W A R N I N G

The court hearing this matter directs that the following notice should be attached to the file:

This is a case under the *Youth Criminal Justice Act* and is subject to subsections 110(1) and 111(1) and section 129 of the Act. These provisions read as follows:

> **110. Identity of offender not to be published.**—(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
>
> . . .
>
> **111. Identity of victim or witness not to be published.—**(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.
>
> . . .
>
> **129. No subsequent disclosure.—** No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any person unless the disclosure is authorized under this Act.

Subsection 138(1) of the *Youth Criminal Justice Act,* which deals with the consequences of failure to comply with these provisions, states as follows:

> **138. Offences.—**(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published) . . . or section 129 (no subsequent disclosure) . . .
>
> (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
>
> (*b*) is guilty of an offence punishable on summary conviction.

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CITATION: *R. v. P.S.,* 2018 ONCJ 142
COURT FILE No.: St. Catharines – 2111-998-16-YS1465-00
DATE: 2018·03·05

ONTARIO COURT OF JUSTICE

sitting under the provisions of the *Youth Criminal Justice Act*, S.C. 2002, c. 1

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

P.S., a young person

Before Justice R.C.B. Watson
Submissions heard on December 5, 2017
Section 11(b) Ruling released on March 5, 2018

H. Limheng .... counsel for the Crown
E. Gok .... counsel for the applicant, P.S., a young person

R U L I N G

R.C.B. WATSON J.:

OVERVIEW

[1] P.S., a young person, seeks a finding that his right to trial within a reasonable time has been violated, contrary to section 11(b) of the *Charter.* He asks that the charges against him be stayed.

[2] P.S. stands charged that on the 15th of May in the year 2016 at the City of St. Catharines in the Central West Region, he did operate a motor vehicle while his ability to do so was impaired by a drug, contrary to section 253(1)(a) of the *Criminal Code of Canada.*

[3] When P.S.'s prosecution began, the application of section 11(b) was governed by "guidelines" identified in *R. v. Morin,* [1992] 1 S.C.R. 771. The "*Morin* regime"

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involved identifying the delay that the state is responsible for, and then determining whether the delay was sufficiently prejudicial to the interests protected by section 11(b) of the *Charter* to qualify as unreasonable, given the competing public interest in prosecuting the case on its merits.

R. v. Jordan

[4] On July 8, 2016, in *R. v. Jordan,* [2016] S.C.J. No. 27 [*Jordan*], the Supreme Court of Canada established a new way of testing unreasonable delay in the hope of simplifying the analysis, and encouraging counsel, courts, and legislators to do more to curb trial delay, which continued to be a serious problem under the *Morin* regime.

[5] *Jordan* created a "presumptive ceiling" in provincial courts of 18 months delay. If the delay in a case exceeds the presumptive ceiling, a breach of section 11(b) will be found unless the Crown can show that the delay was reasonable according to principles established in *Jordan*. If the delay is less than the "presumptive ceiling" the delay is presumed to be reasonable. A breach will be found in such a case only if defence counsel can show that the presumptively reasonable delay has in fact been unreasonable, again, using the principles established in *Jordan*.

[6] The prosecution has conceded that although this case was in the system prior to July 8, 2016, this is not a case where a transitional exception should apply; the prosecution agrees that this is a pure *Jordan* case. This concession is appreciated by the Court.

[7] The prosecution concedes that the total period of anticipated delay is approximately 19 months or 572 days. This is the period between May 15, 2016 and December 7, 2017.

[8] The prosecution asserts that of the total 572 days or 19 months, 461 days or 15.5 months is Crown delay and that 110 days or 3.5 months delay is attributable to the defence.

[9] The prosecution asserts that there are two discrete periods of delay which should be attributed to the defence for the purposes of the overall calculus in this matter. They are as follows:

1) September 27, 2016 to October 24, 2016, a period of 27 days; and,
2) July 12, 2017 to October 23, 2017, a period of 103 days. The prosecution acknowledges a period of legitimate preparation time contained within this period of 30 days, thus reducing the delay to 73 days[1].

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[1] The defence was not available for trial until October 23, 2017 and the Crown was not available between October 23, 2017 and December 7, 2017.

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Late Disclosure of the CFS Report and the DRE Video

[10] The applicant in this matter resists these assertions and focuses on late disclosure which prevented the defence from being able to receive instructions from his client and set an earlier date for trial. This position was borne out and supported by the Case Management Judge in this matter, Mr. Justice Wilkie.

[11] The applicant asserts that a request was made on October 24, 2016 for a Centre of Forensic Sciences Report (the "CFS Report") which resulted in eight adjournments until the CFS Report was acknowledged as received by the applicant on April 10, 2017.

[12] On March 9, 2017, the Crown acknowledged the responsibility for the delay in providing the defence with the requested CFS Report:

> MS. NICKEL: So, I did go, I did follow up. We were waiting for that report from the CFS, Your Honour, and it was in our computer system. It had been pushed over in February, but for some reason nobody had updated that Mr. Singh was actually the solicitor of record so the original disclosure went to the accused. We didn't know Mr. Singh was…
>
> THE COURT: Okay
>
> MS. NICKEL: …it's, clearly, something we need to look at because the matter did go through an item meeting and a JPT. Yeah, I just don't know – in any event, it's now been pushed through and Ms. Popp indicates that it is there for counsel to review. So, as I understand it from Mr. Singh, he [sic] just looking for a new date at this point in order to review that disclosure.
>
> THE COURT: So, you need time to review that.
>
> MR. SINGH: Well, my friend – I thank her for her candor – the reports have been available since….
>
> THE COURT: For a while.
>
> MR. SINGH: …July.
>
> THE COURT: Okay. That's a while.
>
> . . .
>
> MS. NICKEL: It's our delay, absolutely.

[13] The delayed disclosure problem does not end here however. On May 16, 2017, another key piece of disclosure was not provided, the Drug Recognition Examination video (the "DRE Video"). This lack of disclosure prevented the court from setting a trial date. Justice Wilkie expressed his concerns on the record:

> THE COURT: The matter of young Mr. [P.S.]. Mr. Singh is here for the accused. Ms. Pang for the Crown. It's an allegation of impaired by drug. The case is a year old and at this point we're still missing the drug recognition examination video. It has not yet been disclosed.
>
> The court is of the view that one cannot meaningfully set trial time without, without either counsel having been in a position to review that video.
>
> When I say, it's not been disclosed, what I mean to say is that, despite two requests from the police, the Crown has not received it. And the court's of that [sic] view that, in these circumstances, it's not appropriate to set a date but to get some explanation from the police, through the Crown, as to why it has not been disclosed and whether it even exists, I suppose.
>
> . . .
>
> If it's not disclosed then I'm sure that'll result in further discussions between the Crown and the defence as to the best way to proceed.

[14] The DRE Video was disclosed on June 8, 2017.

[15] Similar late disclosure issues were canvassed by the Ontario Court of Appeal in *R. v. D.A.*, 2018 ONCA 96, a decision written by Paciocco J.A., and released on February 1, 2018. Paciocco J.A. writing for the court stated the following:

> [7] First, at the February 26, 2015 judicial pretrial the Crown gave an extensive disclosure package to D.A. That disclosure package included a video statement given by D.A., electronic discs, and more than 120 pages of printed material, including multiple police notes. The pretrial judge recognized that the pretrial could not go ahead because of the substantial, late disclosure that had just been made. Defence counsel needed time to review the disclosure before proceeding. In the face of this last minute, material disclosure, the trial judge's conclusion that "the Crown had substantially filled the essential disclosure requests by February 25, 2015, to an extent which allowed the matter to proceed further, to judicial pre-trial and then setting a trial date" was unreasonable.
>
> . . .
>
> [13] The Crown suggested before us that its consent to adjourn the April 2, 2015 pretrial because of its own last minute disclosure is unimportant in assessing unreasonable delay unless, by its nature, the information disclosed is shown to have been essential to the case. I do not agree. The accused is entitled to review disclosure they have received to determine its importance, before moving a case forward. Where, as here, that disclosure is made so late that it cannot be reviewed before a scheduled appearance, the Crown cannot fairly assert that the accused should go ahead and set a date at that scheduled appearance.

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> [14] The final and most important reason why it was not fair to expect D.A. to set a trial date on April 2, 2015 is that essential disclosure was still outstanding on that date.

[16] Those comments are apposite in this case. Two key pieces of disclosure in this case, the CFS Report and the DRE Video, were not disclosed until approximately 11 months and 13 months after the first appearance, respectively.

ANALYSIS

The *Jordan* Framework summarized by the Ontario Court of Appeal in *R. v. Coulter,* 2016 ONCA 704.

[17] Writing for this Court, Mr. Justice David Paciocco (as he then was) in *R. v. J.M.*, 2017 ONCJ 4 [*J.M.*], outlined and adopted the three stage inquiry expressed in *R. v. Coulter*. I adopt and apply the framework utilized by Justice Paciocco at paras. 9-14 in *J.M.*:

> **9** The first stage is the initial step in calculating the delay for comparison to the presumptive ceiling. The judge begins by quantifying the "**total delay**, which is the period from the charge to the actual or anticipated end of the trial" and then "subtract[ing] **defence delay** from the total delay, which results in the **net delay**": *R. v. Coulter*, *supra* at paras. 34-36.
>
> **10** This approach is in keeping with the basic constitutional principle that the *Charter* protects against improper state action. If delay is "defence delay" it cannot ground a constitutional complaint.
>
> **11** The second stage involves calculating what the Court in *R. v. Coulter, supra* at para. 38 called **remaining delay**. As the *Jordan* majority explained, if delay occurs as a result of "exceptional circumstances" it is to be subtracted from the "net delay". For example, should Crown counsel become unexpectedly ill, that period is not defence delay but it makes no sense to treat such delays as contributing to constitutional violations.
>
> **12** The third stage of analysis involves determining whether the "remaining delay" that is ultimately identified is reasonable. As indicated, the principles to be applied depend upon whether the remaining delay exceeds the appropriate presumptive delay: *R. v. Coulter*, *supra* at paras. 37-59.
>
> **13** In this case, I cannot answer the third stage question of whether the delay exceeds the presumptive ceilings without first settling whether presumptive ceilings are indeed shorter when young persons are being prosecuted, as Mr. Ertel, counsel for J.M., contends.
>
> **14** I will therefore proceed by (1) calculating the total delay, net delay, and then the remaining delay; (2) resolving what presumptive ceiling should apply and then using it to identify whether there has been a presumptive breach, and (3) determining whether the remaining delay is reasonable according to the relevant principles.

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"total delay"

[18] The *Jordan* framework begins with an examination of the time elapsed "from the charge to the actual or anticipated end of the trial": *Jordan* at para. 46. The anticipated end of the trial was December 7, 2017. The prosecution concedes that the total period of anticipated delay is approximately 19 months or 572 days. This is the period between May 15, 2016 and December 7, 2017. The prosecution concedes that of the total delay 461 days or 15.5 months is Crown delay.

"defence delay"

[19] The prosecution asserts that 110 days or 3.5 months delay is attributable to the defence. The defence takes issue with this quantum.

[20] As stated above the prosecution urges this court to attribute the following two periods to the defence in calculating delay in this case.

1) September 27, 2016 to October 24, 2016, a period of 27 days.

[21] I find this period of 27 days is not defence delay. On September 27, 2016 Mr. Singh was appointed counsel for P.S. pursuant to a consent order under s. 25 of the *Youth Criminal Justice Act (*the "*YCJA").* The matter was adjourned to October 24, 2016 so that Mr. Singh could review the disclosure, then meet with and receive instructions from P.S. This period of adjournment early in a proceeding is a usual occurrence in the busy Ontario Court of Justice. As cited in *Jordan* at para. 65:

> **65** 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.

2) July 12, 2017 to October 23, 2017, a period of 103 days. The prosecution acknowledges a period of legitimate preparation time contained within this period of 30 days, thus reducing the delay to 73 days.

[22] I do not find that a delay of 73 days is attributable to the defence in this case for the following reasons. Tab B to the Respondent's Factum is the *Ontario Court of Justice Scheduling for Trial or Preliminary Hearing* form, commonly known as the "Pink Sheet". The Pink Sheet is silent on whether dates were canvassed prior to October 23,

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2017 for trial. The Pink Sheet simply states "Csl wants trial date Oct 23, 2017 or later." Was counsel for the applicant planning a protracted holiday? Did counsel for the applicant have other court commitments? The record is silent on this important period. I find it would be unfair to attribute this delay to the defence in the face of a silent record. A review of the transcript of July 12, 2017 is of no help with respect to this issue and is silent with respect to the availability of the prosecution or the defence. I cannot attribute any delay to the defence in this period.

[23] As cited in *J.M.* at paras. 50-61 and 66-67:

> **50** The *Jordan* majority explained what would count as defence delay in *R. v. Jordan*, *supra*, at paras 61-65. Justice Moldaver, for the majority, was clear that "[d]efence delay has two components." The first is delay waived by the defence. The second is "delay caused solely by the conduct of the defence."
>
> **51** Since there is no suggestion of defence waiver before me, the immediate question is whether there was any "delay caused solely by the conduct of the defence."
>
> **52** It is clear that when the *Jordan* majority was talking about "delay caused solely by the conduct of the defence" it meant delay caused *solely* by the conduct of the defence. In *R. v. Jordan* the primary cause of delay was the inadequate estimate for the preliminary inquiry. Since both the Crown and defence arrived at the estimate this was not considered to be defence delay. The defence and the Crown shared responsibility for the delay, preventing it from being attributed to the defence, even though the defence obviously participated in an underestimation of trial time.
>
> **53** Justice Moldaver provided further guidance. He divided "delay caused solely by the conduct of the defence" into two categories; (1) "deliberate and calculated defence tactics employed to delay the trial," including frivolous applications and requests, and (2) delay "directly" caused solely by the acts of the defence: *Jordan*, *supra* at paras 63-64.
>
> **54** He identified the paradigm example of delay directly caused solely by the acts of the defence as periods of time during which "the court and the Crown are ready to proceed but the defence is not": *Jordan*, *supra* at para 64.
>
> **55** As I read the decision, however, he imposed an important gloss on that language. He effectively distinguished between "pure defence delay," which is subtracted to identify "net delay," and "defence delay required to respond to the charges," which is not.
>
> **56** I say this because Justice Moldaver made it clear that defence delay requested for legitimate preparation, and delay caused by legitimate defence applications or motions, is not to be deducted. Specifically, he said:
>
> > "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 Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will not count

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> against the defence. We have already accounted for procedural requirements in setting the ceiling": *R. v. Jordan*, *supra* at para. 65.

> **57** Of similar assistance are Justice Moldaver's comments on adjournments that "are part of the legitimate procedural requirements of the case," particularly where there is no evidence that the Crown and court are otherwise ready to proceed: *R. v. Jordan*, *supra* at para 122.
>
> **58** Indeed, in *R. v. Williamson*, *supra*, the companion case to *R. v. Jordan*, *supra*, the Court held that the defence was responsible for delay caused when defence counsel declined a scheduling date because of a family commitment. Justice Moldaver commented, at para. 22, however:
>
> > "We agree with the Court of Appeal that this period ... of delay is caused solely by the defence because it is a time where the court was available and ready to proceed but the defence was not, *and the delay was not associated with legitimate defence preparation time*." (Emphasis added)
>
> **59** The implication of this comment is that, had the date been refused by defence counsel for required preparation time, it would not have been considered defence delay, even though the court was available to proceed.
>
> **60** Refraining from deducting "defence delay required to respond to the charges" from total delay makes sense, given basic constitutional law principles. As indicated, section 11(b) is meant to respond to state-caused delay; delay required to respond to charges laid by the Crown is state-caused delay, inherent in the decision to prosecute, even where it is requested by the defence.
>
> **61** It is therefore evident that determinations of defence delay cannot be made simplistically. These guidelines naturally require the exercise of judgment to apply. Appropriately, the *Jordan* Court recognized that determinations of net delay are not an exact science. They are left to the judgment of trial judges who "are uniquely positioned to gauge the legitimacy of defence actions": *Jordan*, *supra* at para 65.
>
> . . .
>
> **66** Similarly, in *R. v. Ashraf*, *supra*, Justice Band accepted that *R. v. Jordan*, *supra*, implicitly overruled *R. v. Godin*, but he held that defence unavailability should not count as defence delay, at least in transitional cases. This is because prior to *Jordan*, *supra*, defence counsel relied on *R. v. Godin* in setting dates, including reliance on Justice Cromwell's comments at para. 23 that defence counsel need not be in "a state of perpetual availability" when scheduling appearances, and that what is required is "reasonable availability and cooperation." He therefore declined to count as defence delay a "20 day" pause that occurred when defence counsel declined a date because of unavailability. [Footnotes omitted.]

[24] These are important considerations in this case as I cannot find that this period of delay is "delay caused solely by the conduct of the defence." From the record before me and the Pink Sheet there is no way of knowing whether the Crown was available to

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conduct the trial before October 23, 2017. To therefore impute this to the defence as delay is in my opinion unfair. Had the record or the Pink Sheet reflected clear availability of the Crown and the police before October 23, 2017, this period of delay may have been attributable to the defence but this is not the record before me.

[25] I do not feel so constrained as my brother Justice Paciocco did in *J.M.* as the record does not reflect that the Crown was ready to proceed between July 12 and October 23, 2017.[2] I do not find the two periods of delay which the prosecution urges me are defence delay. They are not.

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"net delay"

[26] As a result of the above analysis and the concession by the prosecution that the total period of anticipated delay is approximately 19 months or 572 days. This is the period between the May 15, 2016 and December 7, 2017, coupled with the fact that I have found no defence delay in this matter, the "net delay" is 19 months.

"remaining delay"

[27] The trial could not proceed on the first two days scheduled, December 5 and 6, 2017, as defence counsel was sick and unable to conduct the trial. This period is not defence delay nor is it delay which contributes to a constitutional violation. As a result of the unforeseen illness of defence counsel the trial had to be rescheduled to April 12 and 13, 2018.

"*below the presumptive ceiling*"

[28] If I am wrong in this analysis and an appellate court intervenes and finds the "net delay" is below 18 months I engage in the following analysis. If the total delay falls below the ceiling in *Jordan* the onus shifts to the defence to demonstrate that even though the total delay falls below the ceiling, the case is nevertheless a clear one of unreasonable delay. The defence must satisfy both of the following criteria:

1) That the defence took meaningful steps demonstrating a sustained effort to expedite the proceedings; and,
2) That the case took "markedly longer" than it reasonably should have.

[29] The defence in this case could not set trial dates without two critical pieces of disclosure, the CFS Report and the DRE Video. The applicant made a request on October 24, 2016 for a CFS Report, which resulted in eight adjournments until the CFS Report was acknowledged as received by the applicant on April 10, 2017. The delay was

[2] At page 116 of the transcript of December 5, 2017, I indicated to Mr. Limheng the following: THE COURT: I tend to agree with you, Mr. Limheng, on that point. That "point" was the attribution of the delay between July 12, 2017 up to October 23, 2017 as partial delay which should fall to the feet of the defence. At first blush this argument appeared persuasive, but on a closer analysis of the Pink Sheet and the record, there is no indication that the Crown and the police were available during this period and accordingly, I have revisited my position on this point.

exacerbated by the late disclosure of the DRE Video, which was not provided until June 8, 2017. The defence took meaningful steps demonstrating a sustained effort to expedite the proceedings; and, the case took "markedly longer" than it reasonably should have.[3] Was the defence effort a text book example of protecting the record in this case? No, it was not, but that is not the test. Perfection in these matters is not required, nor should it be. To hold counsel for the Crown or the defence up to a standard of perfection is unfair and inappropriate.

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Lower presumptive ceilings for matters under the YCJA.

[30] Mr. Justice Paciocco thoroughly analyzed the *Jordan* framework in *J.M.* through the lens and propositions cited in the *YCJA*.

[31] Commencing at para. 113 Mr. Justice Paciocco stated as follows:

> **113** *R. v. Jordan*, *supra* did not hold or even intimate that the presumptive ceilings for youth cases are lower. This does not, as the Crown contends, make *Jordan* an authority against that proposition. *Jordan* was an adult case and there was no reason why the Supreme Court of Canada would have tackled this question. The law on this issue is completely open and I am obliged to address this question since the matter is before me.
>
> **114** The key principle - that tolerable delay is less for youthful offenders than adult offenders - is well supported in the pre-*Jordan* Ontario Court of Appeal case law including *R. v. M.(G.C.)* [1991] O.J. No. 885 (Ont. C.A.); *R. v. W.(C.)* [1992] O.J. No. 3438 (Ont. C.A.); *R. v. R.(T.)*, [2005] O.J. No. 2150 (Ont. C.A.), and *R. v. B.(L.)*, [2014] O.J. No. 5128 (Ont. C.A.). Most significantly, Justice Osborne said in *R. v. M.(G.C.)* [1991] O.J. No. 885 at para 23 that:
>
>> "As a general proposition, youth court proceedings should proceed to a conclusion more quickly than those in the adult criminal justice system. Delay, which may be reasonable in the adult criminal justice system, may not be reasonable in the youth court."
>
> **115** Sound reasons offered in support of this general proposition include recognition that:
>
>> (1) The "ability of a young person to appreciate the connection between behavior and its consequences is less developed than in adults": *R. v. M. (G.C.)*, *supra* at para 23;
>>
>> (2) "For young persons the effect of time may be distorted.": *R. v. M.(G.C.)*, *supra* at para 23; and
>>
>> (3) "If treatment is required and is to be made part of the ... disposition process, it is best begun with as little delay as possible": *R. v. M.(G.C.)*, *supra* at para. 23

[3] See *Jordan*, at paras. 84-91.

116 These reasons, initially recognized as implicit under the *Young Offenders Act*, are now codified in the *Youth Criminal Justice Act*, section 3(1)(b). This section provides, in relevant part, that:

> 3(1)(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
>
> (iv) timely intervention that reinforces the link between the offending behavior and its consequences, and
>
> (v) the promptness and speed with which young persons are responsible for enforcing this Act must act, given young persons' perception of time.

117 In spite of the accelerated and increased impact of delay on young persons, the same legal test was used under the *Askov/Morin* regime for both young persons and adults. As Justice Sopinka commented in the endorsement in *R. v. D.(S.)* [1992] 2 S.C.R. 161 at para 2:

> "While the societal interest recognized in *R. v. Askov*, [1990] 2 S.C.R. 1199, affirmed in *R. v. Morin*, requires that account be taken of the fact that charges against young offenders be proceeded with promptly, it is merely one of the factors to be balanced with others in the manner set out in *R. v. Morin*."

118 Similarly, in *R. v. M.(G.C.)*, *supra* at para 23, Justice Osborne commented, "I don't view young persons as being entitled to a special constitutional guarantee to trial within a reasonable time, which differs in substance from that available to adults."

119 In *R. v. M.(G.C.)*, *supra*, Justice Osborne did, however, introduce an "administrative guideline" to promote the need to conduct youth court matters with particular dispatch.

120 Using federal data and circumstances then existing in Ontario, Justice Osborne said at para 45, "in general youth court cases should be brought to trial within five to six months, after the neutral period required to retain and instruct counsel, obtain disclosure, etc."

121 Although the *R. v. M.(G.C.)* Court developed this "five to six month plus intake period" guideline for youth before guidelines for adults were set in *R. v. Morin* [1992] 1 S.C.R. 771, in *R. v. T.(R.)*, *supra* at para 34, Justice McPherson recognized post-*Morin* that, "[t[he leading cases, including *M.(G.C.)* are still good law and should be applied."

. . .

127 Since case specific prejudice evaluation can no longer be counted on to protect the general proposition that youth court proceedings should proceed more quickly than those in the adult criminal justice system, only two possible outcomes remain.

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128 The first solution would simply be to abandon the principle that youth cases should generally proceed more swiftly than adult cases, and to apply the *Jordan* regime indiscriminately to adult and youth cases. In my view, this would be wrong. If section 11(b) is to achieve its purpose, constitutional standards for delay have to respond to the prejudice at stake, and the pre-*Jordan* case law has recognized, with good reason, that children generally experience accelerated and heightened prejudicial impact from delay.

129 The second possibility -- the one I believe to be right in law -- is to develop a lower presumptive ceiling for youth cases. Given the analytical components of the *Jordan* framework, lowering the presumptive ceiling for youth cases is the only response that can integrate the principle that youth cases should generally proceed more swiftly than adult cases into the current legal test.

130 Recognizing lower presumptive ceilings for youth is also in keeping with *Jordan* principles, and the reasoning that supports those principles.

131 First, the Jordan Court explained that prejudice "informs the setting of the presumptive ceiling": *R. v. Jordan*, *supra* at para 54. It follows that the accelerated and heightened prejudice generally experienced in youth cases should inform the presumptive ceilings set for young persons.

132 Then there is the recognition by the *Jordan* majority that "a presumptive ceiling is *required* in order to give meaningful direction to the state on its constitutional obligations and to those who play an important role in ensuring that the trial concludes within a reasonable time": *R. v. Jordan*, *supra* at para. 50 (emphasis added). If presumptive ceilings are required to give meaningful direction to the state on its constitutional obligations, it follows that lower presumptive ceilings are required in order to give meaningful direction to the state on its constitutional obligation to promote lower periods of delay when young persons are being prosecuted.

133 It is important to appreciate that recognition of different presumptive ceilings for adult and youth cases does not violate the admonition in the pre-*Jordan* case law that "young persons [are not] entitled to a special constitutional guarantee to trial within a reasonable time, which differs in substance from that available to adults": *R. v. M.(G.C.)*, *supra* at para 23. This comment was never understood to mean that periods of delay for young persons and adults have to be the same. The recognition of shorter administrative guidelines in the *R. v. M.(G.C.)* line of cases make this clear, as does the entire enterprise of trying to achieve shorter periods of delay by recognizing enhanced prejudice for young persons.

134 It is helpful, in my mind, to think of it this way. *Charter* jurisprudence has long recognized that equality of process does not always achieve equality of outcome. This holds true when comparing the effects of delay in youth and adult cases. If the section 11(b) analysis tolerates the same length of delay for youth and adults, the result will be that young persons will receive less protection than adults, as young persons tend to experience the prejudice caused by delay more quickly and more intensely than adults do. Different presumptive ceilings within the same legal test established in *R. v. Jordan*, *supra* are

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> therefore required to ensure that both groups experience the same constitutional guarantee.
>
> **135** In my view, legal principles coalesce to confirm that lower presumptive ceilings have to be developed in youth cases, under the *Jordan* framework.

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[32] In this case, *P.S.* is charged under the *YCJA* and according to Mr. Justice Paciocco's very helpful analysis in *J.M.*, I find that matters involving young persons should have a lower presumptive ceiling than adult offenders.[4]

[33] In light of my findings above that there is no defence delay in this matter and that the defence took meaningful steps demonstrating a sustained effort to expedite the proceedings; and, that the case took "markedly longer" than it reasonably should have because of the delayed disclosure of the CFS Report and the DRE Video, I do not feel constrained to further analyze what the "presumptive ceiling" of delay in matters under the *YCJA* should be in general or in this case in particular.

CONCLUSION

[34] Accordingly, the charge that P.S. did on the 15th of May in the year 2016 at the City of St. Catharines in the Central West Region, operate a motor vehicle while his ability to do so was impaired by a drug, contrary to section 253(1)(a) of the *Criminal Code of Canada* has not been tried within a reasonable time, contrary to section 11(b) of the *Charter*. A stay is therefore entered.

[35] There is another information with respect to an alleged theft of a bicycle which has been moving along concurrently to the above charge. It is up to be spoken to on April 12, 2018. I leave it to the discretion of the Crown as to what they wish to do with this charge.

Dated this 5th day of March, 2018
Justice R. Cameron B. Watson

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[4] For an exhaustive analysis on prejudice in matters under the *YCJA* and the lowering of the presumptive ceiling in matters under the *YCJA* see paras. 122-126 and paras. 136-145 of *R. v. J.M., supra.*