CITATION: R. v. Robert, 2018 ONSC 545
COURT FILE NOS.: 2983/17 and 2985/17
DATE: 20180209

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN Respondent	James Boonstra, counsel for the Crown
– and –	
JOHN JACOB ROBERT and MICHEL CONRAD PAUL GAGNON Applicants	Kenneth Marley, counsel for the Applicants
	HEARD: January 18, 2018

DECISION ON PRE-TRIAL APPLICATIONS

THOMAS R.S.J.

THE APPLICATIONS

[1] The applicants, John Jacob Robert (Robert) and Michel Conrad Paul Gagnon (Gagnon) are charged on two indictments. The first, a 66 count indictment, alleging 34 offences regarding the infliction of pain, suffering or injury to dogs. Those 34 counts relate to allegations of conducting the business of dog fighting. The balance of the counts on that indictment charge offences related to illegal possession and storage of firearms and prohibited weapons.

[2] The second indictment is a single count charging possession for the purpose of trafficking in marijuana.

[3] All offences, but Counts #1 and #2, recite a single offence date of October 9, 2015. October 9, 2015 is the date when two search warrants were executed at 5474 Morris Line in Merlin, Ontario by officers of the Chatham-Kent Police Service (CKPS) and the Ontario Society for the Prevention and Cruelty to Animals (OSPCA).

[4] All charges have followed the same path through the Ontario Court of Justice (OCJ). There is an agreement by counsel that the indictments will be tried together if not formally joined.

[5] Defence counsel for Robert and Gagnon has brought two applications.

[6] The first alleges a breach of the accuseds' right to trial within a reasonable time contrary to s. 11(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and requesting a stay of proceedings (s. 24 (1)). The second alleges unreasonable search and seizure (s. 8) requesting the exclusion of all evidence seized (s. 24(2)).

[7] The charges on both indictments are captured by the relief sought in these applications. These reasons deal only with the application seeking a stay for unreasonable delay. The s. 8 application has been adjourned to March 28, 2018 for argument.

BACKGROUND

[8] The background details below appear not to be in dispute.

[9] On June 8, 2015 Constable Brown (CKPS) attended at 5474 Morris Line to investigate a complaint that there might be dog fighting on the property.

[10] As part of his attendance he entered a fenced area at the rear of the property. He observed a number of dogs he thought to be pit bulls. He made other observations and subsequently returned to the residence and spoke to Robert.

[11] Following this attendance on the property, an investigation was undertaken by CKPS and OSPCA. On September 25, 2015 officers of the OSPCA made a decision to apply for search warrants. On October 5, 2015 a justice of the peace at the Newmarket Courthouse granted a warrant pursuant to the *Criminal Code* and a warrant pursuant to the *Provincial Offences Act* (*POA*) and the *Dog Owner's Liability Act* (*DOLA*).

[12] The warrants were executed by three inspectors of the OSPCA and a full Critical Incident Response Team of CKPS on October 9, 2015.

[13] A third warrant was issued in Chatham on October 9th during the execution of the prior warrants. The third warrant allowed for the seizure of electronic equipment observed on the premises.

[14] The attending officers seized 31 dogs, electronic equipment which included a computer, paraphernalia believed to be used in dog breeding and dog fighting, records, 15 firearms, four knives, ammunition, and approximately 1.6 pounds of marijuana.

[15] Robert and Gagnon were arrested on October 9, 2015 and held for a bail hearing. Both were released on a recognizance with conditions on October 19, 2015.

[16] The accused were before the OCJ for 22 months and six days. The trial of these charges in the Superior Court of Justice (SCJ) is set to be completed on May 11, 2018 or 31 months two days from the date first charged. That calculation exceeds the 30-month presumptive ceiling set by the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 (*Jordan*), a decision released on July 8, 2016. A detailed review of the history of this prosecution is required.

THE CHARGES

[17] I will attempt to set out below the chain of charging documents and orders that made their way through the OCJ and then to this court (SCJ).

(a) Information 15-0839 was sworn October 10, 2015 charging Robert and Gagnon together with Kim Thu Robert with four counts (two counts related to

abuse of dogs s. 445.1(1)(a) *Criminal Code*; two counts careless storage of firearms s. 86(1) *Criminal Code*).

(b) Information 15-0848 was sworn October 15, 2015 charging Robert, Gagnon and Kim Thu Robert with one count possession of marijuana for trafficking (s. 5(2) *Controlled Drugs and Substances Act* (*CDSA*)).

(c) Information 15-0885 was sworn October 29, 2015 charging Robert, Gagnon, Kim Thu Robert and John Khanh Jr. Robert with possession of marijuana for trafficking (s. 5(2) *CDSA*).

(d) Information 15-1868, unsworn but with appearances commencing October 15, 2015 charging Robert, Gagnon and Kim Thu Robert with 32 counts of dog abuse, 13 counts of careless storage of a firearm, 15 counts of possession of firearms without a licence, and four counts of possession of a prohibited weapon.

(e) On November 27, 2015 Kowalyshyn J., on a defence motion, ordered the unsealing of the documents supporting the Chatham warrant of October 9, 2015 for redacting and disclosure by the Crown.

(f) On March 18, 2016, on a defence motion, Wong J. ordered the unsealing of the documents supporting the Newmarket warrants of October 5, 2015.

(g) Information 16-0683, sworn September 7, 2016, charging the same three accused with the same 64 counts as above, but adding two counts of abusing dogs joining Robert Ryan Tomlin (Tomlin) on those two counts only.

It was on this information and *CDSA* information 15-0885 (as above) that Robert and Gagnon were committed for trial by Kowalyshyn J. on August 15, 2017. It was on this information that Tomlin entered a guilty plea before Kowalyshyn J. on August 24, 2017 and was sentenced the same date to a conditional sentence of four months followed by 24 months' probation.

(h) Indictment 17-2983, dated August 21, 2017, charging Robert and Gagnon with one count of possessing marijuana for trafficking (s. 5(2) *CDSA*).

(i) Indictment 17-2985, dated September 25, 2017, charging Robert and Gagnon with 66 counts related to abusing dogs, and possessing firearms and prohibited weapons.

(j) In addition to the charges set out above, the accused were originally charged under the *DOLA* with owning and possessing the banned breed of dogs known as pit bulls. They were respondents to an application brought by the OSPCA to obtain an order to euthanize the dogs. While I do not have the details of those charges, they followed the OCJ informations for an extended period and will be subject to comments set out below.

HISTORY OF THE PROCEEDINGS

[18] The following is a history of the proceedings for the purposes of the application:

Court Date	**Running Total of Days**	**Reason**
Oct. 9/15		Accused arrested
Oct. 10/15	2	Crown request (further investigation)
Oct. 13/15	5	Crown request (further investigation)
Oct. 15/15	7	Crown request (for bail hearing)
Oct. 19/15	11	Following bail hearing, for Crown election and disclosure
Nov. 5/15	28	For further disclosure, and for s. 487.3 application (disclosure of ITO)
Nov. 27/15	50	s. 487.3 order made, Chatham warrant, adjourned for further disclosure

Dec. 17/15	70	Crown election made, edited ITO ready for disclosure, adjourned to review additional disclosure
Jan. 21/16	105	Further disclosure provided; adjourned for defence to review
Feb. 11/16	126	*DOLA* application for destruction of dogs before Court for the first time. Crown advises all charges will be kept together and heard by a judge together with destruction application. Crown says, "We're nowhere near doing a pre-trial" on the criminal charges; adjourned for further s. 487.3 application on the Newmarket warrants.
Mar. 10/16	154	s. 487.3 applications not properly before the Court; intervenor applications also not properly before the Court in the *DOLA* application. Justice Wong to informally case-manage all matters. Crown submits all matter remain together.
Mar. 18/16	162	s. 487.3 applications properly before Court; s. 487.3 orders made; adjourned for editing and disclosure of the ITOs; defence expects that this will complete the disclosure process; intervenor application in *DOLA* charges before Court; defence suggests transfer of those proceedings to the *POA*, Crown insists that they be kept together with criminal charges
Apr. 18/16	193	Edited ITOs only available that day; adjourned to allow for review of this disclosure and for accused to then consider their election as to mode of trial; Court decides to transfer *DOLA* charges and applications to *POA* Court
May 5/16	210	Adjourned for judicial pre-trial (JPT)
July 5/16	271	JPT commenced, but Crown announces that there is now additional disclosure (one "terabyte") and two additional accused to be added
Sep. 21/16	349	Justice Wong not available to continue JPT; s. 487.3 order made in favour of new co-accused; adjourned for the purposes of scheduling a new date for JPT
Oct. 3/16	361	Edited ITO not available for new co-accused; Crown not available to explain
Oct. 6/16	364	Edited ITO and substantial electronic disclosure now available for counsel for new co-accused; adjourned to arrange date for continuation of JPT
Oct. 13/16	371	Adjourned at request of counsel for new co-accused so that disclosure issues can be clarified
Oct. 31/16	389	Counsel for new co-accused still reviewing disclosure; adjourned for continuation of JPT

Jan. 9/17	459	JPT concluded; adjourned to set date for preliminary inquiry (PI)
Jan. 19/17	469	PI date not yet able to be set. Counsel for new co-accused has not provided dates; adjourned for that purpose
Feb. 7/17	488	Counsel not yet able to set a date for PI; adjourned for that purpose
Feb. 16/17	497	Adjourned for preliminary inquiry
Mar. 8/17	517	Counsel for new accused brings application to adjourn the PI; application adjourned for proper service
Mar. 20/17	529	July 18 PI date vacated; adjourned to set new date
Mar. 30/17	539	July 18 preliminary inquiry adjourned to August 15
Aug. 15/17	677	PI completed; case adjourned to next Assignment Court
Sep. 25/17	718	Dates set at Assignment Court; Jan 18 and 19, 2018, March 28 and 29, 2018, and May 7, 8, 10 and 11, 2018
May 11/18	946	Projected last day of trial

ANALYTICAL FRAMEWORK

[19] In *Jordan*, to address "a culture of complacency towards delay," the court set out a new framework with a ceiling beyond which delay is presumptively unreasonable. This ceiling is based on the time from the charge to the actual or anticipated end of trial, and is set at 18 months for cases going to trial in the provincial court and at 30 months for cases going to trial in the superior court (or in provincial court after a preliminary inquiry) (para. 49). The calculation of the total delay does not include defence delay, which the court described as delay clearly and unequivocally waived by the defence and delay caused solely by the conduct of the defence (paras. 61-66).

[20] If the total delay exceeds the presumptive ceiling, the Crown can rebut the presumption that the delay is unreasonable by showing that the delay is reasonable because of the

presence of exceptional circumstances. These are circumstances that lie outside the Crown's control in the sense that (1) they are reasonably unforeseen *or* reasonably unavoidable, *and* (2) the delays emanating from these circumstances cannot be reasonably remedied by the Crown once they arise (para. 69). The court suggested that exceptional circumstances would generally arise with discrete exceptional events and particularly complex cases that require an inordinate amount of trial or preparation time (paras. 71-81).

[21] If the total delay falls below the presumptive ceiling, the court held that the defence bears the onus to show the delay is unreasonable by establishing that (1) it took meaningful steps that demonstrates a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have (para. 82).

[22] Finally, with respect to cases that were already in the system at the time when the court released its decision ("transitional cases"), the court held that a "transitional exceptional circumstance" would apply where the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed (paras. 94-98). With respect to transitional cases where the total delay falls below the presumptive ceiling, defence would not be expected to have made sustained efforts to expedite matters where this was not required under the existing framework (para. 99).

[23] The *Jordan* framework is an attempt by the majority to provide clarity and predictability prospectively (para. 108). In the view of the Court, it is a simpler process with a reduction in the subjective micro-counting previously dreaded by application judges (para. 111).

POSITION OF THE PARTIES

[24] The defence maintains there was no defence delay as contemplated by *Jordan*. Mr. Marley suggests that the reasons for this matter taking an excessive time to trial fall at the feet of the Crown for three reasons:

1. Delayed disclosure;

2. an insistence by the Crown to combine a provincial offence prosecution pursuant to *DOLA* and an animal destruction application with these criminal charges; and

3. the Crown's addition of a co-accused well into the proceeding.

[25] Mr. Boonstra for the Crown argues for a finding of defence delay that would bring the time to trial below the *Jordan* ceiling. Failing that, he suggests the complexity of this prosecution should drive down the time to trial to an acceptable level in a case where the calculation is only one month in excess of the 30 month ceiling.

ANALYSIS

CONCESSIONS

[26] At this point, let me offer items factored in the *Jordan* analysis which are not in dispute. Firstly, counsel are content that there was no delay in these accused obtaining counsel. Mr. Marley appeared from the first day for both Robert and Gagnon.

[27] Secondly, there has been no defence waiver of delay at any stage.

[28] Next, there was a discrete event on or about October 3, 2016 related to Mr. Boonstra that caused a delay in the disclosure process of approximately a working week. As a result, there will be a deduction of five days.

[29] Finally, it is recognized by counsel that these charges were laid nine months prior to the release of the decision in *Jordan*. It is their joint position that there has not been any reliance on the prior regime as directed by *R. v. Morin*, [1992] 1 S.C.R. 771 (*Morin*) that would provide relief from delay in this prosecution.

[30] Let me next turn to the issues raised by the defence.

1 - DELAYED DISCLOSURE

[31] It is common ground that officers executing the search warrant on October 9, 2015 seized a computer from the residence. Apparently the analysis of the contents of the computer took a significant period of time.

[32] On July 5, 2016 on the 14th court appearance, during the course of a mandatory pre-trial in the OCJ, the Crown announced it would be disclosing a terabyte of new material from the computer (quantified by other counsel as 17,000 pages).

[33] It was, as well, at that time, that the Crown indicated two further co-accused would be added to the prosecution.

[34] I have no evidence as to the nature of the new disclosure or its importance to the prosecution. More importantly, I have no evidence as to why it took so long for it to become available. Crown counsel suggested in argument that it might be that the OSPCA did not have the means to analyze the computer download and that it was directed to personnel at the Finance Ministry for that purpose. Be that as it may, it was disclosed to Mr. Marley, counsel for Robert and Gagnon, by external hard drive on approximately July 15, 2016.

[35] Unfortunately, it is clear that this disclosure was not made to Mr. Retar until October 6, 2016. Mr. Retar had now started to appear as counsel for the new co-accused, Tomlin. Disclosure was therefore not complete until almost one year from the date of seizure and arrest.

[36] As the Crown had added Tomlin at this stage, the judicial pre-trial could not proceed until disclosure could be received and reviewed by Mr. Retar. The judicial pre-trial was not concluded until January 9, 2017 or six months from the time it commenced.

[37] Pomerance J., in the pre-*Jordan* decision of *R. v. Boronka*, 2012 ONSC 4952 at para. 74 discussed the special significance of late disclosure to the delay analysis.

> …the five months delay attributable to non-disclosure by the Crown must be viewed differently than pure institutional delay. It has been recognized in various cases that, while institutional delay must be tolerated as an

> inherent part of the system, delay attributable to non-disclosure should be treated more strictly. As it was put by Hill J. in *R. v. McNeilly*, [2005] O.T.C. 266, [2005] O.J. No. 1438 (S.C.) [*McNeilly* cited to O.J.] at para. 72:
>
> > Recognizing that institutional delay is an inevitable reality of processing criminal cases, we "tolerate" such delay. It is not self-evident logic that we are prepared to tolerate crown-occasioned delay in the same manner as institutional delay. Although some prosecutorial delay, in the context of the overall delay, may not compel a finding of unreasonableness, where the total delay demands review, no actions of the accused contributed to the delay, the crown delay is manifestly and unreasonably excessive, and prejudice is established, this court is obliged to protect the delay to trial rights.

[38] Paciocco J.A. in *R. v. D.A.*, 2018 ONCA 96 at para. 13 considered delayed disclosure in the context of adjournments to allow defence counsel to properly review and prepare the new material. He found that the delay associated by disclosure was the responsibility of the Crown.

> The Crown suggested before us that its consent to adjourn the April 2, 2015 pretrial because of its own last minute disclosure is unimportant in assessing unreasonable delay unless, by its nature, the information disclosed is shown to have been essential to the case. I do not agree. The accused is entitled to review disclosure they have received to determine its importance, before moving a case forward. Where, as here, that disclosure is made so late that it cannot be reviewed before a scheduled appearance, the Crown cannot fairly assert that the accused should go ahead and set a date at that scheduled appearance.

[39] I do not suggest that the Crown here purposely delayed disclosure. In fact, it seems they passed it on once received, but an unreasonable delay in accessing material by the charging authorities falls at the feet of the Crown.

[40] All of us involved in the administration of criminal justice are aware of the significant role electronic data can now play in a wide variety of prosecutions. Smart phones, tablets, laptops and other devices provide a potential treasure trove of information for investigators. Downloading information from often inter-connected sources, pursuant to judicial authorizations, is time consuming.

[41] Here, the time it took to access and disclose the new terabyte of potential evidence from a single computer seized by warrant on October 9, 2015 was simply unreasonable and I have no explanation as to why it took so long.

2 – *DOLA* PROSECUTION

[42] I have little detailed information about these provincial offences. It is apparent that Robert and Gagnon were charged with multiple counts under the *DOLA* of owning and breeding pit bulls and were respondents in an application to euthanize the dogs.

[43] The Crown took the position that these charges should proceed through the OCJ for trial together with the criminal offences. The justices of the peace and the OCJ judges who presided from time to time acceded to the Crown position. It was only on April 18, 2016 that those charges were transferred to the Provincial Offences Court.

[44] The Crown maintains that it was not until the Court of Appeal decision in *R. v. Sciascia*, 2016 ONCA 411 (*Sciascia*) that it decided a joint trial of the charges was not possible and agreed to the transfer.

[45] The Court of Appeal in *Sciascia* determined that a joint trial by an OCJ judge of *Criminal Code* offences and *Highway Traffic Act* offences was not possible. Of note, the decision was reversed by the Supreme Court of Canada (R. v. *Sciascia*, [2017] S.C.J. No. 57).

[46] The Crown had elected to proceed by indictment in the fall of 2015. It should have been alive to the very distinct probability that these matters were never going to remain in the OCJ for trial.

[47] While I cannot find that the marrying of these charges directly caused delay, it clearly confused the progress of the case. Commencing on March 10, 2016, counsel for potential intervenors started to appear. On that date, the organizations known as Dog Tales, Animal Justice, and Bullies in Need Rescue Organization were represented by counsel, all seeking to intervene and stop the euthanizing of the seized pit bulls. One counsel

argued that Justice Wong should invoke the inherent *parens partriae* jurisdiction of the OCJ to save the animals.

[48] I do not wish to demean the efforts of the potential intervenors. They appropriately attempted to represent their interests, but became caught in the obvious confusion of where the destruction application should be heard.

[49] I am advised, and counsel agree, that once the *DOLA* charges and the related applications were transferred to the Provincial Offences Court, all matters were resolved. The intervenor applications were heard and denied. Through the hard work of the presiding judicial officers in that court, a compromise was negotiated with several of the dogs being euthanized while the majority were transferred to Florida for their rehabilitation and adoption. The *DOLA* charges were withdrawn.

[50] It is clear from the record that Mr. Marley was concerned that the provincial offences were slowing down the progress of the criminal charges. Justice Wong had attempted to assume a case management function for all the charges as early as March 10, 2016, but it is clear that the number of adjournments and the scheduling process often put the case before other judicial officers.

[51] Of note is the comment made by Justice Wong on October 31, 2016:

> THE COURT: Well, I wasn't the judge the last date. I was the judge, I think, the date before that. That's part of the problem. We're going back and forth based on availability. But I can say that on every occasion Mr. Marley has been in front of me, including the last part of the judicial pre-trial, it was clear that he's not waiving delay and he wants his case to go forward.

3 – ADDED CO-ACCUSED

[52] As mentioned earlier, it was not until the start of the July 5, 2016 pre-trial that the Crown advised that Tomlin would be added to the charges.

[53] Tomlin had initially been charged separately and appeared before the Court on March 22, 2016.

[54] The Crown maintains that it was in the interests of the administration of justice to join Tomlin and proceed against everyone together (*R. v. L.G.* 2007 ONCA 654).

[55] In this instance, that decision by the Crown was ill-timed and, as it turns out, ill-advised.

[56] In *Jordan*, the majority discussed the potential of multiple accused and the impact on the pace of the litigation, albeit in its discussion of exceptional circumstances at paras. 77-79.

> …Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.
>
> A typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance. However, if an inordinate amount of trial or preparation time is needed as a result of the nature of the evidence or the issues such that the time the case has taken is justified, the complexity of the case will qualify as presenting an exceptional circumstance.
>
> It bears reiterating that such determinations fall well within the trial judge's expertise. And, of course, the trial judge will also want to consider whether the Crown, having initiated what could reasonably be expected to be a complex prosecution, developed and followed a concrete plan to minimize the delay occasioned by such complexity (*R. v. Auclair*, 2014 SCC 6 (CanLII), [2014] 1 S.C.R. 83, at para. 2). Where it has failed to do so, the Crown will not be able to show exceptional circumstances, because it will not be able to show that the circumstances were outside its control. In a similar vein, and for the same reason, the Crown may wish to consider whether multiple charges for the same conduct, or trying multiple co-accused together, will unduly complicate a proceeding. While the court plays no supervisory role for such decisions, Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s. 11(*b*) right (see, e.g., *Vassell*). As this Court said in *R. v. Rodgerson*, 2015 SCC 38 (CanLII), [2015] 2 S.C.R. 760 (*Rodgerson*):
>
> > Certainly, it is within the Crown's discretion to prosecute charges where the evidence would permit a reasonable jury to convict. However, some semblance of a cost-benefit analysis would serve the justice system well. Where the additional or

> heightened charges are marginal, and pursuing them would necessitate a substantially more complex trial process and jury charge, the Crown should carefully consider whether the public interest would be better served by either declining to prosecute the marginal charges from the outset or deciding not to pursue them once the evidence at trial is complete. [para. 45]

[57] It is not insignificant that *Jordan* and other delay cases dealing with multiple accused invariably consider the Crown's decision on severance. Here, with accused already severed by separate informations, the Crown chose to join Tomlin.

[58] The addition of Tomlin caused significant delay in moving the matter through the OCJ. He did not receive full disclosure until October 6, 2016. The judicial pre-trial, as noted earlier, was delayed by six months. I question the need for Tomlin's counsel, Mr. Retar, to make his own unsealing applications for warrant materials already disclosed to Mr. Marley's

clients who were now on the same informations. Surely the Crown could have assisted here.

[59] The addition of Tomlin slowed the setting of the preliminary inquiry date and then required an adjournment of the inquiry for a month when Mr. Retar required an adjournment.

[60] Robert and Gagnon were captive to this process. On October 6, 2016 Mr. Boonstra addressed the Court regarding the setting of a new date for the judicial pre-trial:

> The concern that I have about setting the pre-trial is twofold. One, Mr. Marley's case is farther ahead and so delay is an issue in his case. Oh, but I also know that, even if Mr. Retar got the disclosure tomorrow, because if Ms. Murphy picked it up right now and took it back to him, it's substantial. We know that. So I'm reluctant to set a pre-trial date that does not take that into consideration.

[61] On October 13, 2016 Mr. Marley again placed on the record his concerns regarding delay as it related to the addition of Tomlin:

> MR. MARLEY: The reason why we're speaking to it together is because the Crown has chosen, at this juncture in the proceedings, to join Mr. Tomlin and my four clients on the same information. And we began a pre-trial with Justice Wong, it's got to be at least two months ago now, and, at that pre-trial, we learned that there was additional disclosure forthcoming from the Crown. That disclosure is substantial. It's something in the range of 7,000 pages of disclosure, all scanned for us onto a, an external hard drive.
>
> For my part, having my instructions from my clients, I am ready to proceed with the continuation of the pre-trial and, as you might expect, a year into the proceedings, I'm anxious to get preliminary inquiry dates set.
>
> However, Mr. Retar is in a different position. I'll let him explain his situation, but he's not yet ready to set a continuation date for that pre-trial, and I'll [*sic*] Mr. Retar explain to Your Honour why.

[62] Mr. Boonstra has pointed out to me that the Crown attempted to lessen the impact of the addition of Tomlin. The Crown requested Mr. Retar attend at the first pre-trial. But we know disclosure was far from complete for Mr. Retar's client.

[63] The Crown withdrew the charges against two accused related to Robert and Gagnon and also represented by Mr. Marley. This step lead to Mr. Marley agreeing to a one-day preliminary inquiry with a consent committal. This agreement between counsel could also be viewed as defence counsel trying to limit the preliminary inquiry so that his clients could move on to trial. The original date set was July 18, 2017 but then the case had to be adjourned to August 15, 2017 to accommodate Mr. Retar's schedule.

[64] I do not question the attempts by the Crown to dull the effect of the addition of Tomlin to this proceeding. I would suggest that it was obvious to all that delay was a major concern for Mr. Marley and that an application like this one was not just a possibility.

[65] Importantly, Tomlin was allowed to plead guilty to one count under the *Criminal Code* for a conditional sentence. That plea arrangement was made virtually on the day of the preliminary hearing. Tomlin then dropped out of the process again.

[66] This is not the type of careful cost-benefit analysis spoken about in *Rodgerson*. I caution that I know very little about the case against Tomlin, but I suggest, by the result, his addition to the Robert and Gagnon informations was not worth the months of additional delay in getting them tried.

DEFENCE DELAY

[67] At para. 60, the majority in *Jordan* commenced its consideration of defence delay by reflecting on the purpose of the *Charter* provision itself:

> Application of this framework, as under the *Morin* framework, begins with calculating the total delay from the charge to the actual or anticipated end of trial. Once that is determined, delay attributable to the defence must be subtracted. The defence should not be allowed to benefit from its own delay-causing conduct. As Sopinka J. wrote in *Morin*: "The purpose of s. 11(*b*) is to expedite trials and minimize prejudice and not to avoid trials on the merits" (p. 802).

[68] The Court went on to discuss two components comprising defence delay:

> (1) Delay waived by the defence;
> (2) Delay caused by the conduct of the defence.
>
> (paras. 61-63)

[69] As stated earlier, it is conceded that there is no evidence of defence waiver and so I need only consider the second component of defence delay.

[70] The Crown presents two instances in the history of this proceeding which it believes amount to defence delay within the meaning of the term as defined in *Jordan*. If accepted, those time periods, when deducted, would reduce the time to trial below the *Jordan* ceiling.

[71] On March 10, 2016 an agent for Mr. Marley appeared before Justice Wong. All charges were before the Court including the *DOLA* charges. Mr. Marley accepted that he had not perfected service of an application pursuant to s. 487.3 to unseal the materials supporting

the Newmarket warrants. Other matters were considered by Justice Wong on this date including the intervenor application.

[72] The case was adjourned to March 18, 2016 to allow for the unsealing application to be properly before the Court and to allow the potential intervenors to make formal applications in the *DOLA* proceedings. On March 18, 2016 the unsealing order was granted but much of the time was spent addressing what rules of procedure should apply to the intervenor applications and the forum in which they should be heard.

[73] Mr. Marley was clear at this juncture that he believed that matter should be transferred out of the OCJ and that the determination of the application should await the trial of his clients.

[74] Mr. Boonstra argued that the eight days between March 10 to 18, 2016 should be deducted as defence delay since it relates to inadequate service and filing of a defence application. Mr. Marley conceded that his application was not properly before the Court but pointed to the adjournment being necessary to also deal with the intervenors.

[75] Paras. 63-65 of *Jordan* capture the Court's view of the second component of defence delay.

> The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises "those situations where the accused's acts either directly caused the delay. . . or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial" (*Askov*, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay…
>
> As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable…

> To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

[76] Focussing again on the eight days between March 10 and 18, 2016 I am not prepared to deduct this period from the 30 month ceiling. Leaving aside the clear evidence that the adjournment was also granted for other reasons, this eight day period had no effect on the ultimate progress of the case to its conclusion in the OCJ. It must be remembered that it was not until July 15, 2016 that the terabyte of material was disclosed to Mr. Marley and not until October 6, 2016 that it was disclosed to Mr. Retar.

[77] The production of that material progressed on its own timeline determined by the unexplained efforts of the seizing authorities. That late disclosure makes this eight day adjournment meaningless in the *Jordan* analysis.

[78] The second instance of defence delay identified by the Crown brings with it more complex issues.

[79] At an assignment court on September 25, 2017 the two indictments were first before me in this Court. Mr. Marley identified at the outset that he was bringing a s. 11(b) application and a s. 8 application. He estimated the applications could be dealt with in two days while the trial would take five days.

[80] The record is clear that everyone realized the trial lists in late 2017 and early 2018 were already full. The record is also clear that I added trial time to this jurisdiction by scheduling before myself on dates outside those identified as regular trial dates.

[81] The Crown has summarized the exchange between counsel and the Court in para. 11 of its factum.

> …With respect to trial time the Court offered to schedule this matter for either of the weeks of March 12th, or March 26th. It was confirmed that the Crown was available to proceed at those times. Defence counsel was not available the week of March 12th, and only available for two days in the week of March 26th. The Court next offered to set the trial in the week of April 23rd. The Crown was available that week. Defence counsel indicated being only available for one day of the week. The Court next suggested the option of setting non-continuous dates for the trial, being two days in the week of March 26th, and the balance of days being in the week of April 23rd. Defence counsel was available on only the Monday of that week in April. The Court next offered to complete the trial during the week of May 7th. The Crown indicated being available the whole of that week (and would re-assign another trial that week in order to be available) and defence counsel indicated being available for four days of that week. Consequently, the trial was set for March 28th and 29th, and May 7th, 8th, 10th, and 11th.

[82] It is the position of the Crown that if defence had accepted the two weeks in March, the trial would easily have been concluded within the *Jordan* ceiling. As such, it is argued the eight weeks between the conclusion of the March dates and May 11, 2018 should be seen as defence delay and deducted from the time to trial.

[83] The Crown's summary does not include the following exchange:

> MR. MARLEY: And I don't know whether this is a possibility, at all, Your Honour, but I – and this is even going earlier but, the, the session, the November 27th session, I have a number of days available then. Would the – does the court have time to begin, at least do the pre-trial motions then?
>
> MS. MCINTYRE: The ones that were booked for January?
>
> MR. MARLEY: Right, and then we take the January dates and the March dates to complete the trial, if necessary.
>
> THE COURT: Yeah, well, here's the thing. Oh, the – no, you know what? I think that's a great suggestion but the thing is I'm giving you dates for me in, in 2018 and the dates in – the November date, I'm doing a homicide trial in Sarnia.

[84] In *R. v. Cowan*, 2017 ONSC 3228 at para. 36 I considered the dilemma this situation presents:

> A debate has arisen as to whether there is a distinction between the defence not being ready to proceed, which relates to preparedness, and scheduled unavailability due to conflicts: see *R. v. Albinowski*, 2017 ONSC 2260, at para. 15. The concern is whether an adjournment due to already booked counsel is really defence delay. In my view, that decision must be fact driven in the context of each individual case. However, surely an accused would be unable to obtain a stay by choosing to retain the busiest counsel in any given location. Counsel of choice cannot immediately trump other constitutional considerations.

[85] I went on to remind myself that the Supreme Court of Canada in *R. v. Godin*, 2009 SCC 26 at para. 23 directed that the Court cannot require defence counsel to hold himself "in a state of perpetual availability".

[86] I have considered whether a middle ground is available. In *Jordan* (paras. 120-123), the Court chose to apportion the responsibility of delay between Crown and defence. Again, in *R. v. Cody*, [2017] S.C.J. No. 31 (*Cody*), the court revisited defence delay and directed at para. 28:

> In broad terms, the second component is concerned with defence conduct and is intended to prevent the defence from benefitting from "its own delay-causing action or inaction" (*Jordan*, at para. 113). It applies to any situation where the defence conduct has "solely or directly" caused the delay (*Jordan*, at para. 66).

[87] The Court in *Cody* stressed on numerous occasions that "every actor in the justice system has a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with an accused person's right to a trial within a reasonable time" (para. 1) and "all justice system participants – defence counsel included – must now accept that many positions…are no longer compatible with the right guaranteed by s. 11(b)…" (para. 36).

[88] In *R. v. Gordan* 2017 ONCA 436 Doherty J.A. at paras. 6 and 7 apportioned the 11 months needed to set a trial date between defence and institutional delay.

[89] I cannot conclude that it would be appropriate for me to apportion the time between the assignment court on September 25, 2017 and the projected end of the trial on May 11, 2018. I come to that conclusion acknowledging the state of the trial lists at this location

during the timeframe, and, more importantly, the aggressive stance in pressing forward to trial taken by defence counsel throughout.

[90] Mr. Marley, on September 25, 2017, offered dates in November 2017 which the Court could not accommodate. He had alerted the Court to the pending delay application. The Court could not try the case in November 2017 and the defence could not devote two weeks in March 2018. I see the situation as a saw-off.

[91] I do not believe the Court in *Jordan* meant to capture these eight weeks as an example of defence delay. The defence offered dates that would advance the trial and see it finish inside the 30 month ceiling. The Court could not accommodate the earlier dates. Dates were then cobbled together, dates when the Court, defence and Crown were available, to conclude the trial on May 11, 2018.

[92] I confirm my earlier position that this type of delay must be viewed in context. I do not see this as the Court and the Crown being ready to proceed, but the defence is not (*Jordan* para. 64) or the type of delay causing action or inaction discussed at length in *Cody*.

[93] As a result, I will not deduct those eight weeks from the time to trial.

EXCEPTIONAL CIRCUMSTANCES

[94] I recognize that, as a result of my findings above, the net delay period continues to exceed the 30 month ceiling and so the delay is presumptively unreasonable. The Crown may rebut the presumption by justifying the delay due to the presence of exceptional circumstances (*Jordan* para. 68).

[95] The presence of exceptional circumstances is the only basis upon which the Crown can seek to rebut the presumption (*Jordan* para. 81).

[96] Exceptional circumstances will generally fall into one of two categories: discrete events and particularly complex cases (*Jordan* para. 71).

[97] In this matter, counsel agree that disclosure to the co-accused, Tomlin, was delayed about a working week as Mr. Boonstra needed to be absent from work to attend to a family matter that clearly required his attention. I agree that this is a perfect example of a discrete event contemplated by *Jordan*. Although the matter was only adjourned three days from October 3 to October 6, 2016, by which time Mr. Boonstra had returned, I would allow a deduction of five days to take into account the Crown's inability to prepare the disclosure.

[98] The Crown argues that, while not exceptionally complex, this prosecution brought with it enough complications to allow me to deduct several months and bring the time to trial below the *Jordan* ceiling. I am reminded that a qualitative assessment must now be undertaken to determine if the complexity of the case justifies the additional time to trial.

[99] Complexity is, in fact, considered at two points in the *Jordan* analysis; here, and then again as part of the consideration of any transitional circumstances (*R. v. Picard* 2017 ONCA 692 paras. 53-55) (*Picard*).

[100] As mentioned above, *Jordan*, at para. 77 discusses the hallmarks of a particularly complex case.

> …Particularly complex cases are cases that, because of the nature of the *evidence* or the nature of the *issues*, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.

[101] Mr. Boonstra argues that this case presents many of the considerations discussed in *Jordan*. As to the nature of the evidence, he suggests that the volume of disclosure, a

terabyte or 17,000 pages, downloaded from the computer seized, required a significant amount of time for counsel to prepare for the judicial pre-trial.

[102] I agree counsel did require time to prepare, but it was the time it took for the computer disclosure to be made available, coupled with the joinder of Tomlin, that caused the delay.

[103] On October 13, 2016 Mr. Marley told Justice Wong he was ready and his clients were anxious to complete the mandatory pre-trial. He wanted to move on to a preliminary inquiry. Because of the delay related to the disclosure and the preparation of the co-accused, the pre-trial was completed January 9, 2017 and the preliminary inquiry August 15, 2017.

[104] As to a consideration of the nature of the issues, Mr. Boonstra points to the large number of charges under the *Controlled Drugs and Substances Act*, the *Criminal Code* and the provincial *Dog Owner's Liability Act* charges. I am reminded by the decision in *Picard* and *Cody* at para. 64 that complexity "is an exceptional circumstance only where the case as a whole is particularly complex" and that it is important to consider that a case that has been simplified at its conclusion may have been particularly complex in its early stages.

[105] Here, however, the Crown sought to keep all charges together through the first six months of the prosecution. Once the *DOLA* charges and applications were transferred to the provincial offences court, those matters were resolved and the charges withdrawn.

[106] The Crown chose to prosecute allegations occupying one drug count and 66 other counts being a count for each dog seized, each firearm carelessly stored, each firearm possessed without a license and each prohibited knife recovered. The number of the counts do not add to the complexity.

[107] The preliminary inquiry took one day. The pre-trial motions were set for two days. Beyond this motion, the defence has filed a s. 8 application seeking to exclude all the evidence seized at a single location over two days. The focus of that application is the

potential trespass by Constable Brown on the Merlin property that initiated this investigation and its effect on the sufficiency of the information to obtain the warrant.

[108] The trial is set for five days. I have nothing to indicate the issues are complex.

[109] The Crown points to charges which, at one point, included five co-accused. Two of the co-accused were related to the accused Robert and they, along with Robert and Gagnon, were represented by Mr. Marley. There is no indication that those two added complexity and the charges against them were withdrawn as part of the arrangement to limit the preliminary inquiry to one day.

[110] The problems associated with adding Tomlin have been adequately discussed above. His addition does not assist the Crown as to an exceptional circumstance.

[111] There will be no deduction for exceptional circumstances beyond five days for a discrete event.

[112] As a result of the analysis above, the net time to trial is 30 months 28 days and continues to be presumptively unreasonable.

[113] A presumptively unreasonable delay can be justified under the transitional exceptional circumstance. This case commenced nine months prior to the release of *Jordan*. Coincidentally, it was released about the same time the first pre-trial was adjourned for the further disclosure and the addition of the accused, Tomlin. In fairness to the Crown, at the time, few realized the impact that *Jordan* would have on prosecutions like this one. The direction from the Supreme Court of Canada is, however, clear and this prosecution proceeded for 22 months under the *Jordan* regime.

[114] Although counsel have agreed that reliance on the *Morin* framework in the nine months did not affect the time to trial, I have decided that it is prudent to explore the transitional period in any event.

[115] At paragraph 71 of *Picard*, the Court discusses the focus of transitional analysis as it relates to the potential of a transitional exceptional circumstance.

> To determine whether a transitional exceptional circumstance justifies a delay above the presumptive ceiling, the court must conduct a contextual assessment of all the circumstances: *R. v. Manasseri*, 2016 ONCA 703 (CanLII), 132 O.R. (3d) 401, leave to appeal refused, [2016] S.C.C.A. 513, at paras. 320-321. Following the example set in *Williamson*, relevant circumstances include:
>
> i the complexity of the case
> ii the period of delay in excess of the Morin guidelines
> iii the Crown's response, if any, to institutional delay
> iv the defence efforts, if any, to move the case along
> v prejudice to the accused

[116] I have already found the case lacking in complexity. The period in the OCJ is 22 months. The total period to trial is substantially in excess of the *Morin* guidelines even if I were to deduct a number of months for the inherent time requirements of the case for disclosure and preparation.

[117] I have found the Crown's response to be inadequate and ill-advised when confronted with a case that was clearly plodding through the system. The defence made it known early and often that it wanted the matter to proceed and wanted to set dates to allow that to happen.

[118] Finally, the defence has filed affidavits from each of Robert and Gagnon that form part of the record here. The affidavits are provided as evidence of prejudice.

[119] Both accused speak of the impact of the restrictive bail conditions and the concern for their safety due to the public's reaction to the allegations of their abuse of the animals.

[120] I do not need to determine the presence of actual prejudice. The consideration of all of these factors does not allow me to conclude that the Crown is assisted by a transitional exceptional circumstance.

CONCLUSION

[121] The offences before this Court are serious. Public interest in this community for a trial on the merits is palpable. I have attempted, with these reasons, to be true to the clear

direction provided by the Supreme Court of Canada in *Jordan* and its progeny. This is a very close call. However, the time from charge to the end of trial is 30 months 28 days and is presumptively unreasonable.

[122] Focussing on the decisions made by the Crown and the consistent position taken by the defence in pressing this matter on to trial, a number which does not offend the *Jordan c*eiling is unattainable.

[123] I will say, as well, that this calculation fixes the end of trial as May 11, 2018. The five day trial estimate I believe to be reasonable. Attempting to speculate on how this trial will proceed is dangerous. Perhaps it will be shorter than anticipated, perhaps longer. I note however, that a trial does not end until verdict. It remains to be seen if it is realistic to assume a decision could be delivered on all 67 counts on the day the trial concluded.

[124] I find that s. 11(b) of the *Charter* has been breached. Pursuant to s. 24(1), all charges against both accused are stayed.

Original signed by *RSJ Thomas*

Bruce Thomas
Regional Senior Justice

Released: February 9, 2018

CITATION: R. v. Robert, 2018 ONSC 545

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

Respondent

– and –

JOHN JACOB ROBERT and
MICHEL CONRAD PAUL GAGNON

Applicants

DECISION ON PRE-TRIAL APPLICATIONS

Bruce Thomas
Regional Senior Justice

Released: February 9, 2018