R. 771, C.C.C. (3d) 1, analysis and noted in Jordan is evident in this case. However, before I proceed any further with this analysis I think it is important for me to acknowledge that it is incumbent upon the court to do more than tolerate frustration and to do more than suggest that it is other participants in the justice system who are responsible for the quibbling generated by Morin.

Jordan is a necessary tonic designed to address the ills of a system that is desperately searching for a cure. The cure requires more than judicial platitudes and Jordan offers practical, realistic assistance. As the majority states at (para. 5), the framework established by the court is "... intended to focus the s. 11(6) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(6)'s important objectives."

There is no question that the judiciary bears the responsibility of working with other justice system participants to administer the cure. It cannot simply be a curious bystander watching first responders deal with the consequences of a car accident.

The judiciary, like all parties, have a responsibility to work aggressively with other justice system participants to solve issues relating to delay. As the court notes (at paras. 29 and 41) of Jordan:
While this Court has always recognized the importance of the right to a trial within a reasonable time, in our view, developments since Morin demonstrate that the system has lost its way. The framework set out in Morin has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it.

The Morin framework does not address this culture of complacency. Delay is condemned or rationalized at the back end. As a result, participants in the justice system -- police, Crown counsel, defence counsel, courts, provincial legislatures, and Parliament -- are not encouraged to take preventative measures to address inefficient practices and resourcing problems. Some courts, with the cooperation of counsel, have undertaken commendable efforts to change courtroom culture, maximize efficiency, and minimize delay, thereby showing that it is possible to do better. Some legislative changes and government initiatives have also been taken. In many cases, however, much remains to be done.

In this context it is important to recognize the ongoing initiatives of the Chief Justice of the Court of Queen's Bench in Manitoba that were initiated even prior to the decision in Jordan. Also, a recent post-Jordan practice directive released by this court concerning the scheduling of resolution conferences, pre-trial conferences, pre-trial applications, voir dires, and trial dates is welcome contribution to this effort.

In introducing this practice directive the Chief Justice notes:

Concerns about delay in criminal proceedings at all levels of court, now more than ever, require a meaningful and focused response on the part of all participants in the criminal justice system. The constitutional obligations that flow from the Charter right to a trial within a reasonable time have been given an even greater clarity by the Supreme Court of Canada in its judgment of R. v. Jordan, 2016 SCC 27.

As part of the Court of Queen’s Bench’s ongoing attempts to improve “access to justice” in all areas of its jurisdiction, the following direction is now meant to apply to all criminal proceedings in the Court of Queen’s Bench. The new practices that follow from this direction are meant to be a purposeful response to the issue of delay in criminal proceedings and flow from what the Supreme Court of Canada in R. v. Jordan stipulated as the new time imperatives and “presumptive ceiling” that should guide the Court, Crown and defence.
I am optimistic that the requirements of this directive and other active steps by the judiciary will ensure that this court will participate in a meaningful way in meeting and addressing the challenges to the justice system identified in the *Jordan* decision. In my opinion initiatives like this practice directive will assist in alleviating the sense of the frustration and quibbling generated by the *Morin* analysis and noted in *Jordan* and evident in cases such as this one.

In respect of the analysis necessary to deal with "transitional" cases such as this one which originated before the decision in *Jordan*, I am of the opinion that this application can be dealt with by a consideration of the second issue which I have identified. Accordingly, I will proceed on the *Jordan* analysis on the assumption that, without deciding, the presumptive ceiling has been exceeded in this case.

**B. If the delay is above the presumptive ceiling of 30 months, can the Crown rely on the law as it was prior to the decision in *Jordan* in order to successfully argue that a stay of proceeding should not be ordered?**

Assuming for the purposes of argument that the presumptive ceiling has been breached, it is my opinion that the "transitional exceptional circumstance" applies in this case and therefore a stay should not to be granted.

The onus at this stage of the analysis is on the Crown to prove that the delay is not unreasonable.

In this context it is important to consider the caution that the majority in *Jordan* noted in its reasons at paras. 92 and 94 for creating a "transition period".

Those paragraphs state, in part:
When this court released its decision in Askov, tens of thousands of charges were stayed in Ontario alone as a result of the abrupt change in the law. Such swift and drastic consequences risk undermining the integrity of the administration of justice.

And further:

... there are a variety of reasons to apply the framework contextually and flexibly for cases currently in the system, one being that it is not fair to strictly judge participants in the criminal justice system against standards of which they had no notice. ...

And finally:

... the administration of justice cannot tolerate a recurrence of what transpired after the release of Askov, and this contextual application of the framework is intended to ensure that the post-Askov situation is not repeated.

[39] Both the Crown and the accused have discussed the causes of delay identified by the Supreme Court of Canada in Morin. Those factors are set out at para. 27 of the accused’s written submission. As noted at para. 28 of that submission:

The factors were balanced by calculating the time from the charge to the end of the trial and then subtracting any time periods that were waived. The remaining time was then scrutinized to see if it was reasonable or unreasonable delay.

[40] While all of the factors identified by the court in Morin are important and form a part of my considerations in this application, I would specifically mention that it is my finding that:

a) No prejudice as discussed in the case law prior to Jordan is evident here.

b) The charges here are serious and stem out of a violent home invasion that involved the use of firearms.

[41] Prejudice was one of the most significant parts of the analysis required by the law prior to Jordan. As the Crown notes in its submission (at para. 56):
... Without a finding of prejudice to one or more of the protected interests under s. 11(b) ... even lengthy delays would not be found unreasonable. Prejudice could be actual (proven by evidence) or inferred from lengthy and unjustified delays.

[42] While the case law in Manitoba prior to Jordan would support the position that agreement to a specific trial date on its own is not sufficient to constitute a waiver of the right to subsequently allege that an unreasonable delay has occurred, the Manitoba Court of Appeal in R. v. Barkman, 2004 MBCA 151, 190 Man.R. (2d) 75, held (at paras. 33 and 34) that such agreement will, absent other circumstances, give rise to such an inference.

[43] Some of those other circumstances in my opinion would include whether the accused took proactive steps throughout to have his case tried as soon as possible (see R. v. Vassell, 2016 SCC 26, 337 C.C.C. (3d) 1).

[44] In R. v. Godin, 2009 SCC 26 [2009] 2 S.C.R. 3, the court held that the fact that the guidelines set out in Morin were substantially exceeded, "on its own does not make the delay unreasonable" (at para. 5). It is instructive to note that the court held (at para. 5) of that decision:

... The difficulty in this case ... arises from the considerable delay coupled with three additional facts: (1) the case is a straightforward one with few complexities and requiring very modest amounts of court time; (2) virtually all of the delay is attributable to the Crown and is unexplained, let alone justified; and (3) defence counsel attempted, unsuccessfully, to move the case ahead faster.

[45] In the case at bar, there is no indication in the evidence that counsel for either accused attempted to make the Crown or either court aware of any concern regarding delay. In particular, there is no evidence that any such concerns were raised with this
court. As stated previously, the first indication of any concern about delay appears to have arisen only with the filing of the accused s. 11(b) Charter motion in August of this year, and notably, after the decision of the Supreme Court of Canada in Jordan.

[46] While some of the delay in this case is undoubtedly attributable to the Crown, the delay is not inexplicable and is consistent with the way in which cases were generally handled pre-Jordan in order to bring them to trial. Also, as Jordan makes clear, any deficiencies present in the manner in which the case was handled are to be judged "contextually and flexibly" as it is not fair to strictly judge participants involved in criminal cases that arose before the judgment was delivered in Jordan on the basis of the new standards introduced by Jordan.

[47] Unlike the case in Vassell, defence counsel here did not take proactive steps to move this case ahead faster.

[48] Furthermore, while the case is not overly complex, there are a number of matters that add substantive elements of complexity and accordingly, additional time was required. It is not what I would characterize as a "simple case" or "relatively straightforward" as those terms were used in R. v. Williamson, 2016 SCC 28, 398 D.L.R. (4th) 577, a post-Jordan decision.

[49] I agree with the Crown's submission that this is not a case where the passage of time has materially affected the evidence. The evidence available to the accused has neither gone missing or has otherwise been degraded.
In respect of the serious nature of the offences, the indictment and the facts alleged by the Crown speak for themselves. These are very serious offences.

In conclusion, I would refer to the decision of R. v. Curry, 2016 BCSC 1435 [2016] B.C.J. No. 1637 (QL), where the court considered a delay of 40 months reduced to 31.5 months after the deduction for "exceptional circumstances" was calculated in accordance with the directions provided by Jordan. That delay is 1.5 months over the presumptive ceiling established by Jordan and only one month lower that the case at bar.

The court in Curry stated (at para. 176) that as a result of Jordan:

... the issue concerning the transitional exception relates to the parties' conduct: specifically, whether the efforts to bring the case to trial were reasonable given the law as it applied at the time.

In my opinion, although the facts in Curry are quite different, the analysis of that issue, namely, were the efforts to bring the case to trial reasonable given the law as it applied at the time, and the conclusion in Curry, that there was no breach of the accused's right to trial within a reasonable time, is applicable to this case. It adopts an approach that properly avoids the pitfalls of Askov as identified by the majority in Jordan and applies the transitional rules in a flexible and contextual manner.

Accordingly, applying the transitional rules set out by the Jordan case in a flexible and contextual manner, with due sensitivity to the parties' reliance on the law as it was prior to the Supreme Court's decision in Jordan, I conclude that even if the delay is above the presumptive ceiling of 30 months in this case, the Crown has
established that the delay is not unreasonable and a stay of proceeding should not be ordered.

[55] In the result, the applications of both accused alleging a violation of s. 11(b) of the *Charter* and requesting a stay of proceedings are dismissed.
Possible Jordan ATIPP

From: Knickle, Frances J.
Sent: Monday, September 26, 2016 11:48 AM
To: Lefeuvre, Phil M.A; Hollett, Iain; Walsh, Tina M.; Sparkes, Adam J. (Crown Attorney); Mercer, Jennifer
Cc: Reid, Elaine M
Subject: Jordan - proposed changes to Crown practice.docx

Attach please find some discussion point regarding our approach responding to the obligations placed on us by the Jordan decision. None of this is carved in stone (except for the need to create a record of adjournments). I look forward to discussing with you all tomorrow. Safe travels, those of you on the road. No worries if you do not see. I will make copies for tomorrow too.
Possible Jordan ATIPP

Chantal, attached please find a revised Note on Jordan, as discussed. Kindly let me know if this is appropriate in terms of format and layout. Elaine, any final thoughts are welcome, as always.
I need letters of response on M557-2016, M531-2016 and M380-2016 (in my basket) for the Minister’s signature that all go as follows:

I am writing in response to your letter of ***, expressing your concerns regarding the imminent closure (at that time) of the Provincial Court judicial centre in Harbour Grace.

As I am sure you are aware, on 22 July the Government announced a reversal of the decision to close the judicial centre in Harbour Grace. This decision was a result of a number of factors, including the negotiation of better terms for the continuation of the Provincial Court in its current location, and the potential implications of the recently Supreme Court of Canada decision in R. v. Jordan, which has the potential to significantly affect the requirements on the court system in the handling the criminal trials.

I want to thank you for taking the time to write to express your opinions and concerns on such an important issue of public policy.

Also, have a look at each letter to see if there is anything that needs to be specifically raised or responded to by the Minister.
Potential copyright material

If you wish to obtain a copy please contact the ATIPP Office at (709) 729-7072 or atippoffice@gov.nl.ca.