



SUPREME COURT OF CANADA

CITATION: R. v. J.F., 2022 SCC
17

APPEAL HEARD: November 30,
2021

JUDGMENT RENDERED: May
6, 2022

DOCKET: 39267

BETWEEN:

Her Majesty The Queen
Appellant

and

J.F.
Respondent

- and -

**Attorney General of Ontario, Attorney General of British Columbia, Attorney
General of Alberta, Criminal Lawyers' Association of Ontario, Association
québécoise des avocats et avocates de la défense and Association des avocats
de la défense de Montréal-Laval-Longueuil**
Intervenors

OFFICIAL ENGLISH TRANSLATION

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

**REASONS FOR
JUDGMENT:**
(paras. 1 to 80)

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

DISSENTING Côté J.
REASONS:
(paras. 81 to 103)

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Her Majesty The Queen

Appellant

v.

J.F.

Respondent

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**Attorney General of Ontario,
Attorney General of British Columbia,
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File No.: 39267.

2021: November 30; 2022: May 6.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Right to be tried within reasonable time — Order for new trial — Whether, after new trial is ordered, accused can file motion under s. 11(b) of Canadian Charter of Rights and Freedoms for stay of proceedings based on delay in accused's first trial — Whether presumptive ceilings established in Jordan apply to retrial delay.

In February 2011, the accused was charged with seven counts involving sexual offences against his daughter. The trial, whose estimated length was two days, began on December 3, 2013 in the Court of Québec, following a preliminary inquiry. Argument was completed on May 16, 2016, at which time judgment was reserved. While judgment was reserved, the Court rendered its decision in *Jordan*. On February 10, 2017, six years after he was charged, the accused was acquitted on all counts. On June 13, 2018, the Quebec Court of Appeal set aside the acquittal and ordered a new trial. Before the retrial began, the accused filed a motion for a stay of proceedings for unreasonable delay under s. 11(b) of the *Charter*. The motion concerned the delays in the first trial and the retrial.

In assessing whether the s. 11(b) right had been infringed, the trial judge combined the delays for the first trial and the retrial. She held that the accused's right to be tried within a reasonable time had been infringed, and she entered a stay of proceedings. The Court of Appeal dismissed the Crown's appeal, finding that it had not rebutted the presumption that the total delay between the charges and the end of the argument at the first trial was unreasonable.

Held (Côté J. dissenting): The appeal should be allowed, the stay of proceedings set aside and the case remanded to another judge of the Court of Québec for the continuation of the trial.

Per Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer and Jamal JJ.: The *Jordan* framework applies when a motion for a stay of proceedings for unreasonable delay is brought in the course of a retrial. The ceilings set in *Jordan* apply to retrial delay, but when an accused brings a motion for a stay of proceedings for unreasonable delay after an appeal court has ordered a new trial, only the delay in that trial will be counted in calculating delay.

Given that the *Jordan* framework offers greater predictability and clarity and encourages all parties to act proactively, it follows that an accused must raise the unreasonableness of trial delay in a timely manner. It is generally recognized that an accused who raises the unreasonableness of delay after trial, and particularly after conviction, is not acting in a timely manner. It is therefore only exceptionally that an infringement of the right to be tried within a reasonable time can be raised by an accused for the first time on appeal.

However, waiver of delay cannot be inferred solely from an accused's silence or failure to act. For a court to find that delay has been waived, an accused must take some direct action from which a consent to delay can be properly inferred. A court cannot regard an accused's long silence or lengthy inaction as amounting to a clear and unequivocal waiver or an acceptance of the delay associated with a past trial. Any

person charged with an offence has the right to be tried within a reasonable time without having to explicitly state their wish to be protected by this right. Lateness in bringing a s. 11(b) motion for a stay of proceedings nonetheless remains an important factor in determining whether an accused has waived delay. Waiver is established on the basis of the accused's conduct, having regard to the circumstances of each case.

Since the adoption of the *Jordan* framework, which requires an accused to take appropriate action in a timely manner, an accused cannot bring a s. 11(b) motion during a retrial based on delay in their first trial. Lateness in taking action impedes the proper administration of justice and contributes to maintaining inefficient practices that have a negative impact on the justice system and its limited resources. Bringing a motion in a retrial for a stay of proceedings based on first-trial delay is contrary to the parties' duty to take proactive measures and interferes with the proper administration of justice. While an accused has no legal obligation to assert their right to be tried within a reasonable time in order for that right to exist, this does not entitle the accused to do nothing when they believe that their s. 11(b) right is not being or will not be respected. Section 11(b) does not allow an accused to benefit unduly from the lengthening of delay. This means that an accused may not raise first-trial delay once a new trial is ordered. The computation of delay restarts at zero when such an order is made. However, a court may be able to consider first-trial delay in assessing the reasonableness of retrial delay in certain exceptional circumstances.

After a new trial is ordered, the accused regains the status of a person charged with an offence. Delay following such an order is trial delay and therefore falls within *Jordan*, so the presumptive ceilings established in *Jordan* apply to the delay in the new trial. It is not appropriate to adopt different presumptive ceilings for retrials. It has not been shown that there is a real problem, let alone one that could warrant the imposition of a new constitutional standard. The presumptive ceilings established in *Jordan* provide a uniform general framework for assessing the reasonableness of the delay between the charge and the end of trial, irrespective of the varying degrees of prejudice experienced by different groups and individuals. The creation of a new ceiling would be incompatible with the uniform-ceiling approach adopted in *Jordan* and would undermine its objective of simplifying and streamlining the s. 11(b) framework. The *Jordan* framework is flexible enough to be adapted to the specific circumstances of an accused who is retried and to be used by courts to determine whether retrial delay is reasonable, even where it is below the presumptive ceiling. Delay is not reasonable simply because it is within the applicable ceiling; it is only presumptively reasonable.

Two factors can be considered in analyzing the reasonableness of retrial delay in order to take account of the specific nature of this context: retrials must be prioritized when scheduling hearings, and retrials are, as a general rule, to be conducted in less time than first trials. These factors must be assessed contextually, as required by *Jordan*. In this regard, first-trial delay is one of the circumstances that may be taken into account in the assessment. In a context where the first-trial delay exceeds the

applicable ceiling, failure to act expeditiously and to prioritize the case could weigh in favour of a finding that the retrial delay is unreasonable. However, the fact that this contextual element is considered does not allow an accused to raise first-trial delay indirectly; it is the retrial delay that remains the focus of the analysis.

In this case, the accused did not act in a timely manner. It was not until a few months before his retrial was to be held that he brought his s. 11(b) motion. As a result, the delay in his first trial cannot be considered in calculating the total delay. Only the delay since the order for a new trial is counted. The total delay between the order for a new trial and the actual or anticipated end of that trial, 10 months and 5 days, is well below the 30-month presumptive ceiling. None of the factors associated with this specific context supports a finding that the accused's right to be tried within a reasonable time was infringed: the anticipated retrial delay is very short and the case was prioritized. The delay is reasonable and there are no grounds for a stay of proceedings.

Per Côté J. (dissenting): The appeal should be dismissed and the stay of proceedings upheld. There is agreement with the main principles in the majority's analysis. The approach adopted reflects the culture shift required by *Jordan* and provides a pragmatic solution. However, the specific context of the transition from the subjective *Morin* framework to the prospective *Jordan* framework created an exceptional circumstance. In this context, even a delay of 10 months and 5 days in a non-complex case like this one is sufficiently long to justify taking the first-trial delay

into account. Because the issue of reasonableness of delay arises in a context where the accused's first trial had been completed and judgment had been reserved by the time the Court rendered its decision in *Jordan*, this is one of the exceptional cases in which a stay of proceedings must be entered even though the accused did not raise the infringement of s. 11(b) until after a retrial was ordered.

The accused cannot be faulted for not acting proactively and filing a motion for a stay of proceedings before the end of his first trial or in the Court of Appeal. He had a right to have the trial completed and to obtain an acquittal. Fighting to secure an acquittal is a right, not a strategy. Nor can the accused be faulted for not acting in keeping with a culture shift that had not occurred at the time of the events. Between the charges in February 2011 and the filing of the motion for a stay of proceedings in December 2018, only a period of 39 days from the first trial can be attributed to him, in nearly 8 years of proceedings. In reality, the Crown failed to prioritize the accused's case and the system failed to try him in a diligent and reasonable manner. The presumption that the delay is reasonable is rebutted.

Cases Cited

By Wagner C.J.

Applied: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; **considered:** *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. K.J.M.*, 2019 SCC 55, [2019] 4 S.C.R. 39; *R. v. Potvin*, [1993] 2 S.C.R. 880; *R. v. Rabba* (1991), 64 C.C.C. (3d) 445; *R. v. Collins*,

[1995] 2 S.C.R. 1104; **referred to:** *R. v. K.G.K.*, 2020 SCC 7; *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. MacDougall*, [1998] 3 S.C.R. 45; *R. v. Kalanj*, [1989] 1 S.C.R. 1594; *R. v. Rice*, 2018 QCCA 198; *R. v. Thanabalasingham*, 2020 SCC 18; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Boulanger*, 2022 SCC 2; *R. v. Ste-Marie*, 2022 SCC 3; *R. v. Warring*, 2017 ABCA 128, 347 C.C.C. (3d) 391; *R. v. C.D.*, 2014 ABCA 392, 588 A.R. 82; *R. v. Brown*, [1993] 2 S.C.R. 918; *R. v. G. (L.)*, 2007 ONCA 654, 228 C.C.C. (3d) 194; *Phillips v. R.*, 2017 QCCA 1284; *R. v. Roach*, 2009 ONCA 156, 246 O.A.C. 96; *Ontario (Labour) v. Cobra Float Service Inc.*, 2020 ONCA 527, 65 C.C.E.L. (4th) 169; *R. v. Chambers*, 2013 ONCA 680, 311 O.A.C. 307; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *R. v. Hebert*, [1990] 2 S.C.R. 151; *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41; *R. v. Tran*, [1994] 2 S.C.R. 951; *R. v. Conway*, [1989] 1 S.C.R. 1659; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Boisvert*, 2014 QCCA 191; *R. v. Barros*, 2014 ABCA 367, 317 C.C.C. (3d) 67; *R. v. Nikkel*, 2009 MBCA 8, 240 Man. R. (2d) 1; *R. v. Fitts*, 2015 ONCJ 746; *R. v. MacIsaac*, 2018 ONCA 650, 141 O.R. (3d) 721; *R. v. JEV*, 2019 ABCA 359, 381 C.C.C. (3d) 392; *R. v. J.A.L.*, 2019 ABCA 415; *Gakmakge v. R.*, 2017 QCCS 3279; *Masson v. R.*, 2019 QCCS 2953, 57 C.R. (7th) 415; *R. v. Richard*, 2017 MBQB 11, 375 C.R.R. (2d) 61.

By Côté J. (dissenting)

R. v. Jordan, 2016 SCC 27, [2016] 1 S.C.R. 631; *R. v. Rahey*, [1987] 1 S.C.R. 588; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. Rabba* (1991), 64 C.C.C. (3d) 445; *M.G. v. R.*, 2019 QCCA 1170.

Statutes and Regulations Cited

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

Authors Cited

Gold, Alan D., Michael Lacy and Laura Metcalfe. *A Practical Guide to the Charter: Section 11(b)*. Toronto: LexisNexis, 2019.

Vauclair, Martin, et Tristan Desjardins. *Traité général de preuve et de procédure pénales*, 28^e éd. Montréal: Yvon Blais, 2021.

APPEAL from a judgment of the Quebec Court of Appeal (Levesque, Hogue and Sansfaçon JJ.A.), 2020 QCCA 666, [2020] AZ-51688190, [2020] Q.J. No. 3213 (QL), 2020 CarswellQue 8461 (WL Can.), affirming a decision of Roy J.C.Q., 2019 QCCQ 1236, [2019] AZ-51576046, [2019] J.Q. n° 1737 (QL), 2019 CarswellQue 2045 (WL Can.). Appeal allowed, Côté J. dissenting.

Nicolas Abran and *Justin Tremblay*, for the appellant.

Diego Gramajo, for the respondent.

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Walid Hijazi and *Julia Blais-Quintal*, for the intervener Association des avocats de la défense de Montréal-Laval-Longueuil.

English version of the judgment of Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer and Jamal JJ. delivered by

THE CHIEF JUSTICE —

[1] In *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, this Court delivered a clear message to all participants in the criminal justice system in Canada: everyone must take proactive measures to prevent delay and to uphold the right to be tried within a reasonable time guaranteed to an accused by s. 11(b) of the *Canadian Charter of Rights and Freedoms*. By creating ceilings beyond which trial delay is presumptively unreasonable, the Court developed a prospective approach that allows the various participants to know, from the outset of the proceedings, the temporal limits within which the trial must take place.

[2] This appeal affords the Court an opportunity to decide whether the *Jordan* framework applies when a motion for a stay of proceedings for unreasonable delay is brought in the course of a retrial. Two questions arise: (1) After a new trial is ordered, can an accused file a s. 11(b) motion for a stay of proceedings based on delay in the accused's first trial? (2) Do the presumptive ceilings established in *Jordan* apply to retrial delay?

[3] The first question requires this Court to determine when an accused must indicate that their right to be tried within a reasonable time has not been respected. Given that the *Jordan* framework offers greater predictability and clarity and encourages all parties to act proactively, it follows, in my view, that an accused must raise the unreasonableness of trial delay in a timely manner. As a general rule, in the context of a single trial, an accused who believes that their right to be tried within a reasonable time has been infringed must act diligently and apply for a remedy before

their trial is held. However, an accused may in some circumstances be justified in bringing such an application later, as is the case exceptionally on appeal. That being said, when an accused brings an application after an appeal court has ordered a new trial, the accused will no longer be able to raise the delay from their first trial. Only the retrial delay will be counted in calculating delay based on the presumptive ceilings applicable under the *Jordan* framework.

[4] The ceilings set in *Jordan* apply to retrial delay. The framework established in that case protects the right of an accused to be tried within a reasonable time pursuant to s. 11(b), and that provision equally guarantees this right to an accused who is tried a second time. Although it is generally accepted that retrials must be prioritized when scheduling hearings and that they will be shorter than first trials, I do not think it is appropriate to adopt different presumptive ceilings for retrials. The *Jordan* framework is flexible enough to be adapted to the specific circumstances of an accused who is retried.

I. Background

[5] In February 2011, J.F. was charged by indictment with seven counts involving sexual offences against his daughter. The charges covered a period from 1986 to 2001.

[6] The preliminary inquiry was completed on March 28, 2012. The trial, whose estimated length was two days, began on December 3, 2013 in the Court of Québec, district of Montréal.

[7] On December 4, 2013, the prosecution announced a *voir dire* on the admissibility into evidence of the complainant's video statement. The trial was then adjourned, and it resumed on October 20, 2014. On October 24, 2014, the *voir dire* ended and the trial judge reserved decision on it. Just over six months later, on May 8, 2015, the judge rendered his decision and found that the complainant's statement was inadmissible.

[8] The trial resumed on January 18, 2016 and ended the same day. Argument was postponed and was then completed on May 16, 2016, at which time judgment was reserved. While judgment was reserved, this Court rendered its decision in *Jordan*. On February 10, 2017, six years after he was charged, J.F. was acquitted on all seven counts.

[9] The Crown appealed the decision and, on June 13, 2018, the Quebec Court of Appeal set aside the acquittal on the ground that the trial judge had analyzed the complainant's credibility by relying erroneously on stereotypes and prejudices (2018 QCCA 986). It therefore ordered a new trial.

[10] On October 15, 2018, the parties agreed on dates for the retrial, which was to last 10 days. The retrial was then scheduled for April 29 to May 31, 2019.

[11] On December 28, 2018, J.F. filed a motion for a stay of proceedings for unreasonable delay under s. 11(b) of the *Charter*. That was the first time he alleged an infringement of his right to be tried within a reasonable time. In January 2019, the trial dates were moved up to March 11 to April 18, 2019. The motion for a stay of proceedings was argued on February 5, 2019.

II. Decisions Below

A. *Court of Québec, 2019 QCCQ 1236 (Judge Roy)*

[12] After making a global assessment of the delay for the first trial and the retrial, the trial judge held that the respondent's right to be tried within a reasonable time had been infringed.

[13] She rejected the Crown's argument that the accused's long silence regarding the delay amounted to a waiver of his right to be tried within a reasonable time, because such a waiver must be clear, unequivocal and informed. Noting that there was uncontested evidence showing that the accused was concerned about the delay, the judge found that he had never waived his right to be tried within a reasonable time.

[14] The judge then calculated the delay. She found a gross delay of 72 months and 3 days between the charges and the verdict at the first trial, and she determined that, of that total, 70 months and 25 days were not attributable to the defence.

[15] In the Court of Québec, the Crown did not challenge the calculation or categorization of the first-trial delay. Nor did it argue that there were exceptional circumstances or that the transitional circumstance provided for in *Jordan* applied. In its opinion, only the retrial delay had to be considered, that is, 10 months and 5 days. The judge rejected that argument. Taking a [TRANSLATION] “global and contextual” approach to delay, she found that the first-trial delay could not be disregarded in this case given that it “is clearly unreasonable” (paras. 73 and 75 (CanLII)). Not to consider it would be to deny the accused’s rights and would be contrary to the shift in culture sought by this Court. The judge held that the entire delay, including the first-trial delay, had to be counted. She granted the motion based on unreasonable delay and entered a stay of proceedings.

B. *Quebec Court of Appeal, 2020 QCCA 666 (Levesque, Hogue and Sansfaçon J.J.A.)*

[16] The Crown appealed the trial judge’s decision and argued that, under the *Jordan* framework, first-trial delay cannot be included once an appeal court has ordered a new trial. For the reasons given by Levesque J.A., the Quebec Court of Appeal dismissed the appeal and upheld the stay of proceedings, though it adopted a different approach than the trial judge.

[17] The Court of Appeal stated that the calculation of delay must restart at zero in cases where a new trial is ordered by an appeal court and that therefore the delay in the first trial cannot be added to the delay in the second. However, it refused to accept

the Crown's argument that the fact that a new trial has been ordered prevents an accused from raising a violation of s. 11(b) based on delay in their first trial. In the Court of Appeal's view, [TRANSLATION] "it would undoubtedly be unfair for an accused to be barred from presenting an initial motion on the sole ground that a violation was not raised in a timely manner" (para. 60 (CanLII)). The Court of Appeal also rejected the Crown's argument that J.F.'s very long silence could be considered to be a waiver of the delay preceding the order for a new trial, given that the late presentation of a motion cannot in itself amount to a clear and unequivocal waiver. In this regard, the Court of Appeal further noted that although this Court explained in *R. v. Morin*, [1992] 1 S.C.R. 771, that inaction by an accused could lead to an inference that the accused suffered no actual prejudice, this reasoning no longer applies under *Jordan* because prejudice is no longer a factor in calculating delay.

[18] The Court of Appeal added that there cannot be an unqualified refusal to consider first-trial delay. The fact that delay was not raised during the first trial does not mean that it is reasonable. While it is preferable for an accused to raise the unreasonableness of delay as soon as possible, an acquittal may be more advantageous than a stay of proceedings. In this regard, Levesque J.A. cautioned that his remarks should not be taken to mean that [TRANSLATION] "the late presentation of motions under s. 11(b) should be encouraged" (para. 76).

[19] The Court of Appeal proposed a two-step approach for calculating delay in a context where a new trial is ordered. Because the delays in the two trials must be

considered separately, the first step is to assess the first-trial delay under the *Jordan* framework. Only where that delay is reasonable does it become necessary to proceed to the second step and assess the retrial delay, starting from the order for a new trial. However, the Court of Appeal did not discuss the framework that applies in analyzing retrial delay.

[20] Applying the two-step approach it had adopted to this case, the Court of Appeal began by noting that the total delay between the charges and the end of the argument at the first trial was 63 months and 8 days,¹ from which it subtracted 1 day attributable to the defence. Finding that this total delay exceeded the 30-month presumptive ceiling established by this Court in *Jordan*, the Court of Appeal stated that it was up to the Crown to show that the delay was reasonable because of an exceptional circumstance or transitional considerations. Since the Crown had not pleaded any such circumstance, the Court of Appeal held that it had not rebutted the presumption that the delay was unreasonable. The Court of Appeal therefore dismissed the appeal and upheld the stay of proceedings.

III. Issues

[21] The appeal raises the following questions:

¹ The Court of Appeal arrived at a different total delay than the trial judge, because the judge had included the verdict deliberation time in her calculation. But as this Court stated in *R. v. K.G.K.*, 2020 SCC 7, at paras. 3, 24 and 50, and as the Court of Appeal correctly pointed out, delay attributable to deliberation time is excluded from the *Jordan* framework.

- (1) After a new trial is ordered, can an accused file a s. 11(b) motion for a stay of proceedings based on delay in the accused's first trial?
- (2) Do the presumptive ceilings established in *Jordan* apply to retrial delay?

IV. Analysis

A. *Section 11(b) of the Charter and the Temporal Scope of the Right to Be Tried Within a Reasonable Time*

(1) Protection Conferred by Having the Status of a Person Charged With an Offence

[22] Timely justice is one of the characteristics of a free and democratic society, and the conduct of trials within a reasonable time is of central importance in the administration of Canada's criminal justice system (*Jordan*, at paras. 1 and 19). Section 11(b) of the *Charter* reflects the importance of this principle by guaranteeing any person charged with an offence the right "to be tried within a reasonable time". The purpose of this provision is to protect both the rights of accused persons and the interests of society as a whole (*R. v. K.J.M.*, 2019 SCC 55, [2019] 4 S.C.R. 39, at para. 38). At the individual level, trials within a reasonable time are essential to protect the liberty, security and fair trial interests of any person charged with an offence, who, it should be remembered, is presumed to be innocent (*Jordan*, at para. 20; see also *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, at para. 30, citing *Morin*, at pp. 801-3). At

the collective or societal level, timely trials encourage better participation by victims and witnesses, minimize the “worry and frustration [they experience] until they have given their testimony” and allow them to move on with their lives more quickly (*Jordan*, at para. 24, quoting *R. v. Askov*, [1990] 2 S.C.R. 1199, at p. 1220; see also *Jordan*, at para. 23). Timely trials also help to maintain public confidence in the administration of justice (*Jordan*, at para. 25; *Askov*, at pp. 1220-21).

[23] Section 11(b) protects an accused only while they have the status of a person charged with an offence (*R. v. Potvin*, [1993] 2 S.C.R. 880, at p. 908). The term “person charged with an offence” has been interpreted broadly by this Court and refers to a person who is the subject of criminal proceedings (*R. v. MacDougall*, [1998] 3 S.C.R. 45, at paras. 11-13). A person is charged with an offence from the time the charge is laid (*R. v. Kalanj*, [1989] 1 S.C.R. 1594, at p. 1602; *Potvin*, at p. 910) until the final resolution of the matter and the end of the sentencing process (*MacDougall*, at paras. 10 and 17-18; *R. v. K.G.K.*, 2020 SCC 7, at paras. 26-27). On appeal, an accused is no longer a person charged with an offence (*Potvin*, at pp. 911-12; *MacDougall*, at para. 17). The accused reverts to this status only if the trial decision is set aside and a new trial is ordered (*Potvin*, at p. 912).

[24] While s. 11(b) protects an accused throughout the period when they have the status of a person charged with an offence, the framework established in *Jordan* has a limited temporal scope. The presumptive ceilings apply only to delay in holding the trial.

(2) Temporal Scope of the *Jordan* Ceilings

[25] Prior to *Jordan*, s. 11(b) applications were decided under the framework established in *Morin*. That framework involved a test with four factors that were to be balanced to determine whether trial delay was 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; *Godin*, at para. 18; *Morin*, at pp. 787-88).

[26] In an effort to end the culture of complacency that had developed in the criminal justice system, which tolerated excessive delay in bringing accused persons to trial, this Court established a new framework in *Jordan* for the application of s. 11(b). The Court set two ceilings beyond which delay is presumptively unreasonable: (1) a ceiling of 18 months for simple cases going to trial in the provincial court, and (2) a ceiling of 30 months for cases going to trial in the superior court or in the provincial court after a preliminary inquiry (para. 46). Delay attributable to the defence is subtracted from the total delay (paras. 47 and 60). If the net total delay exceeds the applicable ceiling, it is presumptively unreasonable. The Crown can then attempt to show that the delay is reasonable by raising exceptional circumstances (para. 47). If the net total delay is below the ceiling, the defence can try to establish that the delay is unreasonable by showing 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” (para. 48 (emphasis in original)).

[27] The presumptive ceilings set in *Jordan* do not apply to the entire period when an accused is a person charged with an offence. The framework established in that case is limited in scope, since it provides a solution to a specific problem. *Jordan* deals with the culture of complacency that allows for excessive delay in bringing an accused to trial (*K.G.K.*, at para. 34, citing *Jordan*, at paras. 2, 4, 13, 117, 121 and 129). The new framework applies to the delay from the charge to the actual or anticipated end of trial, 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” (*K.G.K.*, at para. 31; see also para. 33; *Jordan*, at para. 47; *R. v. Rice*, 2018 QCCA 198, at para. 41 (CanLII)). Deliberation time is excluded from this framework (*K.G.K.*, at para. 50). Sentencing proceedings are also excluded from the framework. Although the Court recognized in *Jordan* that s. 11(b) continues to apply between conviction and sentencing, it made no comment on how such delay should be treated (para. 49, fn. 2).

[28] *Jordan* also does not address the question of when an accused must bring a motion for a stay of proceedings. In this regard, it should be noted that the Court declined to decide how the presumptive ceilings should be applied where, for example, a s. 11(b) application is brought following a conviction (para. 49, fn. 2). Nor does *Jordan* set out the framework that applies in cases where a new trial is ordered.

[29] To determine whether first-trial delay may be raised under the *Jordan* framework after a new trial has been ordered, it is necessary to consider, first, the duty of an accused to act proactively with respect to delay and, second, the timing of an application based on unreasonable delay and the possibility of obtaining a remedy for the delay complained of.

B. *After a New Trial Is Ordered, Can an Accused File a Section 11(b) Motion for a Stay of Proceedings Based on Delay in the Accused's First Trial?*

(1) *Jordan and the Duty of an Accused to Raise an Infringement of Their Right to Be Tried Within a Reasonable Time in a Timely Manner*

[30] While *Jordan* does not indicate the point in time when an accused must bring a s. 11(b) motion, the Court has nonetheless been clear about how it wishes all participants in the criminal justice system to act: at all stages of the trial process, everyone must take proactive measures to remedy any delay and to ensure that the accused is tried in a timely manner (*Jordan*, at paras. 137-39; *R. v. Thanabalasingham*, 2020 SCC 18, at para. 9).

[31] The new framework marks a shift away from a retrospective approach and adopts a prospective standpoint that allows the various participants to know the bounds of reasonableness from the outset of the proceedings (*Jordan*, at para. 108; *K.G.K.*, at para. 43). The predictability of the new framework makes the parties more accountable and encourages them to be proactive about delay (*Jordan*, at para. 112; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 36). In the case of the Crown, the

prospective approach clarifies the content of its constitutional obligation to bring the accused to trial within a reasonable time (*Jordan*, at para. 112). As for the accused, the predictability provided by the new framework requires that they be an active part of the solution to the problem of delay in criminal cases (*Jordan*, at paras. 84-86 and 113).

[32] As this Court wrote in *Morin*, “[t]he purpose of s. 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits” (p. 802). This section was not intended to make it possible for an accused to frustrate the ends of justice (*Jordan*, at paras. 21, 60 and 63). As the Court also recently noted, an accused may not benefit from the lengthening of delay where it is caused by the accused’s own conduct (*R. v. Boulanger*, 2022 SCC 2, at para. 6; *R. v. Ste-Marie*, 2022 SCC 3, at para. 11).

[33] Defence conduct is considered under the *Jordan* framework, since the delay attributable to the defence is subtracted from the gross total delay (para. 60). Defence delay has two components: (1) delay waived by the defence, and (2) delay caused solely or directly by the defence (*Jordan*, at paras. 61 and 63; *Cody*, at para. 26). Inaction may amount to illegitimate conduct on the part of the defence, because “[i]llegitimacy may extend to omissions as well as acts” (*Cody*, at para. 33). As this Court said in *Cody*, the defence may not benefit from its own inaction or lateness in taking action; it must act proactively:

Accused persons must bear in mind that a corollary of the s. 11(b) right “to be tried within a reasonable time” is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to “actively advoc[e] their clients’ right to a trial within a reasonable time,

collaborat[e] with Crown counsel when appropriate and . . . us[e] court time efficiently” (*Jordan*, at para. 138). [para. 33]

[34] An accused who sees delay lengthening must therefore respond in a proactive manner. Being proactive may mean filing a s. 11(b) motion where the accused believes that their right to be tried within a reasonable time is not being or will not be respected (*Jordan*, at para. 85). Like any other application made by an accused, a motion of this kind must be brought “reasonably and expeditiously” (para. 85). Lateness in raising delay is contrary to the proper administration of justice, because such a practice serves to waste judicial resources. Indeed, the *Jordan* framework is specifically designed to eliminate inefficient practices that impact on the justice system (paras. 41 and 116). Bringing a s. 11(b) motion before the end of the trial allows the accused to alert the Crown and the court to their concerns about delay. As a result, all parties can take proactive measures and cooperate to expedite the proceedings.

[35] It is generally recognized that an accused who raises the unreasonableness of delay after trial (*R. v. Rabba* (1991), 64 C.C.C. (3d) 445 (Ont. C.A.)), and particularly after conviction (*R. v. Warring*, 2017 ABCA 128, 347 C.C.C. (3d) 391, at para. 11; *R. v. C.D.*, 2014 ABCA 392, 588 A.R. 82), is not acting in a timely manner. In *K.G.K.*, Moldaver J. interpreted the prospective approach adopted in *Jordan* as “encourag[ing] pre-trial s. 11(b) applications” (para. 43 (emphasis added)). The defence is in fact encouraged to act before the start of the trial, since the *Jordan* framework allows “the parties to know ‘*in advance*, the bounds of reasonableness so

proactive measures can be taken to remedy any delay” (*K.G.K.*, at para. 43, quoting *Jordan*, at para. 108 (emphasis in original)).

[36] In short, a duty to act proactively also rests on the accused. As a result, the accused must indicate that their right to be tried within a reasonable time has not been respected and, where the circumstances require, bring a motion for a stay of proceedings in a timely manner. As a general rule, this means before the trial is held. By the time the trial dates are set, the parties are generally in a position to know whether the trial delay will exceed the applicable presumptive ceiling, and the defence can raise any concerns it may have. However, it is not out of the question that, exceptionally, an infringement of the s. 11(b) right will reveal itself only once the trial has begun. In such a case, the accused must also act proactively.

(2) A Section 11(b) Application Can Be Brought on Appeal Only Exceptionally

[37] If a s. 11(b) motion is considered late when filed after the end of a trial, only exceptionally will an accused be able to raise this issue for the first time on appeal.

[38] Raising new arguments on appeal is generally discouraged in criminal matters, because the best interests of justice require finality in the adjudication of such matters at trial, as L’Heureux-Dubé J., dissenting, but not on this point, explained in *R. v. Brown*, [1993] 2 S.C.R. 918:

Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of criminal matters could be spread out over years in the most routine cases. Moreover, society's expectation that criminal matters will be disposed of fairly and fully at the first instance and its respect for the administration of justice would be undermined. Juries would rightfully be uncertain if they were fulfilling an important societal function or merely wasting their time. For these reasons, courts have always adhered closely to the rule that such tactics will not be permitted. [pp. 923-24]

[39] A motion for a stay of proceedings brought for the first time on appeal, without the trial judge having had an opportunity to consider its merits, should normally be dismissed (*Rabba; R. v. G. (L.)*, 2007 ONCA 654, 228 C.C.C. (3d) 194, at paras. 42-43; *Phillips v. R.*, 2017 QCCA 1284, at paras. 29-31 (CanLII)). The trial court is best placed to rule on such a motion, because it is the one that has a complete picture of the proceedings. Indeed, this Court noted in *Jordan* that trial judges are uniquely positioned to categorize various periods of delay (paras. 71 and 79).

[40] Generally speaking, appeal courts are reluctant to entertain new arguments, because they are deprived of the trial court's perspective (*R. v. Roach*, 2009 ONCA 156, 246 O.A.C. 96, at para. 6; *Ontario (Labour) v. Cobra Float Service Inc.*, 2020 ONCA 527, 65 C.C.E.L. (4th) 169, at para. 19). This is also the case for constitutional issues (*Roach*, at para. 6; *R. v. Chambers*, 2013 ONCA 680, 311 O.A.C. 307, at para. 45). Only in exceptional circumstances will a party be permitted to raise a new argument on appeal (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at paras. 20-23; *Phillips*, at para. 14).

[41] Where an argument is raised for the first time on appeal, the appeal court must determine whether the situation is an exceptional one in which the exercise of its discretion is warranted, having regard to all of the circumstances. For this purpose, the court must consider, among other things, “the state of the record, fairness to all parties, the importance of having the issue resolved by this [c]ourt, its suitability for decision and the broader interests of the administration of justice” (*Guindon*, at para. 20). What is meant by “state of the record” is that there must be sufficient evidence in the record for the court to decide the issue (see *Phillips*, at para. 19; *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 36). In every case, an appeal court’s “discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties” (*Guindon*, at para. 23; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 33; *Phillips*, at para. 14; *Ontario (Labour)*, at para. 20; *G. (L.)*, at para. 43).

[42] It is therefore only exceptionally that an infringement of the right to be tried within a reasonable time can be raised by an accused for the first time on appeal. The outcome of an unreasonable delay application brought following an order for a new trial must now be considered.

(3) An Accused’s Silence or Inaction Does Not in Itself Amount to a Waiver of Delay

[43] The Crown argues that where an accused raises first-trial delay in the course of a retrial, the accused's failure to allege an infringement of their right to be tried within a reasonable time during their first trial or on appeal can be raised against them. In support of this argument, the Crown suggests that a court can regard an accused's long silence or lengthy inaction as [TRANSLATION] "amount[ing] to a clear and unequivocal waiver or an acceptance of the delay associated with a past trial" (A.F., at para. 24; see also para. 42).

[44] I must reject that proposition. Although the time at which an accused raises the unreasonableness of trial delay may affect the outcome of their motion, waiver of the delay cannot be inferred solely from the accused's silence or failure to act. This is what the Court's jurisprudence teaches, and, in my view, it would be inappropriate to depart from it. In addition to being wrong in law, this proposition by the Crown is a needless one, because this Court has clearly established how an accused's inaction or lateness in taking action must be assessed.

[45] This Court has repeatedly stated that the requirements for finding a waiver of a constitutional right must be strictly construed but that this does not preclude an accused from waiving a procedural right (*R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 203; *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41, at pp. 48-49). An accused may waive a procedural rule as long as this is done "with full knowledge of the rights the procedure was enacted to protect and the effect that waiver will have on those rights" (*R. v. Tran*, [1994] 2 S.C.R. 951, at p. 997).

[46] Section 11(b) of the *Charter* states that any person charged with an offence has the right to be tried within a reasonable time. Such a person may waive a given delay, which will then be subtracted from the total delay (*Jordan*, at para. 61). It is important to note that, where “waiver” concerns the right set out in s. 11(b) of the *Charter*, “it is not the right itself which is being waived but merely the inclusion of specific periods in the overall assessment of reasonableness” (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1686, quoted in *Jordan*, at para. 61).

[47] Waiver “can be explicit or implicit, but in either case, it must be clear and unequivocal” (*Jordan*, at para. 61; see also *Morin*, at p. 790; *Askov*, at p. 1228). In this sense, as the Court stated in *Askov*, an accused’s mere silence or inaction cannot indicate a waiver of delay:

The failure of an accused to assert the right does not give the Crown licence to proceed with an unfair trial. Failure to assert the right would be insufficient in itself to impugn the motives of the accused as might be the case with regard to other s. 11 rights. Rather there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s. 11(b) guarantee, understood its nature and has waived the right provided by that guarantee. Although no particular magical incantation of words is required to waive a right, nevertheless the waiver must be expressed in some manner. Silence or lack of objection cannot constitute a lawful waiver. [Emphasis added; pp. 1228-29.]

(See also *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 929.)

[48] Waiver must be proved by the prosecution (*Askov*, at p. 1229). For a court to find that delay has been waived, the accused must therefore take “some direct action from which a consent to delay can be properly inferred” (*Askov*, at p. 1229). The “mere

silence of the accused is not sufficient to indicate a waiver of a *Charter* right” (*Askov*, at p. 1229; see also *Mills*, at p. 929). To be inferable, implicit waiver “requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver” (*Morin*, at p. 790).

[49] Lateness in bringing a s. 11(b) motion for a stay of proceedings nonetheless remains an important factor in determining whether an accused has waived delay. In *Rabba*, Arbour J.A., as she then was, noted that the fact that such a motion is brought after trial “would, in most cases, be fatal” and “would normally amount to a waiver of any claim which may arise under s. 11(b) of the Charter” (p. 447). While lateness in bringing a motion for a stay of proceedings may be a relevant factor, it cannot in itself establish waiver. This is how Arbour J.A.’s comments in *Rabba* must be interpreted. Waiver is established on the basis of an accused’s conduct (*Askov*, at p. 1228), having regard to the circumstances of each case (see, e.g., *Warring*, at paras. 11-13 and 27).

[50] I note as well that the Crown’s general proposition is not easily incorporated into the new framework established by *Jordan*, under which prejudice to the accused is no longer considered as an analytical factor, as it was under the *Morin* framework. The Crown’s proposition is at odds with the new framework, in that it resurrects the uncertainty and complexity of the prejudice inquiry. Under the *Morin* framework, it could be inferred that long delays had prejudiced an accused even where there was no direct evidence of prejudice (p. 801; *Godin*, at para. 31). Conversely, the

Crown could raise the accused's inaction to show that such conduct was inconsistent with a desire for a timely trial (*Morin*, at pp. 790 and 802-3). However, establishing prejudice was a complicated and uncertain process, as the absence of a consistent standard made the application of the former framework "highly unpredictable" and the treatment of prejudice "highly subjective" (*Jordan*, at paras. 32-33). The *Jordan* framework eliminates the uncertainty of the previous framework, because prejudice is taken into consideration in a different way: once the presumptive ceiling is breached, the accused is now presumed to have suffered prejudice to their liberty, security of the person, and fair trial interests (para. 54). Adopting the Crown's proposition would therefore, to some degree, have the effect of indirectly resurrecting the possibility of raising an accused's inaction or lateness in taking action in order to disprove the existence of prejudice.

[51] This proposition by the Crown also makes the application of the current framework more complex. Indeed, it involves a multi-factored test for inferring waiver from an accused's inaction. The factors that the Crown suggests considering include the duration of the inaction, the accused's conduct and situation, the prosecution's conduct and the manner in which the earlier proceeding unfolded (*A.F.*, at paras. 25 and 77 et seq.). However, *Jordan* already specifies how an accused's inaction or silence is to be treated. Delay may be attributed to the defence where it is waived by the accused or where it is caused solely by the accused's conduct, which includes inaction (*Jordan*, at paras. 61-63; *Cody*, at para. 33).

[52] In short, therefore, the Crown's proposition cannot be adopted. An accused's silence or inaction cannot in itself give rise to an inference that the accused has waived delay, although it may be a relevant and important factor in the waiver inquiry. This conclusion is an obvious one given the fact that any person charged with an offence has the right to be tried within a reasonable time without having to explicitly state their wish to be protected by this right (*Rabba*; see also *Morin*, at p. 802). An accused nonetheless has a duty to raise an infringement of their right to be tried within a reasonable time in a timely manner. At the risk of repeating myself, an accused may not benefit from their own inaction or lateness in taking action. The new framework sanctions an accused's inaction or lateness in taking action. Inaction may be considered illegitimate conduct, and the delay associated with it may be attributed to the defence when the unreasonableness of delay is being determined (*Jordan*, at paras. 63, 113 and 121; *Cody*, at para. 33).

(4) An Accused May Not Raise First-Trial Delay Once a New Trial Is Ordered

[53] In *Jordan*, the Court established that delay runs from the charge to the actual or anticipated end of trial (para. 47), but it did not specify how an order for a new trial affects the calculation of delay. However, *Potvin* provides useful guidance in this regard. First, Sopinka J. stated in that case that such an order revives the accused's status as a person charged with an offence (p. 912). Second, he added, citing D. H. Doherty, that the "constitutional clock" for calculating delay begins running at the time the appellate court orders a new trial:

This does not mean that when there is an adjudication relating to a charge which is appealed, s. 11(b) is spent. If on the appeal the judgment is set aside and the matter is remitted for trial, the accused reverts to the status of a person charged. As stated by D. H. Doherty (now a justice of the Court of Appeal for Ontario) in “More Flesh on the Bones: The Continued Judicial Interpretation of s. 11(b) of the Canadian Charter of Rights and Freedoms” (1984), Canadian Bar Association — Ontario; Annual Institute on Continuing Legal Education, at p. 9:

Section 11(b) does not appear to operate at the appellate stage. Section 11(b) guarantees a trial within a reasonable time, not a final determination of the matter at an appellate level within that time. If, however, a new trial is ordered on appeal, or some other order is made directing the continuation of the trial proceedings, the constitutional clock should be rewound at the time of the order by the appellate court. [Bold and underlining added; pp. 912-13.]

[54] Prior to *Jordan*, appellate jurisprudence seemed to allow an accused who was sent back to be tried again to raise the delay in both their first trial and their retrial (see *R. v. Boisvert*, 2014 QCCA 191, at para. 54 (CanLII); *R. v. Barros*, 2014 ABCA 367, 317 C.C.C. (3d) 67, at paras. 51-53; *R. v. Nikkel*, 2009 MBCA 8, 240 Man. R. (2d) 1; *R. v. Fitts*, 2015 ONCJ 746, at para. 5 (CanLII)). In the view of M. Vauclair and T. Desjardins, that approach was implicitly endorsed by this Court in *R. v. Collins*, [1995] 2 S.C.R. 1104 (*Traité général de preuve et de procédure pénales* (28th ed. 2021), at No. 28.30). In that case, the accused persons had applied for a stay of proceedings at their retrial, and the stay had been ordered by the trial judge but set aside by the Court of Appeal. This Court restored the stay of proceedings on the ground that the delay was unreasonable under *Morin*. However, it did not discuss the right of an accused to bring such an application in a retrial.

[55] The situation is completely different now, because the Court has made stays of proceedings subject to new parameters, as set out in *Jordan*. It should now be understood that the computation of delay restarts at zero when a new trial is ordered. This is also the interpretation adopted by the Ontario Court of Appeal and the Alberta Court of Appeal (*R. v. MacIsaac*, 2018 ONCA 650, 141 O.R. (3d) 721, at para. 31; *R. v. JEV*, 2019 ABCA 359, 381 C.C.C. (3d) 392, at paras. 36-37; *R. v. J.A.L.*, 2019 ABCA 415, at para. 6 (CanLII)). What was said in *Potvin* cannot be interpreted in any other way today. Since the adoption of the *Jordan* framework, which requires an accused to take appropriate action in a timely manner, an accused cannot bring a s. 11(b) motion during a retrial based on delay in their first trial.

[56] Lateness in taking action impedes the proper administration of justice and contributes to maintaining inefficient practices that have a negative impact on the justice system and its limited resources (*Jordan*, at paras. 41 and 116). Because the prospective approach adopted in *Jordan* allows the parties to know from the outset what time is reasonable for their proceedings, they have a responsibility to take proactive measures to prevent that time from being exceeded. This responsibility lies upon both the Crown and the defence. An accused who sees delay lengthening must act reasonably and expeditiously (*Jordan*, at para. 85). Bringing a motion in a retrial for a stay of proceedings based on first-trial delay is contrary to this duty and interferes with the proper administration of justice. It disregards the very reason for which a new trial was ordered, as it essentially results in a stillborn trial. Moreover, given that such

a motion is generally recognized as being late if it is brought after a trial has begun, it would be illogical to permit an accused to bring it even later, in the course of a retrial.

[57] In the instant case, even though the Quebec Court of Appeal recognized that the delay clock is reset to zero after a new trial is ordered, it found that this principle does not prevent an accused from raising first-trial delay after such an order is made (para. 59). In support of this position, Levesque J.A. made two main points. First, relying on the principle that silence does not amount to a waiver, he suggested that a motion cannot be dismissed solely for being late (paras. 60-61, 64 and 70). Second, he stated that *Jordan* does not seem to prohibit such a motion from being brought in the course of a retrial, since the new framework no longer allows the Crown to raise lateness in taking action against the accused (para. 69).

[58] That approach should not be adopted. The Court of Appeal failed to consider the fact that an accused also has a duty to act proactively. On the first point made by the Court of Appeal, I must acknowledge that the court was correct in stating that an accused's long silence cannot in itself give rise to an inference that delay has been waived. With respect, however, I am of the view that the Court of Appeal erred in accepting that this may justify bringing a s. 11(b) motion after a new trial has been ordered. While an accused has no legal obligation to assert their right to be tried within a reasonable time in order for that right to exist (*Morin*, at p. 802, cited by the Court of Appeal, at para. 60), this does not entitle the accused to do nothing when they believe that their s. 11(b) right is not being or will not be respected. The Court's teachings are

clear on this point: s. 11(b) does not allow an accused to benefit unduly from the lengthening of delay, notwithstanding the fact that it is the Crown that has a constitutional obligation to bring the accused to trial.

[59] With regard to the second justification it put forward, the Court of Appeal also failed to consider the responsibility that rests on accused persons when it comes to delay. It is true that prejudice is no longer a factor to be taken into account under the new framework and that the Crown can no longer attempt to justify a delay that is now presumptively unreasonable by inferring from an accused's lateness in bringing a motion that the accused is satisfied with the situation (*Jordan*, at paras. 54 and 81). However, the fact that the Crown can no longer raise the lateness of a motion against an accused does not authorize a lack of diligence by the accused in this regard. *Jordan* is clear on this point.

[60] When a new trial is ordered, the constitutional clock for calculating delay is reset to zero (*Gakmakge v. R.*, 2017 QCCS 3279; *JEV*, at para. 37; *Masson v. R.*, 2019 QCCS 2953, 57 C.R. (7th) 415, at para. 91). It follows that only the retrial delay can be counted when a s. 11(b) application is brought in that new trial. This is not to say, however, that a court may not consider first-trial delay in assessing the reasonableness of retrial delay in certain exceptional circumstances.

C. *Do the Presumptive Ceilings Established in Jordan Apply to Retrial Delay?*

(1) The Presumptive Ceilings Established in *Jordan* Apply to the Delay in a New Trial

[61] In *Jordan*, the Court did not discuss how the framework it created would apply in a context where a new trial was ordered. However, this does not mean that the presumptive ceilings it established do not apply to new trials. *Jordan* has a limited temporal scope and does not encompass all types of delay (para. 49; *K.G.K.*, at para. 39); the presumptive ceilings set by the Court relate specifically to trial delay. *Jordan*'s particular focus was on addressing the culture of complacency toward courtroom delay (para. 45). The presumptive ceilings are intended to facilitate this culture shift by encouraging parties to act proactively in order to expedite proceedings (para. 112). After a new trial is ordered, the accused regains the status of a person charged with an offence and the Crown once again has a duty to bring the accused to trial within a reasonable time. Delay following such an order is trial delay and therefore falls within *Jordan*. Although I do not consider it appropriate to set new ceilings for retrials, as I will explain below, I nevertheless cannot adopt the approach of the Alberta Court of Appeal, which declined to apply any ceiling in this context (*JEV*, at paras. 40, 42 and 50). Not applying the *Jordan* ceilings to retrials would be contrary to the principles established in that case.

(2) The Presumptive Ceilings Should Not Be Changed

[62] The respondent and certain interveners propose the adoption of lower presumptive ceilings for retrials. This proposal cannot be accepted.

[63] This Court recently had to consider a similar proposal in *K.J.M.* In that case, the appellant asked the Court to establish a 12-month presumptive ceiling for single-stage proceedings in youth justice courts under the *Youth Criminal Justice Act*, S.C. 2002, c. 1. However, the Court declined to set a lower ceiling for youth cases. Moldaver J., writing for the majority, noted in particular that the appellant had failed to show that the criminal justice system specifically for young persons had a problem with delay that warranted “the imposition of a new constitutional standard” (para. 63).

[64] It must be remembered that the presumptive ceilings adopted in *Jordan* address a particular problem, that is, the culture of complacency toward trial delay. The retrospective approach that characterized the *Morin* framework, together with the difficulties that arose in applying that framework, played a part in exacerbating that situation. The problem was a real one, which the presumptive ceilings established by this Court in *Jordan* were specifically intended to remedy.

[65] In this case, the respondent has not shown that there is a real problem, let alone one that could warrant the imposition of a new constitutional standard. To support their proposal, the respondent and the Association des avocats de la défense de Montréal-Laval-Longueuil refer mainly to the suggestion made by A. D. Gold, M. Lacy and L. Metcalfe that a six-month ceiling for trials in provincial courts and an eight-month ceiling for trials in superior courts would be appropriate (*A Practical Guide to the Charter: Section 11(b)* (2019), at pp. 15-16).

[66] I must point out that the presumptive ceilings established in *Jordan* provide a uniform general framework for assessing the reasonableness of the delay between the charge and the end of trial, “irrespective of the varying degrees of prejudice experienced by different groups and individuals” (*K.J.M.*, at para. 65). Like Moldaver J., I am of the view that setting ceilings applicable to new trials “would undermine this uniformity and lead to a multiplicity of ceilings, each varying with the unique level of prejudice experienced by the particular category or subcategory of persons in question” (para. 65). It follows that the creation of a new ceiling in this case would also be “incompatible with the uniform-ceiling approach adopted in *Jordan* and would undermine its objective of simplifying and streamlining the s. 11(b) framework” (para. 65).

[67] I would also observe, as Moldaver J. noted in *K.J.M.*, that *Jordan* establishes ceilings for reasonableness, not floors for unreasonableness, and that in most cases accused persons should be brought to trial within a time that is below the ceilings:

While the presumptive ceilings are a significant chapter in *Jordan*, they are not the full story. *Jordan* established ceilings, not floors. While the ceilings offer a bright-line approach, they are supplemented by a more flexible, case-specific approach to delay *below* the ceiling. In this way, *Jordan* marries uniformity with flexibility.

...

In embracing this proactive approach, prosecutors should bear in mind that the presumptive ceiling “is not an aspirational target”, 18 or 30 months is still “a long time to wait for justice”, and most cases “can and should” be completed in less time (*Jordan*, at paras. 56-57). [Underlining added; paras. 69 and 82.]

[68] The *Jordan* framework is therefore flexible enough to be used by courts to determine whether retrial delay is reasonable, even where it is below the presumptive ceiling. Delay is not reasonable simply because it is within the applicable ceiling; it is only presumptively reasonable. Delay may be found to be unreasonable “even if it falls below the presumptive ceiling” (*Jordan*, at para. 82).

(3) Factors to Be Considered in Determining the Reasonableness of Retrial Delay Where It Is Below the Applicable Presumptive Ceiling

[69] The retrial context differs from that of a first trial, since normally the parties have already presented their evidence and arguments a first time. To take account of the specific nature of this context, I propose two factors that can be considered in analyzing the reasonableness of retrial delay. These factors must, of course, be applied flexibly, having regard to the circumstances of each case.

[70] The first factor is the need to prioritize retrials when scheduling hearings. The parties are agreed on this point. Appeal courts and trial courts have also recognized it on a number of occasions (*JEV*, at para. 38; *MacIsaac*, at paras. 23-25; *J.A.L.*, at para. 14; *R. v. Richard*, 2017 MBQB 11, 375 C.R.R. (2d) 61, at para. 32). Participants in the criminal justice system, particularly the Crown and the court, must act proactively when a new trial is ordered so that dates can quickly be set for that trial, which must normally be prioritized. As mentioned above, the accused also has a role to play in this regard and must take proactive measures for this purpose.

[71] The second factor goes hand in hand with the first: retrials are, as a general rule, to be conducted in less time than first trials. The parties are also agreed on this point. It is commonly recognized that retrials will have a shorter time frame than first trials because the parties' respective evidence and positions have been presented a first time (*JEV*, at para. 38; *MacIsaac*, at para. 27; *Masson*, at para. 91). However, I note that it is not out of the question for a retrial comparable in length to the first trial to be justified in certain circumstances. For example, a change in strategy by the prosecution or the accused might mean that the work done during the first trial is no longer relevant (*JEV*, at para. 41; *Masson*, at para. 89). This is why the analysis of delay must remain contextual and take account of the specific circumstances of each case.

[72] These two factors are grounded in the duty of all participants in the criminal justice system to act in a timely manner. In the retrial context, this means that everyone, and especially the Crown, must ensure that retrials are prioritized when trial dates are set and that retrial delay is as short as possible. Recognition of these factors is based on the objectives of s. 11(b). First, prioritizing retrials and considering that, as a general rule, retrials should be conducted in less time protects the s. 11(b) rights of accused persons and limits the negative consequences of being charged with a criminal offence (*Jordan*, at para. 20; *Morin*, at pp. 801-3). The making of an order for a new trial prolongs the period during which the accused is a person charged with an offence as well as the stress, anxiety and stigma associated with having that status. Indeed, this Court reiterated in *Jordan* that lengthy delay gives rise to an inference of prejudice to the accused (paras. 34, 54 and 110). Although *Jordan* eliminates the concept of

prejudice as an analytical factor, this concept nonetheless remains central under the new framework, because the setting of presumptive ceilings was in fact based on the presumption that significant delay is prejudicial to an accused (para. 54). Second, the adoption of these two factors reflects recognition of the fact that prolonged delay also causes prejudice to victims, witnesses and the justice system as a whole (para. 110; see also paras. 22-27).

[73] These factors must be assessed contextually, as required by *Jordan*. In this regard, first-trial delay is one of the circumstances that may be taken into account in the assessment. In a context where the first-trial delay exceeds the applicable ceiling, failure to act expeditiously and to prioritize the case could weigh in favour of a finding that the retrial delay is unreasonable. However, the analysis remains contextual and flexible, and it is for the court to make this determination in light of the specific circumstances of each case. The fact that this contextual element is considered does not allow an accused to raise first-trial delay indirectly. It must be remembered that the constitutional clock for delay is reset to zero when a new trial is ordered and that, from that point on, first-trial delay can no longer be counted. Giving too much weight to first-trial delay would be contrary to the principles set out in *Jordan*, which creates, first and foremost, a prospective framework that encourages parties to act proactively. Where a s. 11(b) motion is brought in the course of a retrial, it is the delay in that trial that remains the focus of the analysis.

V. Application to This Appeal

[74] In this case, the respondent did not act in a timely manner. Neither before nor during his first trial did he raise an infringement of his right to be tried within a reasonable time. Nor did he make an argument to this effect in the Court of Appeal after the Crown decided to appeal the verdict. It was not until a few months before his retrial was to be held that he brought his s. 11(b) motion.

[75] Although the retrial judge found that there was evidence to suggest that the accused had been concerned about delay during the first trial, the fact remains that he never applied for a remedy for that delay. The respondent was charged in February 2011, and his first trial ended in May 2016. He was acquitted in February 2017. The Crown appealed the trial judge's decision. In the Court of Appeal, the respondent did not allege that there had been unreasonable delay in his trial. A new trial was ordered on June 13, 2018, and the respondent brought a s. 11(b) motion for a stay of proceedings for unreasonable delay for the first time on December 28, 2018. That motion concerned the delays in the first trial and the retrial.

[76] Given that the respondent brought his s. 11(b) application in the course of his retrial, the delay in his first trial cannot be considered in calculating the total delay. Only the delay since the order for a new trial is counted. The trial judge therefore erred in combining the delays for the two trials in assessing whether the s. 11(b) right had been infringed. Such an approach in fact leads to an absurd result, because adding the delays together makes ordering a new trial pointless. While the Court of Appeal correctly recognized that combining the delays for the two trials was inconsistent with

the new framework established in *Jordan*, the two-step approach it proposed is also wrong, because it allows an accused to raise first-trial delay after a retrial has been ordered.

[77] To determine whether a motion for a stay of proceedings is well founded, a court must begin by calculating the total delay between the order for a new trial and the actual or anticipated end of that trial. Here, the order was made by the Court of Appeal on June 13, 2018. At the time the motion for a stay of proceedings was argued, the anticipated end of the trial was April 18, 2019, and the total delay was estimated at 10 months and 5 days. None of the delay was attributable to the defence. This delay is well below the 30-month presumptive ceiling applicable to the first trial.²

[78] In this case, if the respondent were to be retried, none of the factors associated with this specific context supports a finding that his right to be tried within a reasonable time was infringed. There is no evidence establishing that the retrial was not prioritized. In October 2018, the parties scheduled that trial for the first available period, April 29 to May 31, 2019, resulting in a total delay of 11.5 months. In January 2019, after the respondent brought his s. 11(b) application, the trial dates were moved up to March 11 to April 18, 2019. The anticipated retrial delay then became 10 months and 5 days, which is reasonable and much shorter than the first-trial delay, in addition to being below the 30-month presumptive ceiling. It is true that the first trial seems to have taken markedly longer than it should have. In this case, however, the length of the

² The presumptive ceiling applicable in this case is the 30-month ceiling, because a preliminary inquiry was held in the first trial.

first-trial delay has relatively little, if any, weight. Given that the anticipated retrial delay is very short and that the case was prioritized, I conclude that the delay is reasonable and that there are no grounds for a stay of proceedings.

[79] In the end, I am of the view that both the trial judge and the Court of Appeal erred in finding that the respondent's right to be tried within a reasonable time had been infringed.

VI. Disposition

[80] For these reasons, I would allow the appeal, set aside the stay of proceedings and remand the case to another judge of the Court of Québec for the continuation of the trial.

English version of the reasons delivered by

CÔTÉ J. —

I. Overview

[81] This appeal concerns the interaction between the culture shift introduced by this Court since *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, the presumptive ceilings within which an accused must be brought to trial, and the situation — not

contemplated by *Jordan* — in which a new trial is ordered. We must propose a pragmatic solution that respects the right of an accused to be tried within a reasonable time while also remaining true to the principles established in *Jordan* when analyzing delay in the context of a retrial.

[82] In rendering its decision in *Jordan* on July 8, 2016, this Court reaffirmed the fundamental right of accused persons to be tried within a reasonable time and thoroughly changed the manner in which delay is treated. A change of direction was required to counter the culture of complacency that had developed among Canadian courts. New ceilings were established, and any delay that exceeds these ceilings is now presumptively unreasonable; an accused no longer has to prove prejudice to obtain a stay of proceedings.

[83] The corollary to this prospective framework is that it requires a certain level of proactivity from all participants in the justice system. An accused can be faulted for their inaction or lateness in taking action. Illegitimate conduct by an accused that is contrary to the values promoted by *Jordan* may justify attributing a portion of the delay to them.

[84] Of course, the Court's purpose in *Jordan* was not to provide second-rate justice to accused persons, but rather to ensure that their constitutional right to be tried within a reasonable time, guaranteed by s. 11(b) of the *Canadian Charter of Rights and Freedoms*, is respected. Where the prosecution breaches its duty and infringes this fundamental right, a stay of proceedings is the only possible remedy (*R. v. Rahey*,

[1987] 1 S.C.R. 588, at p. 614; *Jordan*, at paras. 35 and 47; *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 24).

II. Analysis

[85] I will say from the outset that I agree with the main principles in the analysis of my colleague Wagner C.J., including the fact that in *Jordan* the Court did not discuss how the ceilings would apply in the context of a retrial and that it is not necessary to set new ceilings. I also accept the two factors he proposes to consider in the analysis of the reasonableness of delay following an order for a new trial, where the delay is below the applicable presumptive ceiling. I agree that retrials should, generally, take less time than first trials and that retrials should be prioritized. My colleague's approach makes it possible, among other things, to fulfil the purpose for which a new trial is ordered, as such a trial might otherwise be "stillborn" (Chief Justice's reasons, at para. 56). I have no reservations in endorsing that approach, for the future. It reflects the culture shift required by *Jordan* and provides a pragmatic solution; it clarifies how an order for a new trial affects the calculation of delay, while retaining the ceilings established in *Jordan*. I will also say that I would most likely agree with my colleague's conclusion if the issue of reasonableness of delay arose in a situation where a new trial was ordered and all of the delay in the first trial was *subsequent to Jordan*. However, that is not the case here.

[86] Therefore, with great respect, I disagree with the result reached by my colleague, namely that the accused cannot obtain a stay of proceedings. I would dismiss

the appeal and uphold the stay of proceedings entered by the trial judge (2019 QCCQ 1236) and upheld by the Court of Appeal (2020 QCCA 666) because of a key feature of this case: the accused's first trial had been completed and judgment had been reserved by the time this Court rendered its decision in *Jordan*. I will explain.

[87] As my colleague aptly states at para. 68 of his reasons, the *Jordan* ceilings are merely *presumptive*. If they are exceeded, it is open to the prosecution to try to rebut the presumption and show that the delay is reasonable (*Jordan*, at paras. 68 et seq.). Conversely, the defence may attempt to rebut the presumption of reasonableness and show that the delay is unreasonable despite being below the ceiling (*Jordan*, at paras. 82 et seq.).

[88] This presumption of reasonableness may be rebutted through a contextual analysis of delay in which first-trial delay can be considered, as my colleague states (para. 73). In my view, this is one of the exceptional cases in which a stay of proceedings must be entered even though the accused did not raise the infringement of s. 11(b) until after a retrial was ordered. The specific context of the transition from the framework established in *R. v. Morin*, [1992] 1 S.C.R. 771, to the *Jordan* framework created an exceptional circumstance that justifies taking the delay of the first trial into account. When the first-trial delay is considered in assessing the reasonableness of the retrial delay, the presumption that the delay is reasonable is rebutted, notwithstanding the fact that the retrial delay is below the presumptive ceiling (see Chief Justice's reasons, at paras. 68 and 73).

[89] To begin with, silence alone cannot be held against the accused; he does not have to assert his right in order for it to exist (Chief Justice's reasons, at paras. 43-52). An accused may choose not to raise an infringement of s. 11(b) at a first trial and decide instead to tolerate the delay, particularly if they believe they will be acquitted. Seeking an acquittal cannot be viewed as inaction that amounts to illegitimate defence conduct.

[90] Nor do I think that the accused can be faulted for not raising delay in the Court of Appeal, for two reasons. First, he was *acquitted* at trial. It was the Crown that appealed the case. What then could be reasonably expected of the accused? He had to fight to have the appeal dismissed and the verdict of acquittal upheld. It seems to me that to hold otherwise is a disguised way of reproaching him for wanting an acquittal rather than a stay of proceedings, despite the fact that seeking an acquittal is not a legal strategy.

[91] Second, choosing to raise the issue of delay after trial, in the alternative, would not have been a good defence strategy, especially since, as my colleague says, "only exceptionally will an accused be able to raise this issue for the first time on appeal" (para. 37). In this regard, I agree with the general principles stated by my colleague with respect to new arguments raised for the first time on appeal. Other than in exceptional circumstances, it is not appropriate, once on appeal, to raise the delay in a trial that has come to an end. Appeal courts generally regard the fact that a s. 11(b) motion for a stay of proceedings is brought for the first time on appeal as being "fatal"

to the motion (*R. v. Rabba* (1991), 64 C.C.C. (3d) 445 (Ont. C.A.), at p. 447). In *M.G. v. R.*, 2019 QCCA 1170, the Quebec Court of Appeal stated that this is [TRANSLATION] “fatal” largely because bringing such a motion is improper given that the trial judge had no opportunity to assess the evidence and facts in support of it (para. 42).

[92] As the intervener the Association québécoise des avocats et avocates de la défense quite rightly noted, faulting an accused for not raising such an issue on appeal, while at the same time suggesting that it is improper to do so, creates a no-win situation for the accused. Such a situation is, moreover, especially detrimental to an accused who has been acquitted:

[TRANSLATION] Appeal courts ordinarily find that new grounds of appeal may not be raised in the absence of a factual analysis or decision by a trial judge. Similarly, it would be unthinkable for an accused who is acquitted to be able to file a cross-appeal on an issue that has never been raised. An accused who is acquitted has no right of appeal, yet this is the criticism made by the [Crown] against the [accused].

(I.F., at para. 23)

[93] It is therefore problematic to assert that the accused did not raise delay in a timely manner, given the fact that he was acquitted at trial and that he was, all things considered, restricted by law from raising it on appeal. At what point could he allege an infringement of his *Charter* right? Does an accused have to choose between the right to an acquittal, which flows from the presumption of innocence also guaranteed by the *Charter*, and the right to be tried within a reasonable time?

[94] Accordingly, and with respect, the result reached by my colleague strikes me as harsh and seems to disregard a fundamental fact: the accused's first trial had been completed and judgment had been reserved by the time this Court rendered its decision in *Jordan* on July 8, 2016. In my view, the delay in this case is markedly longer than it reasonably should have been. The fact that the retrial delay is below the presumptive ceiling does not protect all of the delay from the application of s. 11(b). The specific context of the transition from the subjective *Morin* framework to the prospective *Jordan* framework created an exceptional circumstance that justifies upholding the stay of proceedings.

[95] In reality, it has been more than 11 years since the respondent was charged, and his fate has still not been conclusively determined. Certain facts must be recalled. The delay from the first trial is 63 months and 8 days (1,924 days), only 1 day of which is attributable to the defence. A period of 38 days qualifies as a discrete event: the accused's counsel was appointed to the bench, which caused a delay. The net first-trial delay is therefore 62 months. The accused was charged on February 8, 2011, his trial ended on May 16, 2016, and judgment was reserved prior to *Jordan*. It was not until February 10, 2017 that the verdict was finally rendered: the accused was acquitted of all the charges against him. The Crown appealed the acquittal, and on June 13, 2018, the Court of Appeal ordered a new trial. Between June and November 2018, the accused did not know who would represent him at his new trial. An agreement was not reached until November 21, 2018, when the accused's counsel who represented him in the Court of Appeal accepted a mandate to defend him at the new trial. Just over a

month later, on December 28, 2018, the accused filed his motion for a stay of proceedings for unreasonable delay.

[96] The Crown's conduct following the order for a new trial warrants further comment. The delay between the order and the anticipated end date for the retrial, May 31, 2019, was 11 months. However, it was not until the accused filed his motion for a stay of proceedings that the prosecution, for the first time since 2011, adopted a proactive stance and took the necessary steps to move up the accused's retrial. The anticipated retrial delay then became 10 months and 5 days. However, in this case, even such a delay below the presumptive ceiling does not make it possible to disregard the first-trial delay.

[97] Although the charges involved are serious, this is not a complex case with an abundance of evidence. While the accused made sure that he had all the evidence in his possession in order to avoid a possible postponement of the trial, in addition to accepting the first dates available, the prosecution's actions are difficult to reconcile with the proactivity that is now expected of it. Despite the fact that the evidence already existed, the accused's counsel struggled to gain access to it.

[98] By the time a new trial was ordered on June 13, 2018, nearly two years had passed since *Jordan*. Not only was the Crown well aware of its obligations, but in addition, earlier dates were offered as soon as the motion for a stay of proceedings was served. Yet the retrial was treated [TRANSLATION] "in the same manner as if it were a first trial" (R.F., at para. 94).

[99] It seems to me that such a situation corresponds perfectly to the circumstances referred to by my colleague at para. 73 of his reasons. The Crown failed to prioritize the accused's case. In this context, even a delay of 10 months and 5 days in a non-complex case like this one is sufficiently long to justify taking the first-trial delay into account. Moreover, I note that such a situation is unlikely to happen again, as *Jordan* was decided more than five years ago. The fact remains that the system failed to try the accused in a diligent and reasonable manner. The stay of proceedings must be upheld; excessive delays cannot be tolerated.

[100] I cannot fault the accused for not acting proactively and filing a motion for a stay of proceedings before the end of his first trial. He had a right to have the trial completed and to obtain an acquittal. Fighting to secure an acquittal is a right, not a strategy. Nor can I bring myself to fault the accused for not acting in keeping with a culture shift that had not occurred at the time of the events. As I have said, the new framework is prospective. Not only had the culture shift not yet taken place, but the conduct of the prosecution and the court was the primary cause of the delay in the first trial. If the accused may not benefit from the delay he causes to obtain a stay of proceedings, it stands to reason that the prosecution cannot wipe the slate clean of the 62 months of first-trial delay attributable to it simply because the constitutional clock is reset "to zero" (Chief Justice's reasons, at para. 60).

[101] At the risk of repeating myself, it took 62 months to complete a trial that was supposed to last 2 days. More than eight months were then needed to reach a

verdict of acquittal. A new trial was subsequently ordered, *on the application of the Crown*, because of errors in the trial judgment. Apart from the 39 days mentioned above, the accused's conduct was beyond reproach between the charges in February 2011 and the order for a new trial in June 2018. Once his counsel was mandated, the motion for a stay of proceedings was filed little more than a month later, in December 2018. The accused cannot be faulted for not acting in a timely manner: in nearly 8 years of proceedings, only a period of 39 days from the first trial can be attributed to him.

[102] In my view, the accused is entitled to a stay of proceedings. He was a victim of the culture of complacency specifically addressed by *Jordan*. Given the uncertainty of the previous *Morin* framework, the fact that the accused did not move for a stay of proceedings cannot be held against him. He had a right to have the trial completed and to obtain an acquittal. This is a case in which the presumption that the delay is reasonable is rebutted. To conclude otherwise would be to lay on the accused's shoulders the prosecution's failure to bring him to trial in a manner respectful of his fundamental rights.

III. Conclusion

[103] I would dismiss the appeal and uphold the stay of proceedings.

Appeal allowed, CÔTÉ J. dissenting.

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