IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

Docket: AR20-30-09532	)	
B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	***C. L. Bauman***
	)	*for the Appellants*
- and -	)	*(via videoconference)*
	)	
MOHAMMAD SHAKIL KHAN	)	
	)	***J. S. Kliewer*** *and*
(Accused) Appellant	)	***E. D. Atkin***
	)	*for the Respondent*
- and -	)	*(via videoconference)*
	)	
Docket: AR20-30-09533	)	
B E T W E E N :	)	*Appeals heard:*
	)	***April 26, 2021***
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	*Judgment delivered:*
	)	***September 15, 2021***
- and -	)	
	)	
MASON JOAQUIN BURG	)	
	)	
(Accused) Appellant	)	

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

On appeal from 2020 MBQB 137

SIMONSEN JA

[1] These appeals raise the question of whether the Crown's preferring a direct indictment against the two accused violated their rights under section 7 or 11(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The trial judge (the judge) concluded that there was no breach and dismissed the accused's applications for an order quashing the direct indictment based on a violation of section 7, and/or for a stay of proceedings under section 24(1) due to a breach of section 11(b). Both accused appeal, seeking a stay of proceedings of charges of conspiracy to traffic cocaine and, also, in the case of the accused Mohammad Khan (Mr. Khan) only, a charge of extortion.

Introduction

[2] The accused's position is informed by the framework established by the Supreme Court of Canada in *R v Jordan*, 2016 SCC 27, to combat delay in criminal prosecutions. In *Jordan*, the Supreme Court set presumptive ceilings within which trials are to be completed in provincial courts and superior courts—18 months and 30 months, respectively, from the date of the charge (see paras 46, 49).

[3] The accused contend that where, as here, a direct indictment is filed for the sole purpose of moving a case from the Provincial Court (the PC) to the superior court, namely the Court of Queen's Bench (the QB), in order to extend the presumptive ceiling and allow more time for the prosecution, there is a violation of the principles of fundamental justice and, thus, a breach of section 7. The accused argue that there was a section 7 breach because the

Crown's exercise of discretion in filing the direct indictment was an abuse of process, and also resulted in procedural unfairness.

[4] Furthermore, the accused argue that, due to the filing of the direct indictment, the delay in bringing the case to trial in the QB was unreasonable and, thus, a breach of section 11(b). This is so despite the trial being scheduled in the QB for approximately 25.5 months after the charge, well within the 30-month presumptive ceiling. According to the accused, the delay nonetheless involved a breach of section 11(b) because the case took markedly longer than it reasonably should have to get to trial; the trial would have ended approximately 8.5 months earlier in the PC, had the direct indictment not been preferred.

[5] Central to the accused's position with respect to both sections 7 and 11(b) is the assertion that the judge erred in finding that the trial would not have concluded in the PC within 18 months as had been scheduled and, further, that it would not have completed any earlier in the PC than it did in the QB. The accused acknowledge that the strength of their appeals with respect to both sections 7 and 11(b) is much diminished if this factual finding is upheld.

[6] The Crown says that the judge's factual finding about the time required to try the matter in the PC is entitled to deference. Nonetheless, the Crown maintains that the judge's decision does not hinge on that finding, and that he was not required to have "a crystal ball" and be right about the timelines for trying the case in the PC. Rather, the Crown emphasises that the preferring of a direct indictment is a matter of prosecutorial discretion, reviewable only for abuse of process, and that there was no abuse of process

in this case. The Crown sought the direct indictment when approximately 12 months remained on the *Jordan* clock in the PC, and it was concerned that the trial would not be completed within 18 months. This was, in the Crown's submission, a reasonable course of action, given the 18 pre-trial motions then filed by the accused, scheduling difficulties that had been encountered, the fact that no dates had then been set and the accused declining to waive one or two months of delay.

[7] The Crown maintains that it follows from all of the judge's factual findings that there was no breach of section 7, nor any violation of section 11(b), resulting from the preferring of the direct indictment.

The Facts

[8] The accused were charged with a number of drug-related offences at the conclusion of Project Riverbank, a joint investigation of the Winnipeg Police Service and the RCMP into a multi-kilogram interprovincial cocaine trafficking operation. Thirteen accused were arrested and charged. The accused's two relevant *Jordan* dates were April 18, 2020 in the PC and April 18, 2021 in the QB.

[9] Initially, the Crown promptly provided the voluminous disclosure to counsel for the accused. Five case management conferences (CMC) were conducted in the PC, on December 20, 2018, February 19, 2019, March 12, 2019, April 30, 2019 and May 23, 2019.

[10] On March 11, 2019, the day before the third CMC, counsel for the accused provided the Crown with an initial list of 18 pre-trial motions that they intended to bring, some of which required *viva voce* evidence. At the

CMC on March 12, 2019, the accused elected trial in the PC and the CMC judge authorised the setting of a total of 28 days for pre-trial motions and the trial (13 for the motions and 15 for the trial). No actual dates were set, and there was difficulty encountered in doing so.

[11] On April 4, 2019, the Crown proposed that the accused waive delay from the *Jordan* presumptive ceiling in the PC of April 18, 2020 to May or June 2020 in order to provide more flexibility in the setting of dates. The accused declined to waive that period of delay.

[12] On April 5, 2019, after receiving advice that the accused had refused a waiver, the Crown submitted a request to the Director of Public Prosecutions and the Deputy Attorney General of Manitoba for a direct indictment to be preferred against the accused.

[13] At the next CMC on April 30, 2019, 17 days were set for pre-trial motions and 15 days were set for the trial. The dates set were July 24, 2019 for disclosure issues; October 9-10, 2019 for pre-trial motions; November 14-15, 2019, December 9-10, 2019, February 3-7, 2020 and February 10-14, 2020 for the remainder of the pre-trial motions; and March 9-27, 2020 for the trial. These trial dates were within the presumptive ceiling for provincial courts.

[14] The accused identified four more motions that they intended to bring and, at the final CMC on May 23, 2019, two extra dates, July 25-26, 2019, were set for two of those motions. Two further days were recognised as required, but were not set, for abuse of process motions.

[15] The direct indictment was filed on July 12, 2019. Counsel made their first appearance in the QB on July 15, 2019, and they then attended a

pre-trial conference (PTC) on August 28, 2019. The accused presented a list of pre-trial motions which had increased to 28, including an application to quash the direct indictment. It was at the PTC that the Crown advised that it had sought the direct indictment out of concern for the *Jordan* timelines, as the accused had refused to waive delay.

[16] At the PTC, dates were set in the QB and the schedule allowed four additional days for pre-trial motions (a total of 23 days) and three additional weeks for a trial (before a judge alone) from what had been set in the PC. The last block of motions was set for September 14 to October 2, 2020, and the trial was set for October 26 to December 3, 2020.

[17] The Crown was available for trial from September 14 to October 16, 2020, and also had availability for some earlier dates for pre-trial motions, but one defence counsel was not available. This resulted in a scheduled trial completion date at approximately 25.5 months, rather than 24 months, after the charge.

[18] In their factum, the accused say (although not in the evidence, yet without objection by the Crown) that, subsequently, approximately three of the six weeks set for trial were determined to be not necessary and became available to accommodate the judge's need for more decision-making time regarding the pre-trial motions.

[19] The accused's applications pertaining to the direct indictment were scheduled to be heard in March 2020. Given the COVID-19 pandemic, that hearing was adjourned, by agreement, to June 22, 2020. Once the judge delivered his decision dismissing the accused's applications for relief on the basis of breaches of sections 7 and 11(b), the accused abandoned their

remaining motions and, on agreed facts, invited the judge to find them both guilty of conspiracy to traffic cocaine, and Mr. Khan guilty of extortion.

The Judge's Decision

[20] In his reasons for decision, the judge identified that two issues were to be decided (at para 36):

> . . .
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> - whether the Crown's decision to proceed by direct indictment, thereby causing a delay beyond the agreed trial schedule in [the PC], violated [the accused's] s. 7 and/or 11(b) *Charter* rights as prosecutorial abuse or as inconsistent with fundamental aspects of procedural fairness; and, if not
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> - whether [the accused] can demonstrate their right to trial within a reasonable time, as guaranteed by s. 11(b) of the *Charter*, was violated, even though their trial was scheduled to end below the 30 month *Jordan* presumptive ceiling for trial in a Superior Court.

[21] The judge dismissed both of the *Charter* applications.

[22] He aptly summarised the applicable *Jordan* principles (at paras 38-39):

> The Supreme Court of Canada's 2016 seminal *Jordan* [decision] was designed to shake off the legal system's complacency for how fast, or slow, trials worked through the judicial system. Overall, in Manitoba, *Jordan* appears to have met its objective.
>
> Timely justice is a hallmark of a free and democratic society enshrined in s. 11(b) of the *Charter*, which provides that any person charged with an offence has the right to be tried within a reasonable time. From *Jordan*, this means a trial in Provincial

> Court should take place within a presumptive ceiling of 18 months from arrest, and if the trial is in Superior Court, within 30 months. Beyond that, a stay of proceedings is presumed. Defence delay or waiver does not count towards these presumptive ceilings. In exceptional circumstances, the Crown may justify a timeframe exceeding the presumptive ceilings. On the flipside, in the right circumstances, in clear cases, an accused may demonstrate that, while his trial is scheduled to be finished under a presumptive ceiling deadline, the time may nonetheless markedly exceed what is reasonable and a stay of proceedings justified.

[23] The judge also correctly noted that, regardless of whether a trial proceeds in one stage (trial only) or two stages (preliminary inquiry and trial), the presumptive ceiling in superior courts is 30 months (see *R v Schenkels*, 2017 MBCA 62 at paras 43-50; and *R v Bulhosen*, 2019 ONCA 600 at paras 69-71).

[24] In reaching his conclusions, the judge made the following findings of fact:

- The Crown diligently and reasonably expedited the trial process in the PC, including providing timely disclosure, arranging CMC's and initiating plea discussions.

- The accused elected trial in the PC five months after their arrest, leaving only 13 months to complete the then 18 pre-trial motions and the trial; this later increased to 22 motions. The judge characterised the list of motions as "unwieldy" (at para 45(iii)).

- The Crown's actions throughout, up to and including the preferring of the direct indictment in July 2019, were grounded

in good faith, and reflected a valid concern that the accused's trial would not be completed within the 18-month timeline; the judge did not agree with the accused's assertions that "the Crown used the direct indictment process to gain a 12 month tactical advantage, or that they were playing a game with *Jordan* principles" (at para 54).

- While the judge could not say exactly when the trial in the PC would have finished (see para 48), he found that the time set in the PC would "have clearly fallen short of what was necessary" (at para 45(x)). He went further to say that "the case would not have finished as scheduled in [the PC] or sooner than scheduled in [the QB]" (at para 50).

[25] The judge also took the view that his finding that the trial would not have finished as scheduled in PC, or sooner in the PC than scheduled in the QB, drove the determinations to be made with respect to the sections 7 and 11(b) issues (see para 50).

[26] The judge levelled some criticism at the Crown, saying that it should have notified the CMC judge that more time was needed to complete the case and, although not a requirement, should have made known to counsel for the accused its plan to seek a direct indictment.

[27] Nonetheless, the judge concluded that there was no breach of section 7 due to the Crown's preferring the direct indictment, as "[n]othing that happened in these circumstances rises to the state of abuse of prosecutorial discretion as explained in *Anderson* [*R v Anderson*, 2014 SCC

41]" (at para 56). He determined that the Crown's preferring the direct indictment "was a proper exercise of discretion (rather than letting the chips fall where they may in the [PC] schedule and then, if necessary, possibly defending a *Jordan* application for stay of proceedings on the basis of exceptional circumstances)" (at para 51).

[28] The judge also rejected the accused's suggestion that the Crown's proceeding as it did resulted in a "substantive or fundamental procedural fairness issue" (at para 54), amounting to a breach of section 7. Although the Crown's actions had the effect of putting the onus on the accused to establish a breach of section 11(b) on a possible *Jordan* application, the judge found that the preferring of the direct indictment did not result in procedural unfairness giving rise to a breach of section 7 because the accused were not entitled to the process best suited to them; the Crown's actions "were justified under these unique circumstances" (at para 55); and the legal onus was not critical, as the result would have been the same had the Crown been defending a delay above the presumptive ceiling in the PC.

[29] As for the alleged breach of section 11(b), the judge used the timeframe of 25.5 months from the date of the charge to the end of trial, noting that this benefited the accused by ignoring one defence counsel's unavailability to proceed earlier and finish at 24 months. He concluded that the time required to prosecute this case did not markedly exceed what was reasonable.

Standard of Review

[30] In *R v Richard (DR) et al*, 2013 MBCA 105, this Court summarised the standard of review for *Charter* determinations (at para 48):

> The standard of review to be applied to a *Charter* finding where the accused is appealing a conviction was considered by this court in *R. v. Farrah (D.)*, 2011 MBCA 49, 268 Man.R. (2d) 112. In that case, Chartier J.A. (as he then was) reviewed the several steps and related standards of appellate review of a trial judge's determination of a *Charter* issue. First, the court reviews the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. The standard of review is correctness. Next, the evidentiary foundation forming the basis of the judge's decision is reviewed to see if there was an error. At this stage, deference is applied and, absent palpable and overriding error, the facts as found by the judge should not be disturbed. The appellate court then examines the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the legal test. In criminal law, the standard at this stage is correctness.

See also *R v Farrah (D)*, 2011 MBCA 49 at para 7.

Analysis and Decision

Fact-Finding

[31] As I have indicated, the focus of the accused's argument is that the judge erred in his finding that the trial would not have completed in the PC within the 18-month timeframe and that, in fact, it would have taken as long to complete the trial in the PC as in the QB. The accused say that this is a palpable and overriding error of fact, made without evidentiary foundation. Given the lack of evidentiary foundation, they claim that it must have resulted from an error in law, namely the erroneous application of the principles of judicial notice.

[32] First, the accused note that no significant extra time was set for the pre-trial motions in the QB than had been allocated in the PC (19 days were increased to 23, but two of the 23 days were to argue the sections 7 and 11(b) applications). Therefore, it could not be inferred that the motions would not have completed within the time scheduled in the PC.

[33] The accused identify two key concerns that the judge had about the matter finishing as scheduled in the PC. He was concerned about the judicial decision-making time available under the PC schedule, namely that the three weeks between the last pre-trial motion being heard and the first day of the trial, was insufficient. In addition, he was concerned that considerably more time, six weeks instead of three, had been set for trial in the QB, such that a continuation would have been necessary in the PC which would have entailed considerable delay.

[34] The accused contend that neither concern is supported by the evidence.

[35] As for the judge's finding that three weeks was not sufficient time to decide the motions, the accused argue that there was no evidence for this conclusion, and that the only evidence would indicate otherwise. They emphasise that the CMC judge had set the schedule in the PC, knowing the decisions that were involved. The same amount of decision-making time had been allowed under the QB schedule set by the PTC judge. The accused also argue that "[a]ll parties recognized that they were unlikely to get detailed reasons or perhaps any reasons for the decisions made within that timeframe, but that is a routine occurrence in these courts particularly post *Jordan* where the courts are expected to make decisions with reasoned haste, where that

decision is necessary to keep the trial moving forward." According to the accused, the judge's determination regarding the time required to decide the motions was "based on a personal and anecdotal assessment of how much time he needed to make those anticipated decisions."

[36] The accused also challenge whether six weeks were needed for the trial and say that the judge erred when he found, without evidence, that they had "seemingly agreed" (at para 45(ix)) to those dates at the PTC in the QB. The accused note that the CMC judge and experienced counsel had agreed that three weeks were sufficient. Furthermore, the accused contend that the case was based largely on *Charter* issues relating to the admissibility of evidence obtained by judicially authorised searches and wiretap authorisations. The defence had indicated in the case management process that it did not intend to call expert testimony. The accused also note that the judge eventually reduced the six weeks set for trial in the QB to approximately three weeks.

[37] Given the lack of evidence, the accused argue that the judge's finding as to when the trial would have been completed in the PC could only have been made by taking some sort of judicial notice. However, they say that, even at its most relaxed level, judicial notice can only be taken of matters that are "beyond serious controversy" (*R v Spence*, 2005 SCC 71 at para 65). The accused contend that the judge's determination as to the time needed to try the matter in the PC is not beyond controversy as the CMC judge had reviewed the schedule and agreed to all of the dates, including allowing three weeks to make the required decisions on the pre-trial motions and allocating three weeks for the trial.

[38] However, I am satisfied that the judge was entitled to conclude, on the evidence before him, that the matter would not have completed as scheduled in the PC.

[39] While the CMC judge had set the timelines for both judicial decision making and the trial, it was a compressed and ambitious schedule that responded to concerns about the *Jordan* ceiling (which was only about 12 months away when the dates were set) and to the accused's refusal to provide a waiver for a one or two-month extension.

[40] More specifically, as for the time allocated for decision making on the motions, when the matter was first addressed by the CMC judge on March 12, 2019 and timelines were canvassed, she made clear that judicial decision-making time had to be built in to the process. She confirmed that one day was to be set for disclosure issues; two days were to be set for motions about one month after the disclosure issue was argued; two weeks were to be set for motions at least one month after the two days for motions; and three weeks were to be set for trial at least "a couple of months" after the two weeks of motions "to give [the] judge time to make decisions". Clearly, this schedule could not ultimately be accommodated, and much less time was allowed for judicial decision making in the dates that were set in the PC.

[41] Moreover, as noted by the judge, who had presumably become more familiar with all of the motions than the CMC judge, "many of the defence applications comprised multiple components, or motions. . . . The overall effect exponentially compounds the time, effort and complexity to prepare, hear and decide the applications; something that is not readily apparent from the informal list the defence provided" (at para 16). His review of the motions

formed an appropriate evidentiary basis for his conclusion that three weeks was insufficient time to render decisions on "10 days of numerous *Garofoli* [*R v Garofoli*, [1990] 2 SCR 1421] and *Charter* applications" (at para 48).

[42] With respect to the time allocated for trial and the judge's alleged error in concluding that the parties "seemingly agreed" (at para 45(ix)) to six weeks being set, that was the amount of time set by the PTC judge when both the Crown and counsel for the accused were in attendance. Presumably, by that time, they all had a better understanding of the case, and six weeks were set. In the absence of evidence to the contrary, of which there was none, it was open to the judge to infer that there was apparent agreement to the dates. Furthermore, there was no evidence, apart from considering the amount of trial time set in the PC, to establish that the time set in the QB was unreasonable. The Crown says that it would have had a case for trial even if it had been unsuccessful on every *Charter* motion.

[43] In addition, the judge made clear that the six weeks set in the QB were ultimately reduced only because of his active case management. He stated (at para 49):

> . . . Fortunately, I had the benefit of having actively trial managed the case since March 2020 and, critically, the ability to impinge on the six weeks of trial to augment time for the applications; though that depended on counsel fulfilling undertakings to considerably reduce the trial time by agreements on evidence. Obviously, the [PC] trial judge did not have this ability, as only three weeks were allowed for trial.

[44] Finally, the judge did not, as suggested by the accused, err in the application of the principles of judicial notice. Rather, as I have stated, he

reviewed the material that was before him, in order to determine the decision-making time required. He best understood the motions and what was needed to decide them.

[45] As for a continuation date, the judge was entitled to conclude that the "[PC] in Winnipeg was, and remains, under tremendous strain to accommodate the demands upon it" and that continuation dates for trials are "hard to come by, and not quick, especially multiple days with multiple counsel" (at para 45(x)). In *Jordan*, the Supreme Court of Canada commented that trial judges should look to their knowledge of local circumstances (at para 89):

> . . . [T]rial judges should also employ the knowledge they have of their own jurisdiction, including how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances.

Although these comments were made in the context of assessing reasonable time requirements in a case that falls under the presumptive ceiling, they are, as observed by the judge, also applicable to his reasoning in this case.

[46] Therefore, the judge's factual finding as to the time required to try the case in the PC is reasonably supported by the evidence and does not rest on an erroneous application of the principles of judicial notice. Moreover, regardless of this finding, there was, as I will explain, no violation of section 7 or 11(b).

Section 7

[47] There is no dispute that the judge identified the correct legal principles regarding the section 7 issues. The accused say that he erred in his application of those principles to the facts.

[48] In *R v Anderson*, 2014 SCC 41, the Supreme Court of Canada held that the decision to prefer a direct indictment is an exercise of prosecutorial discretion, reviewable only for abuse of process (see para 51), referring to Crown conduct that is "egregious and seriously compromises trial fairness and/or the integrity of the justice system" (at para 50). The onus is on the claimant to establish an abuse of process on a balance of probabilities (see para 52).

[49] In support of their position that the Crown's actions constituted an abuse of process, the accused contend that guidelines crafted by both the Provincial and Federal Attorneys General, which set out the circumstances under which direct indictments are to be preferred, do not contemplate their use in a situation like this (see Public Prosecution Service of Canada, *Deskbook*, Catalogue No J79-2/2014E-PDF (Ottawa: PPSC, 2014-2020) at Part III, ch 3.6; and Manitoba, Department of Justice, Prosecutions, *Policy Directive: Direct Indictments*, Guideline No 2:DIR:1 (Winnipeg: DOJ, 2017)). The accused say that the guidelines provide that, generally, the power to directly indict is to be invoked "to expedite matters or save valuable court resources." Likewise, according to the accused, the jurisprudence supports that these are the purposes for which direct indictments are to be used (see *R v SJL*, 2009 SCC 14 at para 38). They are not to be used as a means of strategically increasing the delay in a case.

[50] The accused also say that any accused person, post-*Jordan*, will be aware that electing a provincial court trial will generally provide the quickest resolution of the criminal matter due to the shorter *Jordan* ceiling. They contend that the Crown rarely exercises its discretion to directly indict when all accused have elected to have their matter heard in the provincial court because a trial in the provincial court is generally more expeditious, "creating a public interest in line with honoring that procedural election right of the accused."

[51] Ultimately, the accused's argument is that it is an abuse of process for the Crown, when faced with the prospect of not completing a trial within the 18-month timeline in a provincial court, to use a direct indictment to extend the timeline to that applicable in a superior court, rather than defend a motion for delay in the provincial court and argue that the matter was sufficiently complex or otherwise justify proceeding to trial beyond the 18-month window.

[52] However, again, I agree with the Crown.

[53] First, the authority relied upon by the accused, *R v Nyznik*, 2017 ONSC 69, about which I will say more later, indicates that the remedy potentially available to them to address a delay stemming from the preferring of a direct indictment would be based on a breach of section 11(b), rather than section 7.

[54] Moreover, the judge's conclusion that there was no abuse of process constituting a breach of section 7 is supported by his unassailable findings of fact that, when the Crown sought the direct indictment, its concerns about delay were well founded and valid in light of the increasing list of pre-trial

motions counsel for the accused wanted to schedule; the Crown had made efforts to expedite the proceedings throughout; and the Crown had acted in good faith, mindful of the obligation to protect the accused's section 11(b) rights. The judge noted that there were an exceptionally large number of pre-trial motions and that the accused had declined to waive a few months of delay.

[55] It must also be remembered that the Crown has a constitutional obligation to ensure that those who ought to be brought to trial are brought to trial, and may use the preferring of a direct indictment for that purpose (see *R v Charlie* (1998), 126 CCC (3d) 513 at para 32 (BCCA)).

[56] The jurisprudence recognises the use of a direct indictment as a means, on the appropriate facts, of ensuring that the *Jordan* ceiling is not exceeded. In *R v CMM*, 2017 MBCA 105, this Court endorsed comments of the Ontario Court of Appeal (made in the context of a case where a delay occasioned by the Crown's pursuit of *certiorari* of a preliminary inquiry judge's decision could have been avoided by preferring a direct indictment) when it stated (at para 14):

> We agree with the comments of Watt JA in *R v Manasseri*, 2016 ONCA 703, that, in the era of presumptive time limits for criminal cases going to trial (see *R v Jordan*, 2016 SCC 27) and the duty of full disclosure (see *R v Stinchcombe*, [1995] 1 SCR 754), the Crown "should give very serious consideration to preferring direct indictments" (at para 376, n 5) to ensure the timely adjudication of criminal cases on their merits. In an appropriate case, such a course of action is more proportional to remedy inherent or unforeseen delays in the criminal process than the alternative of, after a discharge, entering the *certiorari* maze of jurisdictional versus legal error.

[57] Given all of the above, there is no basis for appellate intervention with respect to the judge's conclusion that the preferring of the direct indictment did not involve an abuse of process.

[58] As for an alleged section 7 breach resulting from procedural unfairness caused by the preferring of the direct indictment, the judge noted that the accused relied on *Charkaoui (Re)*, 2004 FCA 421 for the proposition that procedural fairness and the rules of natural justice are principles of fundamental justice, enshrined in section 7 (see para 43).

[59] The judge, however, rightly observed that an accused person is not entitled to a perfect process or the one best suited to him or her (see *R v Lyons*, [1987] 2 SCR 309 at 362); the Crown was not required to follow the accused's preferred course of action, let "the chips fall where they may" (at para 51) and, if necessary, defend a *Jordan* application in the PC.

[60] The judge's factual findings support his conclusion that there was no procedural unfairness resulting from the shifting of the onus on a possible section 11(b) application. Because of the preferring of the direct indictment, the onus on such an application would have shifted from the Crown having to establish exceptional circumstances justifying a delay in the PC beyond the *Jordan* ceiling, to the accused bearing the onus of demonstrating why the case, within the *Jordan* ceiling in the QB, nonetheless involved unreasonable delay because it took markedly longer than it should have. However, in my view, there is no basis for appellate intervention with respect to the judge's conclusion that the legal onus was not critical because the result would have been the same either way—in particular, with respect to his determination that the Crown could have defended a section 11(b) application in the PC had the

matter exceeded the 18-month presumptive ceiling, given "the overall situation, but especially because of the complexity of the case" (at para 62).

[61] Therefore, the judge made no error in concluding that the preferring of the direct indictment did not breach the accused's section 7 rights.

Section 11(b)

[62] The test for a stay of proceedings for unreasonable delay when a trial concludes below the *Jordan* ceiling is twofold: the applicants must establish that (1) they took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. Stays for delay beneath the ceiling should only be granted in "clear cases" (*Jordan* at paras 48, 83).

[63] In rejecting the section 11(b) argument, the judge found that, despite pursuing 28 pre-trial motions, the accused had taken meaningful steps in a sustained effort to expedite the proceedings. However, on the second part of the analysis, using 25.5 months, he found that the case did not take markedly longer than it reasonably should have.

[64] The accused do not allege an error in the judge's statement of the principles but, rather, assert that he erred in the application of the principles to the facts on the second part of the analysis. They rely on the comments in *Nyznik*, in which the Court dismissed a section 11(b) application where a trial was set to be completed in the superior court within approximately 28 months from the date of the arrest. In *Nyznik*, the accused argued that the appropriate ceiling to be applied was 18 months because the Crown had preferred a direct indictment, which meant that the accused were denied the benefit of a

preliminary inquiry and the constitutionally permissible time to bring the matter to trial was extended. Although rejecting the argument that the applicable presumptive ceiling should be 18 months and dismissing the application, the Court commented as follows (at paras 30, 32):

> That conclusion does not mean that an accused person is devoid of any remedy, if it appears that the direct indictment was obtained simply to extend the time in which the prosecution can bring an accused person to trial. A ceiling is simply a ceiling. It does not purport to be a mandate for the time that is to be taken to bring a person to trial. This was made clear in *Jordan* . . .
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> . . .
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> Take the extreme case, where the prosecution obtains a direct indictment the day after the accused person is charged. The defence may well be able to establish that a trial, that then occurs 30 months later, "took markedly longer than it reasonably should have" and, thus, still violates s. 11(b). In that extreme example, the proper approach, under the *Jordan* framework, is not to change the presumptive ceiling, but, rather, is to require the defence to demonstrate that 30 months is still too long a period of time to bring the accused person to trial in the circumstances of that particular prosecution. The preferring of the indictment is a circumstance to which the defence could point that would be relevant to that determination.

[65] This case involves a very different set of facts than those contemplated in *Nyznik*, and the accused's argument faces a number of hurdles. First, as I have explained, the judge specifically found that the case would not have completed in the PC within the allocated timelines.

[66] Regardless, the judge's conclusion that the case did not take markedly longer than it reasonably should have is well supported by his factual findings, namely that the case was clearly complex; other similar

complex cases in Manitoba have taken longer than 25 months to conclude; "the Crown [had] done everything it [could] to ensure the matter proceeded expeditiously" (at para 60(ii)(c)), with the only real source of complaint by the accused being the direct indictment; and the time in the PC had not been "wasted", but was "all necessary to lay the foundation for either trial in [the PC] or [the QB]" (*ibid*). All of these findings are entitled to deference.

[67] Therefore, there is no reviewable error in the judge's conclusion that there was no violation of the accused's section 11(b) rights.

[68] For the foregoing reasons, I would dismiss the appeals.

Simonsen JA

I agree: Beard JA

I agree: leMaistre JA