



SUPREME COURT OF CANADA

CITATION: R. v. K.G.K., 2020 SCC 7

APPEAL HEARD: September 25, 2019

JUDGMENT RENDERED: March 20, 2020

DOCKET: 38532

BETWEEN:

K.G.K.
Appellant

and

Her Majesty The Queen
Respondent

- and -

**Director of Public Prosecutions, Attorney General of Ontario, Director of
Criminal and Penal Prosecutions and Criminal Lawyers' Association of Ontario**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 84)

Moldaver J. (Wagner C.J. and Karakatsanis, Côté, Brown,
Rowe, Martin and Kasirer JJ. concurring)

CONCURRING REASONS:
(paras. 85 to 94)

Abella J.

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2019: September 25; 2020: March 20.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law — Charter of Rights — Right to be tried within reasonable time — Verdict deliberation time — Delay of nine months between conclusion of evidence and argument at trial and trial judge's verdict — Whether s. 11(b) of Canadian Charter of Rights and Freedoms applies to verdict deliberation time — If so, whether verdict deliberation time is included in presumptive ceilings established in Jordan — Test to be applied in assessing whether right to be tried within reasonable time infringed by delay occasioned by verdict deliberation time.

K was charged in April 2013 with sexual offences against his stepdaughter. The evidence and argument at his trial concluded on January 21, 2016. The trial judge reserved judgment. After inquiring as to the status of K's case, the parties were informed on September 30, 2016, that the trial judge would render his decision on October 25, 2016. The trial judge rendered his decision as planned and convicted K. However, the day before, K filed a motion seeking a stay of proceedings on the basis that the delay between the date the charges were laid and the date the verdict was to be rendered was unreasonable and infringed his s. 11(b) *Charter* right to be tried within a reasonable time. The trial judge recused himself from the stay motion. The motion judge dismissed K's motion, finding that neither the verdict deliberation time taken by the trial judge, nor the delay between the charge and the last day of trial, breached K's s. 11(b) rights. A majority of the Court of Appeal dismissed K's appeal.

Held: The appeal should be dismissed.

Per Wagner C.J. and **Moldaver**, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.: Although the right to be tried within a reasonable time enshrined in s. 11(b) extends beyond the end of the evidence and argument at trial and encompasses verdict deliberation time, the presumptive ceilings established by the Court in *Jordan* do not. Where an accused claims that the trial judge's verdict deliberation time breached their s. 11(b) right to be tried within a reasonable time, they must establish that the deliberations took markedly longer than they reasonably should have in all of the circumstances. The burden on the accused is a heavy one due to the operation of the presumption of judicial integrity.

The presumptive ceilings established in *Jordan* were not intended to cover the entire period of time to which s. 11(b) applies. Properly construed, the *Jordan* ceilings apply from the date of the charge until the actual or anticipated end of the evidence and argument. They represent a specific solution designed to address a specific problem: the culture of complacency towards excessive delay associated with bringing those charged with criminal offences to trial. There is no suggestion in this case, nor was there any suggestion in *Jordan*, that delay arising from verdict deliberation time contributes to the systemic problem that *Jordan* sought to address. Further, a host of practical problems would arise if the presumptive ceilings were to include verdict deliberation time, which would run counter to *Jordan*'s goals of clarity and predictability.

When assessing whether an accused person's right to be tried within a reasonable time has been infringed by reason of delay occasioned by verdict deliberation time, the question to be asked is whether the deliberation time took markedly longer than it reasonably should have in all of the circumstances. This test should be approached in light of the presumption of integrity from which judges benefit. The presumption of judicial integrity operates in this context to create a presumption that the trial judge balanced the need for timeliness, trial fairness considerations, and the practical constraints they faced, and took only as much time as was reasonably necessary in the circumstances to render a just verdict. The burden lies on the accused to rebut this presumption by explaining why, in all the circumstances of the case, the verdict deliberation time was markedly longer than it reasonably should have been. The threshold is high because of the considerable weight that the presumption of integrity carries.

In conducting this objective assessment, the reviewing court should consider all of the circumstances. Some relevant considerations include: the length of the verdict deliberation time; how close to the relevant *Jordan* ceiling the case was before the trial judge reserved judgment; the complexity of the case; and anything on the record from the judge or the court. It may also be helpful to compare the length of time taken with the time that a case of a similar nature in similar circumstances would typically take to be decided.

Taking into account all of the circumstances, K has not met his onus of establishing that his right to be tried within a reasonable time under s. 11(b) was violated. While this case is close to the line, the time taken by the trial judge to arrive at his verdict was not markedly longer than it reasonably should have been in all of the circumstances. The most important feature of this case is that K's trial and a substantial portion of the trial judge's verdict deliberation time occurred before the release of the Court's decision in *Jordan*. The trial judge's pre-*Jordan* assessment of the requisite balance between the need for timeliness, fair trial considerations, and the practical constraints he faced was reasonable at the time. Although the end of evidence and argument occurred close to the 30-month ceiling, the proximity of a transitional case (like this one) to the *Jordan* ceilings cannot inform whether the verdict deliberation time taken was reasonable. That said, had *Jordan* been available to the trial judge when he took K's case under reserve, the case's proximity to the ceiling would no doubt have been a factor that he would have considered in assessing how much time he reasonably needed to render his verdict. The impossibility of taking this consideration into account pre-*Jordan* should not be held against him. Additionally, the motion judge did not err in finding that, once the reserve time is subtracted from the total delay to verdict, this case constitutes a transitional exceptional circumstance pursuant to *Jordan*.

Per Abella J.: There is agreement with the majority's disposition of the appeal and most of its analysis. However, there is no basis for requiring an accused to rebut the presumption of judicial integrity to show deliberative delay to be

unreasonable. The objective and contextual factors laid out by the majority for determining whether the deliberation time took markedly longer than it reasonably should have do not require assessing the judge's integrity. The "markedly longer" standard already creates a high threshold. Adding an additional, conceptually irrelevant, burden on the accused of demonstrating that the trial judge acted without integrity elevates the burden to an impossible threshold.

Moreover, the majority appears to have eliminated the role of the reasonable person in the assessment of whether the presumption has been rebutted. Eliminating the role of the reasonable person, a key feature of the assessment of whether the presumption of judicial integrity has been rebutted, compounds the weight of the accused's burden by essentially requiring the reviewing court to make a direct finding about the judge's subjective state of mind and integrity. The test for unreasonable deliberative delay would be more effective and fair, and more consistent with *Jordan*, if it assessed only the objective and contextual factors for the delay, without the added hurdle of having to rebut the presumption of judicial integrity.

Cases Cited

By Moldaver J.

Considered: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. MacDougall*, [1998] 3 S.C.R. 45; **referred to:** *R. v. K.J.M.*, 2019 SCC 55; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. Godin*, 2009 SCC 26,

[2009] 2 S.C.R. 3; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Jordan*, 2014 BCCA 241, 357 B.C.A.C. 137; *R. v. Jordan*, 2012 BCSC 1735; *R. v. Brown*, 2018 NSCA 62, 364 C.C.C. (3d) 238; *R. v. Lamacchia*, 2012 ONSC 2583, 258 C.R.R. (2d) 370; *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357; *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Allen* (1996), 92 O.A.C. 345; *R. v. Potvin*, [1993] 2 S.C.R. 880.

By Abella J.

Considered: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; **referred to:** *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357; *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267; *R. v. Chan*, 2019 ABCA 82, 82 Alta. L.R. (6th) 1; *8640025 Canada Inc. (Re)*, 2019 BCCA 473; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 11(b).

Authors Cited

Canada. Canadian Judicial Council. *Ethical Principles for Judges*. Ottawa, 2004.

Canada. Senate. Standing Senate Committee on Legal and Constitutional Affairs. *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*. Ottawa, 2017.

APPEAL from a judgment of the Manitoba Court of Appeal (Hamilton, Monnin and Cameron JJ.A.), 2019 MBCA 9, 429 C.R.R. (2d) 1, [2019] 5 W.W.R. 492, 373 C.C.C. (3d) 1, [2019] M.J. No. 24 (QL), 2019 CarswellMan 47 (WL Can.), affirming a decision of Joyal C.J.Q.B, 2017 MBQB 96, [2017] 11 W.W.R. 179, [2017] M.J. No. 148 (QL), 2017 CarswellMan 236 (WL Can.). Appeal dismissed.

Katherine L. Bueti and Amanda Sansregret, for the appellant.

Michael Conner, Renée Lagimodière and Charles Murray, for the respondent.

John Walker, for the intervener the Director of Public Prosecutions.

Joanne Stuart, for the intervener the Attorney General of Ontario.

Nicolas Abran, for the intervener the Director of Criminal and Penal Prosecutions.

Jill R. Presser, for the intervener the Criminal Lawyers' Association of Ontario.

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ. was delivered by

MOLDAVER J. —

I. Overview

[1] Section 11(*b*) of the *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right to be tried within a reasonable time. In *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, this Court set out a new framework under s. 11(*b*) designed to overcome a culture of complacency that had grown in the criminal justice system and was causing excessive delays in bringing accused persons to trial. To that end, the Court established ceilings beyond which delay would be presumed to be unreasonable under s. 11(*b*).

[2] This appeal requires the Court to consider the application of s. 11(*b*) when a trial judge reserves judgment. It gives rise, initially, to two questions: does s. 11(*b*) apply to verdict deliberation time, namely the time taken by a trial judge to deliberate and render a decision after the evidence and closing arguments at trial have been made; and, if so, is verdict deliberation time included in the presumptive ceilings established in *Jordan*?

[3] Turning to the first of these questions, it is settled law that the protection of s. 11(b) extends beyond the end of the evidence and argument at trial, up to and including the date upon which sentence is imposed (see *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. MacDougall*, [1998] 3 S.C.R. 45). It follows from this that verdict deliberation time, which necessarily precedes the imposition of sentence, is subject to s. 11(b) scrutiny. Second, for the reasons that follow, I am of the view that the ceilings in *Jordan*, beyond which delay is presumed to be unreasonable under s. 11(b), apply to the end of the evidence and argument at trial, and no further. They do not include verdict deliberation time.

[4] Those conclusions give rise to a further question, namely: how should the delay attributable to verdict deliberation time be assessed in determining whether an accused's right to be tried within a reasonable time has been infringed? The answer, in my view, is that an accused's right to be tried within a reasonable time under s. 11(b) will have been infringed where the verdict deliberation time is found to have taken markedly longer than it reasonably should have in all of the circumstances. The burden on the accused is, as I will explain, a heavy one due to the operation of the presumption of judicial integrity. This presumption presupposes that trial judges are best placed to balance the various considerations that inform verdict deliberation time, and that the verdict deliberation time taken by a judge in a particular case was no longer than reasonably necessary in the circumstances.

[5] Turning to the case at hand, the trial judge took slightly over nine months to render his verdict in a relatively straightforward case of minimal to modest complexity — a lengthy delay to be sure. That said, when all of the circumstances are taken into account — including the fact that the evidence and argument, and most of the verdict deliberation time, took place prior to the release of this Court’s decision in *Jordan* — I am not satisfied that K.G.K. has met his onus of establishing that his right to be tried within a reasonable time under s. 11(b) was violated. While this case is close to the line, I cannot say that the time taken by the trial judge to arrive at his verdict was markedly longer than it reasonably should have been in all of the circumstances. Accordingly, I would dismiss the appeal.

II. Facts

[6] K.G.K. was charged in April 2013 with sexual offences against his stepdaughter, who was a minor at the time. The charges spanned from 2002 to 2013. K.G.K. initially denied the allegations, but later admitted to three or four specific instances of sexual assault between 2011 and 2013.

[7] Four days after being charged, K.G.K. appeared in the provincial court at Winnipeg, Manitoba, and was granted judicial interim release. From that point forward, the matter proceeded slowly. Counsel for the Crown and the defence had no significant discussions between April and August 2013, and did not set dates for a preliminary inquiry until September 2013.

[8] The preliminary inquiry did not proceed until over a year later, on October 14, 2014. On December 15, 2014, after K.G.K. was committed to stand trial before a judge of the Court of Queen's Bench of Manitoba sitting alone, the parties met for a pre-trial conference. However, a trial date could not be set because the Crown was considering further charges against K.G.K. involving other complainants and was planning to make a motion for joinder if those charges were authorized. The conference was adjourned without complaint from the defence.

[9] A second pre-trial conference was held on January 15, 2015. Again, the conference adjourned without setting a trial date.

[10] Two weeks later, at the third pre-trial conference, the Crown advised it would not pursue a motion for joinder, and K.G.K.'s trial was scheduled for January 11 to 22, 2016. While earlier dates (October 19 to 30, 2015) were available, defence counsel was not.

[11] At no point between the laying of the charges in April 2013, and the commencement of K.G.K.'s trial on January 11, 2016, did either the Crown or the defence raise concerns about delay in any meaningful way. They appear to have expected, if not accepted, that such delays were routine.

[12] The evidence and argument at K.G.K.'s trial concluded on January 21, 2016. The trial judge reserved judgment, indicating that he had "a few matters under reserve" but was hoping "to get to this one as soon as [he could]".

[13] The parties did not hear anything for several months. In May 2016, when defence counsel was appearing before the trial judge on another matter, she inquired as to the status of K.G.K.'s case. The trial judge advised that his decision was forthcoming.

[14] On September 14, 2016, the Crown wrote to the Associate Chief Justice of the Court of Queen's Bench (General Division) to inquire about the status of the verdict. The Associate Chief Justice replied that counsel would be contacted shortly to schedule a date for the decision to be delivered.

[15] The parties were informed on September 30, 2016, that the trial judge would render his decision on October 25, 2016. On October 24, 2016, K.G.K. filed a motion seeking a stay of proceedings on the basis that the delay between the date the charges were laid and the date the verdict was to be rendered was unreasonable and infringed his s. 11(b) rights. Despite receiving that motion, the trial judge rendered his decision as planned on October 25, convicting K.G.K. of one count each of sexual interference, invitation to sexual touching, and sexual assault.

[16] K.G.K. candidly acknowledges that "[t]he release of *Jordan* [on July 8, 2016,] triggered the filing of the delay motion" (A.F., at para. 174). Because the judge's verdict deliberation time was a central feature of his stay motion, K.G.K. also moved for the trial judge to recuse himself, alleging that there was a reasonable apprehension of bias in the circumstances. The trial judge granted the recusal motion, and the s. 11(b) stay motion was heard by Joyal C.J.Q.B.

III. Decisions Below

A. *Court of Queen's Bench of Manitoba (Joyal C.J.Q.B.) (2017 MBQB 96, [2017] 11 W.W.R. 179)*

[17] On the s. 11(b) motion, K.G.K. argued that his right to be tried within a reasonable time was breached because approximately 42 months had elapsed from the date of the charges to the date of the trial judge's verdict. The central legal issue before the motion judge was whether the verdict deliberation time taken by the trial judge should be assessed under the *Jordan* framework. He concluded that it should not. In his view, including the verdict deliberation time in the presumptive ceilings established in *Jordan* would not strike an appropriate balance between the constitutional imperatives of s. 11(b) of the *Charter* and judicial independence. Moreover, it would give rise to serious practical difficulties. For example, he noted that including judicial deliberation time within the applicable ceiling "would put both the Crown and the courts in the untenable position of having to schedule all matters in a manner so as to have them completed many months below the ceiling in order to accommodate potential judicial writing time" (para. 55). This, he observed, would undermine the certainty and predictability *Jordan* sought to bring to s. 11(b). Instead, relying on this Court's decision in *Rahey*, the motion judge concluded that verdict deliberation time would only be unreasonable within the meaning of s. 11(b) where, in the overall context of a case, the time taken was "shocking, inordinate and unconscionable".

[18] Applying that test, the motion judge concluded that the delay in K.G.K.'s case was not unreasonable. Despite characterizing the verdict deliberation time taken by the trial judge as "longer than desirable" (para. 103), the motion judge found that it did not result in a breach of K.G.K.'s s. 11(b) rights since it did not rise to the level of "shocking, inordinate and unconscionable". With respect to the delay between the charge and the last day of trial (approximately 33 months), the motion judge took into account the fact that this was a transitional case in which most of the delay occurred pre-*Jordan*, and concluded that the transitional exceptional circumstance identified in *Jordan* applied. In his view, "the parties conducted themselves reasonably having regard to the previous and prevailing legal framework and culture" (para. 94). Accordingly, he dismissed K.G.K.'s s. 11(b) motion.

B. *Court of Appeal of Manitoba (Hamilton (Dissenting), Monnin and Cameron J.J.A.) (2019 MBCA 9, 373 C.C.C. (3d) 1)*

[19] A majority of the Court of Appeal of Manitoba dismissed K.G.K.'s appeal. However, the two judges in the majority wrote separately. Justice Cameron agreed substantially with the motion judge. She concluded the motion judge "did not err in law in his interpretation of *Rahey* nor in his characterisation of the test of reasonableness as it applies to the time that it takes to render a judicial decision" (para. 228). In the result, Cameron J.A. was not persuaded that the motion judge's decision was unreasonable. Accordingly, she upheld his conclusion that neither the trial judge's verdict deliberation time nor the delay between the charge and the last day of trial worked a breach of s. 11(b).

[20] Justice Monnin concurred with Cameron J.A. in the result. Although he agreed with her that the *Jordan* framework should not apply to verdict deliberation time, he rejected the “shocking, inordinate and unconscionable” test that the motion judge applied. Instead, he maintained that in determining whether verdict deliberation time resulted in a breach of an accused person’s s. 11(b) rights, the court should take “a contextual approach which balances a number of facets of the decision-making process according to the relevant evidence of the case” (para. 288).

[21] Justice Hamilton, writing in dissent, would have allowed the appeal. The presumptive ceilings, she found, applied from the date of the charge until the date of the verdict. She acknowledged that *Jordan* did not specifically refer to verdict deliberation time and that appellate courts have not been consistent in their treatment of this issue. However, she reasoned that the manner in which the pre-*Jordan* s. 11(b) jurisprudence treated such time as part of the “inherent time requirements of the case”, combined with this Court’s stated intention to address the culture of complacency, led to the conclusion that verdict deliberation time should be included within the *Jordan* framework. Applying this approach, Hamilton J.A. concluded that the delay in K.G.K.’s case was unreasonable. Hence, she would have directed a stay of proceedings.

IV. Issues

[22] This appeal requires the resolution of three issues:

1. Does s. 11(b) apply to verdict deliberation time, and, if so, is that time included in the presumptive ceilings established in *Jordan*?
2. If s. 11(b) applies to verdict deliberation time but the *Jordan* ceilings do not include that time, how should delay occasioned by verdict deliberation time be assessed in determining whether an accused's right to be tried within a reasonable time has been infringed?
3. Was the verdict deliberation time taken in K.G.K.'s case unreasonable?

V. Analysis

A. *The Jordan Ceilings Do Not Include Verdict Deliberation Time*

[23] Although the right to be tried within a reasonable time enshrined in s. 11(b) of the *Charter* extends beyond the end of the evidence and argument at trial, I am of the view that the presumptive ceilings established by this Court in *Jordan* do not.

[24] *Jordan* focused on the culture of complacency that had taken root in the criminal justice system — a culture which contributed to significant delays in bringing accused persons to trial. When *Jordan* was decided, there was no suggestion

that verdict deliberation time formed a part of this culture or that it contributed in any meaningful way to the delays in bringing accused persons to trial. Nor was any such suggestion made at the hearing of this appeal. Moreover, the practical difficulties that would arise from including verdict deliberation time in the *Jordan* ceilings lend credence to the conclusion that this Court did not intend for that time to be included. Instead, as I will explain, a different test is required in determining whether an accused person's s. 11(b) rights have been infringed on account of verdict deliberation time.

(1) The Temporal Scope of Section 11(b)

[25] Section 11(b) of the *Charter* provides that “[a]ny person charged with an offence has the right . . . to be tried within a reasonable time”. This provision reflects and reinforces the notion that “[t]imely justice is one of the hallmarks of a free and democratic society” (*Jordan*, at para. 1). Section 11(b) protects both an accused’s interests and society’s interests. The individual dimension of s. 11(b) protects an accused person’s interests in liberty, security of the person, and a fair trial. The societal dimension of s. 11(b) recognizes, among other things, that timely trials are beneficial to victims and witnesses, as well as accused persons, and they serve to instill public confidence in the administration of justice (see *R. v. K.J.M.*, 2019 SCC 55, at para. 38).

[26] On this appeal, no one disputes the temporal scope of s. 11(b). Specifically, the parties agree that the right to be tried within a reasonable time encompasses verdict deliberation time.

[27] This point was implicitly decided in *MacDougall*, in which this Court held that the right to be tried within a reasonable time extends to sentencing. As McLachlin J. (as she then was) explained on behalf of the Court, at para. 19:

The next question is whether the phrase “tried within a reasonable time” in s. 11(b) is capable of extending to sentencing. A purposive reading suggests that “s. 11(b) protects against an overlong subjection to a pending criminal case and aims to relieve against the stress and anxiety which continue until the outcome of the case is final”: *R. v. Rahey*, [1987]

1 S.C.R. 588, at p. 610 (emphasis added), *per* Lamer J., Dickson C.J. concurring. In the same case La Forest J., with whom McIntyre J. concurred, stated that “tried” means not “brought to trial”, but “adjudicated” (p. 632). Since the “outcome” of a criminal case is not known until the conclusion of sentencing, and since sentencing involves adjudication, it seems reasonable to conclude that “tried” as used in s. 11(b) extends to sentencing.

[28] Given that s. 11(b) protects an accused from unreasonable delay up to and including the time of sentencing, it necessarily follows that the time taken by a judge to deliberate and render a verdict, all of which precedes the sentencing process, is also included.

[29] This conclusion finds additional support in *Rahey*. Although divided among four sets of reasons, the Court unanimously held that a judge’s failure to render a decision on a directed verdict application within a reasonable time violated the accused’s s. 11(b) rights. Justice Lamer (as he then was) (Dickson C.J. concurring) reasoned that:

The delay in the present case occurred prior to a determination of guilt or innocence and thus, while the case was pending, the appellant continued to be subjected to stress and anxiety. . . . The stigma of being an accused does not end when the person is brought to trial but rather when the trial is at an end and the decision is rendered. [pp. 610-11]

Further, Justice La Forest (McIntyre J. concurring) held that any ambiguity about whether s. 11(b) extends to deliberation time could be resolved by the French version of that section, which provides that “[t]out inculpé a le droit . . . *d’être jugé dans un délai raisonnable*”. He considered the word “jugé” to properly translate to

“adjudicated”, and concluded that s. 11(b) thus “clearly encompass[ed] the conduct of a judge in rendering a decision” (p. 632). He also recognized that “the courts, as custodians of the principles enshrined in the *Charter*, must themselves be subject to *Charter* scrutiny in the administration of their duties”, and that “[i]t would be cold comfort to an accused to be brought promptly to trial if the trial itself might be indefinitely prolonged by the judge” (p. 633).

[30] That said, the mere fact that s. 11(b) encompasses verdict deliberation time does not lead inexorably to the conclusion that this time is included in the *Jordan* ceilings. On the contrary, as will become apparent, the presumptive ceilings established in *Jordan* were not intended to cover the entire period of time to which s. 11(b) applies.

(2) The Temporal Scope of the *Jordan* Ceilings

[31] Properly construed, the *Jordan* ceilings apply from the date of the charge until the actual or anticipated end of the evidence and argument. That is when the parties’ involvement in the merits of the trial is complete, and the case is turned over to the trier of fact. As I will explain, this date permits the straightforward application of the *Jordan* framework in a manner consistent with its design and goals.

[32] In *Jordan*, this Court set out a new framework under s. 11(b) of the *Charter*. At the heart of this framework were two presumptive ceilings, beyond which delay is presumed to be unreasonable: (1) an 18-month ceiling for single-stage cases

proceeding in the provincial court; and (2) a 30-month ceiling for cases proceeding in the superior court or in the provincial court after a preliminary inquiry (para. 49).

Those ceilings operate as follows:

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.

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. [Emphasis in original; paras. 47-48.]

[33] While *Jordan* states that the presumptive ceilings apply “from the charge to the actual or anticipated end of trial”, the Court did not explicitly define the phrase “end of trial”. It has been suggested that this phrase permits of four possible interpretations: (1) the end of the evidence and argument; (2) the date the verdict is delivered, excluding post-trial motions; (3) the conclusion of post-trial motions; or (4) the date of sentencing (see A.F., at para. 131). On close analysis, it is the first interpretation that accurately reflects the reasoning underlying *Jordan* and the mischief it sought to address. To be precise, the *Jordan* ceilings apply from the charge to the end of the evidence and argument, and no further.

[34] Importantly, the *Jordan* ceilings were not designed to exhaust the s. 11(b) analysis and cover all sources of delay. To the contrary, the ceilings represented a specific solution designed to address a specific problem: the culture of complacency towards excessive delay associated with “bringing those charged with criminal offences to trial” (*Jordan*, at para. 2; see also paras. 4, 13, 117, 121 and 129).

[35] This culture of complacency in bringing accused persons to trial arose in part from doctrinal shortcomings that marked the s. 11(b) framework set out in *R. v. Morin*, [1992] 1 S.C.R. 771. The *Morin* framework required courts to balance four factors in determining whether delay had become unreasonable: “(1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay; and (4) prejudice to the accused’s interests in liberty, security of the person, and a fair trial” (*Jordan*, at para. 30; see also *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, at para. 18). Over time, that framework proved to be “too unpredictable, too confusing, and too complex” (*Jordan*, at para. 38). Among other problems, prejudice — which was “confusing, hard to prove, and highly subjective” — had become a determinative factor in the analysis (*Jordan*, at paras. 33-34).

[36] Compounding those doctrinal shortcomings and further fostering the culture of complacency were a number of practical problems. Most notably, *Morin* did nothing to address this culture. Its retrospective approach did not inspire proactive measures to avoid delay; it was designed “not to prevent delay, but only to redress (or

not redress) it” (*Jordan*, at para. 35). Further, unnecessary procedural steps and inefficient advocacy were burdening the system. As a matter of courtroom culture, excessive delay had become far too tolerable.

[37] *Jordan* marked a clean break from the *Morin* approach to s. 11(b). The Court in *Jordan* set out to enhance the clarity and predictability of the s. 11(b) analysis and galvanize systemic change. Importantly, it did so based on cogent evidence that systemic change was needed. The well-documented extent of the culture of complacency in the criminal justice system and its effect on accused persons were significant justifications for creating a new approach to assess delays in bringing accused persons to trial (see para. 40, citing Alberta Justice and Solicitor General, Criminal Justice Division, “Injecting a Sense of Urgency: A new approach to delivering justice in serious and violent criminal cases”, report by G. Lepp (April 2013) (online), at p. 17, B.C. Justice Reform Initiative, *A Criminal Justice System for the 21st Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond*, report by D. Geoffrey Cowper, Q.C. (2012), at p. 4, P. J. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008), at p. 15, and Canada, Department of Justice, “The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System” (2006) (online), at pp. 5-6). This evidence, together with the doctrinal and practical problems of *Morin*, constituted the necessary “compelling reasons” to introduce the presumptive ceilings (para. 45, quoting *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44).

[38] There is no suggestion here, nor was there any suggestion in *Jordan*, that delay arising from verdict deliberation time contributes to the systemic problem that

Jordan sought to address. As indicated (at para. 35), *Jordan* was squarely focused on delay in bringing accused persons to trial and that is the scope of its application.

[39] The *Jordan* decision itself makes this limited temporal scope apparent. For one, the Court expressly declined to comment on whether the *Jordan* ceilings applied from the date of the charge through the date of the sentence, notwithstanding this Court's holding in *MacDougall* that s. 11(b) extends to sentence. Specifically, the Court stated that "[t]he issue of delay in sentencing . . . is not before us, and we make no comment about how this ceiling should apply to s. 11(b) applications brought after a conviction is entered, or whether additional time should be added to the ceiling in such cases" (para. 49, fn. 2). Additionally, the guidance this Court offered to address the culture of complacency focussed almost exclusively on trial practice and procedure. For the Crown, the *Jordan* framework "clarifie[d] the content of the Crown's ever-present constitutional obligation to bring the accused to trial within a reasonable time" (para. 112). It also "encourage[d] the defence to be part of the solution" by deducting defence-caused delay from the total delay at the outset, and by requiring the defence to demonstrate that it had taken "meaningful and sustained steps to expedite the proceedings as a prerequisite to a stay" in cases falling below the presumptive ceiling (para. 113).

[40] While *Jordan* recognized that the judiciary had a role to play in addressing the culture of complacency, there was no suggestion that judicial deliberation time was contributing to that culture. Instead, *Jordan* called upon the

courts to change “courtroom culture” by implementing more efficient trial procedures including scheduling practices, reviewing case management regimes, and making reasonable efforts to control and manage the conduct of trials (paras. 114 and 139; see also *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at paras. 37-39).

[41] That the focus in *Jordan* was directed not at delay attributable to verdict deliberation time but delay in bringing accused persons to trial is borne out when one considers the host of practical problems that would arise if the presumptive ceilings were to include the date on which a verdict might be rendered. As I will explain, including verdict deliberation time within the presumptive ceilings would run counter to *Jordan*’s goals of clarity and predictability, and likely prove unworkable in practice.

[42] Perhaps the most significant problem that would arise if verdict deliberation time were included within the presumptive ceilings is that it would render the argument and adjudication of pre-trial s. 11(b) applications speculative, if not impossible. This is because there could be no way to predict in any given case whether the judge might reserve their decision and, if so, how long they might take to render a verdict.

[43] *Jordan* encourages pre-trial s. 11(b) applications. It marked a shift away from the retrospective, reactive approach taken to excessive delay in *Morin*, preferring instead an approach that allows the parties to know “*in advance*, the

bounds of reasonableness so proactive measures can be taken to remedy any delay” (para. 108 (emphasis in original)).

[44] Assessing verdict deliberation time within the *Jordan* ceilings would require counsel to speculate as to the date on which a verdict might be delivered, which runs directly counter to the predictability that *Jordan* sought to foster. This, in turn, would impede counsel’s ability to take proactive measures to bring the proceedings in under the ceiling, since counsel would not know in advance when the proceedings were expected to conclude. Nor could the judge provide counsel with guidance in this respect since they would not have seen the evidence or heard counsel’s submissions, much less know what time pressures might arise in their own judicial schedule.

[45] The anticipated last date of evidence and argument, by contrast, provides a workable and predictable date to use in calculating delay on pre-trial applications. Indeed, the scheduled end of trial was the date that was used in both *Jordan* (see *R. v. Jordan*, 2014 BCCA 241, 357 B.C.A.C. 137, at para. 18; *R. v. Jordan*, 2012 BCSC 1735, at para. 12) and *Cody* (para. 21).

[46] Extending the *Jordan* ceilings to the date of verdict rather than the date on which evidence and argument conclude would also lead to practical issues for post-trial s. 11(b) applications. Such applications would be particularly problematic for the Crown in cases where the ceiling was breached after evidence and argument concluded and the judge had taken the case under reserve.

[47] Where the ceiling has been breached, *Jordan* places an onus on the Crown to show that the cause of the breach was “genuinely outside its control” (para. 112). This shift in onus was designed to encourage proactivity on the Crown’s part. However, it does not make sense to hold the Crown accountable for the time a judge takes to deliberate on the verdict. As a matter of principle, it is improper for the Crown to interfere or be seen to interfere with the judicial deliberation process insofar as it could reasonably be seen as an attempt to influence the judge’s decision (see *MacDougall*, at paras. 49-52). Nor as a general rule, will the Crown be in a position to explain why the judge took the time they did to arrive at a verdict.

[48] Even if the Crown could learn the reasons why a judge took the deliberation time they did, those reasons could not as a rule be meaningfully tested, as “judges do not become witnesses nor do they file affidavits” (motion judge’s reasons, at para. 59). Indeed, a judge becoming a witness in a case under reserve would in all likelihood compromise their ability to adjudicate that case.

[49] Another undesirable result of including verdict deliberation within the *Jordan* framework would be that the amount of verdict deliberation time available in a given case would vary greatly depending on how close to the ceiling the evidence and argument concluded. As the motion judge observed:

. . . were judges subject to the categorical and unconditional obligation to come to determinations within the presumptive ceilings, the manner in which the case was conducted or unfolded would determine the manner in which a judge approaches and perhaps makes his own or her own decision. In other words, in some cases which might conclude well below

the ceiling, a judge would have many months to render well-crafted written reasons. In other cases which conclude very close to the ceiling, the judge might be left with mere days. [para. 54]

The undesirability and absurdity of this result becomes apparent when one considers a case that concludes close to the ceiling due in part to the quantity and/or complexity of the evidence adduced. In such a case, the greater the volume of evidence and the greater its complexity — assuming it does not rise to the level of an exceptional circumstance under *Jordan* — the less time a judge would have to evaluate it. Surely, this cannot be so.

[50] In sum, properly construed, *Jordan* did not resolve the issue of how to determine whether an accused's right to be tried within a reasonable time under s. 11(b) has been infringed by delay attributable to verdict deliberation time. As I have said, the presumptive ceilings set out in *Jordan* only apply until the actual or anticipated end of the evidence and argument at trial, and no further. This is consistent with the design of *Jordan* and it avoids the serious practical problems that would arise if the ceilings were extended to include verdict deliberation time. Put simply, the presumptive ceilings in *Jordan* do not provide an appropriate yardstick against which the reasonableness of delay attributable to verdict deliberation time may be measured.

B. *How to Determine Whether Verdict Deliberation Time Was Reasonable Within the Meaning of Section 11(b)*

[51] Although it is not disputed that s. 11(b) applies to verdict deliberation time, no clear test for determining whether verdict deliberation time was reasonable within the meaning of s. 11(b) had developed in the jurisprudence pre-*Jordan*. In *Morin*, Sopinka J. observed that delay arising from “actions by trial judges” did not fit particularly well into any category of delay set out in that case (p. 800). In cases following *Morin*, this type of delay appears to have taken on different characterizations in different circumstances — at times being considered part of the inherent time requirements of the case, and at others counting against the Crown (*MacDougall*, at paras. 45-46; see *R. v. Brown*, 2018 NSCA 62, 364 C.C.C. (3d) 238, at para. 73; *R. v. Lamacchia*, 2012 ONSC 2583, 258 C.R.R. (2d) 370, at para. 7). That said, as Cameron J.A. observed in the present case, “[p]rior to *Jordan*, there was nothing in the jurisprudence indicating that trial judges were to estimate how long a reserved decision might take in advance of the trial and include that in their calculation of inherent delay in the *Morin* analysis” (Court of Appeal reasons, at para. 198).

[52] Nor, in my view, did this Court in *Rahey* establish a test whereby judicial deliberation time would only be held to violate s. 11(b) if it is “shocking, inordinate and unconscionable”. None of the four sets of reasons in that case purports to do more than quote the trial judge’s description of the delay as being “shocking, inordinate and unconscionable” (see pp. 604-5, per Lamer J.; p. 649, per La Forest J.; see also Court of Appeal reasons, at para. 287, per Monnin J.A., and paras. 166-68, per Hamilton J.A.). When speaking in their own words, each of the judges merely asked

whether the delay was “unreasonable” or “reasonable” (p. 605, per Lamer J.; p. 616, per Le Dain J.; pp. 621-22, per Wilson J.; pp. 637 and 649-50, per La Forest J.). In sum, while one can conclude from *Rahey* that a breach of s. 11(b) based on verdict deliberation time will be made out where the delay occasioned by it is found to be “shocking, inordinate and unconscionable”, it does not follow that these three features must necessarily exist in order to make out a s. 11(b) breach.

[53] Finally, as I have explained, *Jordan* did not answer how verdict deliberation time should be assessed for the purposes of s. 11(b). It is to that question that I now turn.

[54] In my view, when assessing whether an accused person’s right to be tried within a reasonable time has been infringed by reason of delay occasioned by verdict deliberation time, the question to be asked is whether the deliberation time took markedly longer than it reasonably should have in all of the circumstances.¹

[55] This test should be approached in light of the presumption of integrity from which judges benefit. This presumption “acknowledges that judges are bound by their judicial oaths and will carry out the duties they have sworn to uphold” (*Cojocar v. British Columbia Women’s Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357, at para. 17, quoting *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267, at para. 29, per Abella J., dissenting). As part of their duty to uphold *Charter*

¹ This test only applies when determining whether the time taken by a trial judge to deliberate and render a decision after the evidence and closing arguments at trial have been made violates s. 11(b). These reasons do not address the test applicable to post-verdict delay (e.g., delay in sentencing).

rights, judges are under an obligation to minimize delay at all stages of the trial process, including during the verdict deliberation phase. Post-*Jordan*, judges — like all participants in the justice system — should be acutely aware of the issues that promote delay and which can, in turn, give rise to a s. 11(b) violation.

[56] As I will elaborate, the presumption of judicial integrity operates in this context to create a presumption that the trial judge took no longer than reasonably necessary to arrive at the verdict. Specifically, the trial judge should be presumed to have struck a reasonable balance between the need for timeliness and trial fairness considerations — which take on a different character once the evidence and argument at trial have concluded — as well as the practical constraints that judges face. The burden lies on the accused to rebut this presumption by explaining why, in all the circumstances of the case, the verdict deliberation time was markedly longer than it reasonably should have been. Where the accused meets that burden in a particular case, I hasten to add that, while significant, this finding should not be taken as casting doubt on the judge's overall competence or professionalism.

(1) The Considerations That Inform Verdict Deliberation Time

[57] In determining whether the verdict deliberation time in any given case took markedly longer than it reasonably should have, it must be borne in mind that trial judges are in the best position to assess how much time is needed in all the circumstances of the case. Specifically, the trial judge should be presumed to have struck a reasonable balance between the need for timeliness and trial fairness

considerations — both of which animate s. 11(b) itself — as well as the practical considerations that constrain the amount of time they can spend on a particular case.

[58] Timeliness is essential to achieving the purposes of s. 11(b). These purposes are well-established. In *Morin*, Sopinka J. explained that the primary purpose of s. 11(b) is to protect the individual rights of the accused, but that it also protects societal interests (p. 786). This Court elaborated on these purposes in *K.J.M.*, at para. 38:

At the individual level, [s. 11(b)] protects the accused’s “liberty, as regards to pre-trial custody or bail conditions; security of the person, in the sense of being free from the stress and cloud of suspicion that accompanies a criminal charge; and the right to make full answer and defence, insofar as delay can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence”. At the societal level, “[t]imely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the ‘worry and frustration [they experience] until they have given their testimony’”, and permit them to move on with their lives. Society also has an interest in seeing that citizens accused of crimes are treated humanely and fairly, and timely trials help maintain the public’s confidence in the administration of justice, which is “essential to the survival of the system itself”. “In short, timely trials further the interests of justice”. [Citations omitted.]

[59] With respect to the individual interests that s. 11(b) protects, the nature of the liberty and security of the person interests remains the same from the date on which charges are laid to the date when the verdict is rendered. While awaiting the verdict, accused persons typically remain subject to the same liberty restrictions, stresses, and stigma that existed between the laying of charges and the end of the

evidence and argument at trial. Generally speaking, these interests are best protected by bringing the proceedings to a close as quickly as possible.

[60] Trial fairness, however, takes on a different character after the trial proper ends and the case is left in the hands of the trier of fact. Prior to the end of evidence and argument, time can be the enemy of trial fairness. As this Court observed in *Jordan*, the accused's right to make full answer and defence and "[f]air 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" (para. 20). By contrast, once the evidence is preserved in the record and the case is left in the hands of the trier of fact, those concerns are largely attenuated, and necessary verdict deliberation time works to ensure fairness. This is so because verdict deliberation time reflects the time a trial judge considers reasonably necessary to justly adjudicate a particular case. This includes carefully assessing the evidence, researching points of law, and writing reasons, which "help ensure fair and accurate decision making; the task of articulating the reasons directs the judge's attention to the salient issues and lessens the possibility of overlooking or under-emphasizing important points of fact or law" (*R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 12). As such, this time inures to the benefit of the accused and society at large.

[61] Finally, a reasonable amount of verdict deliberation time must account for the practical constraints that trial judges face, both individually and institutionally.

Reasonableness under s. 11(b) has always accounted for the reality that “[n]o case is an island to be treated as if it were the only case with a legitimate demand on court resources” (*R. v. Allen* (1996), 92 O.A.C. 345, at para. 27). Trial judges know all too well that this is a zero-sum proposition: verdict deliberation time that goes to one case cannot go to another. The appropriate division of time between cases therefore has regard to individual judges’ workloads, different approaches to reasons and reasoning, and the realities of their daily lives (see, e.g., *K.J.M.*, at para. 102). That said, trial judges can and should consider proximity to the *Jordan* ceiling in determining how to prioritize cases in their workload.

[62] There are also limits on judicial and court administration resources. It stands to reason that this front-end burden has an impact on back-end deliberation time, particularly in jurisdictions that are still working to respond to *Jordan*. There is no shortage of commentary on this. For example, in *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (2017), the Standing Senate Committee on Legal and Constitutional Affairs reported that “[a] recurring concern voiced by witnesses and raised in *Jordan* was with respect to how the justice system has been underfunded for too long” (p. 1). This report identified essential contributors to delays in case flow and courthouse administration as being the overbooking and understaffing of courtrooms, and insufficient design and integration of technological solutions to improve efficiency (e.g., to permit videoconferencing and remote access, and to improve scheduling) (pp. 81 and 93). The report also describes an urgent need to “addres[s] the excessive vacancies of

federally appointed judges” (p. 3; see also pp. 5 and 86 et seq.). It suggests that “[a]ll of the concerns with the administration of courthouses and effective case flow management would be significantly alleviated if Canada had enough judges to handle the number of criminal cases awaiting trial” (p. 86). Judges must work within these institutional restrictions and manage their workloads as efficiently as possible. That said, nothing in these reasons should be construed as diminishing the government’s responsibility to ensure that courts are sufficiently resourced to fulfill the promise of s. 11(b) (see *Jordan*, at paras. 40-41, 117 and 140).

[63] Very often, a balancing of the foregoing considerations results in a verdict being rendered within the six-month guideline set by the Canadian Judicial Council (“CJC”). In *Ethical Principles for Judges* (2004), the CJC describes adherence to this guideline as an “adjudicative dut[y]” (p. 20) associated with judicial office, and sets out the content of the duty as follows:

[T]he decision and reasons should be produced by the judge as soon as reasonably possible, having due regard to the urgency of the matter and other special circumstances. Special circumstances may include illness, the length or complexity of the case, an unusually heavy workload or other factors making it impossible to give judgment sooner. In 1985, the Canadian Judicial Council resolved that, in its view, reserved judgments should be delivered within six months after hearings, except in special circumstances. [Footnote omitted; p. 21.]

[64] The significance of this six-month guideline notwithstanding, it is not a determinative measure of constitutionality. Simply showing that this guideline has been exceeded will not, in itself, establish a breach of s. 11(b). Indeed, the *Ethical*

Principles for Judges produced by the CJC is “advisory in nature” (p. 3). The statements and principles therein “are not and shall not be used as a code or a list of prohibited behaviours” and “[t]hey do not set out standards defining judicial misconduct” (p. 3). Moreover, the CJC’s guideline acknowledges the inherent case-specific and judge-specific nature of the balance between the considerations of the need for timeliness, trial fairness, and practical limitations.

(2) Determining Whether the Trial Judge’s Verdict Deliberation Time Took Markedly Longer Than It Reasonably Should Have in All of the Circumstances

[65] Where an accused claims that the trial judge’s verdict deliberation time breached their s. 11(b) right to be tried within a reasonable time, they must establish that the deliberations took markedly longer than they reasonably should have in all of the circumstances. This is — appropriately, in my view — a high bar. As indicated, the presumption of judicial integrity operates in this context to create a presumption that the trial judge balanced the need for timeliness, trial fairness considerations, and the practical constraints they faced, and took only as much time as was reasonably necessary in the circumstances to render a just verdict. Only where the trial judge’s verdict deliberation time is found to have taken *markedly* longer than it reasonably should have will this presumption be displaced. The reason the threshold is so high — “markedly longer” rather than just “longer” or some lesser standard — is because of the “considerable weight” that the presumption of integrity carries (*Cojocarú*, at para. 20). Stays in this context are significant and, although distinct from stays below

the ceiling, they too are likely to be “rare” and limited to “clear cases” (*Jordan*, at para. 48). It bears repeating, however, that where a trial judge’s verdict deliberation time is found to have taken markedly longer than it reasonably should have in a particular case, this should not be taken as casting doubt on the judge’s overall competence or professionalism.

[66] The role the presumption of integrity plays in this context is entirely consistent with the manner in which it has been applied in this Court’s jurisprudence. I agree with my colleague Abella J. that the presumption is used to avoid the “second-guessing of a judge’s thought processes” (*Teskey*, at para. 47). I would add, however, that the presumption of integrity is not just about the judge’s thought processes — it is also about what the judge actually did. Specifically, it recognizes that judges are bound by their oaths of office and encompasses the expectation that they do in fact “carry out” their sworn duties “to the best of their ability” (*Teskey*, at para. 20; see also *Cojocar*, at para. 17). In the present context, the presumption of integrity serves both of these purposes, namely: it significantly limits the circumstances in which a reviewing court may second-guess the trial judge’s determination of how much verdict deliberation time was reasonably necessary in light of the competing considerations in play; and it provides a legitimate basis upon which to presume that the trial judge actually took only as much time as was reasonably necessary in all the circumstances.

[67] In conducting this assessment, the reviewing court should consider all of the circumstances, some of which are identified below. This list is not intended to be exhaustive.

[68] The starting point is, of course, the length of the verdict deliberation time. While it is extremely unlikely that the length of time will suffice on its own, there may be instances in which the time taken is so manifestly excessive that it constitutes a *per se* breach of s. 11(b), irrespective of the circumstances.

[69] The reviewing court should also take into account how close to the relevant *Jordan* ceiling the case was before the trial judge reserved judgment. This is necessary to account for the fact that, even in the absence of a breach of the ceiling, the impact on an accused's liberty and security interests continues to intensify as a case proceeds and approaches the end of evidence and argument. This cumulative impact does not vanish when a trial judge reserves judgment. And that is why trial judges should consider a case's proximity to the *Jordan* ceilings in prioritizing their workloads.

[70] The complexity of the case will be an important consideration. Necessary verdict deliberation time varies in accordance with a case's complexity (see *Jordan*, at para. 88, quoting *Morin*, at pp. 791-92). The amount and nature of the evidence adduced, the number of co-accused (if any), the legal issues raised by the case, and the parties' positions are all relevant in determining whether the time taken by the

trial judge to deliberate on the verdict was markedly longer than it reasonably should have been in all of the circumstances.

[71] Anything on the record from the judge or the court could also be relevant. This might include communications from the court to the parties (e.g., respecting a judge's illness), or communications from the judge to the parties, should the judge deem it appropriate to so communicate (e.g., about their workload and other cases that they may need to prioritize). Further, even if the judge did not put information about their personal workload on the record, the parties and/or the reviewing judge may be aware of the local conditions in a particular jurisdiction and may in turn be able to draw inferences about the trial judge's workload and the institutional constraints they may have faced. Keeping these constraints in mind ensures the proper application of s. 11(b) while state actors work to respond to *Jordan* and bring about the institutional change that s. 11(b) requires.

[72] Finally, it may be helpful in some cases to compare the length of time taken with the time that a case of a similar nature in similar circumstances would typically take to be decided (see *Jordan*, at para. 89).

[73] As my colleague notes, these factors are objective. However, with respect, the reviewing court is not tasked, as my colleague suggests, with "assessing", "inquir[ing] into", or "making a declaration on" the trial judge's actual subjective state of mind (Abella J.'s reasons, at paras. 87 and 91). Rather, the test that I propose requires the reviewing court to engage in an objective determination — one that

mirrors the reasonable observer test used in cases where the accused must directly rebut the presumption of integrity.

C. *A Final Practical Note*

[74] Counsel often find themselves in a difficult position when significant time has passed since the trial judge took the matter under reserve and they have not received any updates on its status. The Crown may be reluctant to probe for information on the status of the case, insofar as it could risk the appearance of inappropriate interference with the judicial process. For their part, the accused may understandably not wish to be seen as applying pressure to the person in whose hands their fate lies.

[75] In *Jordan*, this Court stressed that all participants in the criminal justice system must work together to minimize delay and safeguard an accused person's s. 11(b) interests. To that end, I see no reason why the parties cannot, in appropriate circumstances and through appropriate channels, communicate with the trial judge. This might entail meeting briefly in court or communicating through another procedure approved by the court. However this may happen, counsel can and should expect judges to be sufficiently resolute to consider a request for information without consequences to counsel, the accused, or the trial.

[76] Indeed, some jurisdictions may find it useful to set out a standardized procedure through which counsel can inquire as to the status of a verdict. This may

involve a practice guideline contemplating a joint communication from the parties to the trial judge themselves, or to the regional senior judge or another appropriate person, after a certain amount of time has passed. Ultimately, instituting these procedures could serve to attenuate the anxiety and concern that accompanies the inherent unknowability of a verdict date and delay more generally (*MacDougall*, at para. 19, quoting *Rahey*, at p. 610, per Lamer J.; see also *R. v. Potvin*, [1993] 2 S.C.R. 880, at p. 887). Additionally, where the communication is with the court administration or regional senior judge, it may provide information that assists the court in managing judicial workloads. It may also assist in developing the record for s. 11(b) purposes.

VI. Application to K.G.K.'s Appeal

[77] Notwithstanding the high bar that the presumption of integrity necessitates, this case comes close — even perilously close — to the line. However, when all of the circumstances are considered, I am not satisfied that K.G.K. has met his onus of establishing that the verdict deliberation time markedly exceeded what it reasonably should have been.

[78] Much as I accept that the verdict deliberation time in this case was long, I am not persuaded that it was *per se* unreasonable. Nine months is not so manifestly excessive that it constitutes a *per se* breach of s. 11(b), irrespective of the circumstances.

[79] Turning to the surrounding circumstances, I have already noted that this case was of minimal to modest complexity. While this factor calls into question the reasonableness of the time taken, it must be considered in context.

[80] Beyond his statement that he had “a few matters under reserve” at the time he reserved judgment in this case, there is no information on the record regarding the trial judge’s workload. Accordingly, this factor does not provide much assistance in determining whether the presumption of reasonableness has been rebutted.

[81] As I see it, the most important feature of this case is that K.G.K.’s trial and a substantial portion of the trial judge’s verdict deliberation time occurred before the release of this Court’s decision in *Jordan*. This context matters. *Jordan* was a call to action which no one in this case could have foreseen. Indeed, until *Jordan* was released, the parties appear to have conducted themselves in the complacent manner that defined the pre-*Jordan* era. There is no hint that K.G.K. expressed any interest — let alone concern — about the pace of the proceedings, including the verdict deliberation time taken by the trial judge prior to the release of *Jordan* (some five and a half months after he reserved judgment). It is apparent that the release of *Jordan* caused an attitudinal shift among those involved in K.G.K.’s case: K.G.K. acknowledges that the release of *Jordan* triggered the filing of his delay motion; the Crown wrote to the Associate Chief Justice to inquire about the status of the verdict; and a date was subsequently set for the rendering of the verdict. Notably in all of this,

K.G.K. offers no sufficient explanation for why he waited until the day before the trial judge rendered his verdict, almost four months following the release of *Jordan*, to file the s. 11(b) application at issue. Most significantly, the trial judge's pre-*Jordan* assessment of the requisite balance between the need for timeliness, trial fairness considerations, and the practical constraints he faced was reasonable at the time. Although the end of evidence and argument occurred close to the 30-month ceiling, the proximity of a transitional case (like this one) to the *Jordan* ceilings cannot inform whether the verdict deliberation time taken was reasonable. That said, had *Jordan* been available to the trial judge when he took K.G.K.'s case under reserve, the case's proximity to the ceiling would no doubt have been a factor that he would have considered in assessing how much time he reasonably needed to render his verdict. How long he would have taken to deliberate and release his verdict and reasons cannot be known with certainty, though it can be expected that he would have released his verdict and reasons sooner than he did. The impossibility of taking this consideration into account pre-*Jordan* should not be held against him.

[82] That said, had this case been heard entirely post-*Jordan*, I would in all likelihood have decided the s. 11(b) issue differently. As such, I must respectfully disagree with my colleague that the test I have proposed "raises the accused's burden to a threshold that is both conceptually unhelpful and unreachable" and "could have the unintended consequence of sheltering trial judges' deliberative delay from [*Charter*] scrutiny" (Abella J.'s reasons, at para. 94). That is simply not so.

[83] In sum, taking all of the circumstances into account, K.G.K. has not established that the verdict deliberation time taken by the trial judge was markedly longer than it reasonably should have been. Additionally, I agree with the majority at the Court of Appeal, at paras. 246-50, that the motion judge did not err in finding that, once the reserve time is subtracted from the total delay to verdict, this case constitutes a transitional exceptional circumstance pursuant to *Jordan*.

VII. Conclusion

[84] In the result, I would dismiss the appeal.

The following are the reasons delivered by

ABELLA J. —

[85] I agree with the majority's disposition of the appeal and most of its analysis. Where I part company is in the majority's use of the presumption of judicial integrity as part of the test for assessing whether deliberative delay violated an accused's right to be tried within a reasonable time. I see no reason why finding that a deliberative delay is unreasonable requires impugning the integrity of the trial judge, thereby elevating the accused's burden to an almost insurmountable one.

[86] The majority's test for assessing whether deliberative delay violated an accused's right to be tried within a reasonable time is "whether the deliberation time took markedly longer than it reasonably should have in all of the circumstances". It concludes that, to meet this test, the accused must displace the presumption of judicial integrity. It is not clear to me, however, what role the presumption of judicial integrity can usefully play in assessing whether a delay is "markedly longer" than reasonable.

[87] As the majority notes, assessing the reasonableness of judicial deliberation time involves considering factors such as the length of the verdict deliberation time, proximity to the relevant presumptive ceiling laid out in *R. v. Jordan*, [2016] 1 S.C.R. 631, the complexity of the case including the amount and nature of the evidence and legal issues, local conditions, and anything on the record from the judge that could explain the delay. These are objective and contextual factors. In my respectful view, the test does not require assessing, and should not seek to inquire into, the trial judge's integrity or subjective state of mind.

[88] The presumption of judicial integrity "acknowledges that judges are bound by their judicial oaths and will carry out the duties they have sworn to uphold" (*Cojocar v. British Columbia Women's Hospital and Health Centre*, [2013] 2 S.C.R. 357, at para. 17, citing *R. v. Teskey*, [2007] 2 S.C.R. 267, at para. 29, per Abella J., dissenting). It is invoked in cases which require assessing the judge's state of mind in order to determine whether "the judge has done her job as she is sworn to do"

(*Cojocarui*, at para. 15). In these cases, the presumption of judicial integrity is used “to protect the judicial role from undue perceptual assault” and to avoid the “second-guessing of a judge’s thought processes” (*Teskey*, at para. 47).

[89] Under this jurisprudence, in order to rebut the presumption of judicial integrity, the party assailing the outcome must present “cogent evidence” showing that a reasonable person apprised of the relevant facts would conclude that the presumption is rebutted in all the circumstances (*Cojocarui*, at paras. 18 and 27-28; *Teskey*, at paras. 21 and 33; see also *R. v. Chan* (2019), 82 Alta. L.R. (6th) 1 (C.A.), at para. 12; *8640025 Canada Inc. (Re)*, 2019 BCCA 473, at para. 79 (CanLII)).

[90] It is difficult to see what “cogent evidence” an accused could even offer in this context to demonstrate that the presumption of judicial integrity has been rebutted except evidence of the length of the delay in the circumstances. The objective factors laid out by the majority allow for an assessment of the reasonableness of delay. The “markedly longer” standard it adopted already creates a high threshold. Adding an additional burden on the accused of demonstrating the trial judge acted without integrity, particularly without a clear way to demonstrate this, elevates the burden to an impossible threshold. In other words, it creates the risk that the presumption of judicial integrity will act as a justification for a deliberative delay that, objectively, took markedly longer than it reasonably should have.

[91] Moreover, the majority appears to have eliminated the role of the “reasonable person”, a key feature of the assessment of whether the presumption of

judicial integrity has been rebutted. In the context of determining whether the presumption has been rebutted, the reasonable person was used in our jurisprudence in order to allow the reviewing court to avoid making a declaration on the judge's actual state of mind; a task that is "obviously impossible" (*Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at para. 64, citing Cory J. in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636). Under the majority's test, without the objective lens of the reasonable person, the inescapable inference of a reviewing court concluding that the presumption of judicial integrity has been rebutted is that the trial judge did in fact act without integrity. This modification compounds the weight of the accused's burden by essentially requiring the reviewing court to make a direct finding about the judge's subjective state of mind and integrity.

[92] It is worth noting that without the use of the presumption of judicial integrity, the majority's "markedly longer" test would be wholly consistent with *Jordan*. In *Jordan*, this Court established "presumptive ceilings" beyond which delay was presumed to be unreasonable. Above the presumptive ceiling, the onus shifted to the Crown to justify the length of time the case took (*Jordan*, at para. 58). Below the ceiling and prior to any shift in onus, the accused had the burden of showing that "the case took markedly longer than it reasonably should have" in order to establish that delay had been unreasonable (*Jordan*, at para. 48).² This standard is the one adopted

² Under the *Jordan* framework, when seeking a stay for delay falling below the presumptive ceiling, in addition to demonstrating that "the case took markedly longer than it reasonably should have", the defence must also establish that "it took meaningful steps that demonstrate a sustained effort to expedite the proceedings" (*Jordan*, at para. 48). This consideration does not form part of the test for

by the majority in this case for assessing the reasonableness of verdict deliberation time.

[93] The absence of presumptive ceilings in the case of deliberative delay means that the burden to demonstrate the unreasonableness of deliberative delay remains at all times with the accused. Adding to the accused's burden the requirement to show that the presumption of judicial integrity has been rebutted places the burden beyond the accused's reach.

[94] The presumption of judicial integrity in the majority's test unreasonably raises the accused's burden to a threshold that is both conceptually irrelevant and unreachable. Requiring the accused to demonstrate, and a reviewing court to accept, that the trial judge acted without integrity in order to find that the deliberative delay was unreasonable could have the unintended consequence of sheltering trial judges' deliberative delay from *Canadian Charter of Rights and Freedoms* scrutiny and, ultimately, weakening the substance of the accused's right to be tried within a reasonable time. The majority's test, in my respectful view, would be more effective and fair without it.

Appeal dismissed.

assessing verdict deliberation time since the accused does not have the ability to "expedite the proceedings" in this context.

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