Case Name:

R. v. Gandhi

Between
Her Majesty the Queen, Respondent, and
Nancy Gandhi, Applicant

[2016] O.J. No. 4638

2016 ONSC 5612

Court File No.: CR-16-400000-78-0000

Ontario Superior Court of Justice

M.A. Code J.

Heard: August 29, 2016.
Judgment: September 7, 2016.

(55 paras.)

Criminal law -- Criminal Code offences -- Offences against rights of property -- Forgery and offences resembling forgery -- Forgery or uttering false document -- Fraudulent transactions relating to contracts and trade -- Fraud over $5,000 -- Application by accused for stay of proceedings for unreasonable delay dismissed -- Accused charged with uttering, forgery and fraud -- Total delay 35 months, over 30-month presumptive ceiling -- However, defence responsible for 33 weeks' delay in getting to judicial pretrial, bringing total under presumptive ceiling, as defence counsel waived a period, unreasonably refused to proceed without further disclosure, was unavailable, and then accused changed counsel -- Accused had not taken meaningful steps to expedite proceedings -- While almost all delay preceded Jordan, accused would not receive stay under traditional approach, given very little systemic delay or evidence of prejudice.

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- Delay -- Trial within a reasonable time -- Remedies for denial of rights -- Specific remedies -- Stay of proceedings -- Application by accused for stay of proceedings for unreasonable delay dismissed -- Accused charged with uttering, forgery and fraud -- Total delay 35 months, over 30-month presumptive ceiling -- However, defence responsible for 33 weeks' delay in getting to judicial pretrial, bringing total under presumptive ceiling, as defence counsel waived a period, unreasonably refused to proceed without further disclosure, was unavailable, and then ac-

cused changed counsel -- Accused had not taken meaningful steps to expedite proceedings -- While almost all delay preceded Jordan, accused would not receive stay under traditional approach, given very little systemic delay or evidence of prejudice.

Application by the accused for a stay of proceedings on the basis of unreasonable delay. The accused was charged with uttering, forgery and fraud in relation to her former employment as a bookkeeper for the complainant company. The total delay was 35 months, which was over the 30-month presumptive ceiling set in R. v. Jordan. The initial intake period in the Ontario Court of Justice was unusually long, and took about 1.5 years until parties completed judicial pretrial, and were ready to set a date for the preliminary inquiry. The Crown alleged there was defence delay and waiver during this time period. Little progress was made over 14 appearances before Justices of the Peace, until the judge took over and conducted an ongoing judicial pretrial. After that, matters proceeded at a reasonably and even expeditious time frame. The judicial pretrial was scheduled less than three months from the date the parties concluded they were finally ready and the preliminary inquiry was completed in just over three months, despite needing extra dates. In Superior Court, the records motion was set in under two months, the s. 11(b) application in less than four months, and the trial in less than eight months.

HELD: Application dismissed. The Justices of the Peace played passive roles that allowed the defence to repeatedly delay setting a date for judicial pretrial. While the Crown submitted the defence had waived two periods of delay, there was only clear and unequivocal waiver for one, so this seven-week period when defence counsel was in Florida was defence delay. It was the accused's choice to be represented by counsel that took this approach to her case. There were disclosure issues, and defence counsel unreasonably refused to set a date for judicial pretrial until one more piece of disclosure was received, despite the Crown's repeated suggestion that an experienced judge conducting judicial pretrial could solve the problem. This unreasonable conduct by the defence was responsible for another seven weeks of delay. The accused's current counsel's claim that disclosure was too deficient to proceed was not supported by the evidence in record or his own previous statements. Defence counsel was in Florida again and unavailable for a judicial pretrial date for seven weeks, so this was also defence delay. The accused then changed counsel and the judicial pretrial had to be cancelled and rescheduled. While it was the accused's right to change counsel, this created 12 weeks of defence delay. There were thus 33 weeks of delay attributable to the defence, which brought the total delay to 27 months, which was under the presumptive ceiling. As such, the delay would only be found unreasonable in rare and clear cases, and the accused did not meet the first criterion of taking meaningful steps to expedite the proceeding. Almost all the delay preceded the Jordan decision, but the accused would not receive a stay under the traditional approach either. There was very little systemic delay so no inferred prejudice, and no evidence the delay contributed to the accused's pre-existing mental health issues.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 11(b)

Counsel:

Kene Canton, for the Crown Respondent.

Daniel Brodsky, for the Applicant.

REASONS FOR JUDGMENT

M.A. CODE J.:--

A. OVERVIEW

1 This is a s. 11(b) *Charter of Rights* application brought by the Applicant, Nancy Gandhi (hereinafter, Gandhi), alleging violation of her right to be tried within a reasonable time. She is charged in a three count Indictment with uttering, forgery, and fraud. The Indictment is awaiting trial in this court. I heard the application on August 29, 2016, in advance of the trial date, and reserved judgment. These are my reasons for judgment on the *Charter* application.

2 The three counts of uttering, forgery, and fraud all cover the same approximately five year time period from July 1, 2007 to November 7, 2012. Gandhi worked as the bookkeeper for the complainant company, David MacPhee Design Services, and it is alleged that she cashed forged company cheques made out to herself. There is apparently no dispute between the parties that numerous forged cheques were written on the company's account over the five year time period. The only real issue in the case is the identity of the person who accessed the company computer system and produced the forged cheques. There are over 100 forged cheques in amounts over and under $1000. They were all cashed at a small cheque-cashing business in Ajax known as Cash n Dash Financial. At trial, the Crown will tender numerous documents and will call three witnesses, the two principals in the complainant company (David and Anne MacPhee) and the principal in the cheque cashing company (Nawaz Merali).

3 The Applicant Gandhi was arrested on November 5, 2013 and was released by the police on a promise to appear. The Information was sworn on December 5, 2013. The case spent over two years proceeding through the Ontario Court of Justice. On January 7, 2016, Kozloff J. committed Gandhi for trial after a four day preliminary inquiry. The case has been scheduled for trial in this Court, commencing November 7, 2016. It is presently set as a two week jury trial, although the parties would like to consent to a re-election, in which case it could be tried by a judge alone in less than a week.

4 It can be seen that the total delay, from the laying of the Information to the anticipated conclusion of the trial, is about 35 months. The parties agree that it is these two events that determine the overall length of delay for s. 11(b) *Charter* purposes. In its recent decision in *R. v. Jordan*, 2016 SCC 27 at paras. 47-49, the majority of the Court repeatedly stated that the relevant time period runs from "the charge to the actual or anticipated end of trial." Although the majority changed fundamental aspects of the prior s. 11(b) framework, there was no indication that the Court wished to alter the longstanding principle that s. 11(b) delay begins to run from the swearing of the Information. See: *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459 (S.C.C.); *R. v. Edan*, [2016] O.J. No. 4279 at para. 20 (Ont. C.J.).

5 In *R. v. Jordan*, *supra* at paras. 49, 61 and 63, the majority held that the "most important feature of the new framework" for s. 11(b) analysis is that "it sets a ceiling beyond which delay is presumptively unreasonable." The ceiling for an indictable trial in this Court is "30 months from the

charge to the actual or anticipated end of trial." However, the majority went on to hold that "delay attributable to the defence must be subtracted" and that this subtracted period includes both "delay waived by the defence" and "delays caused solely or directly by the defence's conduct."

6 Accordingly, the total period of 35 months' delay in this case exceeds the presumptive ceiling by five months. However, the real issue is whether that period of total delay should be reduced by various periods of both defence waiver and delays caused directly by the defence. In order to determine that issue, I will review the history of the proceedings in the next section of these reasons.

B. HISTORY OF THE PROCEEDINGS

(i) Introduction

7 The history of the proceedings in this case falls into three broad periods: an initial intake period in the Ontario Court of Justice that was unusually long, extending from first appearance on December 20, 2013 until the end of the judicial pre-trial on June 24, 2015; the time to schedule and complete the four day preliminary inquiry, from June 24, 2015 when dates were set until committal on January 7, 2016; and the time to schedule and complete two pre-trial motions and what will likely be a one week Superior Court trial, from January 7, 2016 until the week of November 7, 2016.

8 It can be seen that the second and third periods of delay are not unreasonably long. Indeed, both the Ontario Court and the Superior Court set dates for preliminary inquiry and for trial that were quite expeditious. Mr. Brodsky, on behalf of the Applicant, concedes this is not a case involving systemic delay.

9 The only period of delay in this case that is troubling is the initial intake period, as it took about a year and a half before the parties completed the judicial pre-trial and were then ready to set dates for the preliminary inquiry. During this initial period, the Crown alleges that various periods of defence waiver and defence delay took place. If the Crown is correct, these periods must be deducted from the 35 months' total delay pursuant to the new *Jordan* framework for s. 11(b) analysis. These periods of alleged defence delay and defence waiver total about ten months and they would reduce the overall delay below the 30 month presumptive ceiling for unreasonable delay.

(ii) The initial intake period

10 There were 18 separate appearances in the Ontario Court during the initial intake period. The first 14 appearances were before Justices of the Peace. They extended for over a year. Little or no progress was made with the case during this period. It was only on the fifteenth appearance that a judge, Vaillancourt J., took charge of the case. Over the course of five months and four appearances, he conducted an ongoing judicial pre-trial (the JPT) and got the case in a position where the parties were ready to set dates for the preliminary inquiry.

11 In my view, it is apparent that this case took far too long to reach the stage of a judicial pre-trial where an experienced and capable judge could manage it. It will be seen that the Justices of the Peace all played passive roles and allowed the defence to repeatedly delay the setting of a date for a judicial pre-trial.

12 The 18 appearances that comprise the initial intake period can be summarized as follows:

* *December 20, 2013*: counsel for Gandhi, Mr. Kayfetz, attended on the first appearance. No disclosure was available other than the synopsis.

* *February 21, 2014*: "initial disclosure" was provided to the defence on the second appearance in the form of a CD. Defence counsel advised that he would be "away for the month of March" and would be "back in April." He requested a remand until April 25. There was a discussion about s. 11(b) of the *Charter* after which the Crown asked, "11(b) is not an issue, correct, Mr. Kayfetz?" Defence counsel replied, "That's right." The Crown asked, "No delay between now and April 25?" Defence counsel replied, "You'll have no problem." The Crown stated, "We'll have a pre-trial in the interim as well." Defence counsel appeared to resist this latter suggestion, stating that the officer in charge was reviewing "three years of business records" and that "there's a lot of background work you've got to do with this." The Crown submits that there was a two month defence waiver of s. 11(b) rights on this appearance.

* *April 25, 2014*: neither the accused nor counsel attended on this third appearance. The Crown advised that there was "further disclosure available for pick-up in the brief." Defence counsel had sent a letter to the Crown advising that he was "in the United States" and that the accused was "very ill and cannot attend court." He stated, "Section 11(b) is waived from the date that disclosure is available, whatever the date may be, until the next court date." The letter requested a remand until June 13. The Crown submits that there was a defence waiver of s. 11(b) rights for the seven week period of this remand.

* *June 13, 2014*: on this fourth appearance, defence counsel advised that he had "been working with the officer [in charge] hand-in-hand" and "the Crown has been getting me disclosure, from the officer, piece by piece." Counsel advised that he spoke to the officer "yesterday afternoon, he told me that he has requested what we believe is the final piece of disclosure and he had been told it will be ready in about two weeks." Counsel requested one further remand. The "final piece of disclosure" that counsel needed was "the books of the [complainant] company" and they were in the process of being copied. He stated that he had copies of the allegedly forged cashed cheques. The Crown took the position that "there's substantial disclosure now and at least enough to conduct a JPT." He stated, "I mean if it gets to a delay issue, my position is that we should be setting a JPT today so that we ... keep taking steps going forward ... The last adjournment was ... from April to June. That's a long time and I think we've certainly got enough for a JPT." Defence counsel again stated that he was waiting for "this final piece of disclosure" and requested a further two week remand, which was granted. The Crown submits that the two week period of this remand is defence delay.

* *June 27, 2014*: defence counsel advised that he spoke to the officer in charge "yesterday." The officer still needed "a couple of weeks" to produce the requested disclosure because "he's the only fraud officer in that division now," he was working on a number of cases, and he was going "to get some help" in early July. Counsel requested a further remand to August 1. The Crown again took the position that "a lot of the disclosure has been provided on this. And I'm really starting to get concerned about the delay on it ... this would certainly benefit from a JPT ... even set it today if my friend were amenable." Defence counsel advised that he had disclosure of "the officer's notes" and he had "photocopies of the bank statements" but "what is missing is the company books that she's alleged to have used and altered in order to commit the fraud." He described this as "essential significant disclosure that demonstrates whether my client committed an offence." Defence counsel clearly stated that he would prefer to "wait until we get the disclosure so both of us can see what the actual fraud was and have a meeting and then set a pre-trial." The Justice of the Peace granted a further remand to August 1. The Crown submits that the five week period of this remand is defence delay.

* *August 1, 2014*: this sixth appearance was extremely rushed as defence counsel had little time. He had to leave court in order to attend a funeral, he had not checked at the Crown's office to see if the anticipated disclosure that he had requested was available for pick-up, and he stated that he would be "off for August." He asked for a further remand to September 17 and he agreed "to come back if disclosure is here. I can go check it." Again, the Crown resisted this approach and stated, "We need to set a JPT on this. It might be the best way ... to have the officer in charge attend, you know, kind of keep his feet to the fire and bring the disclosure." The Crown asked defence counsel, "Have you got a few minutes to set a JPT today ... will you come back later today [after the funeral] and set a JPT? And if you do that, I don't have a problem with it going to that date [September 17] because at least we'll have something in the works." The record is not entirely clear but it appears that defence counsel agreed to the Crown's proposal, stating "put it on the 17th and I'll come back [from the funeral] and see you before I leave [for the month of August]." On the assumption that Mr. Kayfetz did return and did set a date for the JPT, which the subsequent record tends to suggest, the Crown does <u>not</u> submit that this further remand period is defence delay.

* *September 17, 2014*: neither counsel nor the accused appeared in court (although it seems they had appeared earlier at 9:00 a.m.). Nevertheless, the Crown put a number of developments on the record. There was now a JPT form in the file and it stated that Mr. Kayfetz and the Crown had attended at the Trial Coordinator's Office and had set a date for a JPT (presumably on the prior August 1st appearance, as the Crown had requested). The further disclosure requested by the defence was to be available on

September 17th and the court had dates available for a JPT "from August 14th." Defence counsel, according to the JPT form, "requested November 3rd [for the JPT] as defence is not available after September 17th." The Crown submits that the seven week period from September 17 to November 3 is defence delay, due to counsel's unavailability to conduct a JPT.

* *September 19, 2014*: nothing of significance happened on this appearance as it was simply for the purpose of rescinding or extending the bench warrant with discretion that issued on the previous appearance, due to Gandhi's and counsel's non-attendance.

* *November 3, 2014*: this was the scheduled date for the JPT. Mr. Kayfetz phoned in advance to cancel the JPT as he had been discharged. New counsel, Daniel Brodsky, appeared by way of an agent. The agent stated that Mr. Brodsky will "need to have a Crown pre-trial of his own" and that he "intends to re-schedule the judicial pre-trial." The Crown suggested that the agent schedule the Crown pre-trial today, in order to "get it moving again." The agent advised that "Mr. Brodsky intends to move it along" and requested a remand to November 14th.

* *November 14, 2014*: neither Mr. Brodsky nor the accused appeared. No message had been sent to either the Crown or duty counsel to explain their absence. A bench warrant was issued with discretion and the case was remanded for one week.

* *November 21, 2014*: Mr. Brodsky appeared with a designation and the bench warrant was rescinded. He had not yet scheduled a Crown pre-trial. He advised as follows: "I picked up some disclosure and began turning the pages. It's a relatively complicated fraud case." He requested a further two-week remand and stated, "I'll set up a Crown pre-trial in the interim and get it moving." The Crown stated, "This will require a JPT. ... So, once the Crown pre-trial is done, we can set another JPT." Mr. Brodsky replied, "That sounds like a plan."

* *December 5, 2014*: once again, Mr. Brodsky appeared and stated, "This is a relatively complicated fraud matter. And it is long in the tooth ... I'm reading the CDs and going through, turning the pages on the file." He had neither scheduled nor conducted a Crown pre-trial. He requested a further one-month remand and again stated, "I'll set a Crown pre-trial in the interim." He agreed with the Crown that "we might be able to do the Crown pre-trial and the JPT, because this surely will be a prelim and it will take several days." The Crown asked counsel to "have the Crown pre-trial and ... set up a date for a JPT and move it along as fast as we can." Mr. Brodsky stated, "I'll do my best to get it moving."

* *January 2, 2015*: Mr. Brodsky attended and advised that he had "received disclosure, reviewed it and set up a Crown pre-trial for January 15th." He had not scheduled a JPT. He asked for a remand to January 16.

* *January 16, 2015*: Mr. Brodsky attended and advised that he conducted a Crown pre-trial "yesterday." He and the Crown then scheduled a JPT for January 27. The Crown submits that the entire twelve week period of delay, from the originally scheduled JPT on November 3, 2014 to the re-scheduled JPT on January 27, 2015, was due to Gandhi's change of counsel and is, therefore, defence delay.

* *January 27, 2015*: the JPT commenced before Vaillancourt J. and the case was then spoken to in open court. I am advised that the officer-in-charge attended in the judge's chambers on all the JPT dates, in order to deal directly with disclosure issues. After the JPT, Mr. Brodsky stated the following in court: "We tried to commence a judicial pre-trial today but, as the Crown conceded at the pre-trial, apart from some cheques, very little disclosure has been made." The officer-in-charge apparently stated that it would take "a couple of months" to obtain the further disclosure. As a result, March 16 was set for continuation of the JPT. An email dated February 2, 2015 from the officer-in-charge to Anne MacPhee, one of the principals in the complainant company, asked her to "come and see me when you have completed your statement" so they can "go over the entire case" together with "supporting documents." He stated that "Nancy Gandhi has a new lawyer now and this lawyer wants the disclosure submitted in a more detailed fashion than the previous lawyer."

* *March 16, 2015*: the ongoing JPT resumed before Vaillancourt J. Afterwards, in court, Mr. Brodsky advised that "some further disclosure was given to the officer just yesterday but it's not in a form that he can actually present it to the Crown and there's further work that needs to be done in order for the disclosure to be even remotely complete." As a result, May 25th was set for continuation of the JPT. Documentation in the file indicates that Mr. Brodsky picked up further disclosure from the Crown on April 20, 2015.

* *May 25, 2015*: the ongoing JPT resumed before Vaillancourt J. Afterwards, the Crown stated in court that "some further disclosure was provided to my friend this morning" but that "there are ongoing disclosure issues with this case" which "will be addressed on the next occasion." The parties set June 24th for conclusion of the JPT. Vaillancourt J. asked to be notified "if matters get resolved differently." The next day, May 26, Mr. Brodsky sent a lengthy written disclosure letter to the Crown requesting 13 separate items. A week later, on June 3, the Crown responded in writing to each of the 13 requests. Documentation in the file indicates that Mr. Brodsky picked up further disclosure from the Crown on June 17, 2015.

* *June 24, 2015*: the JPT before Vaillancourt J. concluded. Counsel stated in court that through "some diligent work on behalf of the Crown" and "a lot of work" by the trial coordinator's office, "early dates" had been obtained for the preliminary inquiry on September 21 and 22 and on November 23, 2015. Both counsel agreed to these dates and the matter was scheduled as a three-day preliminary inquiry. Counsel noted some ongoing disclosure issues that they anticipated resolving. Documentation in the file indicates that various packages of further disclosure were available for pick-up on July 8, 13, 15 and 23, and that Mr. Brodsky picked these packages up from the Crown on July 29, 2015. In addition, there are a number of ongoing written disclosure requests and responses between the Crown and defence throughout September, October, and November, 2015. Mr. Brodsky concedes that the assigned Crown, Mr. Canton, made commendable efforts to resolve the disclosure problems in the case, once it was assigned to him.

(iii) The time required to schedule and conduct the preliminary inquiry

13 It can be seen that the Ontario Court of Justice was able to schedule the preliminary inquiry within less than three months, from the date on which the parties concluded the JPT and were finally ready to set dates. That is a very expeditious time frame, by any speedy trial standards in free and democratic countries. Furthermore, Kozloff J. was able to complete the preliminary inquiry within just over three months, in spite of losing one of the three scheduled dates and in spite of needing to add a fourth date.

14 There is no serious dispute about this time period. The relevant dates and developments were as follows:

* *September 21, 2015*: the preliminary inquiry commenced before Kozloff J. The Crown stated at the outset that he had provided a "fair amount" of "further disclosure" to the defence on "Thursday," that is, about four days before the Monday commencement of the hearing. The further disclosure all related to the witnesses Anne and David MacPhee and, as a result, the defence was not ready to cross-examine these two witnesses. The parties agreed that the Crown would call the witness Nawaz Merali first, that the second day of the hearing (September 22) would be cancelled, and that a new date would be substituted (November 26). The Crown stated that "disclosure with respect to this matter is voluminous," covering a five-year-long fraud. However, both parties were still of the view that three days was sufficient time to complete the hearing. Mr. Brodsky referred to the fact that they had "enlisted the assistance of Justice Vaillancourt in a judicial pre-trial ... for the purposes of trying to sort out some problems with the disclosure." He stated that "problems persist but I think we're getting closer to sorting things out fully." The Crown examined Mr. Merali in-chief and the defence began its cross-examination. At the end of the day, Kozloff J. encouraged the parties to meet with the witness Merali "and

figure out what it is that you need from him" before he left court and before the next hearing date.

* *November 23, 2015*: on the second day of the hearing, Mr. Brodsky completed his cross-examination of Mr. Merali and the Crown examined Anne MacPhee in chief. At the end of the day, Kozloff J. again encouraged the parties to meet and "determine what you need, before you cross-examine this witness," given that she had referred to certain documents that "would obviously assist Mr. Brodsky." The Crown agreed to ask Ms. MacPhee "to procure those remaining invoices."

* *November 26, 2015*: on the third day of the hearing, the Crown completed its examination-in-chief of Anne MacPhee and the defence began its cross-examination. Once it became apparent that the hearing could not be completed in three days, the parties attended at the Trial Coordinator's office and "like lightning they were able to give us another date," as Mr. Brodsky put it. January 7, 2016 was set as the fourth day for the hearing.

* *January 7, 2016*: on the last day of the hearing, the defence completed its cross-examination of Anne MacPhee. The Crown examined David MacPhee in-chief and the defence cross-examined him. Finally, the defence called Michael Binns, the officer-in-charge, and examined him essentially about the history of various disclosure issues. At the conclusion of the hearing, the defence consented to committal. Mr. Brodsky then stated, "There will be an 11(b) application sometime later and I have to get ordering the transcripts." The accused Gandhi was remanded to appear in Superior Court on February 25, 2016.

(iv) The time required for proceedings in the Superior Court of Justice

15 The Indictment was filed in this Court on February 3, 2016 and the first appearance was on February 25, 2016. On the second appearance, March 10, 2016, a judicial pre-trial was held and dates were set for a Third Party Records Motion, a s. 11(b) *Charter* Motion, and a two-week jury trial. All of these scheduled dates were reasonably timely: the Records Motion was set within less than two months; the s. 11(b) Motion was set within less than four months; and the trial date was set within less than eight months.

16 There is no serious dispute about this time period. The relevant dates and key developments were as follows:

* *February 25, 2016*: neither counsel nor the accused attended and a discretionary bench warrant issued. The Crown advised that a JPT had been scheduled for March 10.

* *March 10, 2016*: a JPT was held before Forestell J. It appears that no admissions were made by the defence. Dates were set as follows: April 11 for return of the subpoena on the Third Party Records Motion; April 25 and 26

for hearing the Records Motion; June 23 and 24 for hearing the s. 11(b) *Charter* Motion; and November 7, 2016 for a nine-day jury trial.

* *April 11, 2016*: the subpoena to Anne MacPhee, the holder of the Third Party Records, was not served until shortly before the return date. As a result, the relevant records were not all returned to court and the April 25 hearing date for the Records Motion had to be re-scheduled. A new subpoena was made returnable on April 25.

* *April 25, 2016*: all of the relevant records were brought to court by Anne MacPhee. The matter was remanded in order to try to resolve the Records Motion.

* *May 27, 2016*: the Crown advised that there were ongoing discussions to resolve the Records Motion and a further one-week remand was requested.

* *June 3, 2016*: the Records Motion had been rescheduled for June 16 but the Crown advised that progress was being made in settling it. A final remand to June 8 was requested.

* *June 8, 2016*: the Crown advised that the Records Motion appeared to have been settled and that, once he confirmed this, the hearing date would be cancelled.

* *June 14, 2016*: the Crown advised that the Records Motion had been settled and that the June 16 hearing date could be vacated. He sought and was granted a consent Order, requiring Ms. MacPhee to produce a certain portion of the requested records. In addition, the s. 11(b) *Charter* Motion set to be heard on June 23 and 24 was not ready to proceed and it was re-scheduled for August 11 and 12. Mr. Brodsky advised the Court as follows: "I've spoken to the person preparing the transcripts and the anticipation is they'll be done this month. And so, the exchange of materials will happen well within the period prescribed by the Rules." The transcripts filed before me indicate the following (according to the Form 2 Certificate of Transcript): the four lengthy volumes of preliminary inquiry transcript were ordered on January 1, 2016 and were completed on March 12 and 15 and April 17, 2016; the 26 short remand transcripts in both the Ontario Court and the Superior Court were ordered on July 8, 2016 and were completed on July 12, 15, 18, 19, 20, 22 and 23, 2016. In other words, Mr. Brodsky may have "spoken to" the person who was to prepare the necessary transcripts, as he put it, but he had not yet ordered them as of this June 14, 2016 appearance when the s. 11(b) Motion had to be re-scheduled. Furthermore, the transcripts were not to be "done this month," as they had not yet been ordered. It was early July before they were ordered, and it was late July before they were completed.

* *August 11, 2016*: the re-scheduled date for hearing the 11(b) *Charter* Motion was again vacated. No materials had been filed and the s. 11(b) Motion was still not ready to proceed. A third hearing date was scheduled for August 29 and 30, 2016. There is no transcript of this appearance.

* *August 25, 2016*: the two-volume Applicant's Record on the s. 11(b) Motion was served and filed. This was four days prior to the August 29 hearing date. Rule 27 of the Superior Court *Criminal Proceedings Rules* requires service and filing of the Applicant's Record 30 days prior to the hearing.

* *August 29, 2016*: the Applicant's Factum on the s. 11(b) Motion was filed on the morning of the hearing. Again, Rule 27 and Rule 6 require service and filing of the Factum 30 days prior to the hearing. In addition, Mr. Brodsky filed what was effectively a third volume of the Applicant's Record at the hearing itself on August 29. It contained all the disclosure correspondence. The hearing of the s. 11(b) Motion proceeded to conclusion on this one day and I reserved judgment.

C. THE MEANING OF "DELAY ATTRIBUTABLE TO THE DEFENCE" UNDER THE NEW *JORDAN* FRAMEWORK FOR SECTION 11(B)

17 The proposition that delay caused by the defence should not be included, or should not count as part of unreasonable delay, is not a new idea that has recently emerged from *Jordan*. It is a longstanding common sense principle that has always been part of the s. 11(b) case law.

18 When the defence particularly needs or wants a period of delay, s. 11(b) rights can be completely waived as a means of securing an adjournment. Even in the absence of a waiver, the defence can nevertheless cause a period of delay. The majority in *R. v. Jordan*, *supra* at paras. 60-66, recognized both of these forms of defence delay, citing pre-existing authority -- *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.); *R. v. Askov* (1990), 59 C.C.C. (3d) 449 (S.C.C.); and *R. v. Conway* (1989), 49 C.C.C. (3d) 289 (S.C.C.) -- thus suggesting that this part of the *Jordan* majority judgment is generally based on longstanding principles. These passages in the *Jordan* majority reasons are as follows:

> 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).
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> Defence delay has two components. The first is delay waived by the defence (*Askov*, at pp. 1228-29; *Morin*, at pp. 790-91). Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the past, "[i]n considering the issue of 'waiver' in the context of s. 11(*b*), it must be remembered that it is not the right itself which is being

> waived, but merely the inclusion of specific periods in the overall assessment of reasonableness" (*R. v. Conway*, [1989] 1 S.C.R. 1659, per L'Heureux-DubÈ J., at p. 1686).
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> ...
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> 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. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.
>
> 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. This should discourage unnecessary inquiries into defence counsel availability at each appearance. Beyond defence unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay (see, e.g., *R. v. Elliott* (2003), 114 C.R.R. (2d) 1 (Ont. C.A.), at paras. 175-82).
>
> 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.
>
> To summarize, as a first step, total delay must be calculated, and defence delay must be deducted. Defence delay comprises delays waived by the defence, and delays caused solely or directly by the defence's conduct. Defence actions legitimately taken to respond to the charges do not constitute defence delay.
>
> [Emphasis added.]

19 The rationale for excluding "delay attributable to the defence" from the calculation of s. 11(b) unreasonable delay is that "the defence should not be allowed to benefit from its own delay-causing conduct," as the majority put it in *R. v. Jordan*, *supra* at para. 60. Similarly, in *R. v. Askov*, *supra* at p. 483, Cory J. stated that "certain actions of the accused will justify delays," and in

R. v. Morin, *supra* at p. 16, Sopinka J. stated, "Neither side, however, can rely on their own delay to support their respective positions."

20 In terms of the first form of defence delay, namely, "delay waived by the defence," the law has not changed. It is apparent from the above passage in *R. v. Jordan*, *supra* at para. 61, that the majority was simply reiterating the well-established principle that a waiver can be "explicit or implicit" but it must be "clear and unequivocal." In addition, it has always been accepted that any waiver must be made with "full knowledge of the rights the procedure was enacted to protect" and that any implied waiver must involve a choice "between available options" and not "mere acquiescence in the inevitable." See: *R. v. Askov*, *supra* at pp. 481-2 and 494-5; *R. v. Morin*, *supra* at pp. 13-15.

21 The second form of defence delay, namely, "delays caused solely or directly by the defence's conduct," is somewhat more complex. Prior to *Jordan*, there was a substantial body of s. 11(b) case law holding that the time required to conduct certain kinds of pre-trial motions and pre-trial proceedings should be characterized as defence delay. In *R. v. Morin*, *supra* at pp. 17-18, Sopinka J. stated that "change of venue motions, attacks on wiretap packets, adjournments which do not amount to waiver, attacks on search warrants, etc." were all examples of delay caused by voluntary actions of the accused. Subsequent authority in Ontario repeatedly held that delay caused by a Third Party Records Motion was defence delay. See: *R. v. Batte* (2000), 145 C.C.C. (3d) 498 at paras. 17-19 and 67 (Ont. C.A.); *R. v. B. (J.G.)* (1993), 85 C.C.C. (3d) 112 at 117 (Ont. C.A.), aff'd 85 C.C.C. (3d) 117 (S.C.C.); *R. v. Herrington* (2003), 68 O.R. (3d) 532 (C.A.); *R. v. Horgan* (2007), 165 C.R.R. (2d) 332 (Ont. C.A.); *R. v. M. (N.N.)* (2006), 209 C.C.C. (3d) 436 at paras. 39-44 (Ont. C.A.); *R. v. Kporwodu and Veno* (2005), 195 C.C.C. (3d) 501 at paras. 98-100, 115, 122 and 138 (Ont. C.A.). Similarly, binding authority in a number of provinces consistently held that delay caused by defence motions in the nature of *certiorari* was delay caused by "actions of the accused." See: *R. v. Harrison*, [1991] O.J. No. 881 (C.A.); *R. v. Cornacchia* (1994), 72 O.A.C. 310 (C.A.); *R. v. M. (N.N.)*, *supra* at paras. 63-5; *R. v. Beausoleil* (1991), 66 C.C.C. (3d) 415 at 427-8 (Que. C.A.); *R. v. Heikel et al.* (1992), 72 C.C.C. (3d) 481 at 513 (Alta. C.A.). Finally, delay caused by extradition proceedings was held to be delay due to "actions of the accused," in voluntarily "resisting extradition." See: *R. v. White et al.* (1997) 114 C.C.C. (3d) 225 at 241-2 (Ont. C.A.).

22 A slightly different approach emerged in more recent authorities in Ontario to the effect that the time required for pre-trial motions should "ordinarily" be treated as "part of the inherent time requirements of the case" and, therefore, entitled to "neutral weight" in the s. 11(b) calculus. Only where defence motions were "frivolous and served no legitimate purpose," or where the Crown "acted arbitrarily or in bad faith" in pre-trial proceedings, would delay be attributed to one side or the other. See: *R. v. Schertzer et al.* (2009), 248 C.C.C. (3d) 270 at paras. 113-118 (Ont. C.A.); *R. v. Emanuel*, 2012 ONSC 1132 at paras. 16-25.

23 The exact impact of *Jordan* on the above lines of authority, concerning delay caused by pre-trial motions and pre-trial proceedings initiated by the defence, is not entirely clear and it will inevitably emerge slowly and incrementally from the post-*Jordan* jurisprudence. However, a number of general propositions can be stated, based on the new *Jordan* framework:

* "Legitimate" defence actions, such as pre-trial motions with arguable merit, are "generally" included in the 30-month "ceiling." Accordingly, they

are no longer excluded as defence delay, nor are they regarded as merely inherent or neutral delay. This is a change from the earlier jurisprudence;

* On the other hand, defence actions that are not "legitimate," such as "frivolous" pre-trial motions, will continue to be treated as defence delay. In this regard, the *Jordan* majority appears to have followed this aspect of *Schertzer*;

* Defence unwillingness to proceed or defence unavailability or "other defence actions or conduct" may also directly cause delay, provided "the court and the Crown are ready to proceed." For example, on the facts of *R. v. Jordan*, *supra*, at paras. 14 and 120-124, the accused "changed counsel and requested an adjournment" shortly before trial. In addition, counsel was unavailable on the "last day scheduled for the preliminary inquiry," which resulted in the need to set a "continuation date." These two events caused delays of four months and one and a half months, which were both attributed to the defence. In the companion case, *R. v. Williamson*, 2016 SCC 28 at paras. 21-2, the Court attributed one and a half months' delay to the defence because the accused was not available until the last of four dates offered by the Court for his first appearance after committal. There appears to be no change to the s. 11(b) law, in these circumstances;

* Complex pre-trial proceedings that are particularly associated with substantial delays, such as an "extradition" hearing (and perhaps Third Party Records Motions and proceedings in the nature of *certiorari*), or a "large number of ... pre-trial applications," or proceedings involving "novel or complicated legal issues" are not "delay attributable to the defence," assuming they are "legitimate" and not "frivolous." However, they may amount to "exceptional circumstances" that justify lengthening the 30-month "ceiling." See: *R. v. Jordan*, *supra* at paras. 72, 77 and 81. At the very least, this is a formal or nominal change from the earlier jurisprudence in how this kind of delay is treated. It remains to be seen whether this change will also make a practical difference, in this kind of case, to s. 11(b) outcomes.

24 In my view, the effect of *Jordan* is to eliminate the subtle and flexible balancing of four factors, under the *Morin* framework, and to replace it with a simpler "presumptive ceiling" for unreasonable delay. The old concept of inherent or neutral delay has been eliminated and the old concept of prejudice has been eliminated. Both of these considerations have been absorbed into or included in the "presumptive ceiling." See: *R. v. Jordan*, *supra* at paras. 53-4. However, certain aspects of the old law concerning defence delay have been preserved. For example, actions that are not "legitimate" (such as frivolous motions) and actions that "directly" cause delay (such as changes in counsel and unavailability of counsel) continue to be treated as defence delay. Although pre-trial motions of arguable merit are no longer considered neutral or inherent delay, and are now given real s. 11(b) weight by their inclusion in the 30-month "presumptive ceiling," they may justify lengthening the ceiling beyond 30 months if they are numerous or complex.

D. APPLICATION TO THIS CASE

25 As noted previously, the Crown submits that there were defence waivers of two periods of delay at the early stages of proceedings (on the second appearance, on February 21, 2014, and on the third appearance, on April 25, 2014).

26 On the February 21, 2014 appearance, neither the Crown nor the defence expressly used the term "waiver." Defence counsel was requesting a somewhat lengthy two-month remand, he was to be "away for the month of March," and he did agree when the Crown said "11(b) is not an issue ... No delay between now and April 25th." It may be that defence counsel was indicating that he would not be attending to Gandhi's case, as he was taking time off in Florida, and that he did intend to waive s. 11(b) in these circumstances. However, he never actually said this. As a result, I cannot be satisfied that there was a "clear and unequivocal" waiver.

27 On April 25, 2014, however, I am satisfied that there was an express waiver and it was "clear and unequivocal." Counsel did not attend court (nor did his client), as he was "in the United States." Further disclosure was available to be picked up, had counsel attended. Most importantly, counsel sent a letter to the Crown stating, "Section 11(b) is waived from the date that disclosure is available, whatever that date may be, until the next court date." He suggested June 13, 2014 as his preferred date for the next appearance.

28 Mr. Brodsky does not dispute the plain meaning of this letter from Mr. Kayfetz, waiving s. 11(b) for the seven-week period of the remand. Rather, Mr. Brodsky attacks Mr. Kayfetz' competence, submitting that he had "no business" waiving s. 11(b) because he had no "meaningful disclosure" at this early stage, and submitting that "no competent counsel" could give a meaningful waiver in these circumstances.

29 I will address Mr. Brodsky's attack on Mr. Kayfetz' competence later in these reasons, as it comes up again in relation to the next periods of alleged defence delay. However, in relation to this April 25, 2014 waiver, the state of disclosure simply has nothing to do with the reason for the waiver. It is apparent that Mr. Kayfetz sought a further remand and waived s. 11(b) because he was not in Toronto and he was not attending to the case (it appears, from later transcripts, that he spent considerable time in Florida). Had he been in Toronto working on the case, he could have picked up the further disclosure, reviewed it, made any follow-up requests for further disclosure, scheduled a Crown pre-trial and a JPT, and moved the case along. It was entirely appropriate to waive s. 11(b), in these circumstances, as he was doing none of these things. It was for the accused Gandhi to decide whether she wished to be represented by counsel who took this approach to her case. It has nothing to do with competence.

30 In my view, there was a clear defence waiver of seven weeks' delay, from April 25 to June 13, 2014. There were no further waivers. The Crown submits that all of the remaining periods of "delay attributable to the defence" are instances of "delays caused solely or directly by the defence's conduct." There are two of these further periods that involve Mr. Kayfetz.

31 The first of these two periods occurred over the course of three appearances, on June 13, June 27, and August 1, 2014. On all three occasions, Mr. Canton was Crown counsel. The case was over six months old by the time of the first of these appearances and it was almost eight months old by the time of the third of these appearances. As summarized above, Mr. Canton responsibly and forcefully took the position on all three occasions that delay was becoming a concern, that "substantial disclosure" had been made, that it was "certainly ... enough for a JPT," and that judicial man-

agement would "benefit" the case by having "the officer in charge attend" in order to resolve ongoing disclosure issues. Mr. Kayfetz resisted this approach and insisted on receiving one "final piece of disclosure" before even setting a date for a JPT. It appears he finally relented on August 1, 2014, under pressure from the Crown, and agreed to set a date for a JPT.

32 In my view, this is classically an example of what the majority in *Jordan* described as defence actions that were not "legitimately taken to respond to the charges" and that "directly caused the delay." There appeared to be disclosure problems in this case, partly because many of the relevant documents were in the possession of third parties (the MacPhees and their company, the alleged victim of the fraud, and Mr. Merali and his company, where the cheques were cashed), and partly because the officer in charge was the only officer in the police division assigned to frauds and he needed help. The Justices of the Peace sitting in busy remand courts could not solve this problem but an experienced judge conducting a JPT, with the officer in charge and both counsel present, could solve it. The Crown repeatedly suggested this solution to the problem and the defence repeatedly resisted it.

33 The judicial pre-trial, or JPT, is arguably the most important tool of modern case-management. When faced with a case like this with disclosure problems, an experienced and capable judge can do at least three things to move it forward: first, give the officer in charge fixed deadlines for producing missing disclosure and keep bringing the officer back to ongoing JPT appearances until the deadlines are met; second, advise and mediate between the parties as to which requests for further disclosure are reasonable (and are likely to be ordered by a court) and which requests are unreasonable (and are likely to be denied by a court); and finally, order the parties to set a date for trial or preliminary inquiry, even though some further disclosure may still be outstanding, once a certain point in the process has been reached. I infer that Vaillancourt J. successfully carried out this modern case-management role and it was wrong for the defence to repeatedly delay his involvement. Crown counsel, on the other hand, foresaw the duties that were to emerge from *R. v. Jordan*, *supra* at para. 70, and he advocated "prompt resort to case management processes to seek the assistance of the court." Also see *R. v. Vassell*, 2016 SCC 26 at para. 6, where the Court praised the "proactive steps" taken in that case, where the defence "pushed for a pre-trial conference or case management," unlike defence counsel in the present case.

34 The longstanding s. 11(b) case law on this point is clear and *Jordan* has not changed it. The leading authorities were recently summarized in *R. v. Lahiry et al.* (2011), 283 C.C.C. (3d) 525 at paras. 106-115 (S.C.J.) so I need not repeat this analysis, which was as follows:

> The real dispute between the parties centres on the further two months of delay, from April 23, 2009 to June 25, 2009, when Mr. Steinberg refused to set a date for trial until he received the revised toxicology report from the Crown. The defence submitted, and the trial judge found, that this was Crown delay. The Crown submits that it is defence delay.
>
> Mr. Wright concedes that "initial disclosure", in the *Stinchcombe* sense, had already been made by the Crown. Indeed, disclosure was complete by April 23, 2009 except for the one outstanding item. Mr. Wright also concedes that the revised toxicology report was not essential to any fundamental decisions that the defence had to make, such as plea or election, prior to setting a date for trial. The

revised report's only significance, at this stage of the proceedings, was that it might have some impact on the length of the trial.

Given these concessions, I am satisfied that defence counsel was wrong in refusing to set a date for trial until he had received the revised toxicology report. There is now a considerable body of binding authority on this point. Beginning with *R. v. Stinchcombe*, (1991), 68 C.C.C. (3d) 1, at pp. 13-14 (S.C.C.), the disclosure process envisioned in that seminal decision was that the Crown would provide "initial disclosure", prior to the accused taking "crucial steps which . . . affect his or her rights in a fundamental way", such as election and plea. Thereafter, the Crown was to provide "continuing" disclosure "when additional information is received" in the period leading up to trial.

In three subsequent decisions, the Ontario Court of Appeal has stressed the point that disclosure need not be complete before dates are set for trial or preliminary hearing. In *R. v. Kovacs-Tatar*, [2004] O.J. No. 4756 *supra*, at para. 47, the court dealt with a situation where defence counsel refused to set a date for trial in a sexual assault case until the Crown's expert medical report had been received. In the case at bar, the defence already had the toxicologist's report and was simply awaiting revisions to it, so the facts are much less sympathetic to the defence position than in *Kovacs-Tatar*, *supra*, where the court stated [at para. 47]:

> Something should be said about counsel's refusal to set a date because the expert report was not available. The Crown is obliged to make initial disclosure before the accused is called upon to plead or to elect the mode of his trial. See the comments of Sopinka J. in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.) at pp. 13-14. In this case, since the Crown had elected to proceed summarily, election of the mode of trial was not an issue. Having regard to the length of time before trial, the appellant's counsel knew the expert's report would be completed many months before the appellant had to plead and the appellant would have had ample time to obtain his own expert's report had he wished to do so. Also, because the obligation of the Crown to make disclosure is a continuing one, the Crown is not obliged to disclose every last bit of evidence before a trial date is set. The defence was not forfeiting its "Stinchcombe rights" by agreeing to set a trial date. Counsel for the appellant did not act reasonably in insisting that he receive the expert report before setting a trial date.

Two years later, in *R. v. M. (N.N.)*, *supra* at para. 37, the court revisited the issue in a case where defence counsel again refused to set a date for trial due to outstanding disclosure requests. Juriansz J.A. repeated what had been said in *Kovacs-Tatar* and emphasized the following:

> Even when the Crown has clearly failed to make mandated disclosure, the defence is not necessarily entitled to refuse to proceed to the next step or to set a date for trial.

> Most recently, in *R. v. Schertzer et al.*, *supra* at paras. 93 and 94, the Court dealt with a case where large amounts of disclosure was still outstanding and counsel, nevertheless, proceeded to set a date for the preliminary inquiry. The Court commended counsel for "acting responsibly in accordance with this court's directions". The Court held that setting "a target date for the preliminary inquiry, even though more disclosure was anticipated, is consistent with this court's direction" in *M. (N.N.)* and in *Kovacs-Tatar*.
>
> ...
>
> In any event, as I read the above line of binding authority, outstanding disclosure can often be significant and it still cannot be used to hold up the setting of dates for trial or preliminary inquiry. Sophisticated forensic testing and ongoing investigative steps often take time and they cannot be allowed to hold the process hostage by preventing the setting of timely trial dates. It is only when the missing disclosure is truly material to "crucial steps" in the process, like election and plea, that it will justify delay at these early stages. This is simply common sense. Lawyers can generally adapt and adjust their trial strategy to ongoing disclosure, received from the Crown while awaiting trial. If the Crown is not being diligent in providing disclosure sufficiently in advance of the trial date, then setting confirmation dates and target dates for trial will solve the problem. By bringing the case back to court, a month or two before the target trial date, defence counsel can create a check to prevent dilatory Crown disclosure practices. If the Crown has not completed all important disclosure by the confirmation date, the defence can then adjourn the target trial date and the Crown's actions will have caused the delay.
>
> In all these circumstances, I am satisfied that the defence acted unreasonably, in the period from April 23 to June 25, 2009, and that this two months and two days of delay was due to conduct of the defence. The trial judge erred in characterizing this period as delay caused by the Crown.
>
> [Emphasis added.]

35 The Court of Appeal has held, in *Kovacs-Tatar*, *M. (N.N.)*, and *Schertzer*, that it is wrong to refuse to set a date for trial or preliminary inquiry until the Crown has disclosed "every last bit of evidence." *A fortiori*, it is wrong to refuse to set a date for a JPT because counsel is waiting for one "final piece of disclosure."

36 Defence counsel's unreasonable conduct was the direct cause of delay in setting a date for the JPT, from June 13 to August 1, 2014. Mr. Brodsky does not dispute the causal link between counsel's conduct and this seven-week period of delay. Nor does he dispute the law that emerges from *Kovacs-Tatar*, *M. (N.N.)*, and *Schertzer*. Rather, he submits that when he took over the defence from Mr. Kayfetz on November 3, 2014, "there was no disclosure in the file" and the case was simply in no position to proceed to a JPT. He later revised or qualified this factual assertion and submitted, "All I had was the cancelled cheque stubs."

37 I cannot accept Mr. Brodsky's submission on this purely factual point for a number of reasons, as follows:

* First, he is taking on the role of a witness by personally giving evidence about the state of disclosure in Mr. Kayfetz' file, without filing any evidence in affidavit form as part of the Application Record and being subject to cross-examination;

* Second, the evidence in the Record does not support Mr. Brodsky's assertions. The Crown described the disclosure as "substantial" on June 13, 2014 and as "a lot of disclosure" on June 27, 2014. There are a number of references by the parties to police notes, bank statements, and forged cashed cheques having been disclosed. Mr. Kayfetz, who is an experienced defence counsel, twice stated on June 13, 2014 that he only needed one "final piece of disclosure," namely, a copy of the complainant company's books. This "final piece" of requested disclosure was apparently available on September 17, 2014. Furthermore, both the Crown and Mr. Kayfetz felt that there was sufficient disclosure by August 1, 2014, at the very latest, to justify setting a date for a JPT;

* Third, Mr. Brodsky's factual assertions to me, in submissions, were internally inconsistent (as noted above). More fundamentally, they are inconsistent with what he said on the record at the relevant time and they are inconsistent with his conduct at the relevant time. On November 21, 2014, Mr. Brodsky appeared in court after taking over the case on November 3, 2014. He stated, "I picked up some disclosure and began turning the pages. It's a relatively complicated fraud case." On December 5, 2014, a month later, he appeared again and stated, "This is a relatively complicated fraud matter ... I'm reading the CDs and going through turning the pages on the file." On both occasions, he asked for more time, apparently to complete his review of the disclosure, "turning the pages" as he put it, in a "relatively complicated" fraud case. It does not sound like a file with nothing in it except "cancelled cheque stubs." Furthermore, after reviewing the disclosure, he proceeded to set a date for a JPT on January 27, 2015, contrary to his submission that the state of disclosure was so deficient that the case was somehow in no position to proceed to a JPT. Finally, it is telling that he never wrote a letter to the Crown, after reviewing the state of disclosure in the file in November and December, 2014, and never asserted that the disclosure was so deficient that the case could not proceed to a JPT;

* Fourth, Mr. Brodsky is attacking Mr. Kayfetz' competence when he asserts that "there was no disclosure in the file" and that the case was in no position to proceed to a JPT. This is unfair and irresponsible, without giving notice to Mr. Kayfetz so that he can respond. See: *R. v. Elliott* (1975), 28 C.C.C. (2d) 546 at 549 (Ont. C.A.); *R. v. W.(W.)* (1995), 100 C.C.C. (3d) 225 at 234 (Ont. C.A.).

38 I am satisfied that there were ongoing disclosure issues in this case but the way to solve them was by proceeding to a JPT, as the Crown repeatedly suggested. Mr. Kayfetz eventually acceded to this view, after some delay. There is no basis for Mr. Brodsky's unsworn, unsupported, and inconsistent assertions about Mr. Kayfetz' lack of sufficient disclosure to proceed to a JPT.

39 In conclusion concerning this seven week period from June 13 to August 1, 2014, it was defence delay caused by counsel's unreasonable refusal to set a date for a JPT until he had one "final piece of disclosure."

40 The second period of "delays caused solely or directly by the defence's conduct," while Mr. Kayfetz was counsel, occurred when he and the Crown set a date for the JPT. This apparently occurred on August 1, 2014, after the case had already been remanded to September 17, 2014. The JPT form states that the further disclosure "will not be available until September 17, 2014," that the court had "dates...available [for a JPT] from August 14th," that the defence was "not available after September 17, 2014," and that "the defence requested November 3" as the date for the JPT. When he appeared in court for the JPT on November 3, 2014, after he had been discharged and the JPT had been cancelled, Mr. Kayfetz stated, "I was in Florida" at the time when he received the letter from his client discharging him.

41 I am satisfied that Mr. Kayfetz was "unavailable" to conduct a JPT, from September 17 to November 3, 2014, and that this seven-week period of delay was caused directly by the defence, as in *Jordan* and *Williamson*.

42 The Crown submits that the final period of delay caused directly by the defence was from November 3, 2014 to January 27, 2015, when Gandhi changed counsel, cancelled the JPT scheduled for November 3, 2014, and then re-scheduled it for January 27, 2015. This period of delay is relatively straightforward as it is governed by a long and consistent line of authority. It is analogous to one of the periods of delay in *Jordan* that was held by the majority to be attributable to the defence. It is also analogous to certain periods of delay in *R. v. Conway*, *supra* at pp. 309-311, where the accused discharged his first counsel and sought an adjournment. In *R. v. Askov*, *supra* at pp. 480-1 and 483, Cory J. twice stated that "delays to retain different counsel" were "attributable to the accused." Cory J. also used *Conway* as an illustration of a case where the accused "directly caused the delay," stating:

> It should be emphasized that an inquiry into the actions of the accused should be restricted to discovering those situations where the accused's acts either directly caused the delay (as in *Conway*), or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial.

The majority in *R. v. Jordan*, *supra* at para. 63, quoted this passage from *Askov* with approval. Finally, in *R. v. Morin*, *supra* at p. 18, Sopinka J. also used *Conway* as an example of delays due to "actions of the accused," including delays caused by "changes of solicitor."

43 In my view, the twelve week or approximately three month period of delay from November 3, 2014 to January 27, 2015 was directly caused by the actions of the accused, in discharging Mr. Kayfetz, retaining Mr. Brodsky, cancelling the JPT, and re-scheduling the JPT after Mr. Brodsky had taken time to review the disclosure and conduct his own Crown pre-trial.

44 It should be emphasized that a finding that delay was "caused solely or directly by the defence's conduct" is not a finding of fault. As Doherty J.A. put it in *R. v. Philip* (1993), 80 C.C.C.

(3d) 167 at 173: "Section 11(b) is not concerned with assigning blame, but only with the cause of delay." Gandhi was entitled to change counsel, if she was no longer content with her first counsel's conduct of the case. It is apparent that Mr. Kayfetz and Mr. Brodsky have very different litigation styles. In particular, they appear to have taken different approaches to disclosure. Once again, s. 11(b) does not concern itself with comparing these styles or preferring one over the other. As the Court put it in *R. v. Schertzer et al.*, *supra* at para. 131:

> ... it must be borne in mind that the defence approach to disclosure will impact on the pace of the proceedings. Some counsel may choose to pursue every possible relevant piece of information in the Crown's possession, while other counsel may choose a more focused attack on specific crucial Crown witnesses. Neither approach is necessarily unreasonable, but the former approach can result in significantly longer inherent time requirements.

45 In the present case, the issues appeared to be narrow as the fraud and forgeries were admitted and only identity was in dispute. In such a case, disclosure requests can properly be narrow and can be focused on the one real issue in dispute. On the other hand, Gandhi was entitled to reject such an approach and retain counsel who would pursue "every possible relevant piece of information." However, the delay caused by this decision to change counsel is clearly defence delay, in my view.

46 In conclusion, the periods of delay in this case that are "attributable to the defence" are as follows:

* The seven week period of waiver, from April 25th to June 13th, 2014;

* The seven week period of delay in setting a date for the JPT, from June 13th to August 1st, 2014;

* The seven week period when counsel was unavailable to conduct the JPT, from September 17th to November 3rd, 2014;

* The twelve week period of delay due to the change of counsel, from November 3rd, 2014 to January 27th, 2015.

47 In other words, there is a total period of 33 weeks of delay that is "attributable to the defence."

E. CONCLUSION

48 The effect of deducting 33 weeks, or just under eight months, from the total delay of 35 months is to bring the relevant period of delay below the "presumptive ceiling." The resulting total delay of just over 27 months is presumed to be reasonable. In *R. v. Jordan*, *supra* at paras. 48 and 82-91, the majority held that delay below the "presumptive ceiling" may still be unreasonable but only in "rare" and "clear" cases:

> If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls *below* the presumptive ceiling, then the onus is on the defence to show that the

> delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.
>
> [Emphasis in original.]

49 In the present case, the Applicant cannot satisfy the first of these two criteria, namely, that the defence "took meaningful steps that demonstrate a sustained effort to expedite the proceedings." In this regard, I rely on the following:

* During the initial intake period, when Mr. Kayfetz was counsel, I have already found that 21 weeks of delay were "attributable to the defence." These periods of delay are antithetical to any "sustained effort to expedite the proceedings";

* When Mr. Brodsky became counsel of record on November 3, 2014, he repeatedly agreed to schedule a Crown pre-trial and a JPT and to "get it moving." He then failed to appear on November 14, 2014, he failed to schedule a Crown pre-trial on both November 21 and December 5, 2014, and he failed to schedule a JPT on January 2, 2015. There is little or nothing in these initial appearances that indicates a "sustained effort to expedite the proceedings";

* At the Superior Court JPT before Forestell J. on March 10, 2016, there were no admissions by the defence (according to Form 18-A1). In this regard, the majority in *R. v. Jordan*, *supra* at para. 138, stated that "Both parties should focus on making reasonable admissions..." Also see *R. v. Vassell*, *supra* at para. 6;

* At the end of the preliminary inquiry before Kozloff J. on January 7, 2016, Mr. Brodsky stated, "There will be an 11(b) application sometime later and I have to get ordering the transcripts." He then waited six months, until July 8, 2016, before ordering the necessary transcripts. As a result, the s. 11(b) application had to be adjourned twice, as it was not ready to proceed, both on June 23 and on August 11, 2016. When the s. 11(b) Motion Record and Factum were eventually filed, they were filed at the last minute in significant non-compliance with the Superior Court Rules. See: *R. v. Jordan*, *supra* at para. 85;

* Finally, the subpoena for the Records Motion was not served in a timely way and that hearing date also had to be re-scheduled.

50 For all these reasons, the Applicant cannot bring herself within the new *Jordan* framework for cases where the delay is below the "presumptive ceiling." However, that new framework is to be applied sensitively and contextually to a transitional case, like the present one, where almost all of

the delay preceded the release of *R. v. Jordan*, *supra* at paras. 95 and 99-103, as the majority explained:

> The new framework, including the presumptive ceiling, applies to cases currently in the system, subject to two qualifications.
>
> ...
>
> The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls *below* the ceiling. For these cases, the two criteria -- defence initiative and whether the time the case has taken markedly exceeds what was reasonably required -- must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. Specifically, the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the *Morin* framework, it would be unfair to require it for the period of time before the release of this decision. However, in close cases, any defence initiative during that time would assist the defence in showing that the delay markedly exceeds what was reasonably required. The trial judge must also still consider action or inaction by the accused that may be inconsistent with a desire for a timely trial (*Morin*, at p. 802).
>
> Further, if the delay was occasioned by an institutional delay that was reasonably acceptable in the relevant jurisdiction under the *Morin* framework before this decision was released, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.
>
> We note that given the level of institutional delay tolerated under the previous approach, a stay of proceedings below the ceiling will be even more difficult to obtain for cases currently in the system. We also emphasize that for cases in which the charge is brought shortly after the release of this decision, the reasonable time requirements of the case must reflect this high level of tolerance for institutional delay in particular localities.
>
> Ultimately, for most cases that are already in the system, the release of this decision should not automatically transform what would previously have been considered a reasonable delay into an unreasonable one. Change takes time ... The reasonableness of a period of time to prosecute a case takes its colour from the surrounding circumstances. Reliance on the law as it then stood is one such circumstance.
>
> [Emphasis in original.]

51 Applying the above transitional approach, and giving no weight to any defence failure to show a "sustained effort to expedite the proceedings," I am satisfied that this case would not have resulted in a stay of proceedings under the old *Morin* framework for s. 11(b) analysis. The approximately eight months of defence delay, as analysed above, would have been regarded as defence

delay under the prior s. 11(b) case law. The intake period from December 5, 2013 to April 25, 2014 would have been treated as four and a half months of neutral or inherent delay, as would the one and a half months from August 1 to September 17, 2014, which was necessary to reasonably schedule a JPT. The five months' delay before Vaillancourt J., from January 27 to June 24, 2015, while the disclosure issues were resolved at the JPT, would likely have been treated as Crown delay due to the failure to make timely disclosure. The three months to schedule the preliminary inquiry would likely have been treated as partly inherent, due to the needs of the parties to prepare for a relatively complex preliminary inquiry. One or two months would have been treated as systemic delay, provided counsel was available on earlier dates (which is not clear). The three and a half months to complete a four day preliminary inquiry, when the parties had only scheduled three days, would have been treated as inherent or neutral delay. The eight months of delay in the Superior Court would have been treated as predominantly neutral or inherent delay, due to the need to schedule and conduct a JPT, the need to schedule and prepare two pre-trial Motions (the second one not being ready to proceed until the morning of August 29, 2016). At most, there might have been two months of systemic delay, from the rendering of judgment on the s. 11(b) Motion to the commencement of the trial, although this is unlikely given that some of this delay would be inherent or neutral because of time needed by the parties to prepare for trial.

52 It can be seen that the only periods of unreasonable delay that would have weighed against the Crown, under the old *Morin* framework, would have been four months of Crown delay in the Ontario Court of Justice and a couple of months, at most, of systemic delay in both courts. These are very short periods of unreasonable delay that could not have given rise to inferred prejudice. See: *R. v. Boateng* (2015), 329 C.C.C. (3d) 1 at para. 41 (Ont. C.A.); *R. v. Lahiry et al.*, *supra* at para. 8.

53 Mr. Brodsky submits that there is actual prejudice in this case. He relies on the report of Dr. Glancy and submits that delay has had an impact on Gandhi's mental health. It would appear that actual prejudice, in the old s. 11(b) sense, plays no separate role in the new *Jordan* framework. Rather, it informs the setting of the "presumptive ceiling." See: *R. v. Jordan*, *supra* at paras. 109-110. In any event, Dr. Glancy's report makes it clear that Gandhi's depression dates back to mid-2012, about a year and a half before she was charged. After she was charged, she "reports increasingly severe depression and anxiety, accompanied by feelings of failure." Dr. Glancy concluded that "the longevity of the case compounds her depression and anxiety ... [she] requires psychiatric treatment. However, the longer the case goes on, the harder it is for any intervention to be successful." It can be concluded that delay did not cause Gandhi's mental health issues, which pre-existed the present charges and which were exacerbated by the fact that she was charged. The extent to which trial delay has contributed to her present mental health is difficult to determine.

54 Accepting that a court applying the pre-existing law would have found some actual s. 11(b) prejudice, balancing this one factor under the old *Morin* framework with the very short periods of unreasonable delay in the case, and balancing the strong societal interest in the prosecution of a relatively serious breach of trust fraud, would not have resulted in a s. 11(b) stay pursuant to the prior law.

55 In conclusion, there has been no s. 11(b) violation in this case, either under the new *Jordan* framework, or under the transitional approach in *Jordan* that draws on the old *Morin* framework. Accordingly, the s. 11(b) *Charter* application is dismissed and the case will proceed to trial, as scheduled, on November 7th, 2016.

M.A. CODE J.