Action No.: 170862858Q1
E-File Name: [redacted]
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF LETHBRIDGE

HER MAJESTY THE QUEEN

v.

[redacted]

Accused

T R I A L
(Excerpt)

Lethbridge, Alberta
December 2, 2020

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Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Lethbridge, Alberta

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December 2, 2020	Afternoon Session
The Honourable Madam Justice Kubik	Court of Queen's Bench of Alberta
L. M. Weich (remote appearance)	For the Crown
P. C. Fagan, QC (remote appearance)	For the Accused (remote appearance)
J. Stringer	Court Clerk

Ruling

THE COURT: Thank you. I see. All right. We've got everybody present. [redacted] is present, as well.

These are my oral reasons for decision with respect to three pretrial applications heard on July 27th through 29th, 2020 and September 21st, 2020. Should any party request a transcript of these reasons, I reserve the right to edit it for spelling, grammar, and clerical errors, and to comply with any bans on publication of identifying information.

I will be delivering these reasons in the following order: one, hearsay evidence admissibility; two, similar fact evidence admissibility; and three, the section 11(b) application.

The first application relates to several hearsay statements of the complainant, TK, given as follows: an oral statement to his foster mother, MM, in the period March 5 through April 26, 2017; a video-audio recorded statement made to social worker [redacted] and RCMP corporal Kevin Kasperski, dated April 26, 2017; an oral statement to MM in August, 2017; and his preliminary inquiry testimony given on May 28th, 2018. At the time of the voir dire, the element of necessity was not in issue. It is yet to be determined whether the Crown will seek to tender any of these statements. As a result, at issue is the threshold reliability of the various statements for the purposes of admission.

Hearsay statements are presumptively inadmissible unless they fall within an exception to the rule or the party seeking to admit the statement proves, on a balance of probabilities, that admission of the hearsay is both necessary and can be relied upon. Failure on either necessity or reliability will result in the statement being inadmissible.

TK is one complainant in a multi-count Indictment who accuses [redacted] of various

sexual offences. With respect to TK, count 5 alleges sexual assault and count 6 alleges sexual interference. TK was 8 years old at the time of the alleged offences and is 11 years old today. He is developmentally delayed, functioning at the level of a 2 to 3 year old child. MM is his foster mother. TK has been in MM's care throughout his young life, but is now the subject of a permanent guardianship order and has resided in her full-time care since 2015. TK is the brother of KM, also a complainant in this matter.

On February 15th, 2017, KM reported to police that [redacted] had sexually assaulted him, resulting in charges being laid on February 17th, 2017. MM came to learn of the criminal charges against [redacted] sometime between the date those charges were laid and March 5th, 2017. After learning about the charges, she began to ruminate on whether [redacted] might have assaulted TK. One day, she approached TK and asked him if he remembered the time he went to church with [redacted] and grandma, as TK refers to her, missed him a lot because he was gone a long time. She asked TK if he had gone anywhere else that day and if KM was there. She testified that TK told her he went to the basement and that "he" had to check TK's penis for an infection. He also told her that "he" rubbed TK's penis and demonstrated a rubbing motion with his fingers. That "he" is never identified. MM testified that she said either "that's gross" or "that's disgusting", left the room, and asked no further questions, as she knew that she should not ask or entice TK to provide further information and that it had to come from TK voluntarily.

She then contacted Child and Family Services, as was her obligation as a foster parent, and arrangements were made to bring TK to the offices of Lethbridge Family Services to be interviewed by [redacted] and Corporal Kasperski. The [redacted]-Kasperski interview took place on April 26th, 2017. The interview was only partially video recorded, due to a technological problem, but the entire audio transcript is in evidence. In this statement, TK speaks of [redacted] touching his penis, his tummy, and his bellybutton. There are various parts of the statement where he speaks of [redacted] touching here and there. Unfortunately, his back is largely to the camera and it is impossible to observe what he is pointing at, if anything. Occasionally, in the context of the audio recording, [redacted] or Kasperski described the gesture but they did not keep descriptive notes, and to know where or how TK was gesturing requires reliance on their memory of the events. In the case of [redacted], her recollection of those specific circumstances is poor. In the case of Kasperski, I have concerns about the reliability of his memory. In some elements of his testimony, he was unable to describe with confidence where TK was pointing.

Sometime after this interview in August, 2017, MM overheard TK in the playroom say something to the effect that "[redacted]'s private brown hairs." She asked him what he had said and he told her that he had seen [redacted]'s private brown hairs. She further asked him how he saw that and he said he pulled it down. MM asked what it was and TK said his pants.

Finally, TK testified at the preliminary inquiry, having given a promise to tell the truth under section 16.1 of the *Canada Evidence Act*. His preliminary inquiry testimony was contradictory as to whether there was touching by [redacted] of him or him of [redacted].

R. v. Khan and *R. v. Khelawon* are the leading cases with respect to the admissibility of hearsay statements. In *Khan*, a young child who was incompetent to testify had allegedly made statements to her mother pertaining to sexual abuse suffered at the hands of her doctor. The statement was made spontaneously, proximate to the event, and the sexual subject matter of the statement was not something which a child of tender years could be expected to know about. The Supreme Court noted that an assessment of reliability should consider the timing of the statement, the described demeanour of the person making it, the personality of the child, and an absence of coaching. In *Khelawon*, the Court refined the manner in which the reliability of the statement should be analysed. In order to prove threshold reliability for admissibility, the party seeking to tender the statement must demonstrate one of two things: that there is no real concern about whether or not the statement is true because of the circumstances in which it came about, or that there is no real concern arising from the hearsay statement because its truth or accuracy can be tested by means other than contemporaneous cross-examination. While this is described as threshold reliability, and judges are cautioned not to make ultimate reliability findings at the admissibility stage, *Khelawon* makes clear that the factors for consideration in assessing admissibility cannot be categorized in terms of either threshold or ultimate reliability. The analysis is contextual. The trial judge, as gatekeeper, must consider all relevant factors. As a result, judges must be cognizant of the dangers raised by the proposed hearsay evidence.

In the case of the two statements TK made to MM and the statement to [redacted] and Kasperski, reliability is dependent on the inherent trustworthiness of the statement. As a result, factors relevant to the truth of the statement must be considered. In the case of the preliminary inquiry testimony where the evidence was given by TK himself, in circumstances where he promised to tell the truth in a courtroom setting and subject to cross-examination, the inherent trustworthiness of the statement is less in issue.

Dealing first with the statement alleged to have been made to MM in March or April of 2017, this statement does not meet threshold reliability and is inadmissible. With respect to its reliability, it was not a *Khan*-type statement. It was not spontaneous. It was not made contemporaneous with or in close proximity to the event. It came about because of inquiry on the part of MM and somewhat probing questions. MM is unable to recall how many questions she asked, the exact wording of the questions asked, or with any precision the answers given. This calls into question the reliability of MM's own memory as to the statement.

In assessing the inherent trustworthiness of the statement, one must consider TK's own capacity, both with respect to memory and accurate recall, particularly in light of the fact that the statement was not made proximal to the event. TK functions at the level of a 2 to 3 year old child. He cannot remember his own address or phone number reliably. At times he cannot recall how to dress himself. He has a propensity to fabricate information and MM testified about the ease with which he can fib, particularly when he is trying to avoid getting in trouble himself. One of the most concerning aspects with respect to the reliability of this statement is that he only ever refers to "he" as the perpetrator, never identifying the person alleged to have touched him.

In relation to the video-audio recorded statement, that, too, does not meet threshold reliability and is inadmissible. While TK, as he arrives at the interview, blurts out information about [redacted] touching him, it is also clear that he has other information, whether the result of an active imagination or information he has received, about [redacted] being a bad man who was in gaol. This leads to concerns about how he has derived certain information in advance of the interview. Additionally, the absence of reliable evidence of where he was pointing when asked to describe where he was touched or reliable evidence from either of his interviewers on this point renders the statement unreliable.

As to the August statement made to MM, it is also inadmissible. The statement was made some 10 months after the alleged incident of touching, lacking the spontaneity and proximity in time seen in *Khan*, and had never been said at any time in the previous 10 months, including during the police interview. The comment was originally overheard and repeated when asked.

Finally, I turn to the preliminary inquiry testimony. This statement was made under a promise to tell the truth in a courtroom and contemporaneous cross-examination on the statement was exercised. As a result, it can be considered inherently trustworthy and meets threshold reliability requirements. While TK may have made contradictory statements during the course of that testimony, the trier of fact can assess its ultimate reliability. As such, TK's preliminary inquiry testimony is admissible upon proof of necessity at trial.

The next decision relates to the Crown's desire to lead cross-count similar fact evidence at the trial of this matter. The evidence before me consists of the police statements and preliminary inquiry testimony of three of the four complainants, as well as voir dire testimony on the issue of collusion. There are four complainants in this case: KM, ZN, JP, and TK. They currently range in age from 17 years to 11 years. They all received respite caregiving from Mr. [redacted]. All have varying degrees of cognitive functioning, with KM and ZN at the higher end of the range and JP and TK at the lower end of the range. All of the boys are connected by various family relationships. KM and TK are brothers. TK's

foster mother is a sister to both JP's mother and ZN's mother.

Each boy, with the exception of JP, who is nonverbal, made separate and distinct allegations about the sexual offences alleged to have been committed by [redacted] against them. KM described sexual contact, including touching of genitals, masturbation, and oral genital sexual contact occurring both at [redacted]'s residence and in a change room at a public swimming pool. This contact is alleged to have occurred on multiple occasions between 2016 and 2017. ZN describes a single incident occurring in 2016 in a parking lot where [redacted]'s hand touched his testicles over his clothing. ZN also describes having seen [redacted]'s hand touch JP's leg in 2016 while [redacted] was assisting JP into his vehicle. TK described touching of his penis by [redacted] and that he touched [redacted]'s private brown hairs; however, based on the statement determined to meet threshold reliability, has provided contradictory evidence about whether he was touched by [redacted] or whether he touched [redacted]. These incidents of touching are alleged by TK to have occurred in 2016 at [redacted]'s residence.

Similar fact evidence is a form of character evidence and is prima facie inadmissible. The burden is on the Crown on a balance of probabilities to establish that the evidence sought to be tendered is of a specific propensity such that its probative value outweighs its prejudicial effect. The Crown also bears the burden of proving that there is no collusion.

In this case, the probative value of the similar fact evidence arises in relation to the actus reus, touching of a sexual nature or for a sexual purpose; the mens rea, intention to touch; or to rebut potential defences, such as accident. The Crown is essentially seeking to demonstrate that [redacted] has a specific propensity to sexually abuse children in his care. The prejudicial effect in the case of cross-count similar fact evidence arises from the risk of misuse of the evidence in terms of weight, distraction, or confusion by the evidence, or that the jury may draw a conclusion about [redacted]'s guilt based solely on character, as opposed to the facts before them.

In considering the probative value of the evidence, I must consider the factors set out in *R. v. Handy*, which include the following: the degree of distinctiveness or uniqueness of what occurred, for example a calling card or a modus operandi; proximity in time; similarity in the nature of the acts alleged; the number of similar acts; circumstances surrounding or relating to the similar acts; any distinct or unifying features; intervening events; or any other factors. Relevant to this analysis is the issue of collusion.

In this case, the only similarities which cut across the allegations are the relationship between the boys and Mr. [redacted]'s role as a respite caregiver to each of them. While these factors may speak to the issue of a specific propensity to commit crimes against vulnerable children, this particular aspect is most at risk of being tainted by the relationships between

the various complainants and the manner in which the complaints arose. While I'm satisfied that there was no direct collusion, I do have concerns about tainting of the evidence, which goes to the assessment of the strength of the similar fact evidence. In particular, ZN was aware generally of KM's complaint before speaking to police. Having some general knowledge that KM had alleged sexual misconduct, ZN then began to think about the incident which had occurred between he and [redacted] and his observations of [redacted]'s hand touching JP's leg. While there is nothing wrong with him re-evaluating those circumstances, his prior knowledge of KM's complaint may have been an influencing fact in how he perceived those events.

In relation to TK, he came to the attention of social workers and police because his foster mother had come to be aware of KM's allegations, ruminated on them, and then made inquiries of him as to what had happened when he was with [redacted]. While TK's statements to MM and the social worker and police officer have already been determined to lack threshold reliability, they reveal a child who may have acquired knowledge about the alleged activities of [redacted], including his own comments that he was a bad man and that he went to gaol. Again, while I am satisfied that there was no direct collusion, the risk of tainting raises issues surrounding the strength of the similar fact evidence which must be considered in the analysis of its probative value.

Turning now to the assessment of the other *Handy* factors, while all of the events are alleged to have occurred during the period 2016 through 2017, there is a wide date range. The nature of the alleged sexual touching is not similar across counts. The allegations of KM are far different than what is alleged by ZN and TK. There is no similar pattern of grooming or similarity in approach, location, or conduct. There is a wide range in terms of the number of assaults alleged by the different complainants. There are no other unifying or distinct features amongst each alleged assault other than the commonality of being in [redacted]'s care, which I have addressed above. Having regard to all of the factors, the evidence is not sufficiently similar to be probative of the issues raised and in fact would be prejudicial from the perspective of moral reasoning in particular, were the jury able to rely on the evidence of each complainant as circumstantial evidence that Mr. [redacted] committed the sexual assaults alleged by the others. Accordingly, the similar fact evidence application is dismissed.

Finally, I turn to Mr. [redacted]'s application seeking a stay of proceedings on the basis of an infringement of his right under section 11(b) of the *Charter of Rights and Freedoms*. On February 17th, 2017, Mr. [redacted] was charged on a seven count Information with various sexual offences relating to a single complainant, KM. He was bound by various release conditions, including weekly reporting, no contact provisions, and requirements to stay away from places frequented by children, amongst other things. On July 28th, 2017, a second Information, containing 15 counts, was sworn, alleging sexual offences against KM

and the three other complainants. The process was transferred from the first Information to the second and the matters proceeded forward under the second Information. The Information was amended at the preliminary inquiry and ultimately Mr. [redacted] faces charges as set out in the current nine count Indictment, which reflect the allegations involving KM and the three other complainants.

The trial of this matter was set to be heard July 20th through 29th, 2020 but was adjourned as a result of the COVID-19 pandemic. No argument was advanced in relation to pandemic-related delay. As a result, for the purposes of this application, I have assumed a conclusion of trial matters as of July 29th, 2020 and note that there has been a waiver of delay from July 29th, 2020 to the date of this decision.

In relation to the first Information, the accused moved promptly and entered his election and plea, trial by Provincial Court judge, on June 1st, 2017. On July 28th, 2017, before the trial date could be set and while the parties were awaiting a pretrial conference, the additional charges were laid. As noted earlier, a replacement Information was laid. The accused consented to the transfer of process and additional disclosure was made by the Crown. That disclosure occurred between July 31st, 2017 and September 8th, 2017. On November 10th, 2017, the accused elected trial by Court of Queen's Bench justice, sitting alone, with a preliminary inquiry, and on November 24th, 2017, the preliminary inquiry date of May 28th, 2018 was set. The preliminary inquiry proceeded as scheduled, although it should be noted that Crown disclosure was not complete until the morning of the preliminary inquiry. Mr. [redacted] was committed to stand trial on the Indictment filed June 20th, 2018.

On June 25th, 2018, the matter was first spoken to in the Court of Queen's Bench at criminal appearance court. A trial date was not confirmed on the record until October 22nd, 2018, at which time a 5 day trial was scheduled for December 9th through 13th, 2019. A pretrial conference was scheduled for June 6th, 2019. Defence participation in the pretrial conference process was anemic. Uninstructed agents appeared on two occasions and defence did not meaningfully complete the mandatory form CC7, although they did provide detailed correspondence to address a number of questions posed to them by the pretrial conference judge, including that they intended to make an application for severance. The defence severance application was filed on November 8th, 2019, and heard and dismissed on November 22nd, 2019. One of the significant reasons the Court dismissed the severance application was the indication of the Crown that they intended to rely on cross-count similar fact evidence in the prosecution of the case. This was a change of strategy from what had been indicated on the CC7.

On the eve of trial, the defence sought an adjournment of the trial, which was denied, and on the morning of trial applied to re-elect to trial by judge and jury. That application was

allowed. After the re-election was allowed, the Crown offered to withdraw its similar fact evidence application in order that the trial could proceed as scheduled. The accused declined to re-elect back. The new trial date was rescheduled to July 20th through 29th, 2020, with 3 days set aside for pretrial voir dires on issues of hearsay evidence, similar fact evidence, and this application.

The following issues arise on this *Jordan* application: one, determining the date on which the clock begins to run; two, determining whether there are any periods of time properly attributed as defence delay; three, in the event that the time to trial exceeds the presumptive ceiling of 30 months, whether there are any exceptional circumstances which would reasonably justify time to trial in excess of the ceiling; four, in the event that the time to trial falls below the presumptive ceiling, whether the defence took meaningful and sustained steps to expedite the proceedings and the case took markedly longer than it should have.

With respect to issue 1, the defence argues that Mr. [redacted] first faced jeopardy on February 17th, 2017, when he was charged with the offences relating to KM. It is the defence position that this is either the start date for the entire analysis or, at the very least, that the counts relating to KM must be considered from this date and the counts relating to the other complainants from July 28th, 2017. The Crown argues that the start date is the laying of the new Information, July 28th, 2017, and that the information which came forward about the other complainants as a result of the ongoing police investigation gives rise to an exceptional circumstance outside of the Crown's control for which the penalty of a running clock should not apply. The Crown relies on the cases of *R. v. McNamara* and *R. v. Belcourt* in this analysis.

In determining this issue, it is important to consider the purpose of the protection afforded by section 11(b). That protection affords the accused trial fairness by ensuring that trial matters are heard when the evidence is fresh in the minds of all witnesses, it ensures the right to be minimally impaired by the spectre and stigma of criminal charges hanging overhead, and it protects the accused right to have his liberty impaired for as short a period as possible. While section 11(b) also exists to ensure timely administration of justice, the burden to be alleviated is that borne by the accused person.

In this case, Mr. [redacted] has been facing jeopardy since February 17th, 2017. The laying of the new Information does not restart the *Jordan* clock, particularly when the new charges involve other complainants and allegations of sexual misconduct occurring during completely different timeframes. These circumstances are distinguishable from both *McNamara* and *Belcourt*. In both of those cases, the original charges and subsequently sworn Informations predated the decision in *Jordan*. While *Jordan* became applicable in the analysis of those case, in *McNamara,* the Court found that the fact that new complaints

came forward was an exceptional circumstance which the Crown could not anticipate or control. In *Belcourt*, the added charges arose out of the same set of circumstances. In this case, social workers and police sought out additional complainants by contacting anyone who had been provided with respite services.

While the Crown may not have had any control over the intervening investigation and its outcome, in the post-*Jordan* landscape, given the fact of different complainants alleging offences occurring during different timeframes, the Crown could just as easily have elected to proceed on separate Informations, particularly in light of the fact that Mr. [redacted] had already elected trial in Provincial Court and was ready to schedule trial dates on the first Information. The step of laying a multi-complainant 15 count Information directly resulted in a re-election to trial by Court of Queen's Bench justice, sitting alone, with a preliminary inquiry, necessarily increasing the amount of court time and trial time associated with booking a 1 week trial.

I agree with the reasoning of Justice Sulyma in *Forsyth*, which applies the Ontario Court of Appeal decision in *Milani*. That case effectively held that the period of time during which a person is subject to judicial process is the relevant period of time for consideration of his section 11(b) interests. This commences with the laying of the first Information.

I decline to hive off the charges laid in February, 2017 involving KM from those laid in July, 2017 involving the other three complainants. The state chose to proceed on a single Information which included all of the original charges involving KM and which was subsequently amended to form the current Indictment before the Court. For the purposes of assessing section 11(b), Mr. [redacted] did not face two distinct periods of jeopardy or judicial process. The judicial proceedings, including the choices about trial strategy, trial procedures, and trial time requirements, all emanate from the single Information and must be considered as a whole. As a result, the start date for assessing the section 11(b) application on all counts is February 17th, 2017.

With respect to determining whether there are any time periods properly attributable as defence delay, the following time periods must be analysed: September 8th, 2017 through November 24th, 2017, which reflects the period from completion of disclosure to setting of the preliminary inquiry; ramification delay arising from not setting a preliminary inquiry date at the September 8th, 2017 appearance; the period June 25th, 2018 through October 22nd, 2018, which reflects the time period between the matter first appearing in the Court of Queen's Bench and the setting of the trial date; ramification delay arising from not setting a trial date at the June 25th, 2018 appearance; and the period December 13th, 2019 through July 29th, 2020, which reflects delay due to the trial adjournment. In assessing each of these time periods, I have reviewed the affidavits filed as well as the transcripts of the various court appearances.

Dealing first with the period September 8th, 2017 through November 24th, 2017, there was no explicit defence waiver and the Crown consented to the various adjournment requests, particularly noting the reasonableness of those requests on September 8th and 22nd and October 6th. On the October 27th and November 10th appearances, there seemed to be some confusion about the need for filing of a form A and a pre-preliminary meeting, which was required by Provincial Court. There is nothing in the record which can be construed as intentional delay by the defence. Accordingly, neither will this time period be deducted, nor does any ramification delay arise from not scheduling the preliminary inquiry on the September 8th, 2017 appearance.

Next is the June 25th, 2018 through October 22nd, 2018 delay in setting the trial date. Defence argues that a period of delay running from July 9th, 2018 to October 22nd, 2018 is properly attributable to it but not the period June 25th, 2018 to July 9th, 2018. I agree with defence that the appropriate calculation is from July 9th, 2018 to October 22nd, 2018, given the exchange of correspondence culminating in the reply from the Crown on July 6th, 2018. Trial dates should have been set on July 9th, 2018, hence 3 months, 12 days are deductible as defence delay.

The Crown argues that the defence should bear ramification delay on the basis that if the matter had been scheduled for trial on June 25th, 2018, dates as early as April 8th, 2019 were available for trial. On the October 22nd, 2018 booking date, the earliest mutually convenient date was December 9th, 2019. In reviewing the October 22nd, 2018 transcript, it should be noted that the Court was unable to accommodate any dates prior to November 18th, 2019, despite the availability of defence counsel in April, May, and September, 2019.

The difficulty with the novel concept of ramification delay is that it requires the Court to engage in speculation about the availability of both judicial resources and counsel. By way of example, in this case, the Crown notes that on July 9th, 2018, two 5 day trials were set, one running from April 8th through 12th, 2019 and one running from April 29th to May 3rd, 2019. The affidavit evidence filed indicates that Ms. Weich was counsel on one of those matters and that Mr. Fagan was of significant seniority to the two defence counsel who secured these dates. But, trial dates are set on a first come, first serve basis, not on the basis of seniority. There is also no evidence before the Court as to the volume of civil matters on the trial list or other double or triple booked criminal matters. There are multiple factors which affect the ability to secure any particular trial dates, and although there are ramifications which may well arise from not scheduling a date on the first opportunity, it is impossible to parse the causes giving rise to these ramifications such that they cannot be attributed as defence delay. In fact, on all of the evidence, it would appear that the delay in scheduling the trial date was institutional.

Finally is the period December 13th, 2019 through July 29th, 2020, reflecting the trial adjournment delay. The trial was adjourned as a result of the accused's successful application to re-elect trial by judge and jury. There is a significant issue about what caused the re-election application and the ultimate delay occasioned to the trial. While Mr. [redacted] had made known his intention to file a severance application, he did not do so until November 8th, 2019. I accept that he was awaiting the identity of the trial judge and that information was available in late June, 2019. On the date of the severance hearing, November 22nd, 2019, the Crown first indicated it would be seeking to adduce cross-count similar fact evidence. If severance was granted, the Crown advised the Court that four separate weeklong trials would be required, as it intended to call each witness to testify in each trial. In the event of severance, additional trial time could not be secured until September, 2020. The severance application was denied. Mr. [redacted] applied for an adjournment of the trial on the Friday prior to trial, which was also denied. He then applied to re-elect trial by judge and jury. The basis for that application was rooted in the similar fact evidence argument. The application to re-elect was granted. The Crown then indicated it would abandon its similar fact evidence argument in order that the trial could proceed as scheduled. Given that the re-election had been entered, proceeding with the trial as scheduled was an impossibility unless the accused re-elected once again.

On the *Jordan* application, argument was advanced by each side that the other had engaged in unjustified tactical maneuvering. The Crown argued that the late severance application and the re-election were simple delay tactics. Mr. [redacted] argued that the similar fact evidence application had no merit and was simply brought to undermine the strength of the severance application but had the resulting effect of changing defence trial strategy, including in terms of the mode of trial.

Jordan has created an atmosphere in which trial judges are asked to assess either the bona fides or the mal fides of counsel in the conduct of their action. The Court should resist the temptation of taking an overzealous approach to second-guessing strategic decisions made, as events unfold, by experienced Crown and defence counsel who are aware of the facts of their case, their duties to the Court, and the rights of the accused.

In this case, I am satisfied that the Crown and defence both made legitimate strategic decisions about the manner in which they advanced their case, which resulted in the adjournment of the December, 2019 trial, distinguishing this case from other late re-election *Jordan* jurisprudence. This delay is not something that is solely attributable to the defence but also cannot be fully borne by the Crown. Accordingly, they should both bear responsibility for the period of delay which resulted, such that it is reasonable to deduct one half of the total 7 months, 16 days delay, or 3 months, 23 days, as defence delay and leave the Crown to bear the other half.

On that basis, the time from charge to the conclusion of trial is 41 months, 12 days. The total deductible defence delay is 7 months, 4 days, leaving a total delay of 34 months, 8 days. This is in excess of the 30 month ceiling and is presumptively unreasonable. Accordingly, it falls to the Crown to demonstrate exceptional circumstances. No evidence of discrete events not encapsulated by the arguments already considered earlier in this decision or trial complexity have been advanced. As such, the application is allowed. Mr. [redacted]'s section 11(b) right as protected by the *Canadian Charter of Rights and Freedoms* has been infringed and, pursuant to section 24(1), a stay of proceedings of all charges is entered.

MS. WEICH: Thank you, Your Honour. I simply ask just -- I didn't write down the numbers fast enough. I heard the time to trial is 41 months, 12 days.

THE COURT: Yes.

MS. WEICH: The total I wrote -- I wrote down the total defence delay is, and then I missed that number.

THE COURT: Seven months, 4 days, leaving total delay of 34 months, 8 days.

MS. WEICH: Sorry, leading to a total delay of?

THE COURT: Thirty-four months, 8 days.

MS. WEICH: Thank you, Your Honour.

THE COURT: Thank you.

MS. WEICH: So, Your Honour, I suppose that only leaves, then, forfeiture of items seized by the police. They're all investigative materials. I don't believe they ever seized anything from the accused. I don't believe he'd be seeking to get anything back.

THE COURT: I'm sorry, I didn't catch the last sentence --

MS. WEICH: Unless my friend has anything to say --

THE COURT: -- of what you said.

MS. WEICH: -- about that.

THE COURT: It was a bit muffled.

MS. WEICH: Sorry. Simply forfeiture, because the police will be asking me what they can do with all of their materials. I don't believe they ever seized anything from the accused, so I don't think he'll be asking for anything back. So I'll simply seek forfeiture of all the materials that police seized.

THE COURT: Mr. Fagan --

MR. FAGAN: My Lady --

THE COURT: -- any comments?

MR. FAGAN: Out of an abundance of caution, I would simply ask my friend to prepare the requisite order, forward it to my office. I expect if -- if there are no items that Mr. [redacted] would like to have returned, I'll simply consent and my friend can file and serve it accordingly.

MS. WEICH: I can see if the police have an exhibit list on hand, My Lady.

THE COURT: Okay. Thank you. And then you can forward that to my attention and I'll sign the order.

MS. WEICH: Thank you.

THE COURT: And then there is the question -- I do understand that you set trial dates for June of 2021. Off the top of my head, I don't know those precise dates, but they should be -- the trial dates should be vacated.

MR. FAGAN: June 7th to the 11th.

THE COURT: Sorry, June?

MR. FAGAN: 7th to 11th.

THE COURT: Thank you. Then those trial dates will be vacated. Anything further?

MS. WEICH: Thank you, My Lady. I don't believe so.

MR. FAGAN: Thank you, My Lady.

THE COURT: Thank you.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Jennifer Stringer, certify this recording is the record made of the evidence in the proceedings, Court of Queen's Bench, held in courtroom number 4, at Lethbridge, Alberta, on the 2nd day of December, 2020, and I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Victoria Winning, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Pro-to-type Word Processing
Order: AL5586
Dated: January 5, 2021