IN THE MATTER OF
City of Mississauga Public Vehicle Licensing By-law 420-04, and an application for a stay of proceedings under s. 24(1) for an infringement of s. 11(b) of the Charter

Between

The Corporation of the City of Mississauga

Prosecutor (respondent)

and

Uber Canada Inc.
and
Ersan Zukic

Defendants (applicants)

Ontario Court of Justice
Mississauga, Ontario

Quon J. P.

Reasons for ruling on application

Application argued: October 13, 2016
Ruling rendered: December 1, 2016

Charges: UBER Canada Inc. has been with "acting as a broker" without a licence, contrary to subsection 2(3) of the City of Mississauga Public Vehicle Licensing Bylaw 420-04 (2 separate charges were laid on separate informations).

Ersan Zukic has been charged with "operating a licensed taxicab in affiliation with an unlicensed taxi broker", contrary to Sched. 8, s. 46(4) of Mississauga Bylaw 420-04 and thereby committing an offence under s. 32(1) of Mississauga Bylaw 420-04 (1 count).

Counsel:

S. Dunford, prosecutor for the City of Mississauga.

J. Rosenthal and R. Cookson (Goodmans LLP), counsel for UBER Canada Inc.

G. Chan and S. Aylward (Stockwoods LLP), counsel for Ersan Zukic.

Cases Considered or Referred To:

Allen v. The Queen (1997), 119 C.C.C. (3d) 1 (S.C.C.) affirming, (1997), 110 C.C.C. (3d) 331 (O.C.A.), per Doherty, Weiler, and Moldaver JJ.A.

City of Toronto v. Uber Canada Inc. et al., [2015] O.J. No. 3540, 2015 ONSC 3572 (S.C.J.O.), per Dunphy J.

Mississauga (City) v. Uber Canada Inc., 2016 ONCJ 461 (O.C.J.), per Nicklas J.

Oshawa (City) v. 536813 Ontario Limited, 2016 ONCJ 287 (O.C.J.), per Coopersmith J.P.

Pelfrey v. The Queen (1995), 99 C.C.C. (3d) 385 (S.C.C.).

Toronto (City) v. Andrade, 2011 ONCJ 470 (O.C.J.), per Libman J.

R. v. Accurate Industrial Waste Ltd., [2001] O.J. No. 3421 (O.C.J.), per Quon J.P.

R. v. Askov (1990), 59 C.C.C. (3d) 449 (S.C.C.).

R. v. Bennett (1991) 64 C.C.C. (3d) 449 (O.C.A.), per Dubin C.J.O., Arbour and Osborne JJ.A.

R. v. Brassard (1993), 85 C.C.C. (3d) 287 (S.C.C.).

R. v. Campbell, [1999] 1 SCR 565 (S.C.C.).

R. v. Clothier, 2011 ONCA 27 (O.C.A.), per O'Connor A.C.J.O., Laskin, and Gillese JJ.A.

R. v. Conway, [1989] 1 S.C.R. 1659 (S.C.C.).

R. v. Coulter, 2016 ONCA 704 (O.C.A.), per Strathy C.J.O., Gillese and Pardu JJ.A.

R. v. Curry, 2016 BCSC 1435 (B.C.S.C.).

R. v. Dass, 2016 BCSC 1701 (B.C.S.C.).

R. v. Dehaney, 2005 ONCJ 468 (O.C.J.), per Weiss J.

R. v. Edan, [2016] O.J. No. 4279 (O.C.J.), per Botham J.

R. v. Gandhi, 2016 ONSC 5612 (S.C.J.O.), per Code J.

R. v. Godin, [2009] S.C.J. No. 26 (S.C.C.).

R. v. Hafee 2015 ONSC 7118 (S.C.J.O.), per Nordheimer J.

R. v. Jordan, 2016 SCC 27 (S.C.C.).

R. v. Kovacs-Tatar, [2004] O.J. No. 4756 (O.C.A.), per Weiler, Rosenberg JJ.A., and Pardu J. (ad hoc).

R. v. Korzh, 2016 ONSC 4745 (S.C.J.O.), per Miller J.

R. v. Lam, 2016 ABQB 489 (A.Q.B.).

R. v. MacDougall (1998), 128 C.C.C. (3d) 483 (S.C.C.).

R. v. Manasseri, 2016 ONCA 703 (O.C.A.), per Watt, Lauwers, and Huscroft JJ.A.

R. v. Mastronardi, 2016 BCSC 1289 (B.C.S.C.).

R. v. Meisner, [2003] O.J. No. 1948 (S.C.J.O.), per Hill J., at para. 32, affirmed, [2004] O.J. No. 3812 (O.C.A.), per McMurtry C.J.O., Doherty, and Lang JJ.A.

Statutes, Regulations, Bylaws and Rules Cited:

1. INTRODUCTION

[1] When the moon is in the seventh month and Moldaver is aligned with Brown, then there will be a new 11(b) framework for the trial courts and complacency will no longer guide the bar. This is now the Age of *Jordan* upon us. And, it will be the *Jordan* analytical framework that will be used to decide these unreasonable delay applications for stays of proceedings brought by the defendants, UBER Canada Inc. and Ersan Zukic, for their respective bylaw charges.

[2] In respect to the defendants' 11(b) applications, two Mississauga bylaw charges had been laid against UBER Canada Inc. ("UBER Canada") and one bylaw charge had been laid against Ersan Zukic (the "alleged UBER driver"). However, these three charges are being prosecuted as "test cases" and were part of a group of charges that had been laid by City of Mississauga bylaw officers between September 1, 2014 and November 30, 2014, against UBER Canada Inc. and against alleged UBER drivers. The two UBER Canada test cases were part of a set of 30 bylaw charges laid against UBER Canada during that period; while for the test case involving Ersan Zukic's charge, Zukic had been one of the 13 alleged UBER drivers that had been charged with Mississauga bylaw offences during that same period. All of these bylaw charges were laid under the City of Mississauga Public Vehicle Licensing Bylaw 420-04 that governs and regulates the taxi industry in Mississauga. It was also decided by the prosecution that the remaining 28 bylaw charges against UBER Canada and the bylaw charges against the other 12 alleged UBER drivers would also follow along with the present three test cases.

[3] For the two charges laid against UBER Canada, City of Mississauga bylaw officers had charged the corporate defendant on two separate Part III informations dated September 4, 2014 and November 17, 2014, with "acting as a broker without a licence", contrary to s. 2(3) of the City of Mississauga Public Vehicle Licensing Bylaw 420-04. In its 11(b) application under the new *Jordan* analytical framework, UBER Canada submits that the presumptive ceilings for unreasonable delay established under the new *Jordan* framework applies equally to corporate defendants as it does to human defendants, even though there is no mention of corporations being covered by the presumptive ceilings set out in R. v. Jordan, 2016 SCC 27 (S.C.C.). In addition, because the two charges laid against UBER Canada had been commenced under a Part III information pursuant to the Provincial Offences Act, R.S.O. 1995, c. P.33, the total delay for the *Jordan* analysis is calculated from the date the information is sworn to the date of the actual or anticipated end of trial, which in this case is December 2, 2016. Ergo, the total delay would be **26 months and 21 days** for the September 4th charge (from the date the information was sworn on September 11, 2014) and **24 months and 12 days** for the November 17th charge (from the date the information was sworn on November 20, 2014).

[4] As for the defendant, Ersan Zukic, a City of Mississauga bylaw officer had charged Zukic, a licensed taxicab driver, under a Part III information, with contravening s. 46(4) of Schedule 8 of the Mississauga Public Vehicle Licensing By-Law 420-04 for "operating a licensed taxicab in affiliation with an unlicensed taxi broker". This offence allegedly occurred on November 6, 2014, but the information containing the charge was not sworn until November 25, 2014. Therefore, the total delay from the date the information had been sworn to the date of the anticipated completion of the trial of December 2, 2016, for the charge laid against the alleged UBER driver, Ersan Zukic, would be **24 months and 4 days**.

[5] Moreover, in their contention that their respective right to a speedy trial had been infringed, both UBER Canada and the alleged UBER driver, Ersan Zukic, submit that none of the total delay in their respective cases should be attributed to either of them, since neither UBER Canada nor Zukic had implicitly or explicitly waived any period of the total delay, nor had they solely been the cause of any of the total delay. But more important, both defendants submit that their respective consents or agreements to adjournment requests made by the prosecution for disclosure purposes and to wait for the decision from the Toronto Injunction case (see City of Toronto v. UBER Canada Inc. et al, 2015 ONSC 3572 (S.C.J.O.) should not be construed or treated as implied waiver by them of any of the delay. In addition, the prosecution is not contending that any of the delay at issue had been solely caused by the defendants, although the prosecution does contend that both defendants had by their conduct and agreement implicitly waived the delay associated with the consent adjournments in their respective cases.

[6] Furthermore, both defendants submit that they had not brought any frivolous applications or motions, nor did they deliberately or by calculation delay their respective proceedings. On the other hand, both defendants contend that the delay in these proceedings had been caused by the prosecution's laissez-faire attitude in the handling of the defendants' cases, especially in not addressing the defendants' requests for additional disclosure promptly and in taking nearly six months just to respond to UBER Canada's written requests for additional disclosure of particular items. And to date they still had not provided particular disclosure that they had stated they would provide. Moreover, the prosecution had precipitated the delay in these proceedings, since they had been the one who had requested adjournments in order to fulfill their disclosure obligations, as well as requesting adjournments to wait for a decision in the Toronto Injunction case.

[7] Ergo, both defendants submit that the remaining delay for their respective charges as a result of deducting any defence delay (which they both contend there is none) from the total delay of roughly 24 to 26 months for their respective charges would exceed the presumptive ceiling of 18 months for unreasonable delay in provincial courts. Accordingly, the defendants submit that because the remaining delay for their respective cases has exceeded the ceiling of 18 months, then a stay of proceedings must issue unless the prosecution is able to establish the existence of "exceptional circumstances" on a balance of probabilities to rebut the presumption of unreasonable delay for their respective cases; or unless the prosecution is able

to satisfy the court that the parties had reasonably relied on the pre-existing law to justify the time it has taken, such that the "transitional exceptional circumstance" would apply to the present cases.

[8] Furthermore, both defendants contend that the prosecution has failed to justify the inordinate delay or to rebut the presumption that the delay had been unreasonable in completing the trials of their three respective charges by proving that the delay had been caused by or had been due to "exceptional circumstances". In particular, that the prosecution has not established that the prosecution of these specific charges required an inordinate amount of trial or preparation time due to their complex nature so as to make the delay reasonable, or that there had been a discreet event or events which had been the cause of any of the delay in completing the trials that would bring the delay below the 18 month ceiling. In addition, since these three test cases were already in the system before the *Jordan* framework was established on July 8, 2016, both defendants further submit that the prosecution has not established that the "transitional exceptional circumstance" should apply to any of the three charges, as the prosecution has failed to establish that the parties had reasonably relied on the pre-existing law established under R. v. Morin, [1992] S.C.J. No. 25 (S.C.C.), to justify the inordinate time it will take to complete the trial of these three charges.

[9] But most importantly, both defendants contend that even if the prosecution had indeed been able to show that the parties had reasonably relied on the *Morin* framework in how they had handled, dealt with, or advanced their respective cases (which they argue the parties had not), then the delay determined under the *Morin* 11(b) calculus would still have been unreasonable and would have in any event greatly exceeded the guideline of 8 to 10 months for having a trial within a reasonable time in a provincial court.

[10] Accordingly, both defendants submit that they have established on a balance of probabilities that their respective right to a trial within a reasonable time under s. 11(b) has been infringed and that the remedy of a judicial stay be granted for their charges under s. 24(1) of the Charter.

[11] On the other hand, in response to both of the defendants' unreasonable delay applications under the *Jordan* framework, the prosecution submits that they have rebutted the presumptive unreasonableness of the delay based on the existence of "exceptional circumstances" that have caused the delay, since it is contended that the defendants' matters were sufficiently complex due to the volume of disclosure requested by the defendants, the novelty of the circumstances and the legal issues arising in respect to UBER Canada's operation, and due to the number of charges laid against UBER Canada and the number of alleged UBER drivers charged that had been joined and proceeding together with the UBER Canada charges.

[12] Furthermore, the prosecution argues that in the event that the "exceptional circumstances" under the new *Jordan* 11(b) framework does not rebut the presumption of unreasonable delay for both defendants' respective cases, then

they submit that the "transitional exceptional circumstance" should apply to justify the time that it would take or had taken to complete both defendants' trials, as the charges were already in the system prior to the application of the new 11(b) framework that had commenced on July 8, 2016, and had only been in effect for just a little over three months prior to the hearing of this application, and since the parties had reasonably relied on the pre-existing law where the *Morin* framework had guided the parties in the proceedings involving both defendants for all but five months of the total delay of just over 26 months and 24 months, respectively, for the three charges in this application.

[13] Moreover, in analyzing the defendants' cases under the *Morin* framework, to establish context for the application of the "transitional exceptional circumstance" to justify the inordinate delay in completing the trial, the prosecution submits that a transcript-by-transcript examination of the defendants' proceedings shows that a significant amount of the delay in their respective proceedings, is in fact, "neutral time" in the form of mutual adjournments, judicial pre-trial hearings, and other forms of case management. Consequently, the prosecution contends that for the defendants' respective proceedings, after deducting periods of delay from the total delay for intake or inherent delay for providing disclosure as well as the neutral delay that had resulted from the consent adjournments, they contend that the remaining delay due to institutional delay or Crown-caused delay is approximately 13 months and 11 days, which they acknowledge is above the *Morin* guideline of 8 to 10 months of reasonable delay, but nevertheless they contend the delay is not unreasonable because UBER Canada and the alleged UBER driver, Ersan Zukic, had not demonstrated or proven that there had been any prejudice to their respective and applicable security, liberty, or fair trial interests from the delay under the *Morin* framework.

[14] However, the defendants contend that the prosecution has misinterpreted the test for deciding if the "transitional exceptional circumstance" should apply to justify the inordinate delay to complete their respective trials, as the prosecution is not entitled to have two kicks at the can or two chances to win in justifying the inordinate delay, by relying first on the *Jordan* framework, and if that does not succeed, then to embark on a full Morin analysis to show there had been no unreasonable delay. The defendants argue that the prosecution did not appreciate the shift in respect to analyzing 11(b) applications and that the *Morin* framework no longer governs. But most importantly, the defendants submit that the test for determining whether the inordinate delay is justified under the "transitional exceptional circumstance" established under the *Jordan* framework requires a two-stage test, which requires first that the prosecution establish that the parties had relied on the pre-existing law and then secondly, that this reliance had been reasonable to justify the time it had taken, but which does not include relitigating under the old framework if the prosecution does not defeat the defendants' 11(b) application under the new *Jordan* framework.

[15] In other words, the defendants submit that the *Jordan* majority, in establishing the new 11(b) framework, did not intend that the Crown or prosecution could justify the inordinate delay under the transitional exceptional circumstance by embarking on a full *Morin* analysis, since the R. v. *Jordan* case had been the first transitional case under the new 11(b) framework and the *Jordan* majority themselves did not embark on full *Morin* analysis to determine if the parties had reasonably relied on the pre-existing law that would justify the inordinate delay in completing the trial.

[16] After the 11(b) application had been argued by both defendants on October 13, 2016, ruling on both applications had been reserved and adjourned until December 1, 2016, for the ruling to be rendered. Therefore, these are the written reasons for ruling on both defendants' s. 11(b) applications, in which both defendants have met their burden in proving on a balance of probabilities that their respective 11(b) right to a trial within a reasonable time had been infringed, so that their respective charges are stayed as a remedy under s. 24(1) of the Charter.

2. BACKGROUND

[17] The idea behind the UBER phenomenon that has swept the planet had been born in 2008. In respect to the UBER Canada's operation in Ontario, UBER Canada Inc. was incorporated in Ontario on February 8, 2012, and has the Ontario corporation number of 3068686. Its registered head office address is located at 100 King Street West, Suite 6100, Toronto, Ontario.

[18] In comparison, the City of Mississauga Public Vehicle Licensing By-Law 420-04 governing the licensing and regulation of the taxi industry in Mississauga for the purposes of health and safety, consumer protection, and public nuisance had been enacted and passed on October 13, 2004, by the Council of the Corporation of the City of Mississauga.

[19] For the two bylaw charges in this proceeding laid against UBER Canada, the City of Mississauga has charged the defendant corporation for operating as a taxi broker in Mississauga without having a taxi broker's license on separate dates of September 4th and November 17th of 2014. However, in the period from September 1, 2014 to November 30, 2014, the municipality had also charged UBER Canada with committing 30 offences of operating as a taxi broker in Mississauga without having a taxi broker's license. Of those 30 charges laid against UBER Canada, it had been decided by the City of Mississauga prosecutors that the two charges in this application would be proceed as "test" cases.

[20] The actual wording of those two charges laid against UBER Canada contained in the Part III informations sworn respectively on September 11, 2014 (004157) and November 20, 2014 (004665), are the following:

Information # 004157:

UBER CANADA INC., 100 King Street West, Suite 6100, Toronto, ON M5X 1B8 on or about the 4th day of September, 2014, at 6750 Mississauga Road, Mississauga, ON did commit the offence of

Acting as a Broker without being licensed, contrary to Section 2(3) of the City of Mississauga By-Law 420-04, as amended, and thereby did commit an offence under Section 32(2) of City of Mississauga By-Law 420-04, as amended.

Information # 004665:

UBER CANADA INC., 100 King Street West, Suite 6100, Toronto, ON M5X 1B8 on or about the 17th day of November, 2014, at 3 Robert Speck Parkway - Mississauga, ON did commit the offence of

Acting as a Broker without being licensed, contrary to Section 2(3) of the City of Mississauga By-Law 420-04, as amended, and thereby did commit an offence under Section 32(2) of City of Mississauga By-Law 420-04, as amended.

[21] Similarly, for the alleged UBER driver, Ersan Zukic, the City of Mississauga prosecutors had also decided to go ahead with the Zukic matter as a "test" case. Zukic had also been one of approximately 13 alleged UBER drivers charged with bylaw offences in respect to their association with UBER Canada during the period from September 1, 2014 to November 30, 2014. Zukic had been charged with committing the bylaw offence on November 6, 2014. These 13 drivers had also been represented by the same legal counsel on all of their court appearances.

[22] The actual wording of the charge laid against the alleged UBER driver, Ersan Zukic, contained in the Part III information sworn on November 25, 2014 (004727), is the following:

Information # 004727:

Ersan ZUKIC [address removed for privacy], Mississauga, ON [postal code removed for privacy] on or about the 6th day of November, 2014, at 309 Rathburn Road West, Mississauga, ON did commit the offence of

Being a Licensed Taxicab Driver and operating Mississauga Taxicab # 230, bearing provincial plate FASTTED in affiliation with a Taxicab Broker who is not licensed, contrary to Schedule 8, Section 46(4) of City of Mississauga By-Law 420-04, as amended and thereby did commit an offence under Section 32(1) of City of Mississauga By-Law 420-04, as amended.

[23] Furthermore, in respect to the two charges for UBER Canada at bar, there had been 8 separate court appearances respectively for both the September 4, 2014 charge and for the November 17, 2014 charge, which had been addressed in this

application, and to which transcripts of those scheduled court appearances had been obtained and provided in its unreasonable delay application, although legal counsel for UBER Canada or their agent did not personally appear on all of the scheduled court appearances, and the prosecution had spoken to several adjournments on behalf of counsel for UBER Canada.

[24] As for the proceedings involving the alleged UBER driver, Ersan Zukic, there had also been 8 separate court appearances for his charge, which had been also addressed in this application and to which transcripts of those court appearances had also been obtained and provided in his unreasonable delay application.

[25] Moreover, part of the total delay that is in common with both of the defendants' proceedings at bar had been attributable to the prosecution and both defendants agreeing to adjourn several court appearances in 2015 for the purpose of waiting for the outcome of a legal proceeding in what the parties have referred to as the "Toronto Injunction case". This injunction application had been brought by the City of Toronto in respect to UBER Canada's operation in the City of Toronto and in respect to the City of Toronto Bylaw governing the taxi industry in Toronto, which had been heard and argued on June 1 and 2, 2015. The decision on that application was subsequently released on July 3, 2015. See City of Toronto v. UBER Canada Inc. et al, 2015 ONSC 3572 (S.C.J.O.), per Dunphy J. The injunction sought against UBER Canada had not been granted.

[26] Also, on the January 28, 2016, court appearance, the prosecutors for the City of Mississauga had requested a judicial pre-trial conference to be scheduled because they were having difficulty in moving the UBER cases forward. Counsel for both defendants were opposed to scheduling or setting a date for the judicial pre-trial conference until they had received all the items they had requested in their disclosure requests. Counsel for UBER Canada had submitted a list of 10 to 17 items in a request for additional disclosure on May 20 of 2015, for each charge that UBER Canada was facing while counsel for the alleged UBER drivers made a request for additional disclosure with a similar list of items for each of the drivers. The prosecution had informed only UBER Canada that most of the items requested were not relevant, but that a few of the items would be forthcoming. However, the court did not grant the defendants' request for a further adjournment, but had scheduled a judicial pre-trial conference to be held on April 19, 2016, sufficiently far enough away so that the prosecution could complete their obligation in providing full disclosure and having further resolution discussions. The court had offered an earlier judicial pre-trial date in March of 2016, but counsel for UBER Canada was not available until the April date.

[27] At the judicial pre-trial conference held on April 19, 2016, which involved counsel for UBER Canada and counsel for the alleged UBER drivers, it was agreed by all that two days for Charter arguments be set aside and scheduled for October 13 and 14 of 2016. It was also agreed to schedule December 1, 2016, as the date before trial that UBER Canada would argue the applicability of the City of Mississauga

bylaw in respect to UBER Canada's operation. However, no date for trial had been set at that time. There had also been a discussion at the judicial pre-trial conference about the prosecution applying to have all the UBER matters heard by a judge of the Ontario Court of Justice instead of a justice of the peace. A confirmation date was also set for July 19, 2016.

[28] On July 4, 2016, counsel for the alleged UBER drivers emailed the prosecutors for the City of Mississauga to inform them that his clients did not waive their rights to be tried within a reasonable time under s. 11(b) or that their position on the City of Mississauga's application to have the UBER matters heard by a judge of the Ontario Court of Justice, instead by a justice of the peace, to be construed as waiver.

[29] However, before the parties appeared in court for the confirmation date scheduled for July 19, 2016, the prosecutors for the City of Mississauga decided to bring an application before the regional senior judge under s. 15(4) of the Justices of the Peace Act, R.S.O. 1990, c. J.4, s. 15(4), to have all the charges laid against UBER Canada and the alleged UBER drivers heard by a judge of the Ontario Court of Justice, instead of a justice of the peace. Counsel for all the defendants did not oppose the application that had been brought by the prosecutors for the City of Mississauga. This application had been heard and argued before Regional Senior Justice Nicklas on June 24, 2016. On July 18, 2016, Regional Senior Justice Nicklas released her ruling and denied the City of Mississauga's application to have the UBER cases heard by a judge of the Ontario Court of Justice.

[30] However, before Regional Senior Justice Nicklas' ruling was released on July 18, 2016, the Supreme Court of Canada had released its judgment in R. v. Jordan, 2016 SCC 27, on July 8, 2016, that changed the analytical framework to be used for s. 11(b) applications

[31] After the prosecution's application to have the UBER cases heard by a judge had been denied, a further judicial pre-trial conference was then conducted on July 19, 2016 (the scheduled confirmation date), where it was confirmed by counsel for the defendants that a s. 11(b) application would be brought and the dates of October 13 and 14, 2016, were to be used for the hearing of the unreasonable delay applications brought by both defendants, and that trial dates of December 1 and 2 of 2016 were selected for the three charges as "test cases".

[32] Furthermore, initial disclosure consisting of 9 items had been provided by the prosecution to counsel for the alleged UBER driver, Ersan Zukic, on January 22, 2015, while 7 items and 8 items of initial disclosure had been provided to counsel for UBER Canada on April 20, 2015, for the September 4, 2014 charge and the November 17, 2014 charge, respectively. However, counsel for UBER Canada and counsel for the alleged UBER drivers submitted written requests for additional disclosure in May of 2015 and in July of 2015, respectively. The requests by both counsel for additional disclosure comprised of a list of approximately 10 to 17 items for each alleged UBER driver and for each charge that UBER Canada had been

charged with. The prosecution did not respond to the request for additional items to be disclosed to the defence until December 1, 2015 (and only responded to UBER Canada). In their response, the prosecution indicated that many of the 10 to 17 items were irrelevant and would not be disclosed, but that some of the requested items would be disclosed to both defendants. However, those particular items that the prosecution stated that they would disclose had not yet been disclosed to either counsel for the defendants, as of the date the unreasonable delay applications had been argued on October 13, 2016.

(A) CHRONOLOGY OF UBER CANADA'S AND ERSAN ZUKIC'S COURT APPEARANCES AND REASONS FOR ADJOURNMENTS AND OTHER SIGNIFICANT DATES

[33] The following is a chronological summary of both UBER Canada's and Ersan Zukic's court appearances and reasons for adjournments, which also includes other significant dates in respect to their respective bylaw charges:

(1) Court Appearance on October 30, 2014 (in respect to only UBER Canada's September 4, 2014 charge):

[34] Defence Counsel N. Staubitz for UBER Canada appears on October 30, 2014, Disclosure was not available on the first appearance date for the September 4, 2014 charge. Both the prosecution and counsel for UBER Canada agree to adjourn the matter until February 19, 2015, in order for the prosecution to provide disclosure.

(2) December 17, 2015

[35] Counsel for the alleged UBER driver, Ersan Zukic, faxes a disclosure request on December 17, 2014, to the prosecution, which contained a list of 15 items.

(3) Court Appearance on December 18, 2014 (in respect to only UBER Canada's November 17, 2014 charge and also in respect to Ersan Zukic's charge):

[36] Defence Counsel Staubitz appears for UBER Canada on December 18, 2014, in respect to the November 17, 2014 charge. A request is made by counsel for UBER Canada, and agreed to by the prosecution, for this new charge to be joined with other UBER Canada charges that were returning on February 19, 2015. Disclosure had not been available on the first appearance date for UBER Canada's November 17, 2014 charge. The Court then asked defence counsel for UBER Canada if a formal application for disclosure had been made yet. Defence Counsel Staubitz stated that no application for disclosure had yet been made.

[37] In addition, Ms. McKinnon, an agent for the defence counsel representing the alleged UBER driver, Ersan Zukic, and 10 other alleged UBER drivers that had also been charged, also appears on December 18, 2014. She informs the court that

counsel had already begun to make disclosure requests by fax, but also had copies of those requests and that they would also be dropped off at the prosecution office.

[38] Prosecutor Dunlop then states to the court that it was going to take some time to provide disclosure, and that they needed more time to do so, and that when she had been reviewing the files as they came in, she said she had not been completely satisfied with some stuff and needed to speak with the officers involved. It was also stated by the prosecutor that it had been decided to keep all UBER-related matters together. Agent for the counsel representing the alleged UBER drivers also agreed to the adjournment date of March 5, 2015, that had been suggested by the prosecution for the purposes of preparing and providing disclosure. The prosecutor also states that disclosure is anticipated to be provided before the next court appearance date of March 5, 2015, and would forward it to counsel if were available earlier.

(4) January 22, 2015

[39] The prosecution provides initial disclosure of 9 items to counsel for the alleged UBER driver, Ersan Zukic, on January 22, 2015. In total, 25 pages of disclosure were provided by the prosecution.

(5) February 12, 2015

[40] On February 12, 2015, Defence Counsel Staubitz, who is representing UBER Canada, formally requests disclosure in writing in respect to the 31 charges laid against UBER Canada, including the September 4, 2014 charge and the November 17, 2014 charge.

(6) Court Appearance on February 19, 2015 (in respect to both of UBER Canada's charges):

[41] On the February 19, 2015, court appearance, Prosecutor Commisso withdraws two charges against UBER Canada (on lines 33 and 60 of the docket) because they had been duplicate charges. After a short discussion, both the prosecutor and Defence Counsel Topolski, who is counsel for UBER Canada, agree to put all of UBER Canada's matters over until May 21, 2015, for the purpose of holding discussions to see if UBER Canada's matters are going to proceed to trial or not.

(7) Court Appearance on March 5, 2015 (for only Ersan Zukic's charge):

[42] Ms. McKinnon, agent for counsel representing Ersan Zukic and 10 other alleged UBER drivers, appears on March 5, 2016. Prosecutor Dunlop states to the court that there were related matters that had been up on February 19, 2015, and that those matters had been adjourned to May 21, 2015, but she also believes that it had been the wish of both the prosecution and counsel for all the alleged UBER drivers to marry these charges back up with the other UBER matters that are up on May 21. In addition, Prosecutor Dunlop states that there is an injunction matter that

is being heard in May, in which the prosecution and the defence both jointly agree to wait for the results, so that they both jointly ask to have these matters put over to be spoken to on that day. Ms. McKinnon, agent for counsel for Ersan Zukic and the other alleged UBER drivers states that she agrees with the prosecutor's remarks:

> *MS. DUNLOP:* *These are matters that also have some related matters up on February 19th and those matters were adjourned to May 21st and I believe they wish to marry them back up to May 21st at 3:00 p.m. Also there is an injunction matter that's being heard in May that we're waiting to find the results of that basically, so we're asking just to be put over to be spoken to on that day, Your Worship.*
>
> *MS. MCKINNON:* *I'm agreeing with my friend's remarks. And just for the purpose of the record I can advise also I did receive some additional disclosure today from my friend.*

(8) <u>April 20, 2015:</u>

[43] The prosecution informs counsel for UBER Canada that initial disclosure of 7 items and 8 items respectively for each charge (approximately 30 pages for each charge) is available to be picked up in respect to the September 4, 2014 charge and the November 17, 2014 charge.

(9) <u>May 20, 2015:</u>

[44] Counsel for UBER Canada sends a request for additional disclosure by fax and courier to the Manager of Prosecutions in regards to the 30 charges that UBER Canada is facing. But specifically, for the September 4, 2014 charge and the November 17, 2014 charge, 16 items and 10 items respectively of additional disclosure had been requested by counsel for UBER Canada.

(10) <u>Court Appearance on May 21, 2015 (in respect to both of UBER Canada's charges and also for Ersan Zukic's charge):</u>

[45] No one for the defence counsel representing UBER Canada attends on May 21, 2015. However, Ms. Perrotta, the Manager of Prosecutions for the City of Mississauga, provides a letter to the court from counsel for UBER Canada. The Manager of Prosecutions then informs the court, that after having a discussion with Defence Counsel Topolski, who is representing UBER Canada, that the Toronto Superior Court of Justice court proceeding (the Toronto Injunction case) had been adjourned to June 1st and that it would likely be prudent to have the decision on that application released before moving forward. She also stated that she believed that they had agreed to put over all the UBER matters until July 30, 2015, to be spoken to:

> *MS. PERROTTA:* *And I will put a letter before the court, Your Worship. I've had some conversation with Jaron (ph) Topolski, who is*

counsel of record for UBER Canada and there was a gentleman here earlier speaking to related matters under the driver umbrella ....

THE COURT: *Okay.*

MS. PERROTTA: *... and there is a court proceeding that was adjourned to June the 1st, I believe, in the City of Toronto and it would likely be prudent to have the decision on that application released before moving forward.*

THE COURT: *Okay.*

MS. PERROTTA: *And I believe that we've agreed, per the letter that Mr. Topolski sent me, that we will adjourn all of the matters to the 30th day of July ....*

THE COURT: *Okay.*

MS. PERROTTA: *... at 3:00 p.m. to be spoken to.*

[46] In addition, Defence Counsel Gerald Chan appears on May 21, 2015, for the alleged UBER driver, Ersan Zukic, and for 10 other alleged UBER drivers, and explains to the court that the matters for the alleged UBER drivers had been put over previously to today's date, to await an outcome in a parallel proceeding going on in the City of Toronto, and that the Toronto Injunction application had been adjourned to June of 2015. Ms. Perrotta, the Manager of Prosecutions for the City of Mississauga then informs the court that they will be seeking to have the matters for the alleged UBER drivers put over to be spoken to, to the same date of July 30th, that the UBER Canada matters had gone to, and that it just makes sense to do so. Defence Counsel Chan then said the statement made by the Manager of Prosecutions had been correct, but wanted to clarify that since the other related UBER matters were being put over until July 30, 2015, to await the outcome of the Toronto proceeding; and given that the understanding was that the decision in the Toronto Injunction Case would inform the prosecution's position for the present cases, Defence Counsel Chan also thinks it would make sense to do the same in the cases of these 11 individuals. The court then adjourns the cases of Ersan Zukic and the other 10 alleged UBER drivers to July 30, 2015 to be spoken to:

MS. PERROTTA: *Your Worship, collectively I believe that these matters will be -- we'll be seeking to have the matters put over to be spoken to, to the same date and that would be July the 30th at 3:00 p.m. to be spoken to. There are related matters on this docket that will be put over as well ....*

THE COURT: *Okay.*

MS. PERROTTA: *... and this just makes an abund(sic) of sense.*

MR. CHAN: *That's correct. And just to further clarify, these matters have been put over previously to this date to await an outcome in a parallel proceeding going on in the City of Toronto.*

THE COURT: *Okay.*

MR. CHAN: *That proceeding has been adjourned. It was supposed to be heard in May, it's now going to be heard in June and so given that the related matter has been put over to July 30th to await that outcome I think it makes sense to do the same in the cases of these 11 individuals.*

(11) Decision in Toronto Injunction case released on July 3, 2015:

[47] Dunphy J. releases the decision in City of Toronto v. UBER Canada Inc. et al, 2015 ONSC 3572 (S.C.J.O.), on July 3, 2016. The injunction sought by the City of Toronto against UBER Canada is not granted. Dunphy J. also finds that UBER Canada's operation is not a taxi broker for the purposes of the Toronto Bylaw.

(12) July 28, 2015:

[48] Defence Counsel Chan, representing the alleged UBER driver, Ersan Zukic, and the other the alleged UBER drivers, sends an email to the prosecution requesting additional disclosure for Zukic and for the other 12 alleged UBER drivers he is representing, which comprises a request for (1) any and all communications between any taxicab or taxicab driver associations and the City of Mississauga and (2) all of the disclosure that had been requested and set out in the letter dated May 20 [2015] from Jerry Topolski (Goodmans LLP), counsel for UBER Canada, to the Manager of Prosecutions.

(13) Court Appearance on July 30, 2015 (in respect to both of UBER Canada's charges and also for Ersan Zukic's charge):

[49] No one for UBER Canada attends on July 30, 2015. Prosecutor Dunford states to the court that he had spoken yesterday to Defence Counsel Topolski, who is representing UBER Canada, and that in his conversation with him they had both agreed to put the matters for UBER Canada over until October 29, 2015 to be spoken to. Prosecutor Dunford also stated that Defence Counsel Topolski had sent a letter one month ago (counsel for UBER Canada actually sent the request on May 20, 2015) asking for extensive (additional) disclosure comprising of a list of 16 items for each one of the 30 charges that UBER Canada was facing. In addition, Prosecutor Dunford also stated that a review of the Toronto Injunction decision (which had been released on July 3, 2016) also needed to be done to determine how it would impact the Mississauga UBER charges, and that they were also trying to resolve the charges in the meantime. Furthermore, he also stated that the UBER Canada matters that were being put over would also allow the prosecution to fulfill

those disclosure requests and come up with a better position for going forward as well:

> *MR. DUNFORD:* *The remaining matters, number 67 through 96 are for UBER Canada Inc. Your Worship, as late as yesterday I spoke to a representative from UBER Canada Inc., a Mr. Jerry Topolski, and Mr. Topolski has spoken to a number of matters in the past ....*
>
> ...
>
> *MR. DUNFORD:* *Okay. And he's counsel, and he, by way of conversation with me, agreed that we should adjourn this matter to October 29th, 2015 at 3:00 p.m. in M3 to be spoken to. He sent in recently, like less than a month ago, a very comprehensive request for disclosure. There are 16 lines on the request for each one of these charges. It's quite extensive what he's requesting in the disclosure. So we're reviewing that. We're also reviewing the decision out of the court in Toronto and how it impacts these charges and we're trying to resolve it in the meantime. So if we put it over to October 29th it will allow us to try to fulfill our obligation for disclosure and come up with a better position for going forward as well.*

[50] In addition, Defence Counsel Chan appeared on July 30, 2015, for Ersan Zukic and the other alleged UBER drivers, and stated that his clients are "somewhat anxious to move this along" and that they had been waiting for the judgment from the Toronto Injunction proceeding, which is why it had also been adjourned previously. He also stated to the court that they had been waiting for more disclosure to be forthcoming from his latest request for additional disclosure (sent on July 28, 2015). Counsel Chan also states that they are agreeing to the three-month adjournment to October 29, 2015, for further disclosure and for the prosecution's review of the Toronto Injunction decision and their position on how it would impact on his clients' charges, even though the adjournment date is a fair ways away. And, in considering that he does not think that they can move forward meaningfully without separating it off from the charges against UBER Canada Inc., Defence Counsel Chan states that he believes that his clients' matters ought to be kept together:

> *MR. CHAN:* *And then just with respect to the other individuals I just want to put some comments on the record because October 29th is a fair ways away. My clients are somewhat anxious to move this along. We had been waiting for the Judgment from the City of Toronto which is why it had been adjourned previously. I appreciate that more disclosure is forthcoming, given my latest request and that the prosecution is in the process of reviewing the City of Toronto judgment. I simply wish to say that the reason, from my client's perspective, that we are agreeing to the October 29th date even though it's three months*

away is because I don't think we can meaningfully move this forward without -- be separating it off from the charges against UBER, the company, which I understand have all -- counsel for UBER and my friend have -- they've already agreed to the October 29th date, and given that I think, by necessity, we ought to keep these matters together. But to the extent that my friend is able to advise us of the city's position in light of the City of Toronto decision or provide further disclosure well in advance of the October 29th date that would be great.

MR. DUNFORD: *I'll attempt to.*

(14) <u>August 31, 2015</u>

[51] Defence Counsel Chan, who is representing the alleged UBER driver, Ersan Zukic, and the other alleged UBER drivers had written to the prosecutor on August 31, 2015, requesting that the charges be withdrawn in light of the Toronto Injunction decision.

(15) <u>Court Appearance on October 29, 2015 (in respect to both of UBER Canada's charges and also for Ersan Zukic's charge):</u>

[52] No one for UBER Canada attends on October 29, 2015. Prosecutor Dunford informs the court that he had spoken to Defence Counsel Topolski for UBER Canada yesterday and that they had agreed to put the matters over until January 28, 2016, to be spoken to. Prosecutor Dunford states that counsel for UBER Canada had made a 19 page request for additional disclosure for UBER Canada's 31 charges and then states that at this time he has an undertaking to complete that or give a response. He then asks the court to have all the UBER matters return on January 28th, 2016:

MR. DUNFORD: *Their counsel, Jerry Topolski and myself, had conversation last week trying to resolve the matter ....*

...

MR. DUNFORD: *And we've agreed that he's requested disclosure. He has a 19 page request for disclosure for all of those matters, I think it's 31 matters, and it's at this time I have an undertaking to complete that or give a response. We ask that all the UBER matters, UBER Canada Inc., return on January 28th, 2016 ....*

[53] In addition, Benjamin Kates, an agent for Defence Counsel Chan, who represents Ersan Zukic and 23 other related defendants, also appears on October 29, 2015. Prosecutor Dunford then requests that all matters for the UBER defendants be adjourned to be spoken to on January 28, 2016. Benjamin Kates then states that they agree to the prosecution's request to put the matters over, but that there

remains some significant outstanding disclosure in respect to all the cases in regards to a disclosure request that went out by email on July 28, 2015, and that they were still waiting for a response to their disclosure request. Prosecutor Dunford states to the court that some of the items on that disclosure request were being disputed, since some of the items are not in the possession of the prosecution and the prosecution is not able to produce them, and they are dealing with them and any motions that fall from that.

[54] Benjamin Kates then states that they would appreciate if the prosecution could put their reasons in writing for the disputed disclosure items. Prosecutor Dunford then agreed to put their reasons in writing. In addition, the agent for Defence Counsel Chan also states that they are certainly prepared to accommodate the prosecution's request and put these matters over but they would like the prosecution's position on disclosure and whatever disclosure is available as soon as possible.

[55] Furthermore, because Defence Counsel Chan had written to the prosecutor on August 31, 2015, requesting that the charges be withdrawn in light of the Toronto Injunction decision, Benjamin Kates then states that it is his understanding that Prosecutor Dunford had been still reviewing the Toronto Injunction decision and evaluating that request and waiting for instructions. In which, Prosecutor Dunford agreed and added that he was in consultation with the City's counsel and with his manager. Benjamin Kates then states that they are still waiting for the prosecution's response to Defence Counsel Chan's letter of August 31, 2015.

[56] Prosecutor Dunford also gave an undertaking to provide all disclosure by December 4, 2015, to both UBER Canada and to the alleged UBER drivers, as well as the prosecution's position on any disputed disclosure:

MR. DUNFORD: *Your Worship, January 28th, 2016 ....*

...

THE COURT: *So January the 28th, 2016, M3, 1:30. That's-take-that makes an awful lot of sense and close that tier at this stage.*

MR. KATES: *So we are prepared to agree to the crown's request to put these matters over, but there still remains some significant outstanding disclosure in respect of all of these cases and with the court's indulgence I'd like to speak to those briefly if I could.*

...

MR. KATES: *That sailed by us any hopes of getting out of here quickly. So in respect of 11 defendants, this is their fifth appearance and would it assist the court for me to list the line numbers?*

...

CLERK OF THE COURT: *What about Michael Hijjar, 37 to 38?*

MR. KATES: *He is in a different category. So in respect of those 13, this is their fifth appearance. My colleague, Mr. Chan, has written to the crown to request that those charges be withdrawn in respect of -- in light of, rather, some developments coming out of the superior court in Toronto. I understand that my friend is still evaluating that request and waiting for instructions.*

...

MR. DUNFORD: *In relation to consultation with city counsel -- counsel for the city and my immediate manager, so ....*

THE COURT: *Well, I would think this is a little more complicated than the norm.*

MR. DUNFORD: *It is.*

THE COURT: *I dealt with the airport ones so I can appreciate that.*

MR. KATES: *In any event, we continue to await a response to -- that request which was made by letter dated August 31, 2015.*

THE COURT: *And when was first appearance for these people?*

MR. KATES: *I believe it was December 2014. I don't have that information in front of me.*

THE COURT: *It's been in the system a while.*

MR. KATES: *And in addition, there was a disclosure request that went out by e-mail on July 28th, 2015.*

MR. KATES: *In any event, to the extent that it is disputed we would appreciate that the position be put in writing.*

MR. DUNFORD: *For sure. I'll reply ....*

THE COURT: *Mr. Dunford, are you the crown that has carriage of these?*

MR. DUNFORD: *That's correct, Your Worship.*

...

MR. KATES: *So we are certainly prepared to accommodate the crown's request and put these matters over, but we would like both the crown's position on disclosure and whatever disclosure is available as soon as possible.*

THE COURT: *Now, do you wish to make any submissions at this stage, Mr. Dunford?*

MR. DUNFORD: *No, Your Worship, just that all the other UBER matters are going over and I've ....*

THE COURT: *Now, is there counsel on the UBER matters?*

MR. DUNFORD: *Yes, and I have an undertaking to have all disclosure ....*

THE COURT: *From counsel for UBER ....*

MR. DUNFORD: *Right -- by December the 4th and I will say the same for December the 4th.*

...

MR. KATES: *And I'm sorry, could I just clarify, was that all disclosure by December 4th as well as your position on any disputed disclosure?*

MR. DUNFORD: *That's right. For sure.*

(16) <u>December 1, 2015</u>

[57] Steven Dunford, prosecutor for the City of Mississauga informs counsel for UBER Canada by letter confirming the request for further disclosure dated May 20, 2015, but that after "review of the files and investigating officers the documents which were previously disclosed are the only items which are in the Prosecution's possession" and "are expected to be relied upon at trial and now comprise full and complete disclosure".

[58] For the September 4, 2014 charge laid against UBER Canada, Prosecutor Dunford informs counsel for UBER Canada that of the 16 items requested on May 20, 2015, only 3 of those items would be provided, namely the "Will says of all officers involved", "Confirmation of the author of the second set of notes", and the "Notes of an officer named Jay Warburton". For two of the 16 items requested, Prosecutor Dunford indicated that the first item was in the original disclosure provided and the second item had been provided to the defendant upon service. For 10 of the items requested, Prosecutor Dunford indicated that they had "No relevance while for the last item requested, Dunford indicated that it had "No relevance Business Record provided".

[59] And, for the November 17, 2014 charge laid against UBER Canada, Prosecutor Dunford informs counsel for UBER Canada that of the 10 items requested on May 20, 2015, none of them would be provided. For the first item requested, Prosecutor Dunford indicated that it had been provided to the defendant upon service. For 8

of the items requested, Prosecutor Dunford indicated that they had "No relevance while for the last item requested, Dunford indicated that it had "No relevance Business Record provided".

(17) <u>December 8, 2015</u>

[60] On December 8, 2015, Defence Counsel Chan emails the prosecution to reiterate his request for the prosecution's position on the cases against the alleged UBER driver, Ersan Zukic, and the other the alleged UBER drivers, in respect to Toronto Injunction decision. The prosecution did not respond to the request.

(18) <u>Court Appearance on January 28, 2016 (in respect to both of UBER Canada's charges and also for Ersan Zukic's charge):</u>

[61] Defence Counsel Topolski appears for UBER Canada while Defence Counsel Chan appears for Ersan Zukic and for the 10 other alleged UBER drivers. It was stated by Prosecutor Dunford to the court that Ersan Zukic and the other alleged UBER drivers are now joined with the UBER Canada proceedings moving forward. Prosecutor Dunford then requests a judicial pre-trial conference be scheduled for all UBER matters, since there are issues that the parties cannot agree on and need the direction of the court.

[62] Defence Counsel Chan, representing Ersan Zukic and the other alleged UBER drivers, states that he had not yet received a response to his disclosure request that was submitted on July 28 of 2015, and that he had written a letter setting out his position of what ought to happen with the charges against the drivers in light of the Toronto Injunction decision, but that the prosecution had not yet responded to that letter. In addition, Counsel for UBER Canada states that an extensive disclosure request had been made in May of 2015 and that they had only received a partial response to that disclosure request. Prosecutor Dunford states that a response to the disclosure request had been given for some of the items of disclosure requested and that there were still some minor things outstanding, but does not think that all of the matters should be held up just for those small minor issues.

[63] However, Counsel for UBER Canada states that they have made an extensive request to the prosecution for additional disclosure in May of 2015 and that they had only received a partial response from the prosecution in December of 2015, in which the prosecution had informed counsel for UBER Canada that disclosure was still forthcoming for some of the items on that list of times requested. As such, Counsel for UBER Canada states that he did not wish to set a date for a judicial pre-trial conference and wants to postpone setting the judicial pre-trial conference until the next return date to continue discussions with the prosecution in regards to issues in respect to the charges and that he also wants the prosecution's position before conducting the judicial pre-trial conference.

[64] In response, Prosecutor Dunford states that the disclosure issues can be argued in a judicial pre-trial conference and that the minor issues that are still outstanding should not hold up the judicial pre-trial conference. Prosecutor Dunford also states that some of the matters are going back to last year, so that they are now a year old.

[65] Counsel Chan for the alleged UBER drivers then states that he has not yet received disclosure in respect to his additional disclosure request submitted in July of 2015. Chan also said he is reluctant to set the judicial pre-trial conference now, but does want to move the matter forward. Chan also says they have not yet had meaningful discussions and has not received the disclosure that he had requested.

[66] After considering the concerns raised by the parties, the Court informs the parties that a judicial pre-trial conference date could be set far enough away so that all the parties can have discussions in the interim and to also accommodate the defendants' concerns about outstanding disclosure items or responses to their disclosure requests so that disclosure could be provided. A judicial pre-trial conference date was then offered by the Court to be held in March of 2016. However, counsel for UBER Canada suggested April 19, 2016, as a date he would be available to conduct a judicial pre-trial conference. It was also agreed that the alleged UBER drivers would also be part of the same judicial pre-trial conference being held with UBER Canada. The parties then agreed to April 19, 2016, for the judicial pre-trial conference:

MR. DUNFORD: *Your Worship, there's a number of matters and the dates that the original information's were laid. They going back into, I believe, last year?*

THE COURT: *First one I see here, number 39, is September of 2014.*

MR. DUNFORD: *Twenty-fourteen, so they're over a year old.*

THE COURT: *Well over, yeah.*

MR. DUNFORD: *Well over a year old. My friend, Mr. Topolski, and I have had some discussion, but at this time I'd be asking that all the matters be put over for a pre-trial. There's some issues that we may agree upon and there are others that we will not agree upon and with the direction of the court, I believe it would be in the best interest and use of the court's time.*

THE COURT: *So let me just see if I got this straight. I understand given the number of the charges, and they're all inter-related, I mean it's all the same issue, correct?*

MR. TOPOLSKI: *They are.*

THE COURT: *Okay.*

MR. TOPOLSKI: *There are dissimilar issues between the individual charges, that being said, there are common issues that coincide to each other, yes.*

...

THE COURT: *There's individual's involved, I understand that. All right, well that's fine. I've got no problem with that, putting it to a pre- trial to see if we can narrow some of the issues and hopefully come to a consensus. So I'm the guy that does the pre-trials ....*

MR. TOPOLSKI: *Your Worship, if I could for the record, before you make that decision, I would say we made an extensive disclosure request to my friend last May. In December I received a partial response to that disclosure request and, my friend I don't say that with any animus, the disclosure request was large and my friend has indicated to me that there is still some material that will be forthcoming. The larger issue, I would suggest, before we set a JPT is that as Your Worship is aware there is now a growing body of jurisprudence on the operations of UBER and companies like it. I've invited my friend and his team to consider the jurisprudence prior to setting a JPT as I'm afraid that we are going to get to a JPT and to some extent spin the court's wheels as we debate some of the more esoteric aspects of the law as it's evolving. My suggestion to my friend was that we wait one more opportunity to set that JPT, have my friend provide me with disclosure, but more importantly, have my friend provide me with the City's position in advance of a JPT which we have asked for. I've participated in a few JPT's with other municipalities now and they certainly go more smoothly when the parties have freely exchanged their legal views before a JPT judge gets it. So, that's my view. I understand that view may have been espoused to you this morning in another forum as well, but I wanted to put that on the record.*

MR. DUNFORD: *Your Worship, I would agree to a certain extent in that these matters, as you indicated, have-are well over a year old. We've had discussions; there has been communication back and forth. The issue with disclosure is something that can be discussed or argued during a JPT.*

THE COURT: *Okay.*

MR. DUNFORD: *The City has a position with regard to some of the information that's been requested and I've provided my response. There are maybe some very minor things*

outstanding, but I don't think that all these matter should be held up just for those small, some minor issues. Without getting into specifics.

...

MR. CHAN: *... I don't mean to speak out of turn and I don't want to interrupt my friend. My matters haven't been called yet, Your Worship. I rise only because I expect them to be called next and they're related to the UBER Canada matters. I am on for a number of individuals. For the record it's Chan, C-H-A-N, initial G. So I just wanted to put the UBER Canada matters are set down for a JPT then my matters will follow the same court given the overlap. I echo much of what my colleague Mr. Topolski has said. My-the specific concerns on my end are I have not yet received a response to the disclosure request that was submitted in July from my clients. I also did write my friend a fairly detailed correspondence setting out our position as to what ought to occur with these charges in August. I'm waiting to hear back on those and so my reluctance to set a JPT at this stage, while we certainly want to move this forward, is that I don't think we've had meaningful discussions as between the parties as to what ought to happen with these cases as well as disclosure and I think it would be more productive and fruitful to have those discussions in advance of scheduling JPT. So those are my comments on behalf of the individuals that I represent.*

THE COURT: *Okay, that's fine. And in reply to both of you gentlemen I'll say this, I can set the judicial pre-trial far enough down the road that whatever items you are seeking should be. If there's third party disclosure well that may not happen if the municipality is not in control of it. So I'm prepared to set it far enough down the road that you'll have enough time to pursue whatever you're pursuing, and I'm looking at some time in March.*

MR. TOPOLSKI: *Thank you, Your Worship.*

THE COURT: *This being the end of January, so that's -- and certainly it's a defence request here so whatever. So I'm prepared to do that and set everybody's on the one date and we'll spend the whole day spinning our wheels, so to speak.*

MR. TOPOLSKI: *So to speak, especially in the case of the UBER operations, yes. Your Worship, my friend and I -- my friends and I anticipated that you might decide in that fashion. We had tentatively thought to ourselves that a date of April 19th works for everybody's schedule. If that date is convenient to the court we would appreciate*

keeping that date.

THE COURT: *That's fine.*

...

MR. DUNFORD: *April the 19th in the afternoon at 1:30.*

MR. TOPOLSKI: *And those are for the UBER Canada matters?*

MR. DUNFORD: *For the UBER Canada matters.*

THE COURT: *Okay.*

MR. DUNFORD: *All the matters with Mr. Chan I'd like to deal with them in the morning, tie them to the ones that were dealt with this morning.*

MR. CHAN: *Sorry, perhaps I could just have a moment to speak to my friend about that, Your Worship.*

THE COURT: *All right, counsel, here's what we'll do. For your matter, numbers 39 to 68 I believe, yeah, 39 to 68, April the 19th at 1:30 ....*

...

THE COURT: *And that's for judicial pre-trial. In the interim whatever you can, you can do and if there's issues at the judicial pre-trial hopefully we'll be able to sort them out then. We, whoever it happens to be.*

...

MR. CHAN: *So-again, for the record, it's Chan, initial G. I'm counsel to each of these 13 individuals. I won't echo my comments from earlier. They were meant to apply to this group. They're related to the charges that UBER Canada is facing. I take the same position and anticipate the same JPT being set for the morning of April 19th it sounds like-or the afternoon of April ....*

MR. DUNFORD: *Afternoon.*

THE COURT: *We're doing it -- it doesn't matter, a judicial pre-trial so it shouldn't take that long. So 1:30? It's*

MR. CHAN: *I think it actually makes sense to do them ....*

THE COURT: *Do them both together.*

MR. CHAN: *To do them-because there are -- again, there are individualized issues but there are common issues as well.*

THE COURT: *That's what I suspect. All right, the 19th of April at 1:30 then .*

(19) <u>Court Appearance on April 19, 2016 for a judicial pre-trial conference (in respect to both of UBER Canada's charges and also for Ersan Zukic's charge):</u>

[67] Defence Counsel Topolski appears for UBER Canada while Defence Counsel Chan appears for Ersan Zukic and for the other alleged UBER drivers for the judicial pre-trial conference. After the judicial pre-trial conference was held, it was agreed by the prosecution and by counsel for all the defendants that two days had been set for October 13 and 14, 2016, for UBER Canada and the alleged UBER drivers' Charter motions, with the understanding that materials comprising arguments, affidavits, and transcripts from both the prosecution and the defence would be provided and filed with the court by September 15, 2016. In addition, December 1, 2016, had been set aside for the prosecution to prove the applicability of the by-law in regards to the charges laid against UBER Canada and the alleged UBER drivers prior to proceeding with any of the trials, in which additional court time will have to be scheduled. In addition, the court set a confirmation date for July 19, 2016.

THE COURT: *We're on the record. Okay, I'm addressing for the record, and I do apologize, I'm not going to put every name on the record. We have one to 57 on our list, including a number of individual's that are named, as well as UBER Canada Inc., a number of charges as against that corporation before me. We've had some extensive conversations with counsel for both UBER Canada Inc. and counsel for the driver's individually charged, Mr. Topolski and Mr. Chan and Mr. Dunford, of course, was here on behalf of the prosecutor's office. What we have agreed to is this, there will be two days set aside to start with to argue certain Charter motions that UBER Canada Inc. wishes to pursue first and that will take place I understand, in agreement, on the 13th and 14th of October. Both of those dates have been set aside. The court starts at nine o'clock in the morning on those dates, and the courtroom madam clerk is?*

...

THE COURT: *The courtroom is M2. And that is set for the full day each of those days. I understand there will be materials provided and filed with the court by the 15th of September, 2016 and those materials, from both crown and defence, will be complete in terms of their arguments with affidavits and transcripts, if need be. Those will be distributed to the justice who will be addressing the trials well in advance so that justice can review them. NOW before that date there will be a confirmation date that the*

matter is progressing as planned, and that will be the 19th of July of 2016, courtroom M2 at 11 o'clock. That is noted as a confirmation date to confirm that the matters are moving ahead or where we are. We will hold the 13th and 14th of October. I should note we've also held the first of December and that will be a date that will be used only if UBER Canada Inc. wishes to make a legal argument in terms of the by-law and where the word broker is used, how that is associated with UBER Canada Inc. Is that a fair summary?

MR. CHAN: *It is. Just to clarify for the record on behalf of the named individual's ....*

...

MR. CHAN: *... they will also be participating in the Charter application.....*

...

MR. CHAN: *... to be brought on October 13th and 14th.*

THE COURT: *Thank you very much. That's noted for the record. And all matters will be adjourned from this afternoon to the dates that I've indicated, starting with July 19th first and thereafter the 13th, 14th of October and thereafter the 1st of December.*

...

MR. TOPOLSKI: *... you had indicated for the December 1st date that it be held for any argument that UBER Canada wished to make in respect of its operations as a broker within the by-laws. If I may suggest a characterization of that that is slightly different, it would be ....*

...

MR. TOPOLSKI: *... that date will be set aside for the parties to present argument on the applicability of the by-law and in particular the charges to which UBER has been charged under the by-laws in an attempt to determine an issue prior to a subsequent trial as to the applicability of the by-law to UBER. And I say that in a somewhat different way just ensure that there is no characterization of the burden on that argument because I believe that would be a burden that would be borne by the prosecution.*

THE COURT: *That's a fair summary.*

MR. TOPOLSKI: *Thank you.*

MR. CHAN: *And I'll adopt the same characterization on behalf of the named individual's.*

THE COURT: *Yes, thank you for that clarification. And I note that there would be more evidence called at a later date should the matter progress through all of these stages; that that December 1st date is for that argument only and thereafter depending on how the court finds there could be additional trial time with respect to other issues that are required for the prosecution and ....*

(20) April 19, 2016

[68] Defence Counsel Chan, who is representing Ersan Zukic and the other alleged UBER drivers, writes to the prosecution and narrows his request for additional disclosure to two specific items in an attempt to resolve the disclosure dispute. Those two items are: (1) any and all policies, memos, directives, or other documentation within the possession or control of the City of Mississauga concerning the authority of enforcement officers to detain individuals, and (2) any and all information within the possession or control of the City of Mississauga concerning the enforcement operations launched against UBER Canada and its drivers.

(21) April 21, 2016

[69] Prosecutor Dunford replies by email on April 21, 2016, to counsel for the alleged UBER driver, Ersan Zukic, that he has forwarded the request for only two items from that list of items of additional disclosure previously requested on July 28, 2015, to the enforcement manager, and will inform counsel when there is a response.

(22) June 3, 2016

[70] Prosecutor Dunford informs counsel for UBER Canada and counsel for the alleged UBER drivers by a letter dated June 3, 2016, confirming a discussion at the April 19, 2016, judicial pre-trial conference, that in light of the nature and complexity of the legal arguments to be made, it would be appropriate for the proceedings to be heard by a judge of the Ontario Court of Justice, instead of a justice of the peace, pursuant to s. 15(4) of the Justices of the Peace Act, R.S.O. 1990, c. J.4, and that the application would be made to the Regional Senior Justice for the Central West Region on June 24, 2016. Prosecutor Dunford was also seeking the consent of counsel for UBER Canada and the consent of counsel for the alleged UBER drivers for the application. Both Counsel for UBER Canada and Counsel for the alleged UBER drivers inform the Manager of Prosecutions for the City of Mississauga by a letter dated June 17, 2016, and June 9, 2016, respectively, that they are consenting to the relief sought by the prosecution.

(23) June 24, 2016:

[71] The application by the prosecution and consented to by counsel for both defendants to have a judge of the Ontario Court of Justice hear all the UBER matters is argued before Regional Senior Justice Nicklas on June 24, 2016. The issue of 11(b) is raised by Regional Senior Justice Nicklas.

(24) July 4, 2016

[72] Defence Counsel Chan, who is representing the alleged UBER driver, Ersan Zukic, and the other alleged UBER drivers emails the POA court clerk and "cc's" counsel for the City of Mississauga, clearly stating that his clients do not waive their right to be tried within a reasonable time under s. 11(b) or that their position on the City of Mississauga's application to have the matter heard by a judge, instead of a justice of the peace, to be construed as waiver.

(25) July 8, 2016

[73] The Supreme Court of Canada releases its decision in R. v. Jordan, 2016 SCC 27, on July 8, 2016, and establishes a new 11(b) analytical framework that applies retroactively to all cases in the system.

(26) July 18, 2016

[74] Regional Senior Justice Nicklas releases her ruling on July 18, 2016, on the prosecution's application to have a judge of the Ontario Court of Justice hear the UBER matters and decides not to grant the prosecution's application. In her decision, Justice Nicklas also noted that while both counsel for both UBER Canada and for the alleged UBER drivers had consented to the motion, they had not waived the defendants' s. 11(b) rights.

(27) Court Appearance on July 19, 2016, for a second judicial pre-trial conference (in respect to both of UBER Canada's charges and also for Ersan Zukic's charge):

[75] Defence Counsel Topolski appears for UBER Canada, while Defence Counsel Chan appears for Ersan Zukic and for the other alleged UBER drivers for the second judicial pre-trial conference. In summarizing the discussions held in the second judicial pre-trial conference, the court confirms that the prosecution would be proceeding with two test cases for UBER Canada and one test case for the alleged UBER drivers. For UBER Canada, the prosecution would proceed with information # 4665 with an offence date of November 17, 2014 and with information # 4157 with an offence date of September 4, 2014. And for the alleged UBER drivers, the prosecution would proceed with the charge against Ersan Zukic in information # 4727. It was also confirmed by counsel for both the defendants that a s. 11(b) application would be brought by the defendants and to be argued on October 13

and 14 and that other motions and arguments are to be argued on December 1 and 2, 2016, and with documents to be filed with the court by the second event pre-trial which had been set for September 8th, 2016. In addition, it was agreed that all the other UBER-related cases would be also adjourned to October 13, 2016 and thereafter to be spoken to, only until the Crown has decided how the matters would be addressed. Moreover, Defence Counsel Chan representing the alleged UBER drivers stated that he does have continuing s. 11(b) concerns for all the individuals charged as UBER drivers.

The Court: *... All right, just in summary before we go off record. I understand that we did select three dates, October 13th and 14th, nine o'clock, M2 for Charter arguments to be made and December 1st, all day was set aside for the applicability of the by-law argument, and I understand all written materials, it was agreed, that September 16th would be filed with the court and distributed to the parties in terms of written materials.*

...

The Court: *This is my understanding of what's going to occur. The Crown is proceeding on test cases for UBER Canada and the UBER taxi drivers, if I could use that summary. For UBER Canada the information that the crown is proceeding with, are two, information 4665, date of offence of November 17th, 2014 and information 4157, which is an information dated the 4th of September, 2014. For the UBER taxi driver, in particular, the test case that the crown is proceeding with is information 4727 which is Ersan Zukic. The rest of the cases involving UBER Canada and the individual taxi drivers by name will be adjourned to October 13th and thereafter whenever the other cases are adjourned to, to be spoken to only until the crown has decided how the matters will be addressed.*

...

MR. CHAN: *... a comment for the record after Your Worship ....*

...

MR. CHAN: *... was done recapping that. Just to note for the record because I represent so many different individuals, I appreciate my friend has exercised his discretion to go with one case as the test case, but I do have continuing 11(b) concerns for all of the individuals who I represent.*

THE COURT: *Thank you. Thank you very much, sir. All right, so formally, the three cases that I've named will be adjourned and the rest to be spoken to, but the three named cases will be adjourned specifically to October 13th, MI court, nine o'clock for the full day and October 14th, MI, nine*

o'clock for the full day. What is expected will be that the UBER taxi driver case, which is the matter of Mr. Zukic, will begin with the 11(b) motion to proceed first and thereafter when the 11(b) motion for that individual is completed then UBER Canada will begin their 11(b) applications for the two cases that the crown has chosen. If the 11(b) is finished for Mr. Zukic on October 13th in terms of the argument, then I understand counsel for UBER Canada will start entering the 11(b) motion for their client on the same date. Thereafter, after the motions for the 11(b) for the 13th and 14th of October, the cases will be adjourned to the 1st of December and the 2nd of December, MI court, nine o'clock for two full days to complete the case. Defence will be deciding whether section 2(b) and 2(d) as well as section 8 of the Charter of Rights and Freedoms of expression/association by the second event pre-trial. It is agreed that 11(b) materials will be filed by the second event pre-trial which we've agreed is September 8th, 2016, M5, nine o'clock. So what is expected is that the defence written arguments and transcripts will be provided as complete as possible, save and except some transcripts. Hopefully the transcripts are completed as well. The crown is to respond within two weeks after that date in writing by September 22nd, 2016 in terms of their filing with the court, and all parties. In addition, the crown is to make a decision if the section 2 Charter is going to be followed through in terms of the argument. The crown is to decide and let the court know by the second event pre-trial date of September 8th if the discovery method of taking evidence offered by defence is agreeable, that is to reduce trial time, and the providing of transcripts of the examination and cross-examination of any expert witnesses. The crown is to make a decision whether or not that would be agreeable if section 2 is going to be pursued. The matters are ultimately going to be adjourned to September 8, 2016, courtroom M5 at nine o'clock for the second event pre-trial. That's the summary. Mr. Chan?

MR. CHAN: *Just to add another comment for the ....*

...

MR. CHAN: *... record only because specific Charter provisions were mentioned. On behalf of Mr. Zukic we do expect to bring a Charter argument relating to the legality of the detention and related issues on the December dates as well as a potential abuse of process application on the back end if and when there's a guilty finding.*

...

THE COURT: *So by the second event pre-trial it's understood the 11(b)*

documents and all of the documents that the defence are relying on to be filed and the crown has two weeks after that, 22nd of September, to file their response to those documents in writing.

(28) Court Appearance on October 13, 2016 (in respect to both of UBER Canada's charges and also for Ersan Zukic's charge):

[76] The 11(b) applications by both defendants were argued on October 13, 2016. The matters were all then adjourned to December 1, 2016, for the ruling on the applications would be given.

(29) December 2, 2016 (anticipated completion of both defendants' trials)

[77] The anticipated completion of both defendants' respective trials is December 2, 2016, for the purposes of the 11(b) applications that had been heard on October 13, 2016.

3. ANALYSIS

(a) The Jordan framework for s. 11(b) applications

[78] The new framework established by the majority of the Supreme Court in *Jordan*, which comprises of specific ceilings where the delay is presumed to be unreasonable once the ceilings are exceeded, is supposed to uncomplicate and rationalize the determination of whether there has been unreasonable delay, as compared to 11(b) applications made under the former *Morin* framework, where there had been micro-counting and unduly long and contested arguments over how to classify minute periods of time as being attributed to the intake period, to inherent delay, to institutional delay, or to neutral, Crown, or defence-caused delay, as well as deciding whether there had been any actual or inferred prejudice to an accused's rights to their security, liberty or fair trial interests, which had led to inconsistent and unprincipled decisions and which permitted trial courts to not find any unreasonableness in the length of the total delay if prejudice could not be proven on a balance of probabilities. This had been acknowledges by the majority in *Jordan* at paras. 29, and 31 to 38 [*emphasis is mine below*]:

> *While this Court has always recognized the importance of the right to a trial within a reasonable time, in our view, developments since Morin demonstrate that the system has lost its way. The framework set out in Morin has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it.*
>
> ...
>
> *This framework suffers from a number of related doctrinal shortcomings.*

First, its application is highly unpredictable. It has been interpreted so as to permit endless flexibility, making it difficult to determine whether a breach has occurred. The absence of a consistent standard has turned s. 11(b) into something of a dice roll, and has led to the proliferation of lengthy and often complex s. 11(b) applications, thereby further burdening the system.

Second, as the parties and interveners point out, the treatment of prejudice has become one of the most fraught areas in the s. 11(b) jurisprudence: it is confusing, hard to prove, and highly subjective. As to the confusion prejudice has caused, courts have struggled to distinguish between "actual" and "inferred" prejudice. And attempts to draw this distinction have led to apparent inconsistencies, such as that prejudice might be inferred even when the evidence shows that the accused suffered no actual prejudice. Further, actual prejudice can be quite difficult to establish, particularly prejudice to security of the person or fair trial interests. Courts have also found that "it may not always be easy" to distinguish between prejudice stemming from the delay versus the charge itself (R. v. Pidskalny, 2013 SKCA 74, 299 C.C.C. (3d) 396, at para. 43). And even if sufficient evidence is adduced, the interpretation of that evidence is a highly subjective enterprise.

Despite this confusion, prejudice has, as this case demonstrates, become an important if not determinative factor. Long delays are considered "reasonable" if the accused is unable to demonstrate significant actual prejudice to his or her protected interests. This is a problem because the accused's and the public's interests in a trial within a reasonable time does not necessarily turn on how much suffering an accused has endured. Delayed trials may also cause prejudice to the administration of justice.

Third, the Morin framework requires a retrospective inquiry, since the analysis of delay arises only after the delay has been incurred. Courts and parties are operating within a framework that is designed not to prevent delay, but only to redress (or not redress) it. As a consequence, they are not motivated to manage "each case in advance to achieve future compliance with consistent standards" (M. A. Code, Trial Within a Reasonable Time (1992), at p. 117 (emphasis in original)). Courts are instead left to pick up the pieces once the delay has transpired. This after-the-fact review of past delay is understandably frustrating for trial judges, who have only one remedial tool at their disposal -- a stay of proceedings. It is therefore unsurprising that courts have occasionally strained in applying the Morin framework to avoid a stay.

The retrospective analysis required by Morin also encourages parties to quibble over rationalizations for vast periods of pre-trial delay. Here, for example, the Crown argues that the trial judge erred in characterizing most of the delay as Crown or institutional delay. Had he assessed it properly, the argument goes, he would have attributed only five to eight months as Crown or institutional delay, as opposed to 34.5 months. Competing after-the-fact explanations allow for potentially limitless variations in permissible delay. As the intervener the Criminal Lawyers' Association (Ontario) submits: "Boundless flexibility is incompatible with the concept of a Charter right and has proved to serve witnesses, victims, defendants and the justice system's reputation poorly" (I.F., at para. 12).

Finally, the Morin framework is unduly complex. The minute accounting it requires might fairly be considered the bane of every trial judge's existence. Although Cromwell J. warned in R. v. Godin, 2009 SCC 26, [2009] 2 S.C.R. 3, that courts must avoid failing to see the forest for the trees (para. 18), courts and litigants have often done just that. Each day of the proceedings from charge to trial is argued about, accounted for, and explained away. This micro-counting is inefficient, relies on judicial "guesstimations", and has been applied in a way that allows for tolerance of ever-increasing delay.

In sum, from a doctrinal perspective, the s. 11(b) framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts.

[79] Moreover, in R. v. Gandhi, 2016 ONSC 5612, Code J. at para. 24, succinctly summarizes the difference in the *Jordan* framework with the old *Morin* framework, by noting that in the new framework the subtle and flexible balancing of four factors is eliminated and replaced with a simpler "presumptive ceiling" for unreasonable delay. He also noted that the old concept of inherent or neutral delay as well as the old concept of prejudice has been eliminated and that both of these considerations have been absorbed into or included in the "presumptive ceiling" *[emphasis is mine below]*:

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.

[80] Furthermore, under the new 11(b) analytical framework, the *Jordan* majority emphasized at paras. 54, 109 and 110, that prejudice no longer has to be established. Prejudice to an accused's Charter-protected liberty, security of the person, and fair trial interests would be presumed once the presumptive ceilings or 18 months for Provincial Courts and 30 months for Superior Courts are exceeded, unless the prosecution can establish on a balance of probabilities that the delay had been caused by exceptional circumstances such as the delay being caused by a discreet event or that the prosecution was complex [*emphasis is mine below*]:

... although prejudice will no longer play an explicit role in the s. 11(b) analysis, it informs the setting of the presumptive ceiling. Once the ceiling is breached, we presume that accused persons will have suffered prejudice to their Charter-

protected liberty, security of the person, and fair trial interests. As this Court wrote in Morin, "prejudice to the accused can be inferred from prolonged delay" (p. 801; see also Godin, at para. 37). This is not, we stress, a rebuttable presumption: once the ceiling is breached, an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one.

...

Second, the new framework resolves the difficulties surrounding the concept of prejudice. Instead of being an express analytical factor, the concept of prejudice underpins the entire framework. Prejudice is accounted for in the creation of the ceiling. It also has a strong relationship with defence initiative, in that we can expect accused persons who are truly prejudiced to be proactive in moving the matter along.

Prejudice has been one of the most fraught areas of s. 11(b) jurisprudence for over two decades. Understanding prejudice as informing the setting of the ceiling, rather than treating prejudice as an express analytical factor, also better recognizes that, as we have said, prolonged delays cause prejudice to not just specific accused persons, but also victims, witnesses, and the system of justice as a whole.

[81] In addition, the majority in R. v. Jordan, held at para. 5 that the new 11(b) analytical framework is intended to focus the s. 11(b) analysis on the issues that matter and to also encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(b)'s important objectives [*emphasis is mine below*]:

A change of direction is therefore required. Below, we set out a new framework for applying s. 11(b). At the centre of this new framework is a presumptive ceiling on the time it should take to bring an accused person to trial: 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. Of course, given the contextual nature of reasonableness, the framework accounts for case-specific factors both above and below the presumptive ceiling. This framework is intended to focus the s. 11(b) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(b)'s important objectives.

(b) Does the new Jordan framework apply to regulatory or public welfare offences?

[82] The Supreme Court of Canada has held that the right to speedy trial guaranteed under s. 11(b) equally applies to prosecutions brought under regulatory or public welfare statues as it does to criminal offences. This notion had been recognized by the Supreme Court in R. v. C.I.P. Inc., [1992] S.C.J. No. 34, where the Supreme Court had held, at para. 44, that the Charter does not distinguish between types of offences, since an accused's interest in the availability and reliability of substantiating evidence will exist irrespective of the nature of the offence with which that person is charged. But more important, the Supreme Court had held that the

right to be tried within a reasonable time is engaged when a person is charged with an offence [*emphasis is mine below*]:

> *In this case, the Provincial and District courts found that the main reason for the 19-month delay was the shortage of court facilities. That makes the delay "systemic or institutional" in nature, and the respondent bears the onus of justifying the inadequate resources (Askov at p. 1231). The appellant's trial was adjourned twice, apparently because of priority being given to Criminal Code matters. The respondent submits that the delay is justified solely on that basis. If I understand that argument correctly, the respondent is suggesting that because the appellant was charged with a regulatory offence, the allowable time frame for bringing it to trial should somehow be greater than it would be in other circumstances. I am not persuaded by that argument. The right to be tried within a reasonable time is engaged when a person is "charged with an offence". The Charter does not distinguish between types of offences, and it seems to me that doing so for the purposes of assessing the reasonableness of delay would unduly stretch the principles of contextual analysis. The interest of an accused in the availability and reliability of substantiating evidence will exist irrespective of the nature of the offence with which that person is charged.*

[83] Since this is a prosecution being tried in the Provincial Offences Court of the Ontario Court of Justice, the 18 month ceiling for provincial courts applies to the present 11(b) applications.

(c) Does the Jordan framework apply to corporations since the majority in R. v. Jordan did not specifically indicate so?

[84] As UBER Canada is a corporate entity, does the new *Jordan* framework and the presumptive ceilings apply to corporations accused of committing an offence, considering that the *Jordan* majority did not specifically mention its application to corporate accused?

[85] Prior to the release of R. v. Jordan, the Supreme Court had recognized that a corporation could avail itself of the protection of s. 11(b) in R. v. C.I.P. Inc., [1992] S.C.J. No. 34, at paras. 30 to 33 and 36 to 38 [*emphasis is mine below*]:

> *It should be kept in mind that "person" includes a corporation under the general provisions of the Interpretation Act, R.S.C., 1985, c. I-21. We must also remember that corporate criminal liability is essentially vicarious liability based upon the acts and omissions of individuals: "a corporation may only act through agents" (Canadian Dredge & Dock Co. v. The Queen, [1985] 1 S.C.R. 662, at p. 675). Extending Charter guarantees to corporations will, in some circumstances, afford a measure of protection to those individuals. See Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, per La Forest J. at pp. 521-22.*
>
> *In R. v. Askov, [1990] 2 S.C.R. 1199, this Court examined the purpose and scope of the right to be tried within a reasonable time. Cory J. (on behalf of the majority) held that "the primary aim of s. 11(b) is the protection of the individual's rights and*

the provision of fundamental justice for the accused" (p. 1219). Section 11(b) protects the right to security of the person, the right to liberty and the right to a fair trial. With respect to the latter of those three, Cory J. noted the following at p. 1220:

> There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time, but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employer; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost.

In making those comments, Cory J. aligned himself with the position of Wilson J. in Mills v. The Queen, supra, where she stated (at p. 968) that:

> ... one of the more significant forms of impairment which can flow from delay in bringing an accused to trial is its impact on the accused's ability to make full answer and defence to the charge. [Emphasis added.]

See also R. v. Rahey, supra, per Wilson J. at p. 622, and per La Forest J. at pp. 643-44.

The Occupational Health and Safety Act, under which the appellant is charged, provides pursuant to s. 37(2)(c) that it "shall be a defence for the accused to prove that every precaution reasonable in the circumstances was taken". The availability of witnesses and the reliability of their testimony could have a significant impact upon the appellant's ability to put forward that defence. I am of the view that the appellant has a legitimate interest in being tried within a reasonable time. The right to a fair trial is fundamental to our adversarial system. Parliament has seen fit to accord that right constitutional protection. I can find no principled reason for not extending that protection to all accused. To that end, I find apposite the comments of MacDonnell Prov. Div. J. in R. v. 741290 Ontario Inc. (1991), 2 O.R. (3d) 336, at pp. 351-52:

> Any accused, corporate or human, can be denied full answer and defence by reason of delay. A corporation is just as vulnerable to the deterioration of recollection which can prejudice any person on trial for an offence. Its witnesses, like those of any accused, can die, move away, or disappear. If, as seems clear, the right of an accused to make full answer and defence is a fundamental principle of the Canadian system of justice, and if that system regards corporations as being susceptible to the same criminal process as humans, it would seem to follow that protection of the fairness of a corporation's trial is a concern which is well within ... s. 11(b).

...

Cory J. was also of the view in Askov (at pp. 1219-20) that there is a "community or societal interest" in s. 11(b):

> That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with

according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest.

In his opinion (at p. 1221):

> ... it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. [Emphasis added.]

In my view, the societal interest applies to corporate offenders as it does to individual accused. To hold otherwise would be to suggest that the community is somehow less interested in seeing the former brought to trial. It would also suggest that the status of an accused can determine whether that accused is to be accorded "fair" and "just" treatment. I am not prepared to accept either of those propositions.

I therefore conclude that the phrase "Any person charged with an offence" in the context of s. 11(b) of the Charter includes corporations.

[86] However, the Supreme Court also held at para. 50 in R. v. C.I.P. Inc., that a corporation could not rely on the presumption of prejudice, since it would offend the principle that interests of the accused must be weighed against the interest of the community in ensuring that those who have allegedly transgressed the law are brought to justice, and therefore, a corporate accused had to establish that its fair trial interest has been irremediably prejudiced [*emphasis is mine below*]:

> *In my view, none of these concerns -- with the exception of legal costs -- logically applies to corporate entities. In order properly to assess the reasonableness of delay, a court has to balance the various interests at stake. The interests of the accused must be weighed against the interest of the community in ensuring that those who have allegedly transgressed the law are brought to justice. The balancing process must be fair. There is no room for artificiality. It seems to me that allowing a corporation to rely upon a presumption of prejudice would offend that principle. It is therefore my opinion that with respect to this fourth factor, a corporate accused must be able to establish that its fair trial interest has been irremediably prejudiced. I use the phrase "irremediably prejudiced" because there are some forms of prejudice that a court can remove, notably by making specific orders regarding the conduct of the trial.*

[87] In short, for the prejudice factor under the *Morin* framework for determining whether there had been unreasonable delay, a corporate accused had to show on a balance of probabilities that its "fair trial interest" has been irremediably prejudiced.

[88] Counsel for the corporate defendant, UBER Canada, submits that a reasonable inference can be made in the majority reasoning in R. v. Jordan, that the new analytical framework applies equally to corporations as to human accused persons. Such, inference can be found in the following passages at paras. 3, 20, and 54 that refer to fair trial interests being protected by the new *Jordan* framework:

An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high.

...

Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.

...

... although prejudice will no longer play an explicit role in the s. 11(b) analysis, it informs the setting of the presumptive ceiling. Once the ceiling is breached, we presume that accused persons will have suffered prejudice to their Charter-protected liberty, security of the person, and fair trial interests. As this Court wrote in Morin, "prejudice to the accused can be inferred from prolonged delay" (p. 801; see also Godin, at para. 37). This is not, we stress, a rebuttable presumption: once the ceiling is breached, an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one.

[89] Ergo, since s. 11(b) protects the fair trial interest of all accused persons, then by implication and by references that the *Jordan* majority had made that its new framework protects the "fair trial interest" of accused persons, the *Jordan* framework would apply to corporations charged with offences. But more significantly, since prejudice is no longer a factor under the new *Jordan* framework, and since unreasonable delay is presumed after the ceiling of 18 months is reached in the provincial courts, then a corporation also no longer needs to prove "irremediable prejudice" to their fair trial interests under the new 11(b) framework.

(d) Application of the *Jordan* framework to the present 11(b) applications

[90] The *Jordan* majority also explained, at paras. 112 and 113, how the new framework will help facilitate a much-needed shift in culture by creating incentives for both the prosecution and the defence by enhancing accountability in the use of proactive and preventative problem solving. For the Crown or prosecution, the new framework illuminates the content of the Crown's ever-present constitutional obligation to bring the accused to trial within a reasonable time. For example, when the ceiling is exceeded, the Crown will only be able to discharge its burden if it can show that it should not be held accountable for the circumstances which caused the ceiling to be breached because they were genuinely outside its control. As for the defence, the new framework encourages the defence to be part of the solution, so that defence delay will be deducted from the total delay in determining if the presumptive ceiling for unreasonable delay had been breached, since the defence

cannot benefit from its own delay-causing action or inaction [*emphasis is mine below*]:

> *In addition, the new framework will help facilitate a much-needed shift in culture. In creating incentives for both sides, it seeks to enhance accountability by fostering proactive, preventative problem solving. From the Crown's perspective, the framework clarifies the content of the Crown's ever-present constitutional obligation to bring the accused to trial within a reasonable time. Above the ceiling, the Crown will only be able to discharge its burden if it can show that it should not be held accountable for the circumstances which caused the ceiling to be breached because they were genuinely outside its control. Crown counsel will be motivated to act proactively throughout the proceedings to preserve its ability to justify a delay that exceeds the ceiling, should the need arise. Below the ceiling, a diligent, proactive Crown will be a strong indication that the case did not take markedly longer than reasonably necessary.*
>
> *The new framework also encourages the defence to be part of the solution. If an accused brings a s. 11(b) application when the total delay (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) falls below the ceiling, the defence must demonstrate that it took meaningful and sustained steps to expedite the proceedings as a prerequisite to a stay. Further, the deduction of defence delay from total delay as a starting point in the analysis clearly indicates that the defence cannot benefit from its own delay-causing action or inaction.*

(1) First Stage: The Determination Of The Total Delay

[91] Furthermore, the new simplified *Jordan* analysis for the determination of whether an accused's rights under s. 11(b) had been infringed involves first determining whether the presumptive ceiling has been exceeded. The *Jordan* majority held, at paras. 47-48 and 66-67, that this is determined by calculating the total delay which would be the time between the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling, then the remaining delay to complete the trial is presumptively unreasonable [*emphasis is mine below*]:

> *If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.*
>
> *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.*
>
> ...

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.

The next step of the analysis depends upon whether the remaining delay -- that is, the delay which was not caused by the defence -- is above or below the presumptive ceiling.

[92] The starting point for calculating the total delay is the date when the accused person is charged, which is the date that the information is sworn. This was confirmed by Code J. in R. v. Gandhi, 2016 ONSC 5612 (S.C.J.O.), at para. 4, in which he held that even though the *Jordan* majority had changed fundamental aspects of the prior s. 11(b) framework, there was no indication that the majority had wished to alter the longstanding principle that s. 11(b) delay begins to run from the swearing of the Information: [*emphasis is mine below*]:

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.).

(2) Second Stage: The Determination Of Defence Delay

[93] The prosecution submits that approximately 13 and 15 months of the total delay of 24 to 26 months respectively for the defendants' three charges had been due to mutual adjournments for disclosure, waiting for the decision of the Toronto Injunction case, and the scheduling of judicial pre-trials and other case management proceedings, which the prosecution has suggested should be treated as implied waiver by the defendants (or neutral time under the *Morin* analysis) for the delay associated with those mutual adjournments.

[94] However, both defendants contend that neither of them had explicitly or implicitly waived any period of the delay or caused any of the delay in their respective proceedings, but that the actual causes of the delay were based on the adjournments requested by the prosecution to complete their disclosure obligations and the adjournments requested by the prosecution to wait for the decision from the Toronto Injunction case, which would inform the prosecution's decision on how to proceed. And, even though the defendants had consented to the prosecution's requests for those adjournments the delay associated with those adjournments had not been explicitly waived by the defendants, nor are their consents or agreements to those adjournments be considered as implicit waiver of that delay. But most

importantly, for the periods in which the defendants' had agreed to the prosecution's requests for adjournments, the defendants submit that the prosecution had not been "ready for trial", because the prosecution had not fulfilled their disclosure obligations or because the prosecution had been waiting for the decision of the Toronto Injunction case in order to inform their decision on how to proceed with the defendants' charges, and therefore, cannot be held to be defence delay under the *Jordan* analysis.

[95] Moreover, in respect to the prosecution's obligation to provide disclosure, the defendants contends that the prosecution has still not fulfilled its disclosure obligations as of the date of the hearing of these 11(b) applications.

(a) Has UBER Canada or the alleged UBER driver, Ersan Zukic, implicitly or explicitly waived any period of the delay?

[96] In R. v. Jordan, the majority reiterated, at para. 61, that waiver can be explicit or implicit, and that for waiver of any delay to be attributed to the accused it had to be "clear and unequivocal" and made with full knowledge of the rights that s. 11(b) had been enacted to protect, and that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness [*emphasis is mine below*]:

> *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-Dubé J., at p. 1686).*

[97] Moreover, in the post-*Jordan* case of R. v. Gandhi, 2016 ONSC 5612 (S.C.J.O.), Code J. noted at para. 20, that the *Jordan* majority did not change the law on delay waived by the defence [*emphasis is mine below*]:

> *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.*

[98] Furthermore, Cory J. in R. v. Askov, [1990] S.C.J. No. 106 (S.C.C.), at paras. 65 and 66, had held that any waiver (explicit or implicit) of a Charter right must be "clear

and unequivocal ... with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process". He also explained that silence or lack of objection cannot constitute a lawful waiver and that if the Crown is relying upon actions of the accused to demonstrate a waiver, then the onus will lie upon the Crown to prove that a specific waiver can be inferred. In short, Cory J. held that the onus rests upon the Crown to establish on a balance of probabilities that the actions of the accused had constituted a waiver of his or her right [emphasis is mine below]:

> *The accused should not be required to assert the explicitly protected individual right to trial within a reasonable time. It is now well established that any waiver of a Charter right must be "clear and unequivocal ... with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process". See Korponay v. Attorney General of Canada, [1982] 1 S.C.R. 41, at p. 49. The failure of an accused to assert the right does not give the Crown licence to proceed with an unfair trial. Failure to assert the right would be insufficient in itself to impugn the motives of the accused as might be the case with regard to other s. 11 rights. Rather there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s. 11(b) guarantee, understood its nature and has waived the right provided by that guarantee. Although no particular magical incantation of words is required to waive a right, nevertheless the waiver must be expressed in some manner. Silence or lack of objection cannot constitute a lawful waiver. The matter was put in these words by Dickson J., as he then was, in Park v. The Queen, [1981] 2 S.C.R. 64, at pp. 73-74:*
>
> > No particular words or formula need be uttered by defence counsel to express the waiver and admission. All that is necessary is that the trial judge be satisfied that counsel understands the matter and has made an informed decision to waive ... Although no particular form of words is necessary the waiver must be express. Silence or mere lack of objection does not constitute a lawful waiver.
>
> *If the Crown is relying upon actions of the accused to demonstrate waiver, then the onus will lie upon the Crown to prove that a specific waiver can be inferred. It may well be that the setting of trial dates and the agreement to those dates by counsel for the accused may be sufficient to constitute waiver. This possibility was noted by Sopinka J. as stated in Smith, supra, at p. 1136:*
>
> > Agreement by an accused to a future date will in most circumstances give rise to an inference that the accused waives his right to subsequently allege that an unreasonable delay has occurred. While silence cannot constitute waiver, agreeing to a future date for a trial or a preliminary inquiry would generally be characterized as more than silence. Therefore, absent other factors, waiver of the appellant's s. 11(b) rights might be inferred based on the foregoing circumstances.
>
> *In sum, the burden always rests with the Crown to bring the case to trial. Further, the mere silence of the accused is not sufficient to indicate a waiver of a Charter right; rather, the accused must undertake some direct action from which a consent to delay can be properly inferred. The onus rests upon the Crown to establish on a balance of probabilities that the actions of the accused constitute a waiver of his or her rights.*

[99] Also, in R. v. Morin, [1992] S.C.J. No. 25 (S.C.C.), at paras. 37 to 39, Sopinka J. confirmed that a period of delay could be subtracted from the overall delay if the accused explicitly or implicitly waived that particular period of delay, which could be by agreement or other conduct that the accused has waived in whole or in part his or her rights to complain of delay. However, he also held that in order for an accused to waive his or her rights explicitly or implicitly under s. 11(b), such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights. Moreover, he held that where the accused's waiver is said to be implicit, then the conduct of the accused must comply with that stringent test for waiver, which requires that such implicit waiver by an accused be clear and unequivocal. Sopinka J. also explained that waiver requires advertence to the act of release rather than mere inadvertence and that if the mind of the accused or their counsel is not turned to the issue of waiver and is not aware of what their conduct signifies, then this conduct does not constitute waiver but that such conduct may be taken into account under the factor "actions of the accused". However, he also confirmed that consent to a trial date can give rise to an inference of waiver, but it will not be waiver if the consent to a date amounts to mere acquiescence to the inevitable [*emphasis is mine below*]:

> *If the length of the delay warrants an inquiry into the reasons for delay, it appears logical to deal with any allegation of waiver before embarking on the more detailed examination of the reasons for delay. If by agreement or other conduct the accused has waived in whole or in part his or her rights to complain of delay then this will either dispose of the matter or allow the period waived to be deducted.*
>
> *This Court has clearly stated that in order for an accused to waive his or her rights under s. 11(b), such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights (Korponay v. Attorney General of Canada, [1982] 1 S.C.R. 41, at p. 49; see also Clarkson v. The Queen, [1986] 1 S.C.R. 383, at pp. 394-96; Askov, supra, at pp. 1228-29). Waiver can be explicit or implicit. If the waiver is said to be implicit, the conduct of the accused must comply with the stringent test for waiver set out above. As Cory J. described it in Askov, supra, at p. 1228:*
>
> > ... there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s. 11(b) guarantee, understood its nature and has waived the right provided by that guarantee.
>
> *Waiver requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver. Such conduct may be taken into account under the factor "actions of the accused" but it is not waiver. As I stated in Smith, supra, which was adopted in Askov, supra, consent to a trial date can give rise to an inference of waiver. This will not be so if consent to a date amounts to mere acquiescence in the inevitable.*

> *In R. v. Bennett (1991), 6 C.R. (4th) 22 (Ont. C.A.), Arbour J.A. alluded to the problem that arises in applying the principles of waiver in respect of accused who agreed to trial dates prior to the release of the Askov decision. Presumably the accused could contend that in agreeing to dates they were not fully aware of their rights. No doubt this is a factor that must be considered by the court hearing the application and it is not appropriate for this Court to make any general pronouncement as to whether waiver would or would not apply in the circumstances. Any alleged misapprehension of rights by reason of the apprehended state of the law before Askov must be considered in light of these reasons.*

[100] Furthermore, at paras. 26 and 27, in the post-*Jordan* case of R. v. Gandhi, Code J. provided an example in which defence counsel had said that he would be away for a month in the United States, which was not held to be any waiver, as well as an example in which the same counsel did make a clear and unequivocal waiver of the delay in a written letter when he had still been away in the United States [*emphasis is mine below*]:

> *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.*
>
> *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.*

(i) Explicit waiver of any delay

[101] For the application at bar, there is no evidence in the transcripts for the eight court appearances for both UBER Canada and for the alleged UBER driver, Ersan Zukic, that either of them had "clearly and unequivocally" explicitly waived any period of the total delay. Therefore, no period of the total delay will be subtracted as explicit waiver by either defendant.

(ii) Implicit waiver of any delay

[102] In R. v. Smith (1989), 52 C.C.C. (3d) 97, the Supreme Court of Canada held at paras. 37 to 41, that an accused's conduct must be taken into account in assessing the prosecution's explanation for the delay, but that there is no obligation on the

part of the accused to press the case on that would relieve the Crown of its obligations under s. 11(b). However, the Supreme Court also recognized that there is a rebuttable presumption that there has been a defence waiver of any delay when an accused agrees to a future date and that the accused's agreement to a future date could be rightly inferred that the accused had waived their right to subsequently allege that an unreasonable delay has occurred. On the other hand, the Supreme Court held that where the defence merely acquiesces to an adjournment that was inevitable, then it is not necessarily a waiver. Moreover, the Supreme Court explained that while silence cannot constitute waiver, an accused's agreement to a future date for a trial or a preliminary inquiry would generally be characterized as more than just mere silence and would generally constitute a waiver. But most importantly, the Supreme Court noted that when an accused demonstrates their desire to move the proceedings along quickly, it would displace any inference of waiver, which would generally arise when an accused agrees to a postponement [*emphasis is mine below*]:

> *If this statement is intended to mean that inaction or acquiescence on the part of the accused, short of waiver, can result in a forfeiture of an accused's s. 11(b) rights, then I do not agree with it. Admittedly an accused's conduct must be taken into account in assessing the prosecution's explanation for delay. There is no obligation, however, on the part of the accused to press the case on, which relieves the Crown of its obligations under s. 11(b).*
>
> *Nor can I agree with the argument of the respondent, that there has been any waiver of the appellant's s. 11(b) rights. Admittedly, Mr. Menzies, on behalf of the appellant, did agree to the dates of May 9-13, 1988, for the preliminary inquiry after Mr. Schachter informed him that no judge was available for the December dates. Agreement by an accused to a future date will in most circumstances give rise to an inference that the accused waives his right to subsequently allege that an unreasonable delay has occurred. While silence cannot constitute waiver, agreeing to a future date for a trial or a preliminary inquiry would generally be characterized as more than silence. Therefore, absent other factors, waiver of the appellant's s. 11(b) rights might be inferred based on the foregoing circumstances.*
>
> *In my opinion, apart from agreeing to a date, the other actions of Mr. Menzies on behalf of the appellant rebut any possible inference that he waived his s. 11(b) rights in relation to the period up until December 21, 1987. Rather than demonstrating waiver of his rights, the appellant demonstrated his desire to move the proceedings along quickly. On July 6, 1987, Mr. Menzies agreed to a request made by Mr. Schachter to dispense with the requirement that the original investigator of the matter appear at the scheduled August hearing since the investigator was scheduled to be on vacation at that point. Of greater importance is a letter from Mr. Menzies to Mr. Schachter dated July 6, 1987 which was a direct result of their agreement to the postponement of the hearing until May 1988. The text of that letter is as follows:*
>
> > Thank you for your letter of June 30th, 1987 [confirming the May 1988 hearing date]. I will attempt to have Mr. Smith present on July 7th, 1987, in order to set the new date with regard to this matter.

> I wish to express my concern and my client's surprise and deep regret that this matter cannot proceed to Preliminary Hearing before Monday, May 9th, and the following week. It seems to me an excessive delay and I wish to register my objection at this point.

It would be difficult for the appellant to inform the Crown more clearly that he was not waiving his s. 11(b) rights. The appellant's objection to the delay was met by inactivity by the Crown. As well, on July 7, 1987, agents for both the appellant and respondent appeared in Provincial Court to set the date for the hearing. The transcript reads as follows:

> Mr. PETERSON [agent for the respondent]: With regards to Mr. Smith, your Honour, this matter had been set. The Commercial Crime Section out of Winnipeg is handling this matter from our department. It was originally set for preliminary hearing in August but, apparently, there was no judge available for that entire week out of Winnipeg. So, believe it or not, the new date they have agreed on is May 9 to May 13, 1988. Apparently they are providing the judge for a week out of Winnipeg, and that is the soonest they can get a judge for a week.
> . . .
>
> Mr. SEMCHUK [agent for the appellant]: I can advise your Honour that Mr. Menzies has written to Mr. Schachter regarding the undue delay in this matter, but that will be something to be taken up at a later date, no doubt.
>
> The COURT: I should think so.

The appellant has demonstrated that he neither caused nor acquiesced in the postponement of the hearing to May 1988. Though Mr. Menzies agreed to the dates, the appellant has displaced an inference of waiver, which would generally arise when an individual agrees to a postponement. Therefore, I cannot agree with the conclusion of Huband J.A. that the appellant had failed to discharge his responsibilities herein.

[103] Moreover, as in most cases where a determination has to be made on whether the conduct of the accused rises to the level of implicit waiver, such determination had been difficult due to the lack of clarity in the jurisprudence as to whether the accused's consent to an adjournment sought by the Crown constitutes "waiver" of the resulting delay. This problem with implicit waiver had been acknowledged by Cromwell J. in his dissenting opinion in R. v. Jordan, at paras. 188 to 192. In his discussion of the meaning of "implied waiver", Cromwell J. noted that there is admittedly some lack of clarity in the jurisprudence of the Supreme Court, as to whether the accused's consent to an adjournment sought by the Crown constitutes a "waiver" of the resulting delay. In addition, Cromwell J. held that when the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent without more does not amount to waiver. He then emphasized that the onus is on the Crown to demonstrate that this period is waived, by showing that the accused's conduct reveals something more than "mere acquiescence in the inevitable," and that it meets the high bar of being clear, unequivocal, and informed acceptance that the period of time will not count against the state [*emphasis is mine below*]:

First, the language of "waiver" in this context may be misleading. As stated by this Court in Conway, when the courts speak of "waiver" in the context of s. 11(b), "it is not the right itself which is being waived but merely the inclusion of specific periods in the overall assessment of reasonableness": p. 1686. This means that periods of time to which the accused has or is deemed to have agreed will not count towards any determination of unreasonable delay.

Second, there is admittedly some lack of clarity in our jurisprudence as to whether the accused's consent to an adjournment sought by the Crown constitutes "waiver" of the resulting delay. In Smith, this Court created a rebuttable inference of waiver if defence consents to a future trial date. This proposition was qualified, however, by the point that "inaction or acquiescence on the part of the accused, short of waiver" does not result in a forfeiture of an accused's s. 11(b) rights: Smith, at p. 1136. In Morin, Sopinka J. explained that the accused's consent to a trial date "can give rise to an inference of waiver", but this is not the case "if consent to a date amounts to mere acquiescence in the inevitable": p. 790. This Court, albeit in very short decisions, upheld this approach in R. v. Brassard, [1993] 4 S.C.R. 287, at p. 287, and R. v. Nuosci, [1993] 4 S.C.R. 283, at p. 284, stating that consent to a future date will be characterized as waiver in the absence of evidence that it is acquiescence.

A rebuttable inference of waiver from the accused's consent to an adjournment does not sit well with the settled law that waiver must be clear, unequivocal and must be established by the Crown: see e.g. Askov at p. 1232. As noted in Morin, the waiver must be done "with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights", and that such a test is "stringent": p. 790.

I conclude that, when the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than "mere acquiescence in the inevitable," and that it meets the high bar of being clear, unequivocal, and informed acceptance that the period of time will not count against the state.

[104] And, in respect to the new 11(b) framework, the majority of the Supreme Court in R. v. Jordan, at para. 61, had verified that the legal requirement for finding that there had been implicit waiver by an accused for any period of delay, which is based on the accused's conduct, must be "clear and unequivocal" and that the accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. Moreover, the majority reiterated that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness [*emphasis is mine below*]:

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-Dubé J., at p. 1686).

[105] Furthermore, in R. v. Jordan, at paras. 121 and 122, the majority, did not find that the consent adjournments of the accused for the circumstances in that particular case to be a waiver and that those consent adjournments were held to be "part of the legitimate procedural requirements of the case", nor had it appeared from the record before the court that any of the adjournments had occurred when the Crown and the court were otherwise ready to proceed [*emphasis is mine below*]:

The more difficult assessment is whether any of the remaining delay was caused solely by the action or inaction of the defence. The Crown argues that the trial judge erred by failing to attribute significant periods of delay to the defence, and that the defence was equally culpable in the delay in bringing this matter to trial. The Crown cited several examples: the defence consented to numerous adjournments; defence counsel initially suggested the four-day estimate for the preliminary inquiry; defence counsel's unavailability resulted in the preliminary inquiry not being completed as scheduled in December 2010; defence counsel failed to respond to the Crown's offer in July 2011 of an earlier trial; and there was no evidence that defence counsel would have been available for trial earlier than June 2012.

While these instances that the Crown points to are symptomatic of the systemic complacency towards delay that we have described, most of them are not attributable solely to the defence. The Crown and defence both share responsibility for the preliminary inquiry underestimation. Similarly, responsibility for the delay resulting from consent adjournments and to the defence's failure to respond to the Crown's offer of a shorter trial time in July 2011 should not be borne solely by the defence. These adjournments were part of the legitimate procedural requirements of the case, and it does not appear from the record that any occurred when the Crown and court were otherwise ready to proceed. Further, there was no evidence that, had the defence responded to the Crown's offer of an earlier trial, the Crown and the court would have been able to accommodate an earlier date. Rather, the only evidence before the trial judge was that the earliest available trial dates were in September 2012.

Are the defendants' consent adjournments implicit waivers of the delay or just mere acquiescences that do not rise to the level of a waiver of the delay?

[106] For the unreasonable delay applications at bar, the prosecution contends that because both defendants had agreed to many of the adjournments that they had by their agreements to those adjournments implicitly waived that period of the delay. However, both defendants submit that consenting to a request by the prosecution for an adjournment had not been on their part an implicit waiver of the delay

resulting from that adjournment and that it has simply been mere acquiescence, since they could not proceed without having disclosure or while they had been waiting for the prosecution to inform their decision on how to proceed with their respective cases while waiting for the decision of the Toronto Injunction case, and after that decision had been released then waiting for the prosecution to decide on how the decision would affect the defendants' charges.

[107] But more important, both defendants contend that it had been the prosecution that had requested all the adjournments for the purposes of disclosure and to also wait for the decision from the Toronto Injunction case and that both defendants had only simply agreed to the prosecution's request for the adjournment, but that it had not implicitly waived those periods of delay in respect to those adjournments. Moreover, the defendants submit that they had no obligation to bring themselves to trial, since it had also been the prosecution's obligation to bring them to trial within a reasonable time within the meaning of s. 11(b). And, in any event the defendants submit that the prosecution had not been "ready for trial" at the time those adjournments had been requested by the prosecution, such that the delay could not be held to be defence delay.

[108] The number of consent adjournments by UBER Canada for the periods from October 30, 2014 to May 21, 2015 for the September 4, 2014 charge, and from December 18, 2014 May 21, 2015 for the November 17, 2014 charge were for the purpose of allowing time for the prosecution to provide initial disclosure which would be legitimate procedural requirements of the case. In addition, the consent adjournment for the period from December 18, 2014 to March 5, 2015, were also for the purpose of providing initial disclosure to the alleged UBER driver, Ersan Zukic. Initial disclosure had been provided or available to Ersan Zukic on January 22, 2015. The prosecution also provided or made available initial disclosure to UBER Canada for all of its 30 charges on May 20, 2015. However, counsel for UBER Canada submitted a request for further disclosure on May 20, 2015, while counsel for the alleged UBER driver, Ersan Zukic, made a request for further disclosure on July 28, 2015.

[109] Furthermore, after the February 19, 2015 court appearance date, the prosecution contends that both defendants in agreeing to adjourn their matters to wait for the decision in the Toronto Injunction case would also be implied waiver by the defendants of the delay in respect to waiting for that decision. That period of delay in respect to those three court appearances in 2015, of February 19, March 5, and May 21, for the period from February 19, 2015 to July 31, 2015, to wait for the decision from the Toronto Injunction case involves 5 months and 9 days of delay.

[110] However, after the decision in the Toronto Injunction case had been released on July 3, 2015, the prosecution then sought further adjournments on the next court appearances held on July 30, 2015 and October 29, 2015, in order for the prosecution to review that decision and to consider how that decision would impact the defendants' charges. The prosecution did not provide responses to either of

the defendants' request for additional disclosure until the December 1, 2015 (which had only been to counsel for UBER Canada), or on the defendants' request for the prosecution's decision on whether to withdraw the charges against the defendant in light of the decision from the Toronto Injunction case until January 28, 2016. During this period of delay, the prosecution also did not inform the court that they had been "ready for trial".

[111] Furthermore, both defendants submit that they did not explicitly or implicitly waived that period of delay of 5 months and 9 days to wait for the decision in the Toronto Injunction case, since they had not been the ones who had requested the adjournments and had just simply acquiesced to the prosecution's request to adjourn all their matters to allow the prosecution to wait for the outcome of that legal proceeding brought by the City of Toronto against UBER Canada, which would help inform the prosecution's decision on how to proceed with the all of defendants' matters.

[112] And, on the question of whether there had been an implied waiver in respect to any period of the delay resulting from agreeing to an adjournment request made by the prosecution based on the holding in R. v. Smith, (1989), 52 C.C.C. (3d) 97 (S.C.C.), the defendants submit that there is a marked difference between consenting to a future date for a trial and a preliminary inquiry, which could be considered to be an implied waiver under R. v. Smith and in the situation in which an accused simply agrees to an adjournment request by the prosecution for a future set date.

[113] Although both defendants would have also benefitted in waiting for the decision from the Toronto Injunction case, especially when UBER Canada had been represented by the same legal counsel in the Toronto Injunction case as in its present application at bar and would have intimate information about the legal issues being argued in that proceeding, there is no evidence that the consent by the defendants for the adjournment requests made by the prosecution to wait for the ruling on the Toronto Injunction had been more than mere acquiescence. In other words, just because both defendants would have potentially benefitted by agreeing to the adjournments to wait for the outcome of the Toronto Injunction case, does not imply there had been "clear and unequivocal" waiver from the conduct of both defendants in their agreements to those adjournments.

[114] In addition, counsel for the alleged UBER driver, Ersan Zukic, had stated to the court on July 30, 2015, that the alleged UBER drivers were concerned about their matters moving forward. But most importantly, counsel for the alleged UBER driver, Ersan Zukic, sent a notice to counsel for the city of Mississauga and to the clerk of the court on July 4, 2016, to inform them that their agreement to consent to the prosecution's application to have the matters for the alleged UBER drivers transferred to a judge of the Ontario Court of Justice was not to be construed as waiver. This certainly would be evidence that rebuts any presumption that there had been any clear and unequivocal waiver on behalf of the defendant, Ersan Zukic, of any of the delay caused by requests made by the prosecution, or that Zukic had

implicitly waived the inclusion of specific periods of delay in the overall assessment of reasonableness. And, in regards to UBER Canada's charges, even though, counsel for UBER Canada had remained silent about any concerns of delay under s. 11(b), until July 18, 2016, counsel for UBER Canada's agreement to the adjournments to wait for the decision of the Toronto Injunction case cannot be construed to be implicit waiver, since it had not been clear and unequivocal that the delay caused by those adjournments would not count in the determination of unreasonable delay under s. 11(b).

[115] On the other hand, if it had been the other way around, where it had been the defendants who had actually requested the adjournments to wait for the decision in the Toronto Injunction case, then an argument could be made that the defendants had indeed waived that delay implicitly or had caused the delay.

[116] Ergo, since there is no evidence that the periods of delay related to the consent adjournments for the purposes of providing disclosure, or for the consent adjournments in respect to waiting for the decision of the Toronto Injunction case, and then waiting for the prosecution to decide on how that decision impacted on the defendants' charges, had been clearly and unequivocally waived by the defendants, then these consents by counsel for the defendants does not reveal something more than "mere acquiescence in the inevitable," nor do they meet the high bar of being clear, unequivocal, and informed acceptance that the period of time would not count against the state.

[117] Accordingly, neither defendant had implicitly waived the delay in respect to any of the adjournments for the prosecution to provide disclosure or in respect to the three court appearances in 2015, on February 19, March 5, and May 21, which involves 5 months and 9 days of delay, to wait for the decision in the Toronto Injunction case.

(b) Has any of the total delay been solely caused by UBER Canada or the alleged UBER driver, Ersan Zukic?

[118] Both UBER Canada and the alleged UBER driver, Ersan Zukic, submit that they had not solely caused any of the total delay in their respective proceedings, nor does the prosecution contend that any of the total delay in the defendants' respective cases had been solely caused by the defendants.

[119] However, there is one situation that had added delay to the defendants' proceedings and that had in in respect to the January 28, 2016 court appearance. In that court appearance, the prosecution had requested that the defendants' matters be scheduled for a judicial pre-trial conference, but both counsel for the defendants were reluctant to schedule the judicial pre-trial conference until they had received complete disclosure from the prosecution. However, the court did schedule the judicial pre-trial conference far enough away so that the parties could resolve the disclosure issue and for the prosecution to provide any outstanding disclosure.

[120] In the post-*Jordan* case of R. v. Gandhi, Code J. held, at para. 35, that it is wrong for defence counsel to refuse to set a date for trial or preliminary inquiry until the Crown had disclosed every last bit of evidence or to set a date for a judicial pre-trial because defence counsel is waiting for one final piece of disclosure.

> *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."*

[121] Although the judicial pre-trial conference could have been scheduled on a date much earlier than on April 19, 2016, since defence counsel cannot refuse to set a judicial pre-trial conference simply because they are waiting for every item of disclosure to be provided, the court did permit the added delay to occur so that disclosure could be completed. As well, the delay cannot be held to be solely caused by the defendants, since the prosecution did inform the defendants that certain items of disclosure were still forthcoming along with the fact that the prosecution did not inform the court that they were ready to set the defendants' matters down for trial until April 19, 2016. In other words, the delay that could be attributed to scheduling the judicial pre-trial conference until April 19, 2016, cannot be held to be defence delay, since the prosecution had not been ready for trial on January 28, 2016.

(c) Have the defendants' brought any frivolous applications or motions in these proceedings?

[122] The majority in R. v. Jordan had held at paras. 65 and 66 that procedural requirements are accounted for in setting the ceiling where defence actions legitimately taken to respond to the charges do not constitute defence delay and that defence applications and requests that are not frivolous will also generally not count against the defence [*emphasis is mine below*]:

> *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.*

[123] Both defendants submit that there had only been two pre-trial applications in the proceedings at bar: (1) an application brought by the prosecution under s. 15(4) of Justices of the Peace Act, and (2) the 11(b) applications brought by the defendants. However, the defendants submit that even though they had not opposed the application brought under s. 15(4) of the Justices of the Peace Act, it had not been an application brought by the defendants, but had been one brought by the prosecution. As for the 11(b) applications, the defendants submit that they are not frivolous and are legitimate responses to the charges outside the ambit of delay.

[124] In the post-*Jordan* case of R. v. Edan, [2016] O.J. No. 4279, at paras. 22 and 23, Botham J. held that applications for Charter relief are part of the trial process and that the delay occasioned by the adjournment of the 11(b) application is not relevant because the issue of time to trial relates solely to the dates scheduled for the hearing of the substantive matter [*emphasis is mine below*]:

> *Crown counsel submits that delay occasioned by the adjournment of the 11(b) application is not relevant because the issue of time to trial relates solely to the dates scheduled for the hearing of the substantive matter.*
>
> *I am not persuaded by that argument. At para. 48 of the judgment in Jordan, the court defines total relevant delay as that from the charge to the actual or anticipated end of trial. Applications for Charter relief are part of the trial process. Were it not for the Crown's request that the matter be adjourned to July 18th, there is no reason to think that submissions in this matter would not have concluded on June 23rd. As it is, Mr. Edan's matter remained outstanding a further 25 days, making the total time from charge to the end of trial 19 months and 24 days.*

[125] In regards to the application brought by the prosecution to have the UBER matters heard by a judge of the Ontario Court of Justice, which had not been opposed by counsel for both defendants, it had not been a proceeding initiated by the defendants, but one initiated by the prosecution and had only been brought after court dates have been already obtained and schedule for Charter motions and the application to challenge the constitutionality or the applicability of the City of Mississauga taxi industry bylaw.

[126] Accordingly, for the purpose of the *Jordan* analysis, neither defendant had brought any frivolous applications or requests that caused any delay, and as such, neither of the defendants had solely caused any of the delay in their respective proceedings, which can be subtracted from the total delay.

(d) Prosecution did not inform the court they were ready for trial until April 19, 2016 at the first judicial pre-trial conference.

[127] Moreover, at no point did the prosecution state in any of the court appearances between the first court appearances of October 30, 2014 and January 28, 2016, that they were "ready for trial" for the respective defendants' charges. Indeed, it was not until the first judicial pre-trial conference held on April 19, 2016, when the

prosecution informed the court that the dates of October 13 and 14 and December 1 and 2 of 2016 had been obtained and set down for the hearing of Charter applications and the hearing on the applicability of the Mississauga Bylaw governing the taxi industry to UBER Canada's operation. In particular, it had not been until that first judicial pre-trial conference held on April 19, 2016, that the prosecution had indicated to the court for the first time that they were ready for trial and that dates had been set to hear these three test cases involving the defendants in this application.

[128] In addition, counsel for UBER Canada contends that as of the date of the hearing of the present 11(b) applications on October 13, 2016, the prosecution still has not provided UBER Canada with particular items of disclosure they had stated that they would in their letter of response dated December 1, 2015, to UBER Canada's request for additional disclosure made on May 20, 2015.

[129] As such, approximately 19 months and 17 months had passed respectively before the prosecution had even been "ready for trial" from the date the respective informations had been sworn on September 11, 2014 and November 20, 2014 for both of UBER Canada's charges, and November 25, 2014, for the alleged UBER driver, Ersan Zukic's charge.

(3) Third Stage: The Resulting Delay Calculated For UBER Canada And For The Alleged UBER Driver, Ersan Zukic

[130] For the next step in the new 11(b) analysis, it has to be determined if the remaining delay (total delay minus defence delay) exceeds the presumptive ceiling of 18 months in provincial court (or 30 months in the superior court), beyond which any delay is presumptively unreasonable. If the ceiling is exceeded, the burden shifts to the Crown or the prosecution to show on a balance of probabilities that the delay was nevertheless reasonable due to "exceptional circumstances".

(a) The delay (Total Delay Minus Defence Delay) for UBER Canada's September 4, 2014 charge

[131] For UBER Canada's September 4, 2014, charge, the delay remaining after subtracting any defence waiver and the delay solely caused by the corporate defendant UBER Canada Inc. from the total delay of 26 months and 21 days for this particular charge, which in this case is none, would leave **26 months and 21 days of remaining delay**. This remaining delay of 26 months and 21 days exceeds the presumptive ceiling for unreasonable delay of 18 months for proceedings in the provincial courts.

(b) The delay (Total Delay Minus Defence Delay) for UBER Canada's November 17, 2014 charge

[132] And, for UBER Canada's November 17, 2014, charge, the delay remaining after subtracting any defence waiver and the delay solely caused by the corporate defendant UBER Canada Inc. from the total delay of 24 months and 12 days for this particular charge, which in this case is none, would leave **24 months and 12 days of remaining delay**. This remaining delay of 24 months and 12 days also exceeds the presumptive ceiling for unreasonable delay of 18 months for proceedings in the provincial courts.

(c) The Delay (Total Delay Minus Defence Delay) for Ersan Zukic

[133] And, for the alleged UBER driver, Ersan Zukic's charge, the delay remaining after subtracting any defence waiver and the delay solely caused by the alleged UBER driver, Ersan Zukic, which in this case is none, from the total delay of 24 and 4 days would then be **24 months and 4 days**. This remaining delay of 24 months and 4 days to complete Ersan Zukic's trial exceeds the presumptive ceiling for unreasonable delay of 18 months for proceedings in the provincial court.

(4) Fourth Stage: Has the Prosecution Met Its Burden In Proving There Had Been The Presence Of "Exceptional Circumstances" Which Would Rebut The Resulting Presumption Of Unreasonable Delay For The Present Cases?

[134] Once the defendants can show that the presumptive ceiling of 18 months has been exceeded, the burden then shifts to the prosecution to demonstrate that the delay was nevertheless reasonable, by establishing on a balance of probabilities the presence or existence of "exceptional circumstances" beyond the prosecution's control.

[135] Since the delay (total delay minus defence delay) for the defendants' respective charges of approximately 24 to 26 months exceeds the presumptive ceiling of 18 months for both defendants' respective proceedings, the burden now shifts to the prosecution to show the presence or existence of "exceptional circumstances" in order to rebut the presumptively unreasonable delay. If the prosecution fails to meet their burden, then there will be a finding that both defendants' right to a trial within a reasonable time had been infringed and a stay of proceeding will be entered for the three charges at bar, unless the prosecution can justify the time it has taken under the "transitional exceptional circumstance".

[136] The *Jordan* majority at paras. 69 and 70 established a two-part test for determining if there are exceptional circumstances that lie outside the Crown or prosecution's control, which would rebut the unreasonableness of the delay for cases that exceed the numerical ceilings established under the new *Jordan* framework. First, has there been any exceptional circumstances which caused any period of the delay (total delay minus defence delay) that is unforeseen or unavoidable? If there is, then did the Crown reasonably remedy the delays emanating from those

circumstances once they arise. The majority also explained that "exceptional circumstances" are conditions or situations that lie outside the Crown's control, since they are reasonably unforeseen or reasonably unavoidable (but they do not have to be rare or entirely uncommon) and that Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise [*emphasis is mine below*]:

> *Exceptional circumstances lie outside the Crown's control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.*
>
> *It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful -- rather, just that it took reasonable steps in an attempt to avoid the delay.*

[137] But most importantly, the majority in R. v. Jordan, held at paras. 71, 76, and 80 to 81, that the exceptional circumstances that the prosecution has to prove in order to justify the delay and rebut the presumption of the unreasonableness of the delay would generally fall into two categories, namely discreet events and particularly complex cases. The period of delay caused by a discreet event is to be deducted from the delay that is presumed unreasonable (total delay minus defence delay), and if the resulting calculation does not bring the delay below the presumptive ceiling then a stay of proceedings will be issued. And, if the case is not found to be complex, then a stay of proceedings will also issue, but if the case is found to be complex, then without further analysis a stay of proceedings will not be issued, since the inordinate delay will be justified and the delay reasonable [*emphasis is mine below*]:

> It is obviously impossible to identify in advance all circumstances that may qualify as "exceptional" for the purposes of adjudicating a s. 11(*b*) application. Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.
>
> ...
>
> If the remaining delay falls below the ceiling, the accused may still demonstrate in clear cases that the delay is unreasonable as outlined below. If, however, the remaining delay exceeds the ceiling, the delay is unreasonable and a stay of proceedings must be entered.
>
> ...

Where the trial judge finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No further analysis is required.

To be clear, the presence of exceptional circumstances is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. As discussed, an exceptional circumstance can arise from a discrete event (such as an illness, extradition proceeding, or unexpected event at trial) or from a case's complexity. The seriousness or gravity of the offence cannot be relied on, although the more complex cases will often be those involving serious charges, such as terrorism, organized crime, and gang-related activity. Nor can chronic institutional delay be relied upon. Perhaps most significantly, the absence of prejudice can in no circumstances be used to justify delays after the ceiling is breached. Once so much time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay.

(a) Has the prosecution proven that there had been discreet events which had caused delay in the defendants' proceedings?

[138] The *Jordan* majority had also provided, at paras. 72 to 75, illustrations or examples of discreet events causing delay that may amount to being an exceptional circumstance. They are events such as medical or family emergencies that cause the accused, important witnesses, counsel or the trial judge to be absent or unavailable for trial, or cases with an international dimension, such as cases requiring the extradition of an accused from a foreign jurisdiction, and in which the Crown and the system could not have reasonably mitigated, or unforeseeable or unavoidable developments that occur during the trial, such as a complainant unexpectedly recanting while testifying which requires the Crown to change its case, or when the trial goes longer than reasonably expected even where the parties have made good faith efforts to establish realistic time estimates [*emphasis is mine below*]:

> Commencing with the former [discreet events], by way of illustration, it is to be expected that medical or family emergencies (whether on the part of the accused, important witnesses, counsel or the trial judge) would generally qualify. Cases with an international dimension, such as cases requiring the extradition of an accused from a foreign jurisdiction, may also meet the definition.
>
> Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected -- even where the parties have made a good faith effort to establish realistic time estimates -- then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.

> Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling. Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a timely solution. For this reason, it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.
>
> The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course, the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, 2016 SCC 26). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e., it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).

[139] In respect to both defendants' proceedings, there were no discreet events that had caused any delay, such as medical or family emergencies, cases with international dimensions, and unforeseeable or unavoidable developments that arose during trial and in which the prosecution did not have enough time to remedy or had been able to reasonably remedy. The delay attributed to the adjournments to wait for the decision in the Toronto Injunction case was not a discreet, unforeseeable or unavoidable event, in which the prosecution had no control. If the prosecution wanted to delay the proceedings to wait for the decision from the Toronto Injunction application, then the prosecution could have or should have asked the defendants to expressly waive the delay in respect those adjournments. However, this had not been done by the prosecution.

(b) Has the prosecution proven on a balance of probabilities that the cases against both defendants are complex cases?

[140] Even though UBER Canada is facing only two charges in this proceeding and the alleged UBER driver, Ersan Zukic, is facing only one charge, until they had decided to proceed with these particular charges as test cases, the prosecution contends that the prosecution of all the charges against UBER Canada had been indeed complex because of the approximately 30 charges brought against UBER Canada Inc. between September 11, 2014 and November 20, 2014 for an offence under the City of Mississauga Public Vehicle Licensing By-law 420-04, for different dates and different drivers; the novelty of the UBER situation and the legal issues in respect to the Mississauga bylaws governing the taxi industry in Mississauga and its applicability to the UBER Canada enterprise and to UBER drivers; and the amount and type of items of disclosure being requested for each individual charge by

counsel for both defendants and the volume of charges being grouped and proceeding together.

[141] In respect to complexity as an exceptional circumstance that could rebut the presumption of delay when the ceiling has been exceeded, the *Jordan* majority held at paras. 77 to 80, that if a case is particularly complex due to the nature of the evidence or the nature of the issues and requires an inordinate amount of trial or preparation time, then the delay can be justified and viewed to be reasonable so that no stay of proceedings would be issued. For a case to be considered particularly complex, the *Jordan* majority elaborated that in respect to 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. As for the nature of the issues, the *Jordan* majority explained that complexity may be, among other things, characterized by a large number of charges and pre-trial applications; novel or complicated legal issues; and a large number of significant issues in dispute. In addition, the *Jordan* majority noted that 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, but the *Jordan* majority also cautioned against an overly generous approach to the issue of whether a case is complex so as to constitute "exceptional circumstances" by pointing out that a typical murder case will not usually be sufficiently complex to comprise an exceptional circumstance. However, if the Crown has initiated a complex prosecution, consideration must be given by the court to whether the Crown has developed and followed a concrete plan to minimize the delay occasioned by such complexity, and if the Crown fails to show that it has developed and followed a concrete plan to minimize the delay, then it will not be able to show exceptional circumstances, because it will not be able to show that the circumstances were outside its control [*emphasis is mine below*]:

> *As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration. 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.*
>
> *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, [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, [2015] 2 S.C.R. 760:

> 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]

Where the trial judge finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No further analysis is required.

[142] Since the 18-month ceiling has been exceeded, then to rebut the presumption of that the delay is unreasonable the prosecution contends that the delay had been justified and reasonable for the following circumstances which demonstrates the complexity in the nature of the legal issues and evidence surrounding the defendants' respective charges: (1) both defendants had made voluminous disclosure requests which indicates complexity; (2) the delay had been caused by conducting two judicial pre-trials which shows the matters had been complex; and (3) the transfer application that had been made under s. 15(4) of the Justices of the Peace Act, R.S.O. 1990, c. J.4, also shows complexity.

[143] However, both defendants disagree with the prosecution's characterization of the defendants' charges as being of a complex nature, which would rebut the presumption of the unreasonable delay for their respective charges. Moreover the defendants argue that the three situations relied on by the prosecution are not exceptional circumstances because the defendants' charges are not complex, as had been determined by Nicklas J. in her ruling on the application brought by the prosecution to have all the UBER matters transferred in order to be heard by a judge of the Ontario Court of Justice. At para. 15 in Mississauga (City) v. Uber Canada Inc., [2016] O.J. No. 4088, Nicklas J. held that the charges related to UBER Canada's operation was not factually complex:

... With regard to factual complexity, just because there are a considerable number of counts, it does not make these cases factually complex.

[144] Furthermore, the defendants argue that the delay in bringing these charges to trial cannot be justified based on the complexity of the case, since none of the hallmarks of complexity is present. The defendants further submit that with respect to the nature of the evidence, the disclosure is not voluminous, there are few expected witnesses, and there are no significant requirements for expert evidence. And, in respect to the nature of the issues, the defendants submit that these proceedings involve straightforward prosecutions under the Provincial Offences Act for breaches of a municipal by-law and at the heart of the defendants' cases are relatively routine matters of statutory interpretation. But more important, the *Jordan* majority, at para. 78, noted that a typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance. As such, the defendants submit that the complexity of their respective proceedings is certainly well below that standard.

(i) Does holding two judicial pre-trials indicate complexity?

[145] The prosecution submits the present matters were sufficiently complex on an account that two judicial pre-trial conferences were necessary to be conducted due to the nature of the legal issues, volume of disclosure, and the number of defendants that had been charged similarly, which had been dealt with concurrently with every court appearance.

[146] However, the majority in *Jordan* explained, at paras. 53 and 83, that they have factored in reasonable institutional delay, inherent needs of a case, and the complexity of most cases in setting the numerical ceilings in which there would be presumptive unreasonable delay once they are exceeded:

> *Second, the presumptive ceiling also reflects additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case. These factors include the inherent time requirements of the case and the increased complexity of criminal cases since Morin. In this way, the ceiling takes into account the significant role that process now plays in our criminal justice system.*
>
> ...
>
> *... As we have said, in setting the ceiling, we factored in the tolerance for reasonable institutional delay established in Morin, as well as the inherent needs and the increased complexity of most cases.*

[147] Moreover, judicial pre-trial conferences have many functions, including case management, resolving disclosure issues, for the parties to seek guidance from the court, for the determination and discussion of trial estimations, legal issues, and admissions, and for discussions in an effort to reach a resolution to the charges and for potential sentences. What's more, local practices may require judicial pre-trial-conferences when the estimated trial time is anticipated to be more than a half of a

day. Hence, the utilization by the parties of judicial pre-trial conferences is not necessarily a demonstration or evidence of complexity for the purposes of "exceptional circumstances".

(ii) Nature of evidence: volume of additional disclosure requested by the defendants is basis of complexity

[148] The prosecution submits that the delay associated with the time it took to respond to the requests for additional disclosure should be treated as "exceptional circumstances" that had caused delay because of the voluminous disclosure requests made by the defendants and that the list of items of additional disclosure that counsel for both defendants had sought to be disclosed was a huge task to accomplish within a short time. In addition, the prosecution submits that the voluminous disclosure request was exceptional because it was far from a typical disclosure request for a municipal bylaw offence and because of the time it took to reply to all 17 pages of this request on 30 charges with 16 inquiries for each charge.

[149] However, the defendants argue that the prosecution cannot simply rely on a request for additional disclosure that has 10 to 17 items for each charge for UBER Canada and for each of the alleged UBER drivers, especially since none of those items were ever disclosed to the defendants. Moreover, the defendants' submit that if the prosecution needed more time to vet any item to be disclosed for privilege then the prosecution could argue "exceptional circumstances", but the prosecution cannot simply rely on the disclosure requests submitted by the defendants to argue complexity when there is nothing on the record from the prosecution why such items could not be disclosed in a timely fashion or whether they would be ever disclosed, in respect to the defendants' request for additional disclosure.

[150] Moreover, counsel for UBER Canada had requested additional disclosure on May 20, 2015, while counsel for the alleged UBER driver, Ersan Zukic, had requested additional disclosure on July 28, 2015, yet the prosecution did not respond in writing until December 1, 2015 (and to only UBER Canada), which is over 6 months after the request had made. The response had indicated that most of the items sought as additional disclosure would not be disclosed for being irrelevant, but that a few of the items would be provided. However, those items that the prosecution said they would provide has still to date not yet been provided to UBER Canada.

[151] However, although the volume of additional disclosure requested by the defendants may have been more than would be normal for a bylaw prosecution related to the Mississauga taxi industry bylaw, it does not meet the complexity criteria to be considered an exceptional circumstance to rebut the presumed unreasonable delay. At the most, the request by the defendants for a long list of items of additional disclosure would have added to the demands of the assigned prosecutor and support staff, but not to the time that it would take for the prosecution to get the defendants' matters to trial. Moreover, even though the 10 to 17 items sought for additional disclosure for each of the 30 UBER Canada charges and for each of the

13 alleged UBER drivers may have been an onerous task placed on the assigned prosecutor or their support staff, the amount of disclosure is not so voluminous that would justify the delay in these proceedings, since they were never even disclosed by the prosecution.

[152] Accordingly, the prosecution has not demonstrated that the defendants' cases are complex cases based on the nature of the evidence that would justify the delay, or that the inordinate delay had been reasonable to rebut the presumption that the delay had been unreasonable.

(iii) Complexity due to many charges with many defendants

[153] The prosecution argues that the UBER matters should be found to be complex, since there had been 30 separate charges laid against UBER Canada and 13 alleged UBER drivers charged similarly with the bylaw offence of driving a taxicab in affiliation with UBER Canada, and that all these matters were proceeding together and involved voluminous disclosure requests that involved a substantial list of items and because of the number of resolution discussions for each of the charges that required a significant amount of time for the prosecution to deal with. For the 30 UBER Canada charges, the prosecution submits that there had been 17 pages of disclosure requests for additional disclosure that entailed 16 inquiries for each of the 30 charges

[154] However, both defendants argue that the three charges in the present 11(b) applications are not of a complex nature, since they are proceeding as test cases and are relatively minor municipal bylaw cases that require only two or three witnesses for each trial and which would only involve a day and a half of trial time to complete.

[155] In addition, counsel for the alleged UBER driver, Ersan Zukic, submits that even though the Zukic matter had proceeded in tandem with the other 12 individuals alleged to have driven a taxicab in affiliation with UBER Canada, the 13 accused drivers have not been charged jointly in any formal sense, nor could they have been, and the charges against the 13 the alleged UBER drivers involved different inspectors, different dates, and different accused drivers. Therefore, it is submitted that the other cases involving the other 12 alleged UBER drivers should have little to no bearing on assessing the reasonableness of the delay that Mr. Zukic has had to endure. Similarly, counsel for UBER Canada submits that the 30 charges that have been laid against UBER are for different dates, different drivers, and for different officers, and each of the charges is not complex.

[156] But more important, the defendants submit that complexity for the purposes of determining exceptional circumstances to rebut the presumption of unreasonable delay cannot be based on a procedural decision made by the prosecution to combine and keep all the charges together that had been laid against all the alleged UBER drivers, as well as with all the charges laid against UBER Canada.

[157] Moreover, the fact that the September 4, 2014 charge and the November 17, 2014 charge had initially proceeded through pre-trial case management steps together with a number of other, similar charges against UBER Canada and with the charges laid against the alleged UBER drivers does not render the case "particularly complex". Indeed, such an argument was expressly rejected on the prosecution's motion to have all the UBER-related charges reassigned to a judge of the Ontario Court of Justice. In dismissing the motion, Justice Nicklas noted at para. 15 of her decision:

> *... just because there are considerable number of counts, it does not make these cases factually complex.*

[158] In any event, the prosecution's choice to have the various charges - which relate to different events, occurring on different dates, and involving different drivers - proceed together for the purpose of pre-trial management had been a procedural choice made by the prosecution. Therefore, any delay resulting from that procedural choice must be limited according to the bounds imposed by s. 11(b), as had been emphasized at para. 79 by the majority of the Supreme Court in R. v. Jordan:

> *Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's section 11 (b) rights.*

[159] Moreover, counsel for the alleged UBER driver, Ersan Zukic, submits that the prosecution's reliance on the number of charges and the number of individuals charged as alleged UBER drivers cannot be used to enhance the prosecution's claim of complexity. The individually charged UBER drivers are not co-accused drivers and is not the same as when individuals are co-accused and the prosecution chooses to prosecute all the co-accused together, while for the individual alleged UBER drivers they were charged on different days, at different locations, and by different municipal bylaw enforcement officers.

[160] And, in a case that did have seven co-accused that had been tried together and where unreasonable delay had been raised, Moldaver J. for the Supreme Court in R. v. Vassell, [2016] S.C.J. No. 26, held at paras. 5 to 7, that if the Crown chooses to prosecute all seven accused jointly then it had been required to remain vigilant that its decision does not compromise the s. 11(b) rights of the accused persons, and that the Crown has to take a more proactive stance in circumstances where the accused person took proactive steps throughout, from start to finish, to have his case tried as soon as possible. Moldaver J. also commented that in order for the Crown to fulfill its obligation to bring all accused to trial within a reasonable time, the Crown cannot close its eyes to the circumstances of an accused who has done everything possible to move the matter along, only to be held hostage by his or her co-accused and the inability of the system to provide an earlier date [*emphasis is mine below*]:

In this case, the Crown chose to prosecute all seven accused jointly, as it was entitled to do. But having done so, it was required to remain vigilant that its decision not compromise the s. 11(b) rights of the accused persons (see, for example, R. v. Auclair, *2014 SCC 6, [2014] 1 S.C.R. 83, and* R. v. Schertzer, *2009 ONCA 742, 248 C.C.C. (3d) 270, at para. 146).*

In many cases, delay caused by proceeding against multiple co-accused must be accepted as a fact of life and must be considered in deciding what constitutes a reasonable time for trial. But here, it was clear from the outset that the delay caused by the various co-accused not only prevented the Crown's case from moving forward, it also prevented Mr. Vassell from proceeding expeditiously, as he wanted. Importantly, this is not a case where Mr. Vassell simply did not cause any of the delay; rather, it is one in which he took proactive steps throughout, from start to finish, to have his case tried as soon as possible. In this regard, his counsel reviewed disclosure promptly, pushed for a pre-trial conference or case management, worked with the Crown to streamline the issues at trial, agreed to admit an expert report, made the Crown and the Court aware of s. 11(b) problems, and at all times sought early dates.

In these circumstances, I believe that a more proactive stance on the Crown's part was required. In fulfilling its obligation to bring all accused to trial within a reasonable time, the Crown cannot close its eyes to the circumstances of an accused who has done everything possible to move the matter along, only to be held hostage by his or her co-accused and the inability of the system to provide earlier dates. That, unfortunately, is what occurred here. In the last analysis, Mr. Vassell ended up being the sole person out of the initial seven co-accused to be tried. To repeat the words of O'Ferrall J.A., he "waited three years for a three-day trial". That is unacceptable, and it resulted in Mr. Vassell being deprived of his right to be tried within a reasonable time.

[161] In considering whether a particular case is complex, the *Jordan* majority had noted, at para. 78, that for context, murder charges are not complex, and as such, a trial of a municipal bylaw charge under the taxi industry bylaw would not be complex, even if each trial had required 7 to 8 witnesses from the prosecution and the defence, the documentary evidence would not be voluminous for each individual charge, and in which the estimated trial time would be approximately one and half days at the most for each case. In other words, it is not a complex regulatory trial, such as can occur when several individuals and corporations are charged jointly with committing hundreds of offences laid under consumer protection legislation where the trial would entail 15 to 17 witnesses that would take 25 days of trial time to complete and with hundreds of pages of documents that have to be proven at trial. Therefore, the defendants' cases are not complex cases just because the prosecution had chosen to proceed and deal with all the alleged UBER drivers and all of UBER Canada charges together for pre-trial proceedings and case management, pre-trial discussions and conferences, and for pre-trial court appearances.

(iv) Complexity due to the novelty and complicated legal issues

[162] The prosecution also relies on the novelty and complexity of the legal issues in the proceedings at bar as an exceptional circumstance which had caused the inordinate delay in completing the defendants' trials promptly. However, both defendants submit that the prosecution of the present UBER cases are not complex, since Nicklas J. has already ruled that they are not factually complex that they should be heard by a judge of the Ontario Court of Justice and that such Charter applications are regularly and normally heard by Justices of the Peace presiding over the trials of municipal bylaws or other regulatory prosecutions.

[163] In addition, the defendants submit there cannot be any suggestion that UBER's assertion of rights under the *Charter* in some way constitutes "exceptional circumstances"; otherwise, asserting one's *Charter* rights (such as the right to freedom expression under section 2(b)) would risk undermining another (i.e. the right to trial within a reasonable time under section 11 (b)). Moreover, in rebutting the prosecution's argument that the present cases are complex, the defendants refer to what Justice Nicklas had already noted about the issue of complexity in regards to present cases in her decision in Mississauga (City) v. Uber Canada Inc., [2016] O.J. No. 4088, at para. 15, in respect to the prosecution's application to transfer the UBER matters, in which she had held that *Charter* applications in provincial offences court are neither inherently complex, nor unusual:

> *As indicated by Regional Senior Justice Fuerth, Charter applications are frequently heard by justices of the peace in Provincial Offences Court. Although the challenge to the by-law may not be an every day occurrence in those courts, it is also within the ordinary realm of decisions made by justices of the peace. ...*

[164] In any event, in the circumstances of this case, there is nothing to suggest that UBER Canada's *Charter* applications caused any delay. Rather, as is made apparent by the record, the adjournments were all attributable to other matters, for example, the need to make full disclosure, the need to provide time for resolution discussions, or a desire to await the outcome of the Toronto Injunction case. On the face of the record, it is clear that the adjournments were not granted as a result of any unusual complexity in the proceedings.

[165] Furthermore, in R. v. Curry, 2016 BC5C 1435 (B.C.S.C.), which is a post-*Jordan* case in which the Crown had argued the case had complexity based on "novel or complicated legal issues", the British Columbia Supreme Court, in deciding that the issues had not been complex, held at paras. 169 to 171, that the delays associated with the complexity inherent in the nature or subject matter of the application concerning the disclosure or use of materials relating to confidential sources was not the reason that delayed the trial or lengthened the overall period that was reasonably required for this case to get to trial. Moreover, the British Columbia Supreme Court had held that complexity due to those applications had added to the demands on counsel and the Court, but that the delay had resulted from the

inadequate scheduling of the application and not from complexity [*emphasis is mine below*]:

> *The Crown does not contend that this case was complex because it involved a joint trial of two accused persons. Rather, the Crown contends that complexity arose from "novel or complicated legal issues", namely those relating to the obligation to disclose materials relating to confidential informants. The Crown notes that the law was developing at the time, as in the McKay line of cases, and significant time was given in these proceedings to applications addressing the issue and the developments.*
>
> *I cannot agree that the case was complex for this reason in a way that delayed the trial.*
>
> *The delays associated with applications concerning the disclosure or use of materials relating to confidential sources resulted from the inadequate scheduling of the applications, not from complexity inherent in the nature or subject matter of the applications. The applications by their nature took this case beyond the basic level of complexity for charges of the type in issue arising from a search of a residence, and added to the demands on counsel and the Court. However, the applications were argued and determined in relatively short order, and, for the most part, without requests for adjournments to allow counsel to prepare. I do not conclude that these applications by their nature added a level of complexity that should lengthen the overall period that was reasonably required for this case to get to trial.*
>
> *The applications concerning the disclosure of materials relating to confidential informants did not add complexity to the case in such a way as to create an exceptional circumstance.*

[166] That being said, a case involving a fatality or a serious injury case with many witnesses including expert witnesses, which is being prosecuted under a regulatory statute, would certainly involve more complexity than a prosecution under a bylaw regulating the taxi industry.

[167] Ergo, for the present three charges in the 11(b) applications they are certainly more complicated than a run-of-the-mill taxi industry prosecution not involving the use of UBER technology, but they did not reach the level of complexity that would have excused or justified the delay to complete the trial of these three cases, which had exceeded the presumptive ceiling of 18 months for provincial courts.

(v) If the defendants' cases were complex, had the prosecution developed and followed a concrete plan to minimize the delay occasioned by such complexity?

[168] Finally, to the extent there was any added complexity at all in these proceedings, the prosecution has failed in its duty "to minimize the delay occasioned by such complexity". For the UBER Canada charges, the September 4, 2014 charge was laid on September 11, 2014, while the November 17, 2014 charge was laid on

November 20, 2014. And, for the alleged UBER driver, Ersan Zukic, his November 6, 2014 charge had been laid on November 25, 2014. Since that time, there has been no indication that the prosecution developed or followed any plan whatsoever to minimize the delay in the defendants' respective proceedings. Indeed, it was not until April 19, 2016 (19 months after the September 4, 2014 charge and 17 months after the November 17, 2014 charge and the November 25, 2014 charge) that the prosecution even asked for trial dates to be set. And, it was not until a further six weeks had elapsed, on June 3, 2016 (over 20 months after the September charge and over 18 months after the November charges), that the prosecution brought its motion to have these charges reassigned to a judge of the Ontario Court of Justice, a motion that it brought without having considered the further delay that might result. And, it was not until a further six weeks after that, on July 19, 2016 (22 months after the September charge and 20 months after the November charges), that the prosecution finally elected to proceed with the three "test cases". As such, it cannot be said that the delay in this case was the result of circumstances beyond the prosecution's control. Accordingly, the prosecution has failed to establish "exceptional circumstances" that could rebut the presumption that the delay is unreasonable.

[169] Even if it could be construed that the prosecution had been making reasonable efforts to expedite the trials, the prosecution only decided to proceed by way of doing two test cases of the 30 UBER Canada charges and one test case of the 13 alleged UBER drivers at the second judicial pre-trial conference held on July 19, 2016, more than 20 months after the three charges were laid. At that point it was too little and too late to remedy the inordinate delay that had already existed.

[170] Moreover, the prosecution had not even turned its mind to ensuring that the defendants' s. 11(b) rights to a trial within a reasonable time had been complied with, even after counsel for the alleged UBER drivers had stated to the court on the July 30, 2015, court appearance that his clients were concerned about moving their matters forward.

[171] On the other hand, both defendants contend that even if these matters were found to be complex, the prosecution did not make reasonable efforts to mitigate the delay but had acted unreasonably or in a laissez-faire fashion in responding to the request for additional disclosure submitted by counsel for UBER Canada on May 20, 2015, and by counsel for the alleged UBER drivers on July 28, 2015. Even if most of the 10 to 17 items sought by the defendants were not available or not in the prosecution's possession or were not relevant, the prosecution did not respond to those requests for further disclosure until December 1, 2015 (but only to UBER Canada's request), in which most of the 10 to 17 items requested for each charge laid against UBER Canada were not provided and were decided to be irrelevant by the prosecution. However, the prosecution did respond and inform UBER Canada that one or two of the items on the list for additional disclosure was to be provided, but still had not been provided.

[172] In respect to the prosecution's reliance on the number of charges and the number of defendants to demonstrate complexity, such trials for such charges would likely have involved no more than seven or 8 witnesses for each of the 30 charges against UBER Canada or against all the alleged UBER drivers. Moreover, each case would likely have had nearly all the same evidentiary and legal issues, but are no more complex than an accident case involving a fatality. And again, the demands of a prosecution under the taxi industry bylaw of the 30 charges against UBER Canada, which would involve different dates and different drivers and different enforcement officers, along with the prosecution of the 13 alleged UBER drivers certainly would have placed considerable demand on the assigned prosecutor and support staff, but would not meet be sufficient to meet the complexity criteria, since the charges were all on different informations and would not properly be considered to be co-defendants.

[173] Even if the defendants' cases had been complex, the prosecution had failed to develop a plan at a reasonable point to minimize the delay and to bring both defendants' cases to trial within a reasonable time. The defendants also submit that the prosecution had changed course in June and July of 2016, by trying to first have the UBER matters heard by judge of the Ontario Court of Justice and then by selecting test cases to proceed with. By that time, there had already been more than 18 months of delay after the three informations were sworn in September and November of 2014. This plan to proceed with test cases had been too little and too late. Certainly more could have been done at a much earlier point by the prosecution to alleviate the procedural delay and complexity that had been caused by the prosecution choosing to have all the UBER matters proceed together for pre-trial management purposes with the present three test cases.

[174] Ergo, since there had been no discreet events in respect to the cases at bar, nor were these cases sufficiently complex to justify the inordinate delay, then the prosecution has not discharged their onus of proving there are "exceptional circumstances" that would rebut the presumed unreasonableness of the delay.

(5) Fifth Stage: Does The "Transitional Exceptional Circumstance" Apply To The Three Charges Laid Against Uber Canada Inc. And The Alleged Uber Driver, Ersan Zukic, To Justify The Time The Cases Have Taken, Which Is Based On The Parties' Reasonable Reliance On The Previous Law?

[175] Because these test three cases in the present 11(b) applications had already been in the system prior to the release of R. v. Jordan on July 8, 2016, and because the delay (total delay minus defence delay and minus any delay resulting from exceptional circumstances) for the defendants' respective cases had exceeded the presumptive ceiling of 18 months for provincial courts, then a "transitional exceptional circumstance" may apply, but only if the prosecution can demonstrate that "the time the case has taken is justified based on the parties' reasonable

reliance on the law as it previously existed." Hence, the burden is on the prosecution to demonstrate that the parties had reasonably relied on the previous analytical framework for s. 11(b) and that such reliance would justify the delay going beyond the presumptive ceiling.

[176] For this stage of the *Jordan* analysis, the prosecution submits that the parties have indeed relied on the law as it had previously existed and such reliance is evidenced by the fact that the majority of the delay in the defendants' respective proceedings had occurred prior to July 8, 2016. Specifically, the respective informations for the three test cases had been sworn either on September 11, 2014, or on November 20, 2014, or on November 25, 2014, which means that for 22 months and for 20 months respectively, the parties had been operating under the law as it had previously existed, and that the three proceedings from July 8, 2016 to the anticipated end of trial on December 2, 2016 would be just under 5 months while operating under the new 11(b) framework.

[177] In addition, the prosecution argues that the majority in *Jordan* had made it quite clear that the old 11(b) framework is still relevant for charges currently in the system and contends that a *Morin* analysis should be utilized for determining whether the inordinate delay in the three test cases at bar is justified by the parties reliance on the old law, in order that cases that had already been in the system can be fairly dealt with, so as to avoid the wholesale stay of these pre-*Jordan* cases just because the particular delay would breach the presumptive ceiling under the new 11(b) framework.

[178] And, by embarking on a *Morin* analysis of the delay in these three test cases at bar, the prosecution contends that for the two charges laid against UBER Canada, 19 months and 17 months respectively of the total delay of 26 and 24 months should be attributed to neutral and inherent delay, which would then leave nearly 7.5 months of institutional or Crown caused delay for both of UBER Canada's charges, and as such, would come within the *Morin* guidelines of 8 to 10 months for reasonable delay to obtain a trial for the provincial courts.

[179] Furthermore, in respect to the charge laid against the alleged UBER driver, Ersan Zukic, the prosecution contends that 11 months of the total delay of 24 months should be attributed to neutral and inherent delay, which would leave then leave nearly 13 months of institutional or Crown caused delay for the Zukic charge, but because the defendants had failed to prove any prejudice then the delay would not have been unreasonable under the *Morin* framework, even though the unexcused delay had exceeded the *Morin* guideline of 8 to 10 months for reasonable delay to obtain a trial for the provincial courts.

[180] However, the defendants submit first that the prosecution has not met its burden in satisfying the court that the parties had reasonably relied on the state of the law as it existed prior to *Jordan*, since the prosecution has not led any evidence on the parties reasonable reliance on *Morin* to justify the delay that has exceeded the 18-

month ceiling and that should be the end of the inquiry into the applicability of the "transitional exceptional circumstance". However, if there is evidence of the parties reliance on the old law, then the defendants submit that it had not been reasonable, since the delay had vastly exceeded the *Jordan* ceiling of 18 months for provincial courts as well as going well beyond the *Morin* guideline of 8 to 10 months in provincial court. Moreover, the defendants submit that the prosecution had not even been ready for trial until over 17 months had already passed after the respective informations had been sworn.

[181] Furthermore, even under a *Morin* analysis, none of the defendants' consents to the prosecution's request for adjournments for the purposes of disclosure or for waiting for the decision of the Toronto Injunction case would amount to explicit or implicit waivers or be treated as neutral time, since it had been the prosecution who had requested the adjournments as well as not been ready for trial during those periods of delay attributed to the adjournments, and therefore cannot be deducted from the total delay of 26 months and 24 months respectively for the defendants' charges.

[182] On the other hand, even deducting for intake and inherent delay or delay that could be found to be neutral under the *Morin* analysis, which includes reasonable time for the prosecution to provide disclosure (2 months for Part III offences); reasonable time for scheduling a judicial pre-trial conference (1 month); reasonable time for scheduling and waiting for a decision for the transfer application to Justice Nicklas (1 month); and the delay waiting for the decision from the Toronto Injunction case, which because it would have benefitted all parties would have likely been found to be neutral under the *Morin* analysis (5 months), there would still be somewhere between 15 months and 17 months of institutional or Crown delay, which would be still be well over the *Morin* guideline of 8 to 10 months.

[183] And, as for the prosecution's argument that the delay in the defendants' cases had been nevertheless reasonable, despite the insitutional or Crown delay exceeding the *Morin* guidleine of 8 to 10 months of reasonable institutional delay because the defendants' had failed to prove actual prejudice in the present 11(b) applications, the defendants argued that even under *Morin* framework there would be inferred prejudice arising from the inordinate delay of 15 to 17 months of instuitional or Crown delay. However, the defendants argue that the prosecution cannot even jump to *Morin* until they are able to prove that the parties had reasonably relied on the pre-existing 11(b) law, which the defendants contend that the prosecution has failed to do. In addition, the defendants contend that the prosecution has misinterpreted how the "transitional exceptional circumstance" is to be applied, and that embarking on a *Morin* analysis is fruitless, since it is not required and since the prosecution does not get two chances to win or to have two kicks at the can under the *Jordan* framework.

(a) Proof or evidence that would satisfy the court that the parties had reasonably relied on the pre-existing law

[184] The defendants argue that the prosecution has failed to adduce any evidence which could satisfy the court that the parties had reasonably relied on the pre-existing law to justify the delay in excess of the 18-month presumptive ceiing, such as in the form of an affidavit.

[185] Although an afffidavit attesting to the prosecution's reliance on the old law may satisy the court as to the parties reasonable reliance on the pre-exisiting law, inference could also be made from evidence in the record of the defendants' proceedings, from correspondence between the parties, and from the conduct and behaviour of the parties in the proceedings. Just as a court can infer the existence of prejudice from evidence in the record, so can it infer reasonable reliance.

(b) One cannot presume there had been reasonable reliance by the parties on the pre-existing law based simply on the fact that most of the time related to the defendants' proceedings had occurred before the release of R. v. Jordan

[186] Moreover, the prosecution argues that because most of the behaviour and conduct by the parties in dealing with these three test cases had already occurred prior to the release of R. v. Jordan, the court should presume reasonable reliance by the parties on the *Morin* framework in how they had dealt with the present cases at bar. However, to accept the prosection's assertion on this point, it would have to be accepted as a presumption of fact or a logical inference without proof of such reliance by the parties, and in finding that the parties had indeed relied on the pre-existing law, so as to justify the presumptive unreasaonble delay in the three test cases. However, if that was all that was needed then the *Jordan* majority would not have estblsihed the "transitional exceptional circumstance" and it would have simply allowed the trial courts to continue with the *Morin* analysis for cases that had already been in the system.

(c) The prosecution's misinterpretation of the test to be used in determining whether the transitional exceptional circumstance should apply

[187] In consideration of the transitional exceptional circumstance, the prosecution argues that in applying the previous *Morin* 11(b) test to the present cases, the delays in the defendants' cases were reasonable, since the defendants' had been unable to prove any actual prejudice in the present 11(b) applications.

[188] However, the defendants argue that the prosecution has misinterpreted the *Jordan* majority's explanation as to how the transitional exceptional circumstance may apply to cases already in the system that exceeds the presumptive ceiling of 18 months for provincial courts to justify the time the cases have taken.

[189] First of all, the *Jordan* majority had held that the new 11(b) framework applies retroactively, so that cases already in the system are also subject to the *Jordan*

analysis for s. 11(b) applications. At paras. 92 to 104, the *Jordan* majority had held that the new framework, including the presumptive ceiling, applies to cases currently in the system, subject to two qualifications. For the first qualification of cases in which the delay exceeds the presumptive ceiling, the majority had held that a "transitional exceptional circumstance" may arise where the charges were brought prior to the release of this decision. In addition, the majority explained that this transitional exceptional circumstance will apply when the Crown or the prosecution satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed, in which a contextual assessment, sensitive to the manner in which the previous framework was applied, is required. For example, the majority identified that prejudice and the seriousness of the offence had often played a decisive role in whether delay was unreasonable under the previous *Morin* framework, and as such, they held that for cases currently in the system those particular considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account [*emphasis is mine below*]:

> *When this Court released its decision in Askov, tens of thousands of charges were stayed in Ontario alone as a result of the abrupt change in the law. Such swift and drastic consequences risk undermining the integrity of the administration of justice.*
>
> *We recognize that this new framework is a departure from the law that was applied to s. 11(b) applications in the past. A judicial change in the law is presumed to operate retroactively and apply to past conduct (Canada (Attorney General) v. Hislop, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 84). ...*
>
> *Here, there are a variety of reasons to apply the framework contextually and flexibly for cases currently in the system, one being that it is not fair to strictly judge participants in the criminal justice system against standards of which they had no notice. Further, this new framework creates incentives for both the Crown and the defence to expedite criminal cases. However, in jurisdictions where prolonged delays are the norm, it will take time for these incentives to shift the culture. As well, the administration of justice cannot tolerate a recurrence of what transpired after the release of Askov, and this contextual application of the framework is intended to ensure that the post-Askov situation is not repeated.*
>
> *The new framework, including the presumptive ceiling, applies to cases currently in the system, subject to two qualifications.*
>
> *First, for cases in which the delay exceeds the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. For example, prejudice and the seriousness of the*

offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account.

Moreover, the delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with significant institutional delay problems. Judges in jurisdictions plagued by lengthy, persistent, and notorious institutional delays should account for this reality, as Crown counsel's behaviour is constrained by systemic delay issues. Parliament, the legislatures, and Crown counsel need time to respond to this decision, and stays of proceedings cannot be granted en masse simply because problems with institutional delay currently exist. As we have said, the administration of justice cannot countenance a recurrence of Askov. This transitional exceptional circumstance recognizes that change takes time, and institutional delay -- even if it is significant -- will not automatically result in a stay of proceedings.

On the other hand, the s. 11(b) rights of all accused persons cannot be held in abeyance while the system works to respond to this new framework. Section 11(b) breaches will still be found and stays of proceedings will still be entered for cases currently in the system. For example, if the delay in a simple case vastly exceeds the ceiling because of repeated mistakes or missteps by the Crown, the delay might be unreasonable even though the parties were operating under the previous framework. The analysis must always be contextual. We rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case.

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. In his dissenting opinion in Mills v. The Queen, [1986] 1 S.C.R. 863, Lamer J. (as he then was) was alive to this concern and his comments are apposite here:

> This case is the first to have presented this Court with the opportunity of establishing appropriate guidelines for the application of s. 11(*b*). The full scope of the section, and the nature of the obligation it has imposed upon the government and the courts has remained uncertain for the period prior to the rendering of this judgment.
>
> Given this uncertainty and the terminative nature of the remedy for a violation of the section, i.e., a stay of proceedings, I am of the view that a transitional approach is appropriate, and indeed necessary, to enable the courts and the governments to properly discharge their burden under s. 11(b). This is not to say that different criteria ought to apply during the transitional period, that is, the period prior to the rendering of this judgment, but rather that the behaviour of the accused and the authorities must be evaluated in its proper context. In other words, it would be inaccurate to give effect to behaviour which occurred prior to this judgment against a standard the parameters of which were unknown to all. [Emphasis added; p. 948.]

We echo Lamer J.'s remarks. For cases already in the system, the presumptive ceiling still applies; however, "the behaviour of the accused and the authorities" -- which is an important consideration in the new framework -- "must be evaluated in its proper context" (Mills, at p. 948). 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.

We disagree with Cromwell J. that our framework's allowance for present realities somehow creates a Charter amnesty. For cases currently in the system, the s. 11(b) right will receive no less protection than it does now. The point is that, on an ongoing basis, our framework has the potential to effect positive change within the justice system, rather than succumb to the culture of complacency we have described.

[190] In addition, the defendants argue that if the prosecution fails to prove the parties had reasonably relied on the pre-exisiting law on balance of probabilities, then they cannot simply jump to *Morin* and embark on a full *Morin* analysis to show the inordinate delay is reasonable.

[191] Moreover, to support the contention that a full *Morin* analysis is not required for the traditional exceptional circumstance inquiry, the defendants rely on the post-*Jordan* case released on September 16, 2016, of R. v. Dass, 2016 BCSC 1701 (B.C.S.C.), where the British Columbia Supreme Court had held, at para. 80, that it is not enough to refer back to a *Morin* analysis to determine whether, if an application for

a stay based on delay had been brought before the release of the *Jordan* decision, it would not, or might not have succeeded. If that were all that was required, the Court would have said so, and a transitional exceptional circumstance would be unnecessary. However, what is needed and the question that has to be decided for the inquiry into the applicability of the transitional exceptional circumstance, the British Columbia Supreme Court had concluded, is whether the Crown has shown that the time taken is justified based on the parties' reasonable reliance on the law as it developed between *Morin* and *Jordan* [*emphasis is mine below*]:

> *I do not understand* Jordan *and* Williamson *to say that it is enough to refer back to a* Morin *analysis to determine whether, if an application for a stay based on delay had been brought before* Jordan, *it would not, or might not have succeeded. If that were all that was required, the Court would have said so, and a transitional exceptional circumstance would be unnecessary. It is important to remember that the Court in* Jordan *saw the need to establish a presumptive ceiling to post-charge delay in order to deal with what it called a "culture of complacency" that had diluted the effects of* Askov *and* Morin *(at paras. 40 and 41). To repeat, the question to be decided under the transitional exceptional circumstance is whether the Crown has shown that the time taken is justified, based on the parties'* reasonable *reliance on the law as it developed between* Morin *and* Jordan.

(i) Does the prosecution have two kicks at the can in order to satisfy the court that the transitional exceptional circumstance applies to justify the delay which exceeds the presumptive ceiling of 18 months?

[192] The prosecution in their arguments to justify the time it has taken for the defendants' cases is relying on both the *Jordan* framework and the *Morin* framework to contend that the delay is not unreasonable. However, the defendants argue that the prosecution had been incorrect in their interpretation of how to go about applying the *Jordan* "transitional exception circumstance" to cases already in the system. In other words, the defendants submit that the prosecution is not entitled to have two chances to win or to have two kicks at the can in trying to justify the delay, by relying first on the framework in *Jordan* to show that the delay had not been unreasonable and that if they fail to do so, then attempt to show the delay had not been unreasonable under a full *Morin* analysis.

[193] Furthermore, for transitional cases where the delay exceeds the ceiling of 18 months for provincial courts, the prosecution is required to prove that the parties had reasonably relied on the pre-existing law in order to justify the time that it would take to complete the trial. However, the defendants contend that this burden on the prosecution to prove a reasonable reliance on the pre-exiting law to justify the inordinate delay to complete the trial for transition cases is not an opportunity for the prosecution to relitigate s. 11(b) under the old *Morin* framework when it had not been successful under the new *Jordan* framework, thereby having a second kick at the can. In particular, the defendants submit that the determination of whether the unreasonableness of the delay can be justified under the transitional exceptional

circumstance ought to be made under only the new *Jordan* framework and not under both the *Jordan* framework and then again using a full analysis under the *Morin* framework to determine whether the prosecution has established that the *Jordan* transitional exception circumstance should apply to justify the delay in completing the trials.

[194] In addition, the defendants argue that since the R. v. Jordan case had been the "first" case decided under the transitional provisions of the new 11(b) framework, and because the majority of the Supreme Court did not use or do a full *Morin* analysis in deciding whether there had been unreasonable delay in the *Jordan* case (a transitional case) as part of their determination of whether the transitional exceptional circumstance should apply based on the parties reasonable reliance on the pre-existing law to justify the inordinate delay, then the proper determination of whether the traditional exceptional circumstance should apply is to only do an analysis of the circumstances of the delay using only the *Jordan* framework including the transitional exceptional circumstance component. Accordingly, the defendants submit that since the majority in *Jordan* did not engage in the complicated calculus and delay analysis required under the old *Morin* framework in deciding which period should be inherent delay or institutional delay, or whether it is part of intake or whether the delay is neutral, or whether it is Crown-caused or defence-caused delay, then it also is not required to be undertaken in the case at bar for determining whether the transitional exceptional circumstance would apply to the cases at bar.

[195] The *Jordan* majority in considering whether the transitional exceptional circumstance justifies the delay in respect to that particular case had held at para. 128 that it did not, since a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating. Therefore, it cannot be said that the Crown's reliance on the previous state of the law was reasonable:

> *However, since Mr. Jordan's charges were brought prior to the release of this decision, we must also consider whether the transitional exceptional circumstance justifies the delay. In our view, it does not. We recognize that the Crown was operating without notice of this change in the law within a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating. Therefore, it cannot be said that the Crown's reliance on the previous state of the law was reasonable.*

[196] In sum, it would not be necessary or desirable to rehash or undertake a full *Morin* analysis for each transitional case; otherwise, what would actually occur if this additional step of a full *Morin* analysis were to be undertaken in the determination of whether the "transitional exceptional circumstance" should apply would be to

bring about exactly what the majority had found be untenable under the Morin framework, in which the s. 11(b) calculus was overly complicated and inconsistently applied, especially when courts would not find that an inordinate period of delay in getting to trial had not been unreasonable delay where the accused had been unable to prove prejudice to their security, liberty and fair trial interests. Ergo, conducting a full *Morin* analysis for each transitional case would inevitably add more complications than simplicity as envisioned by the *Jordan* framework, and would waste more valuable court time then it would save, and that conducting a full *Morin* analysis of each transitional case had not been the intention of the majority in *Jordan* in introducing their new more rational and simpler analytical framework for unreasonable delay applications. Although the majority in *Jordan* did emphasis that the prosecution could establish for transitional cases a reasonable reliance on the pre-existing law for context, it did not mean that to do so would require rehashing or undertaking a full *Morin* analysis of the transitional case for determining if the delay in getting to trial had been unreasonable.

[197] But most importantly, the *Jordan* majority found that the *Morin* framework was flawed and no longer suitable for determining the unreasonableness of the delay to complete the trial under s. 11(b), and would therefore contradict the *Jordan* majority's decision to revamp the framework for analyzing unreasonableness of the delay if courts still had to conduct a full *Morin* analysis for a transitional case in deciding whether the transitional exception circumstances should apply. In other words, if the *Jordan* majority had wanted the trial courts to do so, they would have kept the *Morin* analytical framework alive simply for the transitional cases instead of declaring the retroactive application of the new 11(b) framework to cases already in the system.

(ii) The *Jordan* framework does not contain a magic spell that can turn a prince into a frog, nor is the "transitional exceptional circumstance" an incantation that can turn a frog into a prince

[198] In deciding whether the delay in transition cases that exceed the presumptive ceilings is justified based on the reasonable reliance of the parties, the *Jordan* majority commented, at paras. 102 to 104, that an ingredient for the new *Jordan* 11(b) recipe, the transitional exceptional circumstance, does not create a Charter amnesty for transition cases, nor does the new *Jordan* recipe automatically turn delay that had been reasonable under the *Morin* framework into unreasonable delay just because the resulting delay now exceeds the applicable presumptive ceiling. For cases already in the system, such as these three test cases, the *Jordan* majority held the presumptive ceiling of 18 months still applies to them; however, the *Jordan* majority held that the behaviour of the accused and the authorities (the prosecution) -- which is an important consideration in the new framework -- must be evaluated in its proper context. To elaborate, the *Jordan* majority explained that it would be inaccurate to give effect to behaviour which occurred prior to this judgment against a standard the parameters of which were unknown to all. Moreover, the *Jordan*

majority held that the reasonableness of a period of time to prosecute a case takes its colour from the surrounding circumstances, and that reliance on the law as it then stood is one such circumstance [*emphasis is mine below*]:

> *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. In his dissenting opinion in Mills v. The Queen, [1986] 1 S.C.R. 863, Lamer J. (as he then was) was alive to this concern and his comments are apposite here:*
>
> > This case is the first to have presented this Court with the opportunity of establishing appropriate guidelines for the application of s. 11(b). The full scope of the section, and the nature of the obligation it has imposed upon the government and the courts has remained uncertain for the period prior to the rendering of this judgment.
> >
> > Given this uncertainty and the terminative nature of the remedy for a violation of the section, i.e., a stay of proceedings, I am of the view that a transitional approach is appropriate, and indeed necessary, to enable the courts and the governments to properly discharge their burden under s. 11(*b*). This is not to say that different criteria ought to apply during the transitional period, that is, the period prior to the rendering of this judgment, but rather that the behaviour of the accused and the authorities must be evaluated in its proper context. In other words, it would be inaccurate to give effect to behaviour which occurred prior to this judgment against a standard the parameters of which were unknown to all. [Emphasis added; p. 948.]
>
> *We echo Lamer J.'s remarks. For cases already in the system, the presumptive ceiling still applies; however, "the behaviour of the accused and the authorities" -- which is an important consideration in the new framework -- "must be evaluated in its proper context" (Mills, at p. 948). 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.*
>
> *We disagree with Cromwell J. that our framework's allowance for present realities somehow creates a Charter amnesty. For cases currently in the system, the s. 11(b) right will receive no less protection than it does now. The point is that, on an ongoing basis, our framework has the potential to effect positive change within the justice system, rather than succumb to the culture of complacency we have described.*

[199] In short, the *Jordan* framework does not contain some magic spell that can turn a prince into a frog or turn delay that had been reasonable under a *Morin* analysis into unreasonable delay just because the delay happens to now exceed the *Jordan* presumptive ceiling of 18 months in provincial court, nor can the transitional exceptional circumstance be used conversely by the prosecution to turn a frog into a prince or delay that had already been unreasonable under the Morin framework into delay that would now be reasonable under *Jordan*.

[200] Moreover, the *Jordan* majority held that in applying the new 11(b) framework to transitional cases, such as to the present three test cases, that reliance on the old

law is one circumstance to take into consideration when determining whether the delay in completing the defendants' trials had been reasonable in the circumstances under *Morin*. Moreover, the *Jordan* majority held that the behaviour of the accused and the prosecution -- which is an important consideration in the new framework -- must be evaluated in its proper context, which would be to assess their behaviour sensitive to the circumstances under the *Morin* framework. In other words, how the accused and the prosecution had conducted themselves in these proceedings while still operating under the *Morin* framework provides the relevant context to deciding whether the time it had taken to complete the defendants' trial are justified.

(d) Proving reasonable reliability on the pre-*Jordan* framework is a two-step test

[201] The defendants contend that the prosecution has not provided any evidence of the parties' reasonable reliance on the pre-existing law and further submit that it is not enough such to argue there had been reasonable reliance on the previous law without an evidentiary basis to demonstrate that there had been such reliance. To continue further with that argument, the defendants contend that the prosecution cannot simply jump to *Morin* without first proving that the parties had reasonable relied on the pre-existing law. In other words, the defendants submit that the prosecution has to meet a two-step test in order to prove that the time it has taken to complete the trial of the three test cases is justified under the transitional exceptional circumstance. For the first step, the prosecution has to prove the parties had relied on the pre-*Jordan* framework and once it has done that, then for the second step, the prosecution has to prove that the reliance on that pre-existing law had been reasonable.

[202] This two-step analysis is spelled out by the *Jordan* majority at para. 96, where they held that the "transitional exceptional circumstance" will apply when the prosecution satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed, based on a contextual assessment, sensitive to the manner in which the previous framework had been applied, with the understanding the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. In their explanation on how to determine if the parties had reasonably relied on the previous *Morin* framework, the *Jordan* majority had identified that "prejudice" and the "seriousness of the offence" had often played a decisive role in whether delay had been unreasonable under the previous framework. As such, the *Jordan* majority explained that for transition cases, consideration of such factors as prejudice and the seriousness of the offence could inform whether the parties' reliance on the previous state of the law had been in fact reasonable:

> *First, for cases in which the delay exceeds the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual*

assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account.

(e) The conduct and behavior of UBER Canada and the alleged UBER driver, Ersan Zukic throughout their respective proceedings.

[203] Under the *Morin* framework, the trial judge had to consider action or inaction by the accused that may be inconsistent with a desire for a timely trial (*Morin*, at para. 62). For the present 11(b) applications, there is no evidence that the defendants were deliberately delaying the proceedings by asking for adjournments or by making frivolous requests or bringing frivolous applications or motions or in making many frivolous disclosure requests. The defendants' had only made one request for additional disclosure and the 11(b) applications are certainly not frivolous considering the inordinate delay that has occurred in the present proceedings. Moreover, under the *Morin* framework, the defendants did not have any obligation to ensure a speedy trial, since the obligation had been on the prosecution to do such:

This Court has made clear in previous decisions that it is the duty of the Crown to bring the accused to trial (see Askov, supra, at pp. 1225, 1227, 1229). While it was not necessary for the accused to assert her right to be tried within a reasonable time, strong views have been expressed that in many cases an accused person is not interested in a speedy trial and that delay works to the advantage of the accused. This view is summed up by Doherty J. (as he then was) in a paper given to the National Criminal Law Program in July 1989 which was referred to with approval by Dubin C.J.O. in Bennett (at p. 52) and echoes what has been noted by numerous commentators:

> An accused is often not interested in exercising the right bestowed on him by s. 11(b). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits. This view may seem harsh but experience supports its validity.

As also noted by Cory J. in Askov, supra, "the s. 11(b) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused" (p. 1222). This right must be interpreted in a manner which recognizes the abuse which may be invoked by some accused. The purpose of s. 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider. This position is consistent with decisions

> *of this Court in regard to other Charter provisions. For example, this Court has held that an accused must be reasonably diligent in contacting counsel under Charter s. 10(b) (R. v. Tremblay, [1987] 2 S.C.R. 435; R. v. Smith, [1989] 2 S.C.R. 368). If this requirement is not enforced, the right to counsel could be used to frustrate police investigation and in certain cases prevent essential evidence from being obtained. Nonetheless, in taking into account inaction by the accused, the Court must be careful not to subvert the principle that there is no legal obligation on the accused to assert the right. Inaction may, however, be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay.*

[204] Furthermore, in R. v. Askov, [1990] S.C.J. No. 106 (S.C.C.), Cory J. held at para. 57, that an accused has no duty to bring himself to trial and that the burden had been on the Crown or the prosecution to bring the defendants to trial in a timely fashion:

> *It must be remembered that it is the duty of the Crown to bring the accused to trial. It is the Crown which is responsible for the provision of facilities and staff to see that accused persons are tried in a reasonable time.*

[205] The prosecution also contends that counsel for UBER Canada had not appeared at three court appearances as evidence that UBER Canada's actions were inconsistent with someone who wanted a speedy trial; rather, these actions do not demonstrate any urgency on UBER Canada to have these matters go to trial or that UBER Canada was being prejudiced by the delays from the adjournments.

[206] However, the evidence indicates that counsel for UBER Canada did not appear since the prosecution had been the one who had requested the adjournments to wait for the decision from the Toronto Injunction case, or for disclosure, or to conduct resolution discussions, and had already obtained agreement from counsel for UBER Canada for those adjournments. But, at the same time, the prosecution had not been ready for trial when counsel for UBER Canada did not appear at those particular court appearances. As such, these non-appearances by counsel for UBER Canada cannot be held to be a desire by UBER Canada to delay the proceedings, since the prosecution had not been ready for trial at those points in time and it had been the prosecution that had sought the adjournments on those days when counsel for UBER Canada did not appear.

[207] In respect to the alleged UBER driver, Ersan Zukic, there had been no adjournment requests made by Zukic or any evidence that Zukic had been delaying the proceedings.

[208] Ergo, both defendants' actions in their respective proceedings did not show a deliberate attempt to delay the proceedings. Neither of them sought adjournments or brought frivolous requests or applications. In addition, both defendants respectively only made one additional request for more disclosure and their request for that additional disclosure did not appear to be frivolous or an attempt to delay

the proceedings. Therefore, the defendants' actions are not inconsistent with a desire for a timely trial.

(f) <u>The conduct and behaviour of the prosecution throughout the proceedings.</u>

[209] In arguing against the application of the "traditional exceptional circumstance" to justify the inordinate delay, the defendants contend that the prosecution had been taking a laissez-faire attitude in bringing the defendants to trial under the *Morin* framework and had also not provided any evidence of a reasonable reliance on the pre-existing law or that there had been excessive institutional delay that was condoned in the Mississauga jurisdiction.

[210] The defendants also submit that there is no evidence that the conduct of the prosecution was in any way based on reliance on the *pre-Jordan* framework. Indeed, there is nothing on the record to indicate that the prosecution had ever turned its mind one way or the other to the issue of delay, or to the need to prosecute the defendants' charges in a timely manner until January 28, 2016, when the prosecution requested that a judicial pre-trial be set for case management and to discuss disclosure and legal issues, which is more than 14 months after the defendants' informations were sworn in the Fall of 2014. Moreover, it was not until April 19, 2016, at the first judicial pre-trial conference that the prosecution indicated that they were "ready for trial", which is more than 16 months after the informations were sworn in the Fall of 2014.

[211] And, because the prosecution did not tum its mind to the issue of delay until very late in the defendants' proceedings, then the prosecution cannot possibly have been relying upon the *pre-Jordan* framework as excusing the delay that ensued.

[212] Furthermore, there is also certainly nothing to suggest that the prosecution had developed a plan to bring the defendants' charges to trial within a reasonable time, based on the *pre-Jordan* framework. Rather, the record shows such troubling occurrences as repeated adjournments sought by the prosecution to respond to the request by the defendants for additional disclosure and to await the delivery, and then to permit review, of the decision of Dunphy J. in the Toronto Injunction case, only to have the prosecution then fail to take any steps to inform the defendants about how that decision would impact the defendants' charges.

[213] Moreover, the prosecution did not respond to the requests by the defendants for additional disclosure until December 1, 2015, more than 6 months after that request had been submitted by counsel for UBER Canada on May 20, 2015.

[214] In addition, the prosecution did not respond promptly to the defendants' request for the prosecution's position on how the decision in the Toronto Injunction case would impact on the defendant's cases until the January 28, 2016, court appearance when

it sought a judicial pre-trial, which is nearly 7 months after the decision in the Toronto Injunction case had been released on July 3, 2015.

[215] As well, counsel for the alleged UBER drivers had raised his concern to the court about moving the matters forward for the alleged UBER drivers' on the court appearance for July 30, 2015, which is over 8 months after the information for the alleged UBER driver, Ersan Zukic, had been sworn on November 25, 2014. Similarly, counsel for UBER Canada also indicated having 11(b) concerns in July 2015 in respect to Nicklas J's inquiry into delay under s. 11(b) at the transfer application hearing held on June 24, 2015, which is approximately more than 8 months and 6 months respectively after the informations were sworn for UBER Canada's two charges on September 11, 2014 and November 20, 2014, respectively.

(i) The prosecution cannot rely on delay of their own making or delay resulting from their procedural choices to establish justification for the delay

[216] As it applies to the prosecution's conduct in the present proceedings, Sopinka J. for the Supreme Court in R. v. Morin, at para. 46, had noted that similar to the treatment of conduct of accused persons that cause delay, actions of the Crown such as adjournments requested by the Crown or the Crown's failure or delay in providing disclosure, or change of venue motions, cannot be relied on by the Crown to explain away delay that is otherwise unreasonable [*emphasis is mine below*].

> *As with the conduct of the accused, this factor does not serve to assign blame. This factor simply serves as a means whereby actions of the Crown which delay the trial may be investigated. Such actions include adjournments requested by the Crown, failure or delay in disclosure, change of venue motions, etc. An example of action of this type is provided in Smith, supra, where adjournments were sought due to the wish of the Crown to have a particular investigating officer attend the trial. As I stated in that case, there is nothing wrong with the Crown seeking such adjournments but such delays cannot be relied upon by the Crown to explain away delay that is otherwise unreasonable.*

(ii) Prosecution informed counsel for UBER Canada that certain items of disclosure were forthcoming, but have yet to be provided

[217] The defendants also submit that the prosecution did not make the argument that the defendants' request for additonal disclosure had been frivolous. In fact the prosecution took an inordinate amount of time to respond to their respective requests for additional disclosure. As such, the prosecution could have responded much earlier to the defendants' request for additonal disclosure by informing the defendants that particular items being sought were either priviliged, not relevant, or not under their control. However, the prosecution did not respond until December 1, 2015, to those requests for additional disclosure, in which their responses had

been, for the most part, that most of the items requested were either not relevant or not in the control of the prosecution, but the prosecution did inform only counsel for UBER Canada that one or two of the items from their respective requests would be forthcoming, although the prosecution has still not provided those promised items to the defendants. The prosecution, however, did not ever respond to the request for additional disclosure submitted by counsel for the alleged UBER driver, Ersan Zukic, on July 28, 2015.

[218] Moreover, the defendants contend their requests for additional disclosure were not frivolous and could assist them in bringing an abuse of process application at the end of the trial.

[219] Ergo, by not responding in a timely fashion to those disclosure requests, the defendants could not remedy the situation or set a trial without a response to those disclosure requests until they had actually received the prosecutions' response, which added significantly to the delay in these proceedings. Nor, had the prosecution been ready for trial while those requests for additional disclosure had been still outstanding and not responded to. Even though the defendants could not have refused to set their matters down for trial to wait for every item of disclosure unless they were crucial to an important decision or choice that the defendants would have to make, the prosecution had not requested the defendants matters be set down for trial, since the prosecution had not been ready for trial until April 19, 2016, which is over 10 and 8 months respectively after the defendants had made their respective requests for additional disclosure.

[220] Consequently, the prosecution's actions cannot be evidence of a reasonable reliance of the pre-Jordan framework, since it had been the prosecution who created much of the inordinate delay and did not ensure that the defendants' right to a speedy trial had not been infringed under the pre-existing law.

(iii) The prosecution cannot rely on the "transitional exception circumstance" unless the prosecution has taken concrete steps to move the defendants' cases along

Has the prosecution made a reasonable effort to remedy the delay?

[221] First of all, even prior to the release of R. v. Jordan on July 8, 2016, the dates of October 13 and 14, 2016, as well as December 1, 2016, for the pre-trial motions had already been obtained and scheduled during the first judicial pre-trial conference that was held on April 19, 2016. Moreover, there is no evidence that the prosecution had tried to obtain earlier dates as an effort to remedy any of the impugned delay. However, the prosecution did decide to only proceed with two cases as test cases of UBER Canada's 30 charges and one test case for the alleged UBER drivers, which likely reduced the requirement of resources and court time

needed to complete all the charges laid against UBER Canada and for all the trials of all the alleged UBER drivers proceeding together with these particular test cases.

(g) Seriousness of the offence

[222] Under the *Morin* framework, Sopinka J. held, at para. 30, that the interests of the accused must be balanced by the interests of society in law enforcement, and that as the seriousness of the offence increases, so does the societal demand that the accused be brought to trial [*emphasis is mine below*]:

> *There is, as well, a societal interest that is by its very nature adverse to the interests of the accused. In Conway, a majority of this Court recognized that the interests of the accused must be balanced by the interests of society in law enforcement. This theme was picked up in Askov in the reasons of Cory J. who referred to "a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law" (pp. 1219-20). As the seriousness of the offence increases so does the societal demand that the accused be brought to trial. The role of this interest is most evident and its influence most apparent when it is sought to absolve persons accused of serious crimes simply to clean up the docket.*

(h) Virtually no prejudice for a certain category of regulatory offences where imprisonment is not a possibility

[223] In R. v. Omarzadah, [2004] O.J. No. 2212 (O.C.A.), Doherty J. had commented at para. 3, that although the *Morin* guidelines for summary conviction matters should apply to POA prosecutions, they should not necessarily be strictly applied, especially where there would be very little prejudice or stigma present for someone charged with a regulatory offence like a speeding ticket issued under a Part I Certificate of Offence for the purposes of the 11(b) inquiry:

> *The applicant is concerned that the reasons below will be taken as establishing a six-month guideline for prosecutions under Part I of the POA. The applicant is concerned that delays beyond six months will be treated as presumptively unconstitutional. The reasons below should not be read as authority for that proposition. The analysis of s. 11(b) provided in R. v. Morin, [1992] 1 S.C.R. 771 applies to POA prosecutions. To the extent that guidelines are helpful where s. 11(b) claims are advanced in prosecutions under Part I of the POA, the R. v. Morin summary conviction guidelines should govern. Even those guidelines, however, should not necessarily be strictly applied. It must be acknowledged that any "stigma" arising out of the delay in the trial of charges like speeding is virtually non-existent. In allocating finite resources, the state is entitled to give some priority to the speedy resolution of more serious allegations.*

[224] The three test cases under consideration are charges laid under a municipal bylaw that governs the taxi industry in Mississauga. However, they were charges laid under Part III informations, which generally are considered to be more serious than regulatory offences commenced under a Part I Certificate of offence. And, as a

Part I Certificate would contain a set fine, charges commenced under Part III information do not contain a set fine and the maximum fines that could be imposed would be the fines set out under the particular municipal bylaw.

[225] However, even though the possibility of imprisonment is not available for the alleged UBER driver if he is convicted, the penalties for a conviction for a Part III charge for contravening a provision of the City of *Mississauga Public Vehicle Licensing* Bylaw 420-04 is subject to the fines set out in s. 32(1) and (2) which provides for a maximum fine of $25,000 for a natural person and a maximum fine of $50,000 for a corporation. These are certainly not the lower set fines that Justice Doherty had been alluding to, for a Part I regulatory charge where he had held there is virtually no prejudice. The maximum fines set out in the Bylaw are contained in ss. 32(1) and (2):

> ***32(1) Fine - for contravention***
>
> *Every Person who contravenes any provision of this By-law, and every director or officer of a corporation who concurs in such contravention by the corporation, is pursuant to section 161 (2) of the Municipal Act, 2001 guilty of an offence and on conviction is liable to a fine not exceeding $25, 000.00.*
>
> ***(2) Fine - for contravention - corporation***
>
> *Despite subsection (1) where a corporation is convicted of an offence under the provisions of this By-law pursuant to section 161 (3) of the Municipal Act, 2001 is liable to a fine not exceeding $50,000.00.*

[226] However, the maximum fines that could be imposed for contravening this municipal bylaw are substantial, which would infer that the present charges are relatively serious, since the maximum fines for the present bylaw charges are greater than the maximum fine of $5000 that could be imposed for being convicted of a summary conviction offence under the Criminal Code.

[227] More important, however, when considering the seriousness of the present charges, imprisonment is not a possibility for the alleged UBER driver, Ersan Zukic, and as such only a fine could be imposed as a penalty for a conviction against either UBER Canada or against Ersan Zukic. So, relative to Part I regulatory offences, the present Part III charges are, for the most part, more serious than those commenced under Part I certificates, but much less serious than criminal charges. In addition, in comparison to other types of regulatory offences in respect to the seriousness of the offence factor under the *Morin* analysis, there would be much less societal demand that persons or corporations charged with these particular taxi industry bylaw offences be brought to trial as compared to persons or corporations charged with criminal offences, or where the charges involve fatalities under provincial traffic laws, or for charges where there have been serious injuries under provincial occupational health and safety statutes, or for charges laid under

provincial consumer protection statutes where there are many victims, or for charges related to polluting the environment on a large scale.

[228] However, the conduct of the prosecution in not promptly responding to requests to for additional disclosure and not being ready for trial until April 19, 2016, which had been over 16 months after the defendants' informations were sworn in the Fall of 2014, does not indicate that the prosecution had any concerns about the seriousness of the these bylaw charges, one way or another, since the prosecution failed to ensure that the defendants' right to a trial within a reasonable time would not be infringed.

(i) The requirement to prove prejudice under the Jordan framework

[229] In arguing that the inordinate delay is reasonable under the pre-*Jordan* framework, the prosecution submits that the defendants had failed to prove any prejudice. This prosecution argument is unfortunately what may be termed a "chicken-and-egg dilemma", or a "catch-22 situation", or a "no-win situation" for the defendants. That is to say, under the new *Jordan* framework, the defendants were no longer obligated to prove prejudice to prove the unreasonableness of the delay, since prejudice is assumed once the presumptive ceiling of 18 months in provincial court is breached.

[230] But most importantly, the determination of the reasonableness of the delay in the present 11(b) applications are being determined under the *Jordan* framework, where prejudice does not have to be proven by the defendants, and not under the pre-*Jordan* framework in which prejudice would have required the defendants to prove prejudice. And since the presumptive ceiling of 18 months had been exceeded in the present case, then the burden is actually on the prosecution to justify the inordinate delay by satisfying the court that the parties had reasonably relied on the pre-*Jordan* framework to justify the time it has taken. Therefore, since the *Jordan* majority did not require the defendants to prove prejudice at any stage of the new 11(b) framework, then there would not have been any evidence of actual prejudice before the court. As such, the prosecution cannot now rely on the absence of evidence of prejudice to the defendants' liberty, security, and fair trial interests, when none is required in a 11(b) application made under the *Jordan* framework. As for reliance on the *Morin* framework that would have required the defendants to prove actual prejudice, the delay of 26 to 24 months in the defendants' cases had already "vastly" exceeded the 18-month ceiling under *Jordan*; while under a *Morin* analysis, the 15 to 17 months of institutional and prosecution delay would have greatly exceeded the *Morin* guideline of 8 to 10 months of reasonable institutional delay, which would have also inferred prejudice to the defendants' Charter-protected interests due to the inordinate delay, and could have supported a finding of unreasonable delay under the *Morin* framework in any event.

[231] However, the proof of prejudice for corporate accused would have been determined much differently under the *Morin* framework, than under the *Jordan* framework

(j) The determination of "prejudice to the accused" under the pre-Jordan framework

[232] The issue of prejudice affects natural person differently from corporate accused. At paras. 61 to 64 in *Morin*, Sopinka J. held that prejudice to the accused can be inferred from prolonged delay and that in an individual case, prejudice may be inferred from the length of the delay, so that the longer the delay the more likely that such an inference will be drawn:

> *Section 11(b) protects the individual from impairment of the right to liberty, security of the person, and the ability to make full answer and defence resulting from unreasonable delay in bringing criminal trials to a conclusion. We have decided in several judgments, including the unanimous judgment in Smith, supra, that the right protected by s. 11(b) is not restricted to those who demonstrate that they desire a speedy resolution of their case by asserting the right to a trial within a reasonable time. Implicit in this finding is that prejudice to the accused can be inferred from prolonged delay. In the American concept of this principle, expounded in Barker v. Wingo, the inference is that no prejudice has been suffered by the accused unless he or she asserts the right. While the observation of Dubin C.J.O. in Bennett that many, perhaps most, accused are not anxious to have an early trial may no doubt be accurate, s. 11(b) was designed to protect the individual, whose rights are not to be determined on the basis of the desires or practices of the majority. Accordingly, in an individual case, prejudice may be inferred from the length of the delay. The longer the delay the more likely that such an inference will be drawn. In circumstances in which prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined.*
>
> *This Court has made clear in previous decisions that it is the duty of the Crown to bring the accused to trial (see Askov, supra, at pp. 1225, 1227, 1229). While it was not necessary for the accused to assert her right to be tried within a reasonable time, strong views have been expressed that in many cases an accused person is not interested in a speedy trial and that delay works to the advantage of the accused. This view is summed up by Doherty J. (as he then was) in a paper given to the National Criminal Law Program in July 1989 which was referred to with approval by Dubin C.J.O. in Bennett (at p. 52) and echoes what has been noted by numerous commentators:*
>
> > An accused is often not interested in exercising the right bestowed on him by s. 11(b). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits. This view may seem harsh but experience supports its validity.
>
> *As also noted by Cory J. in Askov, supra, "the s. 11(b) right is one which can often be transformed from a protective shield to an offensive weapon in the hands of the accused" (p. 1222). This right must be interpreted in a manner which recognizes the abuse which may be invoked by some accused. The purpose of s. 11(b) is to*

expedite trials and minimize prejudice and not to avoid trials on the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider. This position is consistent with decisions of this Court in regard to other Charter provisions. For example, this Court has held that an accused must be reasonably diligent in contacting counsel under Charter s. 10(b) (R. v. Tremblay, [1987] 2 S.C.R. 435; R. v. Smith, [1989] 2 S.C.R. 368). If this requirement is not enforced, the right to counsel could be used to frustrate police investigation and in certain cases prevent essential evidence from being obtained. Nonetheless, in taking into account inaction by the accused, the Court must be careful not to subvert the principle that there is no legal obligation on the accused to assert the right. Inaction may, however, be relevant in assessing the degree of prejudice, if any, that an accused has suffered as a result of delay.

Apart, however, from inferred prejudice, either party may rely on evidence to either show prejudice or dispel such a finding. For example, the accused may rely on evidence tending to show prejudice to his or her liberty interest as a result of pre-trial incarceration or restrictive bail conditions. Prejudice to the accused's security interest can be shown by evidence of the ongoing stress or damage to reputation as a result of overlong exposure to "the vexations and vicissitudes of a pending criminal accusation", to use the words adopted by Lamer J. in Mills, supra, at p. 919. The fact that the accused sought an early trial date will also be relevant. Evidence may also be adduced to show that delay has prejudiced the accused's ability to make full answer and defence.

Conversely, the prosecution may establish by evidence that the accused is in the majority group who do not want an early trial and that the delay benefited rather than prejudiced the accused. Conduct of the accused falling short of waiver may be relied upon to negative prejudice. As discussed previously, the degree of prejudice or absence thereof is also an important factor in determining the length of institutional delay that will be tolerated. The application of any guideline will be influenced by this factor.

(k) The special situation of corporate accused under the Morin framework based on R. v. CIP Inc., where corporate accused had been required to prove "irremediable prejudice" to their fair trial interest in order to prove the delay had been unreasonable.

[233] There is, however, one particular circumstance which reasonable reliance on the pre-existing law could have been found in to justify the inordinate delay, and that concerns the requirement of a corporate accused to prove "irremediable prejudice" to that corporation's fair trial interest.

[234] In respect to UBER Canada's situation, the previous state of the law required that a corporate accused had to prove that its fair trial interest had been "irremediably prejudiced", since corporations did not suffer the same sort of prejudice that human accused would, except in respect to their fair trial interest: R. v. CIP Inc., [1992] S.C.J. No. 34 (S.C.C.). In short, corporate accused under the *Morin* framework had

to prove that their fair trial interest had been irremediably prejudiced in order to prove that their s. 11(b) right to a trial within a reasonable time had been infringed.

[235] More significantly, the Supreme Court of Canada had held in R. v. CIP Inc., at para. 50, that corporate accused could not rely on "inferred prejudice" to prove the delay had been unreasonable [*emphasis is mine below*]:

> *In my view, none of these concerns -- with the exception of legal costs -- logically applies to corporate entities. In order properly to assess the reasonableness of delay, a court has to balance the various interests at stake. The interests of the accused must be weighed against the interest of the community in ensuring that those who have allegedly transgressed the law are brought to justice. The balancing process must be fair. There is no room for artificiality. It seems to me that allowing a corporation to rely upon a presumption of prejudice would offend that principle. It is therefore my opinion that with respect to this fourth factor, a corporate accused must be able to establish that its fair trial interest has been irremediably prejudiced. I use the phrase "irremediably prejudiced" because there are some forms of prejudice that a court can remove, notably by making specific orders regarding the conduct of the trial.*

[236] Therefore, in transition cases involving corporate accused where the delay in completing the trial would only affect the fair trial interests of the corporation; contrary to a natural person where such delay would also affect their security and liberty interests, there may have been less of an urgency to move a case along when an accused corporation's security and liberty interest would not be affected by any delay. Although the delay had been 19 months for the corporate accused in R. v. CIP Inc., the Supreme Court had held that delay had not been unreasonable, since there had been no evidence of "irremediable prejudice" to the corporate accused's fair trial interest and that prejudice from the delay could not be inferred for a corporation.

[237] On the other hand, UBER Canada relies on the holding in R. v. 1762432 Ontario Inc. (c.o.b. The Painted Lady), [2012] O.J. No. 746 (O.C.J.), in which the court had found the corporation's s. 11(b) right to a trial of a bylaw charge of operating a business without a licence within a reasonable time had been infringed, when the delay had exceeded the *Morin* guideline of 8 to 10 months. In that case the court had found evidence of prejudice based on an "affidavit" of a director or officer of the corporation attesting to fading memories of an unnamed employee and of themselves. However, the court did not make a finding that the corporate accused had proven "irremediable prejudice" to their fair trial interest on a balance of probabilities as had been required by the Supreme Court in R. v. CIP Inc. for a corporate accused to show that the delay had been unreasonable.

[238] And, as this court had decided in R. v. Accurate Industrial Waste Ltd. [2001] O.J. No. 3421 (O.C.J.), at paras. 111, 112, and 145, in which a corporate accused had been charged with contravening a municipal bylaw, the inexcusable delays of 16.9

and 14.8 were found not to be unreasonable, since the corporate accused had failed to prove "irremediable prejudice" to its fair trial interests:

> *The C.I.P. Inc. decision was followed by Charron J. in R. v. Oliver, Mangione, McCalla and Associates, [1993] O.J. No. 2781 (Ont. Ct. (Gen. Div.)), at para. 3:*
>
> > The determination of this appeal rests upon a consideration of the principles set out in the subsequent case of CIP v. The Queen (1992), 71 C.C.C. (3d) 129 S.C.C. on the question of prejudice and the corporate accused. In CIP Inc., the Supreme Court of Canada confirmed that a corporate accused has the right to be tried within a reasonable time pursuant to s. 11(b) of the Canadian Charter of Rights and Freedoms. The factors as set out in R. v. Askov (1987), 37 C.C.C. (3d) 289 must be considered: the length of the delay, the explanation of the delay, waiver and prejudice of the accused. In Askov, the Court found that prejudice may be inferred or it may be proven. In cases of very long delays "an often virtually irrebuttable presumption of prejudice to the accused " would result from the passage of time. It was argued in CIP Inc. however that a corporate accused could not rely on the presumption of prejudice resulting from a long delay since the inference of prejudice was linked to the liberty and security interests of an accused, not the fair trial interest. The Supreme Court of Canada reviewed the concerns expressed in Askov which led to an inference of prejudice and, with the exception of legal costs, found those of no relevance to corporations.
>
> *In sum, a corporate defendant cannot rely on a presumption of prejudice being found by a court or to have prejudice inferred by the court based strictly on the actual length of the delay. In other words, an excessive length of time between the laying of the informations and the trial date would draw a presumption or an inference by the court of prejudice to an individual or human defendant because of the delay. However, for a corporate defendant it cannot rely on any presumption or inference of prejudice based only on the length of the delay. A corporate defendant because it cannot rely on the right to security of the person, which only an individual can claim, since it does not suffer anxiety or stress while waiting for trial, then cannot expect the court to presume or infer prejudice from the length of the delay. It therefore must show that its fair trial interest has been irremediably prejudiced by the delay.*
>
> ...
>
> *The inexcusable delays of 16.9 and 14.8 months fall outside the administrative guideline of 8 to 10 months. However, these proceedings have shown a complexity that required a longer time in getting to trial. There is evidence of laboratory testing done on samples, diagrams of underground pipes connected to the sewer system, and the involvement of 13 to 14 witnesses. Combining that with the absence of evidence showing the defendant's fair trial interest was irremediably prejudiced, and the societal interest in seeing the corporate defendant go to trial, the 16.9 and 14.8 months of delay were not unreasonable.*

[239] Under the *Morin* framework and the Supreme Court's decision in R. v. C.I.P. Inc., prejudice to a corporate defendant could only be established if the corporation could prove on a balance of probabilities that their "fair trial interests" were irremediably prejudiced, which for the most part was not easy task, and would explain why prosecutions of regulatory charges against corporations would for the most part

proceed slowly through the courts. Even in the circumstances of R. v. C.I.P. Inc., it had taken 18 months to get to trial.

[240] Therefore, it would not have been unusual for corporations facing bylaw charges to proceed at a glacial speed and where it would take years for the charges to even be set down for trial, as corporate accused may not necessarily have an incentive to have a trial in the face of large fines.

[241] Ergo, this could have been one situation in which reasonable reliance on the *Morin* framework could have been inferred to justify the inordinate delay for UBER Canada's charges. However, the prosecution has not raised this special situation in respect to corporate accused and the difficulty it would have in proving irremediable prejudice to its fair trial interest. But more significantly, there is no evidence that the prosecution had relied on this specific situation for corporate accused as a consequence of the *Morin* framework, so that such an inference could be made that the parties had reasonably relied on the pre-existing law to justify the time it has taken.

(l) Would the institutional delay in the present cases been reasonably acceptable in the Mississauga jurisdiction under the Morin framework?

[242] The *Jordan* majority had noted that if the delay was occasioned by an institutional delay that was reasonably acceptable in the relevant jurisdiction under the pre-*Jordan* framework, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

[243] For the cases at bar, there is no evidence that the Mississauga jurisdiction is plagued by lengthy, persistent and notorious delay, nor would the institutional delay or prosecution delay of 17 to 19 months have been reasonably acceptable in the Mississauga jurisdiction under the *Morin* framework.

(m) A stay of proceedings will only be warranted if the delay "vastly" exceeds the presumptive ceiling of 18 months and the Crown had caused the delay.

[244] In *Jordan*, the majority at para. 98, provided an example when a stay may be issued in a transition case. They indicated that this would be one where the delay in a simple case "vastly" exceeds the ceiling because of repeated mistakes or missteps by the Crown, then reasoned that such delay would have been unreasonable even though the parties had been operating under the previous framework [*emphasis is mine below*]:

> *On the other hand, the s. 11(b) rights of all accused persons cannot be held in abeyance while the system works to respond to this new framework. Section 11(b) breaches will still be found and stays of proceedings will still be entered for cases currently in the system. For example, if the delay in a simple case vastly exceeds*

the ceiling because of repeated mistakes or missteps by the Crown, the delay might be unreasonable even though the parties were operating under the previous framework. The analysis must always be contextual. We rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case.

[245] As these transition cases were not complex, the delay of 26 and 24 months respectively for UBER Canada and for the alleged UBER driver, Ersan Zukic, had "vastly" exceeded the presumptive ceiling of 18 months for a provincial court. Accordingly, the prosecution has not satisfied the court that the parties had reasonably relied on the pre-*Jordan* law to justify the time it has taken. As such, the transitional exceptional circumstance does that apply to these three test cases.

[246] Therefore, both defendants' s. 11(b) right to a trial within a reasonable time have been infringed and a stay of proceedings will be granted for these three test cases.

4. DISPOSITION OF THE RESPECTIVE 11(b) APPLICATIONS

(a) In respect to UBER Canada Inc.'s 11(b) application in respect to its two charges

[247] The delay (total delay minus defence delay (which there is none)) for the corporate defendant UBER Canada to complete its trial is 26 months and 21 days, for the September 4, 2014 charge, which exceeds the presumptive ceiling of 18 months for provincial court proceedings. Furthermore, the presumption of unreasonble delay for this specific charge has not been rebutted due to the prosecution's failure to demonstrate the presence of "exceptional circumstances" on a balance of probabilities that had justified the delay in completing the trial of this particular charge. In addition, the prosecution has also failed to establish that the "transitional exceptional circumstance" should apply to justify the time it has taken to complete the trial of this charge because the prosecution had not proven on a balance of probabilities that the parties had reasonably relied on the pre-exisiting law.

[248] And, for the second charge for the offence date of November 17, 2014, the delay (total delay minus defence delay (which there is none)) for the corporate defendant UBER Canada to complete its trial is 24 months and 12 days, which exceeds the presumptive ceiling of 18 months for provincial court proceedings. Furthermore, the presumption that the delay is unreasonble for this particular charge has not been rebutted due to the prosecution's failure to demonstrate the presence of "exceptional circumstances" on a balance of probabilities that had justified the delay in completing the trial of this particular charge. In addition, the prosecution has also failed to establish that the "transitional exceptional circumstance" should apply to justify the time it has taken to complete the trial of this charge because the prosecution had not proven on a balance of probabilities that the parties had reasonably relied on the pre-exisiting law.

[249] Consequently, UBER Canada Inc.'s right to a trial within a reasonable time guaranteed under s. 11(b) for these two charges have been infringed and its application for a stay of poceedings under s. 24(1) is therefore granted in respect to the two charges of September 4, 2014 and November 17, 2014.

(b) <u>In respect to Ersan Zukic's 11(b) application</u>

[250] In addition, the delay (total delay minus defence delay (which there is none)) for the defendant Ersan Zukic to complete his trial is 24 months and 4 days, which exceeds the presumptive ceiling of 18 months for provincial court proceedings. And, because the prosecution has failed to also rebut the presumption that the delay is unreasonble by demonstrating the presence of "exceptional circumstances" on a balance of probabilities that had justified the delay in completing the trial of Ersan Zukic's charge; and because the prosecution has also failed to establish that the "transitional exceptional circumstance" should apply to justify the time it has taken to complete the trial of this charge, since the prosecution has failed to prove on a balance of probabilities that the parties had reasonably relied on the pre-exisiting law.

[251] Therefore, the defendant Ersan Zukic has met his burden on a balance of probablities that his Charter right to have a trial within a reasonable time guaranteed under s. 11(b) had been infringed. Accordingly, a stay of proceedings under s. 24(1) will be entered for Ersan Zukic's charge.

Dated at the City of Mississauga on December 1, 2016.

QUON J.P.
Ontario Court of Justice