ONTARIO COURT OF JUSTICE

CITATION: *R. v. Live Nation Canada Inc*., 2016 ONCJ 735
DATE: December 5, 2016
COURT FILE No.: Toronto

B E T W E E N :

HER MAJESTY THE QUEEN
(Prosecutor)

— AND —

LIVE NATION CANADA INC., LIVE NATION ONTARIO CONCERTS GP INC., OPTEX STAGING & SERVICES INC., and DOMENIC CUGLIARI
(Defendants)

Before Justice Nakatsuru
Heard on October 14, 2016
Reasons for Judgment released on December 5, 2016

D. McCaskill, S. Succi.....counsel for the Prosecution
J. Siegel, A. Grossman, J. Solomon.....counsel for Live Nation
S. Thompson.....counsel for Cugliari

NAKATSURU J.:

A. INTRODUCTION

[1] The applicants, Live Nation and Domenic Cugliari, are charged with a number of offences under the *Occupational Health and Safety Act* R.S.O. 1990 c. O.1. These defendants allege that their s. 11(b) *Charter* rights have been violated. Optex Staging and Services did not join in these applications. These are the written reasons elaborating my decision to dismiss the applications.

[2] There is no question this case has taken a long time. That is obvious to anyone. The stage built for the Radio Head concert at Downsview Park, Toronto,

collapsed on June 16, 2012. The defendants were charged on June 6, 2013. The trial is not anticipated to end until January 27, 2017. Section 11(b) of the *Charter* guarantees every one the right to be tried within a reasonable period of time. The right is a fundamental one. The integrity of our judicial system depends upon it. Since the enactment of the *Charter* in 1982, the criminal justice system has struggled with ensuring that this right is properly interpreted and respected. Were it so simple that a limitation period demarcated the boundaries of this right, much judicial ink would have been saved over the years. However, such simplicity would not necessarily mean that justice is served on the facts of a particular case.

[3] The recent case of *R. v. Jordan*, [2016] S.C.J. No. 27 is our highest court's latest attempt to provide greater clarity and urgency to this right. The Supreme Court of Canada streamlined the analysis of any alleged breach, provided more certainty in determining when a delay becomes constitutionally unacceptable, and encouraged a change in what is described as a culture of complacency in the criminal courts.

[4] The s. 11(b) analysis has changed. The framework that needs to be applied is the following:

- Calculate the **total delay**, which is the period from the charge to the actual or anticipated end of trial.
- Subtract **defence delay** from the total delay, which results in the "**Net Delay**".
- Compare the Net Delay to the presumptive ceiling.
- If the Net Delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of **exceptional circumstances**. If it cannot rebut the presumption, a stay will follow. In general, exceptional circumstances fall under two categories: **discrete events** and **particularly complex cases**.
- Subtract delay caused by discrete events from the Net Delay (leaving the "**Remaining Delay**") for the purpose of determining whether the presumptive ceiling has been reached.

- If the Remaining Delay exceeds the presumptive ceiling, the court must consider whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable.
- If the Remaining Delay falls below the presumptive ceiling, the onus is on the defence to show that the delay is unreasonable.
- The new framework, including the presumptive ceiling, applies to cases already in the system when *Jordan* was released (the "**Transitional Cases**").

B. THE APPLICATION OF *JORDAN* TO CORPORATIONS

[5] Before undertaking this s. 11(b) analysis, I must address a preliminary issue raised by the Crown, Mr. McCaskill. The Crown argues that the new *Jordan* analysis does not apply to corporations charged with an offence. He submits that *R. v. CIP Inc.,* [1992] 1 S.C.R. 843 remains good law and has not been overturned by *Jordan*. According to this argument, the majority in *Jordan* was speaking only about individuals and not corporate entities in formulating the new framework. Nowhere in that decision, it is submitted, was *CIP* ever mentioned let alone expressly overruled. The Crown contends that the Supreme Court of Canada does not overrule its previous judgments unless it expressly so states. In addition, in principle, it is submitted there are good reasons for treating corporate defendants charged with a public welfare offence in a regulatory context differently from individuals. The Crown argues that the contextual analysis given to the interpretation of constitutional rights supports his position: see *R. v. Wholesale Travel Group Inc.,* [1991] 3 S.C.R. 154.

[6] I do not accept this submission.

[7] First of all, the previous s. 11(b) framework articulated in *R. v. Morin*, [1992] 1 S.C.R. 771 applies to corporate defendants. This was made clear in *CIP.* Similar arguments raised by Mr. McCaskill were rejected by Stevenson J. in *CIP.* Like the case at bar, *CIP* involved a delay in a prosecution under the *Occupational Health and Safety Act*. Stevenson J. expressly rejected the suggestion that the allowable

time be greater for regulatory offences. Further, the court emphasized that one of the primary purposes underlying s. 11(b) was to protect an accused's right to a fair trial. Stevenson J. cited with approval the following passage from MacDonnell J. in *R. v. 741290 Ontario Inc.* (1991), 2 O.R. (3d) 336 (Prov. Div.) which explained how this purpose applies equally to corporations (at para. 33):

> 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).

[8] As well, Stevenson J. held that the societal interest in seeing the justice system work fairly, efficiently, and with reasonable dispatch applied to corporate accused as much as it did to individuals.

[9] There was nonetheless a clear and significant difference in the application of the *Morin* test when it came to corporate defendants. When it came to the factor of prejudice, the only relevant prejudice to be considered was prejudice to the corporate defendant's fair trial interests. A corporation had no liberty or security of the person interest to be protected. Thus, prejudice would not be presumed for a corporation in a s. 11(b) analysis. Rather, the corporation would have to prove that its fair trial interests had been "irremediably prejudiced".

[10] Another reason I reject the Crown position is that although *CIP* was not referred to in *Jordan* or its companion case *R. v. Williamson*, 2016 SCC 28, there was an express overruling of *R. v. Askov*, [1990] 2 S.C.R. 1199, *Morin*, and their progeny except to the extent they were applicable to cases in the transitional period. Given that *CIP* followed the framework set out in *Morin*, the clear implication is that *CIP* has also followed into the precedential dustbin of outdated s. 11(b) jurisprudence.

[11] Finally, perhaps most importantly, a significant theoretical underpinning of the *Morin* framework has been removed by *Jordan*. This is the consideration of prejudice. The majority in *Jordan* was highly critical of the prejudice component of the *Morin* test. They described prejudice as "confusing, hard to prove and highly subjective." Under the new test, prejudice in all its forms has been taken into account in setting the presumptive ceiling. In other words, once the ceiling is breached, prejudice to any *Charter*-protected liberty, security of the person, and fair trial interests is presumed. For the corporate accused which does not suffer from liberty or security of the person prejudice due to delay, this aspect of the majority's decision is pivotal. *Jordan* holds that the accused's fair trial interests are presumed to be prejudiced once the ceiling is breached. A corporation also enjoys the same protection of its fair trial interests as a person. While the old analysis required the applicant to show "irremediable" prejudice, a prejudice that cannot be remedied by some other means or order, the *Jordan* test does not. To underscore that point, the majority states: "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."(at para. 54).

[12] These comments are well-considered. They are in keeping with the majority's over-all goal to provide more certainty and simplicity to trial judges. They are in keeping with the desire to make pro-active changes to the culture of complacency existing in the courts. While the rejection of prejudice as an analytical tool on a case-by-case basis is open to criticism, it is nevertheless consistent with the objectives of the majority. For me, if these goals are to be taken seriously and achieved in practice, it would make no sense to exempt a case such as this from the new framework. Injecting prejudice back into the analysis for corporate defendants would impair these objectives. Thus, I find that those goals and therefore the *Jordan* framework apply equally to the prosecutions of corporations. I find that they apply equally to regulatory offences like those under the *Occupational Health and Safety Act*.

[13] From a principled viewpoint, it is my conclusion that to apply the new *Jordan* framework equally to corporations and individuals is sound. In *Jordan* there is a renewed emphasis on the societal interest in trials that are conducted efficiently and without undue delay. As already alluded to in *CIP* those concerns are valid for corporate trials. I can fully appreciate that for regulatory prosecutions involving corporate accused, this is a significant jurisprudential change that will likely bring more corporate challenges under s. 11(b). While I cannot say with any certainty, the requirement for a corporate applicant to prove "irremediable prejudice" under the old test likely has resulted in a greater tolerance for delays in the regulatory context. If such a situation exists, under the new regime, it is no longer acceptable. Given that it is not only an accused's interest that is being protected by s. 11(b) but also the community's, the same presumptive ceilings must be respected for any accused. Having said that, for cases still in the system when the *Jordon* decision was released, this difference in approach to corporate accused under the *CIP* case will have to be factored in when it comes to the consideration of the transitional exceptional circumstance.

C. CALCUATION OF THE NET DELAY

[14] The first step in the *Jordan* test is the calculation of net delay. Both applicants stand in the same position here. Neither have waived any s. 11(b) delay. With respect to delay solely caused by the defence, very little if any material delay can be attributed to this. Thus from the swearing of the information to the anticipated finish of the trial, the net delay is a period of about 44 months. This exceeds the 18 month presumptive ceiling for a trial in the Ontario Court of Justice.

D. EXCEPTIONAL CIRCUMSTANCE: DISCRETE EVENTS

[15] The Crown must prove there are exceptional circumstances to justify the delay. Exceptional circumstances lie outside the Crown's control in the sense they are reasonably unforeseen or reasonably unavoidable and the Crown cannot reasonably remedy the delays emanating from these circumstances once they arise.

[16] With respect to the discrete events exception, I am of the view that there are such exceptional circumstances in this case. However, even taking into account any delays caused by discrete events and subtracting this from the net delay, the remaining delay in this case remains above the 18 month presumptive ceiling. This is inevitable since even the period of delay from the swearing of the information (June 6, 2013), to the original start date for the trial, (July 13, 2015), a period of over 2 years, is beyond the presumptive ceiling. Given this, although I will get into more detail about the history of the court proceedings when it comes to the consideration of the transitional exceptional circumstance, it is not necessary to do so here.

[17] Furthermore, in my opinion, in keeping with the spirit of *Jordan*, I should focus on the larger picture without getting mired into the minutiae of trial transcripts or the conduct each party. In other words, I will not lose sight of the forest for the trees.

[18] When I look at the forest, there are certain events that are significant when it comes to how the delay has occurred.

- Three weeks of trial time originally scheduled commencing July 13, 2015, and ongoing into that month were vacated and lost. As a result, additional time had to be sought beyond the time originally allotted for this trial.

- The amount of time originally estimated for the completion of this trial was 6 weeks. Subsequently, 3 weeks was raised as a possibility. This was again revised as the trial proceeded. The trial has gone on significantly longer than the estimates. It will have taken over 9 weeks of trial time to its anticipated finish.

[19] At the set date appearance on May 30, 2014, this trial was originally scheduled to last 6 weeks. The first three weeks commenced July 13, 2015. The second block of time commenced on November 9, 2015. It was originally scheduled in this fashion as it was thought the Crown's case would take three weeks. Then a break was built in. The defence was planning to go the second block of three

weeks. Had the trial gone as expected, the trial was anticipated to be completed by November 27, 2015.

[20] Certain events transpired whereby the first three weeks in July were vacated and the trial commenced on the second block of time in November. We thus lost three weeks of scheduled court time. This caused further delay because continuation dates had to be scheduled to complete this trial. This occurred for a number of reasons. The first complicating factor was the issue of whether Optex would be represented by counsel or an agent, or would even formally appear at the trial. Optex had discharged their counsel on January 8, 2015. As the July trial dates approached, despite giving assurances Optex would retain counsel, it never did. Crown counsel responsibly brought this to my attention to determine if the July dates remained viable. On June 8, 2015, I started a series of case management meetings to ensure that the trial did not get sidetracked by this issue. Dale Martin, the president of Optex, was summoned to court on June 17, 2015, to explain Optex's situation. Mr. Martin advised that he would be retaining a lawyer. Mr. Martin re-attended on July 13 and September 10 for further case management appearances. He consistently advised that the corporation would retain a lawyer. He ultimately did not. Mr. Martin has represented Optex as an agent at this trial.

[21] On the June 8th and 17th case management appearances, not only was the issue of Optex's readiness for trial in July discussed, a disclosure issue was also raised. It is not necessary to get into the details of this issue at this point. I will further analyze this issue when I deal with the transitional exception. For now, all I need say is that on June 17th, because of relatively recent new disclosure by the Crown, Live Nation moved to adjourn the July dates. The Crown did not oppose the defence motion. Counsel for Mr. Cugliari advised me that the request was inevitable. As a result, I reluctantly vacated the July dates and adjourned the start of the trial to November 9th. I scheduled interim dates to further case manage the trial.

[22] The second discrete event that has caused significant delay in this case is the under-estimation of court time required. Again, given that this exceptional circumstance will not bring the delay under the presumptive ceiling, I do not intend to delve deeply into this history here. However, I do need to respond to an argument made by the applicants. It is the applicants' position that the responsibility for this delay should lay solely at the feet of the Crown. They argue that this does not ever constitute an exceptional circumstance since the Crown is responsible for the estimate of trial time and bears the burden of ensuring the estimates are accurate.

[23] In my opinion, this position is untenable. Of course, it is well-established that the accused has no obligation to bring themselves before the court. Nevertheless, when it comes to the estimation of trial time, this may fall within what *Jordan* has considered to be a discrete event. In *Jordan* the majority recognized that discrete and exceptional events during a trial could arise in this fashion and that they should not be considered rare (at paras. 73 and 74):

> 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*. [Emphasis added]
>
> 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.

[24] In my view, the defence cannot divest itself of any responsibility for an inaccurate estimate of trial time by simply arguing that much of the delay took place during the presentation of the Crown's case. I do not suggest that the defence has acted inappropriately. The defence contested various facets of the Crown evidence. It was entitled to mount a vigorous defence. It has so far. Nonetheless, in the course of making full answer and defence, a significant amount of time was taken up by the defence especially in cross-examination. This defence conduct is beyond the control of the Crown. While any Crown estimate should take into account the potential length of cross-examination, the Crown cannot be expected to be completely prescient without some input and cooperation of the defence. Even the defence through no fault of their own may not be able to accurately estimate their cross-examination. Much depends upon the answers and the attitude of the witnesses. Sometimes cross-examination may open up unanticipated avenues that the defence may wish to explore. This may cause a delay that even the defence cannot reasonably foresee. While inevitably there will be always be a degree of inaccuracy when it comes to trial estimates, in this case, it was so significant that I do not believe that the Crown could reasonably have foreseen the amount of delay caused by it.

[25] In sum with respect to the discrete event exceptional circumstance, these two factors contributed to the delay in this case. Of course, the Crown must take steps to avoid the delay caused by the discrete events. Here this was challenging to do. No additional time was set up until the trial commenced in November. In part, it was necessary to determine if Optex was going to retain counsel or not. The retention of new counsel would require input from new counsel when it came to the estimate of trial time and the scheduling of further dates. New counsel's calendar would have to be accommodated. The issue was not pressed at the time because there were fluctuating estimates of how much trial time this case would actually need. The Crown posed the possibility that the trial could perhaps be completed within the three weeks in November. There was not great opposition by the defence

to this suggestion at the time. It later became apparent that this was unrealistic. As the trial commenced and continued, the scheduling was consistently raised and addressed. I find that the Crown did act reasonably in trying to avoid the delay caused by the failure to properly estimate the length of this trial. However, by this time, the presumptive ceiling had already been surpassed and best efforts to accommodate early continuations were hampered by the realities of scheduling.

[26] I have not deducted this delay from the net delay since as indicated, this would still not bring us below the ceiling. If I were called upon to do so, I am of the view the best method to deduct the period of delay caused by these discrete events would be to calculate where we would be at in the trial if it were not for the events. For instance, if we had made use of the three weeks in July that were vacated, where would we stand in the trial proceedings? If approached in this fashion, even if the July dates were used, the trial still would not have been finished by now given the actual amount of trial time this case has taken.

[27] That said, it is not necessary to conduct these calculations since it would not lower the delay below the presumptive ceiling and I find that the Crown has proven another exceptional circumstance; that is this case is a particularly complex case.

E. EXCEPTIONAL CIRCUMSTANCE: PARTICULARLY COMPLEX CASES

[28] A second category of exceptional circumstances are cases where because of the nature of the evidence or the issues, an inordinate amount of trial or preparation time is required such that the ensuing delay is justified. This is how *Jordan* describes such cases (at para. 77):

> 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.

[29] In assessing this exceptional circumstance, I have my experience and expertise as a trial judge in the Ontario Court of Justice. In addition, given the timing of this section 11(b) application, I have had the advantage of hearing the entirety of the Crown's case in making this determination. A number of factors support my conclusion.

[30] First of all, I appreciate that Mr. Cugliari is facing only one count on the information. This is an allegation he committed the offence of endangering a worker as a result of his advice that was made negligently or incompetently at the Downsview workplace. By comparison, Live Nation is facing several different charges. However, while this may simplify the legal issues that Mr. Cugliari faces, from an evidentiary standpoint it does not. Almost the entirety of the factual evidence is intertwined with Mr. Cugliari's role as the engineer with respect to the construction of the Radio Head stage. His is not a peripheral or discrete role when it comes to assessing the evidentiary complexity of the case. This is well reflected by the leading role played by his counsel, Mr. Thompson, when it came to the expert evidence called by the Crown.

[31] Secondly, when I assess this case in a realistic fashion having regard to the evidence and the manner in which this case has proceeded to this point, I am driven to the conclusion that the Crown has proven this exceptional circumstance. When assessed against the hallmarks suggested in *Jordan*, this case meets the test. This case is particularly complex from an evidentiary standpoint. While the incident involved only one discrete event in time, the issue of how the stage collapsed and who was responsible is highly complex. This concert was a large undertaking involving a number of parties. The understanding of the stage design, its

construction, and the investigation of the engineering aspects of the collapse is highly technical and very much in dispute. There was voluminous disclosure, a significant number of important witnesses, and a large body of exhibits. I need not say a lot about the experts. The complexity of that evidence is most obvious. Their testimony spanned a number of days. The expert reports are lengthy and detailed. It is highly technical engineering evidence. It is not easy to understand without a background in engineering. The documentary exhibits filed and referred to in the experts' testimony are hundreds of pages. All of this highlights the complex nature of this trial. On this issue, I am well aware that experts often testify in criminal trials. The import of the comment in *Jordan* that a typical murder trial (which almost invariably involves some forensic expert evidence) will not usually be sufficiently complex to comprise an exceptional circumstance, is not lost on me. I have also reviewed the comments made by Watt J.A. in *R. v. Manasseri,* [2016] O.J. No. 5004 (C.A.) at paras. 340 to 360 where he held that the forensic expert evidence regarding the cause of death did not render the homicide trial to be so complex as to meet this exceptional circumstance. See also *R. v. Coulter,* [2016] O.J. No. 5005 (C.A.). However, I find that the expert evidence called at this trial distinguishes itself from *Manasseri*. Being familiar with the type of expert evidence called at such murder trials, I find that the expert evidence at this trial is of a different magnitude when it comes to complexity.

[32] I am not surprised that it took nearly a year before the parties were prepared to set dates for trial. Further this case will have taken about 9 weeks of trial time to its anticipated finish. For a trial in the Ontario Court of Justice, this is a significant amount of dedicated trial time. In my opinion, the complexity of the evidence is the reason for the amount of time and resources this trial has required. Indeed, counsel themselves have commented on the record about the complex nature of the evidence and issues.

[33] Thirdly, for the applicant, Live Nation, there is the issue of whether it is the "constructor" within the meaning of the legislation. This may not be a novel legal

issue but it is very much in dispute. Live Nation brought a motion for a directed verdict at the end of the Crown's case, arguing at length that there was no evidence that Live Nation was the "constructor" at the Downsview workplace. After lengthy submissions, this motion was dismissed by me. This is a legal issue that has contributed to the complexity of the trial.

[34] Finally, three defendants are being prosecuted. Initially, a potential severance was raised by Mr. Cugliari. He had made it a part of a motion for disclosure and particulars. On October 9, 2015, Mr. Cugliari abandoned the severance motion because he had received the disclosure he had requested. I note that Live Nation opposed this motion for severance. The Crown too was in opposition for a number of reasons not the least being a concern that separate trials would permit the defendants to point accusatory fingers at each other which raised a potential prospect of inconsistent verdicts in separate trials. In my view, severance was not appropriate. The evidence in almost its entirety would have had to have been called at separate trials including not only the expert evidence but also overseas witnesses who had to be flown in. It was in the interests of justice to proceed against these multiple defendants. This added to the complexity of the proceedings. I should also note that Optex has been essentially unrepresented at this trial. While Mr. Martin, the president of the company, was permitted to act as the agent representing Optex, he has no legal training or experience. As a result, it was necessary for me to properly explain the trial process and to ensure steps were taken so that Optex received a fair trial. While Mr. Martin has conducted himself appropriately and in an efficient manner, the fact Optex was represented by a non-lawyer did not lessen the complexity of this trial.

[35] I fully appreciate the sentiments expressed in *R. v. Vassel*, (2006) 337 C.C.C. (3d) 1 (S.C.C.) that where the Crown chooses to prosecute joint defendants it must be vigilant not to compromise the s. 11(b) rights of an individual defendant. Here, this was recognized by all counsel and myself to be a challenging issue. There is a competing obligation to ensure that Optex is fairly treated. Optex was given a

reasonable opportunity to retain counsel. As the record reflects, the sole reason for Optex's inability to retain counsel was not due to any dilatory behaviour, misconduct, or deliberate tactic to delay the trial but its inability to financially retain one.

[36] I have also considered whether the Crown having initiated this type of prosecution, developed and followed a concrete plan to minimize the delay occasioned by the complexity. I find that the Crown made reasonable efforts to manage this complex case. The Crown was cognizant of any delay and attempted, while respecting the defendants' right to make full answer and defence, to get this trial conducted efficiently and effectively. Case management meetings were scheduled before the trial started. The witnesses were called in a logical and timely manner. There was no undue delay caused by a lack of a litigation plan or strategy. Defence motions or objections were dealt with by the Crown without complaint or requests for adjournments. The only significant matter that the Crown did not get right was the estimate of the trial time required. As I have already explained, this was not entirely within the Crown's control.

[37] Before concluding, I would like to address some specific points raised by the applicants. On behalf of Mr. Cugliari, Mr. Thompson places significant reliance on the case of *R. v. Vollick*, 2010 ONSC 6746. This was an appeal decision which upheld a stay of proceedings for a s. 11(b) violation. Mr. Vollick was an engineer charged with the same offence as Mr. Cugliari. Mr. Vollick had certified that a piece of laundry equipment he had inspected was properly guarded. A worker died as a result of injuries sustained while working with this equipment. While this case pre-dated the *Jordan* decision, Mr. Thompson relies upon it not only for its outcome, but for the manner in which the court dealt with the Crown submission that portions of the delay was justified based upon the complexity of the engineering evidence. Justice Murray dismissed the Crown appeal and found that the trial judge made no overriding error in balancing the factors set out in *Morin.* Specifically, when it came to complexity and delay, although it was conceded there was some complexity to the prosecution, Justice Murray found that one could not assume from the 18 volumes

of Crown disclosure that the case was particularly complex. Justice Murray held even having regard to any existing complexity of the prosecution, only a five month period of inherent delay was tolerable before the parties should have been ready to set a date for trial. Eighteen months of operative Crown and institutional delay with a finding of significant actual prejudice resulted in the charge being stayed.

[38] While I appreciate Mr. Thompson's argument that there are substantial similarities between *Vollick* and the case at bar, I find the case distinguishable. From an analytical perspective, it remains significant that *Vollick* was decided before *Jordan*. Justice Murray was responding to a Crown argument that complexity justified a year's worth of delay from the laying of the charge to the setting of the trial dates. In other words, it was submitted that the neutral intake period could be extended by the complexity of the Crown case.

[39] In my opinion, complexity as an exceptional circumstance is a different matter. Under the previous *Morin* framework, the complexity of a case was assessed under the reasons for the delay. It was a factor in determining how a period of delay should be characterized and who should be responsible for it. Complexity of a case impacted upon the length of the trial, the amount of time required to prepare, the institutional resources used, and the potential for adjournments and continuations. Complexity factored into the length of justifiable delay during each discrete period of the proceedings and whether the delay could be subtracted from the operative delay which was usually institutional or Crown delay.

[40] While complexity as an exceptional circumstance in the *Jordan* framework requires consideration of many of the same things as under the *Morin* analysis, it seems to me that it still remains a fundamentally distinct analytical concept. When complexity was considered in the *Morin* framework, it was generally viewed as a factor that extended justifiable time periods. As an aside, I have always found that there was a degree of arbitrariness in assigning specific periods of time as

permissible due to the inherent nature of the case. For example, a judge could simply categorize a period of time, whether it be three months or six months, as what was required before the parties were ready to set the case down for trial without any detailed reason for the measure. Philosophically, *Jordan* moves away from such arbitrary assignments of time for differing categorizations of delay. A finding of particular complexity under *Jordan* is a complete justification for s. 11(b) purposes. As a concept, complexity is no longer used to carve out discrete periods of time from the calculus. Complexity as an exceptional circumstance should therefore consider the whole of the case and trial proceedings. It likely requires a higher threshold for its establishment than under the *Morin* test.

[41] Thus, it is tempting to say that given Justice Murray lowered the amount of neutral time to be attributed to intake and preparation than from what the trial judge found, that even under the new *Jordan* test, the Crown would not have been able to establish this exceptional circumstance. However, Justice Murray was never asked to apply the new framework. Given the doctrinal differences between the two tests, one cannot simply make a direct comparison between that case and this case as Mr. Thompson suggests.

[42] Secondly, more decisively for my purposes, there are significant factual differences between the two cases. While the amount of Crown disclosure was said to be about the same, the length of the trials are not. In *Vollick* the trial was anticipated to take three weeks of trial time. Here we are now at nine weeks. While I cannot say with any confidence what the evidentiary issues were in *Vollick*, I believe I can infer that they were far less complex. In *Vollick* the engineering issue was the certification of some guards on a laundry machine. Here the engineering issue involves a huge scaffolding stage for a mega-outdoor concert with numerous aspects involved in the construction of the stage. Testing of the various components were conducted by experts and a reconstruction of potential collapse scenarios was conducted at McMaster University. It is hard to believe the complexity of the evidential issues in *Vollick* can compare to the case at bar. Mr. McCaskill who was

the trial Crown in *Vollick* submitted that they do not. Finally, unlike the trial judge and Justice Murray in *Vollick* who had to decide the s. 11(b) application before the trial commenced, I have had the advantage of hearing the entirety of the Crown's case and am in a far better position to assess the particular complexity of this prosecution.

[43] On the other hand, Live Nation admits that this case is complex. Counsel on this application and at various times during the course of the trial has conceded this. What Mr. Siegel argues on behalf of Live Nation is that the Crown in proving this exceptional circumstance must show some direct causal connection between complexity and the periods of delay that have occurred. I disagree. I do agree that the complexity of the case must bear some relationship to the delay in getting the trial finished. In *Jordan* it was noted the presumptive ceiling could be reached due to the inordinate preparation or trial time resulting from complexity. However, any requirement for a strict causal connection between complexity and each period of discrete delay in the time preceding and during the trial is neither practical nor necessary for the s. 11(b) analysis. Those instances where complexity has not required extensive preparation or trial time will usually be obvious. For example, it will be difficult to realistically argue complexity if the trial is anticipated to be completed in a single day. Given this, to require the Crown to connect the dots between the complexity of the case and the reasons why each day of trial time was necessary would take the s. 11(b) analysis further into the forest and require the judge to inspect each tree found therein. This cannot be right.

[44] In my opinion, the particular complexity of this case is meaningfully linked to the amount of delay that has taken place. The actual trial time required of 9 weeks, the history of the proceedings, and the evidence lead convinces me that a sufficient basis exists to establish this minimal connection.

[45] The final point is *Jordan* states that once this exceptional circumstance is proven, there is no need for further analysis. In my view, there cannot be an

absolute *carte blanche* given to the conduct of a trial once this exceptional circumstance is proven. In other words, the delay may at some point become so extreme that complexity can no longer justify the delay that has taken place. I am satisfied given how the proceedings have been conducted and the amount of time this trial is anticipated to take, that we have not reached that point.

[46] This conclusion is sufficient to dispose of the s. 11(b) application. For the sake of completeness though I will assess whether the Crown has also proven the transitional exceptional circumstance.

F. TRANSITIONAL EXCEPTIONAL CIRCUMSTANCE

[47] This case was being tried when *Jordan* was released. The Crown argues that it has proven the transitional exceptional circumstance. To invoke this exceptional circumstance, the Crown must prove that the delay is justified on the basis of the parties' reasonable reliance on the previous state of the law. Further, if the institutional delay was reasonably acceptable under the *Morin* framework, this delay will be a component of the reasonable time requirement for cases currently in the system. In order to determine whether this exceptional circumstance has been proven, I must undertake a contextual analysis of all the circumstances, sensitive to the manner in which the previous framework was applied and the fact that the parties behaviour cannot be judged strictly, against the standard of which they had no notice. In this analysis, prejudice and seriousness of the offence can inform whether the parties' reliance on the former law was reasonable. Further, the fact that a jurisdiction with significant institutional delay problems may be an important factor.

[48] In *Manasseri*, Watt J.A. commented on this exceptional circumstance (at para. 321):

> *R. v. Williamson*, 2016 SCC 28, provides an example of a contextual assessment of the circumstances that inform the decision about whether a transitional exceptional circumstance would justify a delay above the

presumptive ceiling. Relevant circumstances included:

i. the complexity of the case;

ii. the period of delay in excess of the *Morin* guidelines;

iii. the Crown's response, if any, to any institutional delay;

iv. the defence efforts, if any, to move the case along; and

v. prejudice to the accused.

[49] In assessing this transitional exceptional circumstance, I will have to delve deeper into the history of the proceedings and apply some of the contextual factors referred to.

The History of the Proceedings Before the Trial Dates Were Set

[50] The Information was sworn June 6, 2013. The first appearance was June 27, 2013. On this appearance date, the Crown elected that the trial be conducted by a judge rather than a justice of the peace. The defendants were represented. The Crown at that time indicated that there was an individual charged, Mr. Cugliari, and the Crown had concerns about any unnecessary delays. After a couple of appearances, the Information was transferred from the provincial offences court to Old City Hall courthouse. July 25, 2013, was the first appearance in the set date court at Old City Hall. At this point, the Crown stated that there was substantial disclosure, some 7 banker's boxes, and that a couple of months would be necessary to prepare the disclosure. The parties all consented to the remand date of September 26, 2013. The disclosure was made to the parties in early September.

[51] On September 26, 2013, the Crown indicated that he had disclosed the entirety of the prosecution's case. There were 19 volumes of disclosure. The Crown stated that the defendants had made additional disclosure requests since then. The Crown was looking into this. All parties agreed that the matter should be remanded to November 14, 2013.

[52] On November 14, a judicial pretrial was set for February 12, 2014. On that date due to an administrative misunderstanding, the pretrial was moved to the following day, February 13, 2014. A judicial pretrial was held before Justice Chapin.

An ongoing judicial pretrial date was scheduled for May 30, 2014. Before that date, on May 13, 2014, the Crown contacted counsel for the defendants to schedule a teleconference so that the issues that Justice Chapin expected to be dealt with were discussed by counsel. On May 30, the pretrial was completed and trial dates were secured from the trial coordinator. The dates were set without objection. The trial verification form does not indicate whether the first available dates were set. Six weeks of trial time was scheduled. The dates were July 13-17, 20-31, 2015, and November 9-27, 2015.

The History of the Disclosure Issue Regarding Chris Fediuk

[53] After the setting of the trial dates, on July 29, 2014, Chris Fediuk provided a signed and dated statement. He was an ex-employee of Optex. In the two page statement, he stated that Optex had reinforced pick-up trusses that should have been used in the construction of the Downsview stage to support the structure of the roof. He stated that he had asked Ms. Lindsay Shipway, a manager of Optex, why the Downsview stage collapsed and he was told that it was because the reinforced pick-up trusses were not used. Mr. Fediuk was told that the wrong pick-up trusses were mistakenly sent to Downsview. In addition, after the collapse, he stated that Mr. Dale Martin instructed him to hide these reinforced pick-up trusses from Ministry of Labour inspectors when they came to visit the Optex yard.

[54] On November 19, 2014, Mr. Thompson, counsel for Mr. Cugliari, emailed this statement to Mr. McCaskill. The next day, the Crown forwarded the statement to Mr. Lomer, the Ministry of Labour Investigator in charge of the Downsview investigation, and asked to speak to him.

[55] On December 1, 2014, Mr. Lomer contacted Mr. Fediuk to set up a meeting. On December 4, 2014, Mr. Lomer and a Ministry of Labour engineer, Mr. Khorsand, met with Mr. Fediuk at the Ministry office in Mississauga to collect more information about his statement and this reinforced truss. On December 9, 2014, Mr. Lomer provided additional disclosure to the Crown that resulted from this meeting.

[56] On January 8, 2015, counsel for Optex removed himself from the record. The motion was brought for nonpayment of fees and the inability to obtain instructions from the client.

[57] On March 4, 2015, Mr. Lomer met with the Crown and Mr. Khorsand regarding the information collected from Mr. Fediuk. It was decided that further investigation was necessary. On the same day, Mr. Lomer contacted Mr. Martin to advise him that the Crown had received the Crown disclosure back from Optex's previous counsel and that the Crown could be contacted to obtain this disclosure. Mr. Lomer unsuccessfully attempted to contact Gary Hurley, an Optex employee, on March 9, 2015.

[58] On March 11, 2015, Mr. Lomer and Mr. Khorsand went to Mr. Hurley's home and met with Mr. Hurley and set up a meeting to collect further information. On March 13, 2015, Mr. Lomer and Mr. Khorsand met with Mr. Hurley at the Mississauga office about the reinforced pick-up truss and Mr. Fediuk's statement. As a result of this meeting, on March 16, additional disclosure was given to the Crown to review. On March 27, 2016, the Crown wrote to Mr. Martin a letter sent by Purolator and advised him that the Crown had not been contacted by any new law firm retained by Optex and that the disclosure remained in the possession of the Crown. Mr. Martin was advised that he was entitled to receive this disclosure and that there was additional new disclosure to be provided. The Crown asked what Mr. Martin's intentions were.

[59] On April 16, 2015, Mr. Lomer spoke with the Crown about getting the disclosure to Optex. On April 20, 2015, Mr. Lomer spoke with Mr. Martin about making arrangements to provide the returned disclosure. During that conversation, Mr. Martin uttered that he had gotten Mr. Fediuk's statement. He stated that he disagreed with the information provided by Mr. Fediuk and that Mr. Martin never hid anything from the Ministry of Labour. Mr. Martin advised that the inspector could visit the yard and look at the reinforced pick-up trusses. A date was scheduled to

provide the disclosure and to collect the information from Mr. Martin about these trusses.

[60] On April 28, 2015, Mr. Lomer and Mr. Khorsand attended at Optex's yard and met with Mr. Martin. Mr. Lomer provided the disclosure that was returned by Optex's previous lawyer. The Crown's contact information was also given should Optex retain a new lawyer in order to discuss scheduling a pretrial as it related to the trial. At that time, Mr. Lomer observed the reinforced pick-up truss that Mr. Martin was referring to. In addition, Mr. Martin provided further information to the inspector.

[61] As a result of the information received from Mr. Martin, on May 6, 2015, Mr. Lomer unsuccessfully tried to contact Al Gullion, the rigger involved in the Downsview stage, to collect information about the reinforced pick-up trusses. Subsequently on May 7, 2015, Mr. Lomer did make contact with Mr. Gullion and set up a meeting.

[62] On May 14, 2015, Mr. Lomer and Mr. Khorsand met with Mr. Gullion in Barrie about the reinforced pick-up trusses. This information was provided to the Crown on May 20 and May 27, 2015. On May 28, 2015, additional disclosure resulting from these investigations were couriered out to the parties.

[63] Mr. Lomer avers in his affidavit that based upon the exhaustive further investigation into the allegations set out by Mr. Fediuk in his July 29, 2014, statement, Mr. Lomer was satisfied that there was no attempt to deceive the Ministry of Labour and that no items had been hidden from the Ministry in their investigation of the case.

The Case Management of the Trial

[64] After the new disclosure was sent to the defence, the Crown obtained a case management meeting before me on June 8, 2015. Optex did not appear at this meeting. The Crown advised that Optex had not yet retained new counsel as he had hoped for and that the previous counsel had returned the disclosure. This

disclosure had been shipped to Mr. Martin. In addition, I was advised that Mr. Cugliari had provided new information and this was investigated. The Crown stated that when Mr. Lomer had delivered the disclosure to Mr. Martin, he received more information from Mr. Martin. This lead the Crown to believe that there may be more to the new allegations than the Crown originally thought. Further investigation then proceeded. About 100 pages of further disclosure was provided to the defence. Most was provided within the last week or two. The Crown advised that the "real sticking point" was that Optex was unrepresented. The Crown had advised Optex of this case management meeting but there was no response. The Crown had no idea whether Optex wanted to participate in the trial. Mr. Martin had indicated they may retain counsel through their insurance company. The Crown had contacted this lawyer but that lawyer was not sure if the firm was going to be retained. In the Crown's view it was necessary to bring this case management meeting to determine if the July trial dates were viable. Mr. Thompson stated that he was not sure if further disclosure was forthcoming. He advised of the issue of particulars that Mr. Cugliari wanted. He added that his client was an individual and that it was already two years out from the date of the charges. Mr. Thompson stated "It would appear that what the Crown is requesting is probably inevitable but we're concerned about our client's right to a trial within a reasonable time." Mr. Siegel adopted Mr. Thompson's comments except noted that he was not representing an individual. He stated "We need to do this right and if there's going to be further information as we get any closer to trial than this, let alone the stuff that came in a week or so ago that hasn't been digested yet, the best case scenario is that we'll be scrambling, the worst case scenario is that we'll simply be unable to be ready." The Crown then commented that they were having witnesses coming in from different parts of the world. From their perspective as well, it was necessary to determine if the July dates were viable. When asked whether the ongoing investigation and disclosure could be an issue in July, the Crown answered possibly. I held that I did not want to adjourn any dates without knowing where Optex stood. The Crown indicated that if Optex did not show then the Crown would proceed with an in absentia trial against Optex in July. I

decided to issue a summons to Optex to have them return to a second case management meeting.

[65] On June 17th, the date the summons was returnable, Mr. Martin appeared for Optex. Mr. Martin indicated that he had approached his previous lawyer but had not yet retained him. Mr. Martin had sent a letter of confirmation but there was a matter of outstanding fees. I told Mr. Martin that the July trial date was set and I wanted to conduct a timely and efficient trial while allowing full answer and defence to the parties. I told him I expected Optex to have a lawyer ready to go for those dates if Optex decided to retain one. Mr. Martin advised he had approached his previous lawyer but was not sure if he would be ready to go in July. At this point, counsel for Live Nation asked for the adjournment of the July dates. Mr. Grossman for Live Nation stated that it was not ready to commence a trial then because of the additional disclosure from the Crown and some further potential disclosure including more transcripts of interviews. Counsel stated that this was a very complex case and they needed to conduct further investigation. Counsel submitted that they simply needed more time and such a complex matter could not be rushed. The Crown stated that the motion was not being opposed. Mr. Thompson on behalf of Mr. Cugliari stated that it seemed that the request for an adjournment was inevitable. The Crown was still investigating aspects of disclosure and they were still awaiting particulars. Mr. Thompson indicated that he was not prepared to waive any of his client's rights with respect to a trial within a reasonable time. I stated to Mr. Martin that it looked like everyone was in agreement that the July dates should be adjourned and the trial commence in November. I stated "To be frank, I don't particularly like it and I'm not assessing blame on anybody at this point or responsibility." I vacated the July dates. In order to know what more time was needed to be scheduled, I said we needed to know who Optex's lawyer was going to be and their availability. I told Mr. Martin that I expected that a lawyer would be retained for November so that we could determine the schedule. I stated we would try to schedule further dates on July 13th if not earlier. I remanded the case to that

date so that the state of Optex's retainer could be determined.

[66] On July 13th, Mr. Martin advised that he was still trying to retain Mr. Norm Keith, his previous counsel, but Optex's controller was out of the country. The Crown was concerned. The Crown indicated they had the November dates but did not want to lose them. The Crown stated that they may have overestimated the time required for trial and perhaps those November dates would suffice. The Crown submitted that the November dates should be nailed down and the trial should proceed then whether Optex had a lawyer or not. The Crown indicated that whatever disclosure the defence was missing was figured out and would be given to them that afternoon. Mr. Thompson's request for particulars was responded to but he was not content with it and was bringing a motion. This motion had to be arranged. Mr. Martin indicated he would have a firm answer about his retainer in about a week. I advised Mr. Martin that the trial was going to start in November and that he should be ready whether he had a lawyer or not. If Optex did not show, the trial would still proceed. The Crown suggested perhaps another appearance would be appropriate to see if three rather than two counsel would be involved. Mr. Siegel also just mentioned to the Crown whether they should rethink the estimate of three weeks of trial time as being enough. The Crown suggested another week should be considered. The case was to be brought back on September 10th to be spoken to.

[67] On September 10, 2015, Mr. Martin again indicated that he hoped Optex would have a lawyer by the following week. They were trying to get together a large retainer. Mr. Thompson stated he was going to bring a motion for particulars. There was additional disclosure but the Crown was in a position to give that. The parties agreed that these issues would not affect the November trial dates. I advise Mr. Martin that I had been case managing the trial in order to ensure Optex's issue with retaining a lawyer would not jeopardize any further trial dates. I set the trial dates as with or without counsel for Optex with Mr. Martin's concurrence and understanding. The trial dates of November 9 to 27 were confirmed. When I inquired about further

trial dates being needed, the Crown stated he was not sure if any more than three weeks would be required. He stated he was hoping to complete the trial in three weeks. No other counsel said anything in response to this.

[68] On October 9, 2015, Mr. Cugliari brought a motion for particulars. Counsel for Live Nation submitted that he was opposed to Mr. Cugliari's motion for severance. Mr. Thompson submitted that he received the disclosure he was asking for so he was abandoning the motion for severance. The motion for particulars was heard. I dismissed the motion. Mr. McCaskill stated that he was still in the dark as to Optex's representation. Optex did not appear for or participate in the motion. The case was remanded to November 9, 2015 for the beginning of the trial. I again asked about the three week estimate. The Crown stated he now thought the three weeks would get through the Crown case. There were some 15 to 18 witnesses. I stated that we needed to re-visit the issue in November as we did not know about Optex's representation. The Crown agreed that the time estimate would be affected by the number of parties represented by counsel. Again, other counsel did not say anything.

The History of the Trial Proceeding

[69] On November 9, 2015, the trial started. Mr. Martin acted as agent for Optex. On November 20, additional trial dates were secured. Three weeks and 1 day of further trial time: March 29-31, April 7-8, June 1-3, 6-8, 13-15, 20-22, 2016.

[70] On November 25, the Crown realized it had failed through inadvertence to disclose a video used by some of the experts. That day of court time was lost. Mr. Thompson recommended perhaps an extra day or two of trial time needed to be secured. Crown counsel submitted that the plan between counsel was that the Crown's case would be completed in March and April with perhaps a couple of extra days thrown in. Then the defence would start its case in June. On November 25, counsel attended the trial coordinator and secured March 23 and April 21 as additional days. Further, April 27, 29 and May 31, 2016 was also later added.

[71] On April 21, 2016, Mr. Cugliari's father passed away. The case was adjourned to restart on April 27th.

[72] On June 3, 2016, it was clear additional time would be required. December 5, 6, 7, 8, 12-16, 19-22, 2016 and January 25-27, 2017 was secured. On the trial verification form, Mr. Thompson offered the dates of November 21, 22, 24, 25 and December 1, 2, 2016. On August 25, 2016, the date of October 14, 2016, was set for the hearing of the s. 11(b) application.

ANALYSIS OF THE TRANSITIONAL EXCEPTIONAL CIRCUMSTANCE

[73] I find that the Crown has reasonably relied upon the previous state of the law. One factor that needs to be considered is the complexity of the case. I have already found this case particularly complex. This factor has infused much of the history of the proceedings as illustrated above. The complexity of the case supports the finding that this is a transitional exceptional circumstance.

[74] In addition, in applying the previous *Morin* framework, I find that much of the delay incurred in the case would have been considered neutral and not operative institutional or Crown delay. In this case, given the complexity, there would have been a long intake period. The information was sworn June 6, 2013, and the initial trial dates were not set until May 30, 2014, some 11 months and 24 days later. I recognize the length of this intake period. However, in that span of time, the case had to be transferred to a different courthouse, some 19 volumes of disclosure was made initially, further defence requests for disclosure had to be fulfilled, the disclosure had to be reviewed and digested by the defence so that meaningful pre-trials could be conducted, and two judicial pre-trials were conducted in February and May. While this is not the model of efficiency, aside from the Crown's initial comment that there was an individual involved, at no court proceeding before May 30th, did any party indicate that the pace of the proceedings was unusual or slow given the nature of the evidence, the volume of disclosure, and the issues

that needed to be addressed. Further, no significant submission was made to me that somehow this initial period was a product of Crown delay. It seems that all the parties were content with the pace of this pretrial proceeding.

[75] From May 30, 2014, to the beginning of the trial in July, 2015, was a period of some13 months. It was further a period of some18 months until the anticipated end of the trial in November. This was institutional delay. Under the previous *Morin* framework, the cases of *R. v. Lahiry,* [2011] O.J. No. 5071 (S.C.J.) and *R. v. Tran,* [2012] O.J. No. 83 (C.A.) mandated that some time be attributed to the need for the defence to prepare for trial. This must be subtracted from the institutional delay. In my view, given the complexity of the case, more time should be attributed to the time required for the defence to prepare. At the same time, I recognize there was an extended intake period. I have not been provided any specific evidence nor did the parties make any specific submissions about how much would be appropriate to attribute to defence preparation. Given some of the comments made in the previous jurisprudence, I find that it would be reasonable to attribute some 6 months to defence preparation especially in light of the need to retain and instruct expert evidence. Thus, to this point, the operative institutional delay to the end of the trial would be about 12 months which would be above the *Morin* guidelines.

[76] I am further aware of the nature of the institutional delay here at Old City Hall courthouse. For regular trials, cases normally are set within the guidelines. However, as I have already stated, this case is not a minor matter nor one that can be easily scheduled within a short period of time. For an anticipated 6 week trial, there will be a delay in obtaining sufficient trial time to accommodate it. It is not simply a matter of squeezing in a few days here and there. In addition, it seems that all the parties scheduled this to provide a break between the Crown's case and the defence case. I cannot say how this plan affected the scheduling of the trial.

[77] The other major contributors to the delay as I have already alluded to was the loss of the July trial dates and the under-estimation of time. One reason for the

loss of the July trial dates was the issue of the representation of Optex. The other was the disclosure issue. This clearly factored into the reason for vacating the trial dates. The defence submits that this was Crown delay. In short, it is argued that it was the late disclosure of the investigation into the statement of Chris Fediuk that caused the adjournment. The answer is not so simple in my view. First of all, it is material that the statement of Mr. Fediuk came from one of the parties who now complains about the delay, Mr. Cugliari. This is not an instance where the Crown or the investigators sat on a witness statement that only they knew about which lead to late disclosure. Here there is no explanation why the statement of Mr. Fediuk which was taken on July 29, 2014, was not disclosed by counsel for Mr. Cugliari until late fall of that year. Once given to the Ministry of Labour, it initially investigated the allegations promptly by interviewing Mr. Fediuk. It is true there was a delay between the interview of Mr. Fediuk in December of 2014 and March of 2015, when further investigations were conducted about this statement. However, it must be remembered that in the interval, counsel for Optex removed himself from the record and efforts were made to see if Optex was retaining counsel and getting the disclosure directly to the defendant. It is of some moment that Mr. Fediuk was making serious allegations of misconduct against employees of Optex, a defendant in the prosecution. In March and in the following months, further witnesses were interviewed. Mr. Martin himself was questioned and a visit to the Optex yard was conducted. The Crown submitted that as the investigation continued new information was being received that had to be investigated before disclosure could be finalized. Looking at the time table of events in March, April, and May of the Ministry of Labour investigation, I cannot say that they were wholly tardy in their efforts given that trial dates had already been set.

[78] All that being said, it was a factor in the adjournment of the July dates. However, there are two aspects of this that are worth emphasizing. First of all, it was a defence motion that requested the adjournment. All the parties were in agreement. No one strenuously objected. While I appreciate Mr. Thompson made it

clear he was not waiving any s. 11(b) rights, he certainly did not voice any strong opposition. Further, the Crown began to believe that perhaps the trial time had been overestimated and that the trial could be completed in three weeks. Again, no one was suggesting otherwise early on. Finally, I am now in possession of more information about exactly what was the issue that Mr. Fediuk brought to the table and the conclusion of the Ministry. I am now not so certain that the defence would have required the adjournment of all those dates in July in order to be adequately prepared to meet this issue. In my view, when I look at the whole of the circumstances, I cannot say that this should have been categorized simply as Crown delay based upon late disclosure. I think all parties bear some responsibility for that adjournment.

[79] Finally, the greatest source of the delay has been the under-estimation of time. I recognize that the Crown made a mistake about disclosing a video and we lost a day of trial time. Mr. Cugliari's unfortunate loss of his father resulted in another trial date being adjourned. But these are minor matters that no one is relying upon. However, it is abundantly clear that this trial has taken far longer than anyone expected. No one was deliberately attempting to delay this trial. Everyone was making best efforts to try and reasonably schedule and complete this trial. The Crown had a plan. I made best efforts to move it forward. The defence provided input and cooperated. Despite that, the trial time was significantly under-estimated. Under the *Morin* framework, delay resulting from such a situation was generally treated as neutral.

[80] So despite the lengthy overall time that this trial has taken which would have invited serious scrutiny under the previous analysis, the operative delay which was mainly institutional was far less. Perhaps a year or a bit more.

[81] I have already alluded to the Crown's response to the delay. The Crown had a plan. The Crown did underestimate the time initially when he thought three weeks was enough but this understanding did not last long and did not contribute

significantly to the delay. The issue of Optex's potential representation presented an obstacle to immediately securing new and additional dates for obvious reasons. I have heard the Crown's case. The evidence was lead in an efficient and reasonable manner. Productive admissions were secured from the parties. The parties and I consistently reassessed the time required and whether we needed more time. It is the nature of the Ontario Court of Justice that long trials once started cannot simply continue uninterrupted until completed. In cases like this where continuations need to be secured, trial coordination is a challenge.

[82] There is then the defence efforts to move this case along. As I have said, the defence cooperated in getting this case heard. Their conduct cannot be criticized in that regard. That being said, the applicants in making full answer and defence have taken considerable time with many of the witnesses. I am not saying that this time was not justifiable but it is the reality of how this trial was conducted. The defence made objections and brought motions. Again, fully justifiable in making full answer and defence but they required time to be heard. These could not be fully anticipated by the Crown. Finally, while I have mentioned that Mr. Cugliari's counsel clearly expressed Mr. Cugliari was not waiving any s. 11(b) rights, he made no serious complaint of the pace of the proceedings or brought up any prejudice he was suffering to my or the Crown's attention until the hearing of this s. 11(b) application. During the trial and indeed during the case management proceedings, I sensed no urgency on the part of the applicants in speeding this trial along. I neither saw nor heard any distress about how long this trial was taking. Rather the focus was always on taking the time to get it right. I would not go so far as to adopt the Crown argument that the defence is now simply tactically using s. 11(b) as a sword rather than a shield by raising this application only after the close of the Crown's case. I am not fully persuaded by this submission. *Jordan* has changed the legal landscape of the s. 11(b) analysis. Any counsel prompted to bring an application by the release of that decision when before counsel was not minded to do so, is only properly discharging their obligations to their client.

[83] Then there is the issue of prejudice. It is here that Live Nation's application takes it on the chin. Given the law in *CIP* it was entirely reasonable for the Crown to rely on the previous state of the law as it relates to Live Nation, a corporate entity. Indeed, I would say Mr. Siegel himself in not bringing any application earlier relied upon that state of the law. There is no suggestion that Live Nation has suffered any prejudice to its fair trial rights due to the delay let alone a prejudice that cannot be remedied. This would have been an insurmountable hurdle to a successful s. 11(b) application for Live Nation under the previous framework.

[84] Mr. Cugliari is in a different situation. He is an individual. He does not claim any prejudice to his fair trial or liberty interests. He claims a prejudice to his security of the person interest. Mr. Cugliari has sworn an affidavit. Under the old analysis, both inferred and actual prejudice could be considered. After careful consideration, I do not find that Mr. Cugliari has suffered significant prejudice from the delay. I appreciate that as a professional engineer, this charge has come under the scrutiny of his governing body. However, that investigation remains on hold. Any alleged prejudice resulting from this circumstance, results from the charge itself and not the delay: see *R. v. Kovacs-Tatar* (2004), 192 C.C.C. (3d) 91 (Ont. C.A.) at para. 33. It is further mitigated by Mr. Cugliari's own averment that despite the charge, his employer and his clients who know his work continue to have confidence in him as a professional engineer and as a result he has "not suffered professionally in that regard." Thus, whatever the delay, his professional standing and success has not been affected. While Mr. Cugliari states that his life has been on hold and he has been unable to make long term plans, again this is unsupported by other evidence and it is not made clear how the delay as opposed to the charge itself has caused him to put these plans on hold. Finally, he avers that he has been under stress as a result of the proceedings and that he has suffered periodic anxiety attacks including one on May 11, 2016, where he went to the hospital for observation. Let me say that I have the greatest of sympathy for Mr. Cugliari. I recognize that it is not easy. However, the anxiety attacks he claims is not supported by any medical evidence or information. There is no information that he is getting active treatment or medication

for it. I am not persuaded that this stress or anxiety is significantly related to the delay as opposed to the charge. I have no doubt that there has been stress and anxiety and that the length of time this trial has taken has not been helpful. However, based upon the record, while I am prepared to infer some prejudice, I cannot conclude that it is substantial. This includes an assessment of both actual and inferred prejudice.

[85] A final consideration is the seriousness of the charge and society's interest in seeing a trial on the merits. As the seriousness of the offences increases, the societal interest in seeing the charges brought to trial increases: see *Kovacs-Tatar* at para. 58; *R. v. Steele* (2012), 288 C.C.C. (3d) 255 (Ont. C.A.) at para. 31. At the same time, I recognize that the seriousness of the offence should also cause the Crown to properly give such a case the attention that it deserves.

[86] In the context of *Occupational Health and Safety Act* charges, these charges are very serious. No one disputes that. Factually as well, it is a matter of public importance that a trial on the merits be heard. This was a major musical concert where a catastrophic collapse of a large outdoor stage occurred just before concert-goers were being admitted and before a famous rock band, Radio Head, was about to take the stage. A young man died. Others narrowly avoided serious injury and death. The public can rightfully ask why this happened and who is responsible. The companies and the engineer equally have an interest in the outcome. If the charges cannot be proven beyond a reasonable doubt, they are rightfully entitled to that verdict. Much rides on a trial on the merits. Had I been required to balance the factors under the *Morin* test, I would have concluded in the same way I have in considering this case under the new *Jordan* test; that the applicants have not have shown that their s. 11(b) right to a trial within a reasonable time has been violated.

[87] In conclusion, in undertaking a contextual analysis of the all the circumstances, sensitive to the way the old framework was applied, and

understanding these parties behaviour cannot be judged strictly against the *Jordan* test, I find that the Crown has proven the transitional exceptional circumstance. This trial has been significantly delayed but its complexity and the manner in which it has been litigated, much of which was out of the sole control of the Crown, substantiates the conclusion that a stay of proceedings is not the right decision. Even if we had done everything possible, this trial could not have concluded within the presumptive ceiling. The seriousness of the charges and the lack of significant prejudice supports this conclusion as well. As a result, the Crown has proven the transitional exceptional circumstance.

Released: December 5, 2016.

Signed: “Justice S. Nakatsuru”