

Evaluating Judicial Delay After *Jordan*: Don't Throw the Baby Out with the Bathwater

J O N A T H A N A V E Y *

I. INTRODUCTION

When the Supreme Court of Canada issued its decision in *R v Jordan*, the majority decision did more than simply provide a new metric for evaluating whether delay rises to the level of a *Charter* infringement.¹ It also issued a stinging criticism of the “culture of complacency” pervading the criminal justice system, and placed the onus on “all participants in the justice system [to] work in concert to achieve speedier trials.”² Less than a year later, the Court doubled-down on *Jordan* in its decision in *R v Cody*.³ Examining the *Jordan* framework in the light of questions surrounding what constitutes defence delay, the *per curiam* decision emphasized again the seriousness of delay and the importance of all parties to take a proactive approach in preventing it by targeting its “root causes.”⁴

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¹ *R v Jordan*, 2016 SCC 27 [*Jordan*].

² *Ibid* at paras 4, 40, 104, 116, 135 [emphasis added].

³ *R v Cody*, 2017 SCC 31 [*Cody*].

⁴ *Ibid* at para 36. For commentary on the significance of a *per curiam* decision, see Peter McCormick, “The Political Jurisprudence of Hot Potatoes” (2002) 13 NJCL 271 at 276; see also André Bzdera, “Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review” (1993) 26 Can J Political Science 3 at 25; Stephen Coughlan, Editorial Comment on *R v Cody*, 2017 CarswellNfld 251.

The Supreme Court has provided guidance specifically towards the Crown and defence. This guidance has been supplemented in discrete circumstances, such as in the context of jointly charged accused where the actions of just one accused delay the proceedings,⁵ and whether delay caused by one accused should result in severance of accused.⁶ However, while the Supreme Court stated in *Jordan*, and reiterated in *Cody*, that judges have an important role to play in addressing and preventing delay, its comments primarily surrounded the exercising of case management discretion by trial judges.⁷ The Court has not yet addressed how the time accrued while a judge's decision is reserved will be evaluated under s. 11(b). This delay, which I will refer to as 'judicial delay' or 'decision delay,' can impact proceedings primarily in two ways, which I divide into pre-trial and post-trial delay.

Pre-trial delay can occur where a judge reserves their decision on a pre- or mid-trial application. Depending on the scheduling of the application relative to the trial and the amount of time taken, this delay may result in adjourning the start of the trial, or recessing the trial and scheduling a continuance.⁸ Post-trial delay is the delay caused by the time taken when a judge sitting without a jury reserves their ultimate decision.

The case of *R v K.G.K.* will bring the question of post-trial decision delay squarely before the Supreme Court of Canada for the first time. The trial in *K.G.K.* was completed in just over 33 months; however, the trial judge gave his decision nine months later, causing the accused to file an application asserting a violation of his 11(b) rights.⁹ The application was dismissed, and the accused appealed to the Manitoba Court of Appeal. Cameron and Monnin JJA dismissed the appeal, but for differing reasons.¹⁰ Hamilton JA dissented. She would have stayed the proceedings, holding that there had been an unreasonable delay.

⁵ See e.g. *R v Manasseri*, 2016 ONCA 703, leave to appeal to SCC refused, 37322 (13 April 2017).

⁶ See e.g. *R v Singh*, 2016 BCCA 427.

⁷ See e.g. *Cody*, *supra* note 3 at paras 38-39; *Jordan*, *supra* note 1 at para 63.

⁸ It should be borne in mind that an adjournment may result even where the application decision is delivered in advance of the scheduled trial date. In an application pertaining to admissibility of evidence, for example, the judge's decision may significantly impact the parties' trial strategy, and counsel must have adequate time to prepare once they are aware of the ruling.

⁹ *R v KGK*, 2017 MBQB 96 at para 3 [KGK (QB)].

¹⁰ *R v KGK*, 2019 MBCA 9 [KGK (CA)].

Once again, the Supreme Court will be left to grapple with competing constitutional demands. On one side is the right of an accused to be tried within a reasonable time. Conversely, restricting the ability of judges to reserve and take the necessary time to render a decision threatens the principle of an independent judiciary.¹¹ This may also impact the fairness of the trial process apart from judicial independence.

The Court will have to consider how it will reconcile the presumptive ceilings it laid out in *Jordan* in the context of judicial delay. Specifically, it will first need to determine whether judicial delay is to be evaluated within the *Jordan* ceilings, and if not, what standard is to be applied.

There are also practical issues at stake. In the criminal justice system, judges are often called on to adjudicate emotionally-charged and complex matters. They are typically presented with perspectives that are diametrically opposed. They may hear evidence that is highly technical, or hear from so many witnesses that the sheer volume necessitates a thoughtful review. Finally, they often hear evidence that is admissible, but only for a particular purpose, or evidence that they subsequently hold to be inadmissible.

How judges deal with the evidence they hear is of immense importance to all parties in the justice system. It is trite to say than an accused is entitled to a fair trial. But while the decisions in *K.G.K.* have so far focused on the portion of s. 11(d) requiring an independent judiciary, I am of the view that the right to a fair hearing also encompasses the judge's fact-finding process. In my opinion, the right to a fair trial includes a decision made by a finder of fact who does not feel so rushed to make a decision that they are unable to give thoughtful consideration to the evidence presented. In this vein, I agree with the comments of Doherty JA in *R v N.S.* that:

Trial fairness is not measured exclusively from the accused's perspective but also takes account of broader societal interests. Those broader interests place a premium on a process that achieves accurate and reliable verdicts in a manner that respects the rights and dignity of all participants in the process, including, but not limited to, the accused.¹²

This article is not intended to propose a solution to the question of how to evaluate decision delay. Instead, I will focus on the challenges inherent in the judicial reasoning process and the value of judges being able to reserve

¹¹ See Canadian Charter of Rights and Freedoms, s 11(d), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11. [Charter].

¹² *R v NS*, 2010 ONCA 670 at para 50 [NS (Ont CA)], aff'd 2012 SCC 72 [NS (SCC)] [emphasis added].

their decision to conduct a detailed and thoughtful analysis. In doing so, I will assert that the requirement for judges to provide reasons for their decisions provides an important safeguard against the inadvertent misuse of evidence, and that reserving a decision provides judges the best opportunity to reflect on the evidence and its application, a process that puts judges in the best position to deliver an accurate and reliable verdict. It is in this careful contemplation that judges will be in the best position to determine what is true, and what is just a good story.

It cannot be disputed that delay is a substantial issue within the criminal justice system, and that judicial delay is a contributing factor. However, I am of the view that the value of a judge's ability to reserve their decision is compelling, and that when balancing an accused's right to be protected from unreasonable delay with the need for a judge to carefully evaluate the evidence presented, it is the latter that should be given weight – not only from the perspective of judicial independence, but because of the underlying goal of the criminal justice system: to seek the truth. Accordingly, however the Court chooses to resolve the issue, I am of the view that the Court should err on the side of caution before restricting – whether explicitly or in effect – a judge's ability to reserve.

II. *K.G.K.*: WAITING FOR AN ANSWER

Turning to the case of *K.G.K.*, the trial judge was faced with determining the veracity of allegations of ongoing sexual misconduct spanning about ten years. The complainant, who was 14 years old at the time initially disclosed the abuse in 2013, reporting that she had been abused since she was a child. She provided a videotaped statement to police, and three years later testified at the trial. When he was arrested, the accused also made a statement. He denied some of the allegations, but admitted to some of the conduct alleged. He was ultimately charged with sexual offences from two different time periods; the first being September 2002 – April 2008, and the second being May 2008 – April 2013. In addition to the complainant, the accused testified in his own defence.¹³

The decision of the trial judge to reserve his decision is entirely understandable. He was faced with determining the truth of serious allegations, with a key element of the Crown's case being the evidence of a

¹³ *KGK (CA)*, *supra* note 10 at paras 179-182.

17-year-old complainant testifying about events that had occurred during her childhood; the first of which when she was four years old.¹⁴ In assessing her evidence, the trial judge was required to determine her credibility in a manner appropriate to her presentation at trial; however, he had to separate that from his determination of her evidence's reliability, as her perception from childhood would be different than those of an adult.¹⁵ Taking time to thoughtfully consider the evidence was appropriate; the problem was how much time passed before a decision was issued.

The timeline relevant to the delay issue is straightforward: the accused was charged on April 11, 2013. The preliminary inquiry proceeded as originally scheduled in October 2014, and the trial was completed – again as initially scheduled – on January 21, 2016. The trial judge reserved his decision, and after some time passed indicated that it would be delivered on October 25, 2016. The accused filed his delay motion the day before, and requested that the trial judge recuse himself from hearing it, which he did.¹⁶ In the midst of these events, the Supreme Court of Canada released its decision in *Jordan* on July 8, 2016.¹⁷

As is evident from the timeline, this was not a circumstance similar to many other cases where delay has been an issue, in that it was not marked by numerous adjournments and discrete delays.¹⁸ Rather, the dominant portion of the delay at issue was the nine months taken by the trial judge to render a decision. The issue to determine was how that delay impacts an 11(b) evaluation, vis-à-vis the *Jordan* framework.

A. The First Look: Going All the Way Back

As the trial judge recused himself, Joyal CJQB heard the delay application.¹⁹ Reviewing the legal framework for unreasonable delay, he summarized the *Jordan* approach and noted that the Supreme Court did not

¹⁴ *Ibid* at paras 233-234, 237.

¹⁵ See *R v W(R)*, [1992] 2 SCR 122 at 134, 13 CR (4th) 257.

¹⁶ *KGK (QB)*, *supra* note 9 at paras 2, 4, 7-14; *KGK (CA)*, *supra* note 10 at paras 1, 24-39.

¹⁷ *Jordan*, *supra* note 1.

¹⁸ The only period of time that was argued to fall on defence surrounded the scheduling of the trial date; there was an approximately 11-week period where the Crown and court was available but the defence was not. However, even if attributed to the defence, this period would not reduce the delay below the *Jordan* ceiling. See *KGK (QB)*, *supra* note 9 at paras 41, 83.

¹⁹ *KGK (QB)*, *supra* note 9 at para 4.

consider decision delay in that decision.²⁰ He agreed with the Crown’s submissions that “the principle of judicial independence and the right to a trial within a reasonable time must both be given their full effect and, at the same time, reconciled in a way that respects the place of both the principles in our Constitution.”²¹

Ultimately, Joyal CJQB held that while judicial delay can be considered under 11(b), it does not fall within the *Jordan* framework.²² He concluded that the application of presumptive ceilings to such delay would result in one constitutional principle “trumping” the other, and also recognized that inclusion of decision delay in the presumptive ceilings would present practical problems both in the context of scheduling and in the way a judge approaches their decision.²³

To determine a standard that would appropriately reconcile the competing constitutional interests presented, Joyal CJQB relied on the Supreme Court of Canada decision in *R v Rahey*.²⁴ *Rahey* is a decision from before even the well-known cases of *R v Askov* and *R v Morin* – a time where the approach to 11(b) was quite unsettled. This is demonstrated by *Rahey* itself: it features four separate judgements, each from two judges (with some overlap between decisions), and has been described as being “notoriously difficult to analyze” as a result.²⁵ Despite this, the focus of *Rahey* was a judicial delay of 11 months stemming from a defence motion for a directed verdict, and so, correctly interpreted, it may provide some precedential authority.²⁶ While the Court in *Rahey* was divided on fundamental aspects of the analysis, it was unanimous in concluding that the delay at issue was unreasonable. Lamer J (as he then was) stated:

[T]he eleven-month delay was the result of inaction on the part of the trial judge when faced with a decision that generally is made within a few days. Glube C.J.T.D. called his delay “shocking, inordinate and unconscionable”. The Court

²⁰ *Ibid* at para 29.

²¹ *Ibid* at paras 46-47, citing *Reference Re Same-Sex Marriage*, 2004 SCC 79 at para 50 [*Same-Sex Marriage*], and *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 at para 70, 137 DLR (4th) 142.

²² *KGK (QB)*, *supra* note 9 at paras 43, 64, 66.

²³ *Ibid* at paras 6, 54-55.

²⁴ *R v Rahey*, [1987] 1 SCR 588, 2 WCB (2d) 217 [*Rahey* cited to SCR].

²⁵ Don Stuart, *Charter Justice in Canadian Criminal Law*, 6th ed (Toronto: Carswell, 2014) at 446.

²⁶ *Rahey*, *supra* note 24 at 604-605.

of Appeal referred to his “disgraceful slowness”. In the words of s. 11(b), the delay is unreasonable[.]²⁷

Relying on the above passage, Joyal CJQB held that the standard for evaluating judicial delay is whether it is “shocking, inordinate and unconscionable.”²⁸ In his view, this “high threshold” is necessary as it is only that standard that will allow the competing constitutional interests to be reconciled and balanced.²⁹ He then applied the transitional exceptional circumstance from *Jordan* to the 33-month delay that occurred before the judicial delay, and the *Rahey* standard to the decision delay. He concluded that neither delay infringed 11(b) and dismissed the application.³⁰

B. Appellate Review: A Three-Way Split

Given the novel issue and the recently revamped approach to 11(b), it is unsurprising that the matter was appealed. What may be surprising is that the Manitoba Court of Appeal – which rarely offers a dissent – issued three separate judgements, each of which advocate for a different approach to the evaluation of judicial delay. It is ironic in that the multiple approaches and lack of clear direction harken back to *Rahey*; however, it departs from *Rahey* in that the panel was not unanimous in their conclusions.

1. Justice Hamilton Assesses Under the Jordan Framework

Hamilton JA (in dissent) disagreed with Joyal CJQB’s conclusion that the Supreme Court had established a test of “shocking, inordinate and unconscionable” for evaluating judicial delay. In her view, those words were simply the way a lower-court judge described the delay in *Rahey*, and the Supreme Court decision simply related the judge’s description.³¹ She interpreted *Rahey* as establishing the test as, “whether the decision-making time, in the context of all of the circumstances of the case, is unreasonable for the purposes of addressing an accused’s section 11(b) motion for a stay of proceedings.”³²

In her detailed analysis, Hamilton JA considered a number of pre-*Jordan* Supreme Court decisions that dealt with 11(b) to provide context for

²⁷ *Ibid* at 612.

²⁸ KGK (QB), *supra* note 9 at para 65, citing *Rahey*, *supra* note 24 at para 43.

²⁹ KGK (QB), *supra* note 9 at para 77.

³⁰ *Ibid* at paras 83, 94-95, 103-105.

³¹ KGK (CA), *supra* note 10 at paras 161-170.

³² *Ibid* at para 169.

“considering the majority decision in *Jordan*.”³³ She held that the principle which results from those cases are that decision delay is part of the inherent time requirements of a case. Under the *Morin* analysis, such times were generally considered neutral, but could count against the Crown where the time extended past what was reasonable.³⁴

From that context, she considered the *Jordan* decision, including factual aspects of the proceedings. She noted that the total delay in *Jordan* included two weeks of decision delay after the preliminary inquiry, and that the Supreme Court indicated that the time before the Court is “the time up to when a conviction is entered.”³⁵ Also important to her analysis was that the Court in *Jordan* relied on the *Morin* guidelines for institutional delay in establishing the presumptive ceilings, before adding additional time for other factors. These “inherent time requirements” included a judge’s decision-making time.³⁶

Based on her analysis, Hamilton JA concluded that judicial delay should be evaluated within the *Jordan* ceilings.³⁷ She recognized that judicial independence is a constitutional principle, but concluded that removing decision delay from the *Jordan* framework would effectively remove judges from the actors called to address the culture of complacency addressed in *Jordan*.³⁸ Applying the timelines and the transitional exceptional circumstance to this case, she held that the delay was unreasonable, and would enter a stay of proceedings.³⁹

2. Justice Cameron upholds the Queen’s Bench Decision

Cameron JA agreed with the conclusion that judicial delay falls under 11(b), and adopted the *Rahey* standard.⁴⁰ It was her view that Lamer J’s comments, considered in their totality and in context, amounted to using

³³ See *ibid* at para 76, citing *Rahey*, *supra* note 24; *R v Conway*, [1989] 1 SCR 1659, 34 OAC 165; *R v Askov*, [1990] 2 SCR 1199, 11 WCB (2d) 224; *R v Morin*, [1992] 1 SCR 771, 12 CR (4th) 1; *R v MacDougall*, [1998] 3 SCR 45, 128 CCC (3d) 483; *R v Godin*, 2009 SCC 26; *R v Vassell*, 2016 SCC 26.

³⁴ *KGK (CA)*, *supra* note 10 at paras 99-101, 105.

³⁵ *Ibid* at para 108-109.

³⁶ *Ibid* at para 111, citing *Jordan*, *supra* note 1 at paras 52-53.

³⁷ *Ibid* at paras 7, 115-119, 126-128.

³⁸ *Ibid* at paras 120-122.

³⁹ *Ibid* at paras 171-172.

⁴⁰ *Ibid* at paras 173-174, 219, 228.

the terms “shocking, inordinate and unconscionable” interchangeably with “unreasonable in the circumstance of decision-making delay.”⁴¹

She disagreed that decision delay should fall under the *Jordan* presumptive ceilings. Rather, her view was that the Supreme Court’s silence on this question in both *Jordan* and *Cody* – where the Court did address other steps the judiciary can take to fight delay – indicates that the Court did not intend for judicial delay to be considered in that analysis.⁴² While she agreed with Hamilton JA that the *Morin* analysis classified decision delay as an inherent time requirement, Cameron JA interpreted the ceilings in *Jordan* as referring to “trial process issues and not the time required for judicial decision-making.”⁴³ She also expressly agreed with Joyal CJQB’s assessment of the practical difficulties surrounding scheduling and decision-making that would result if the *Jordan* ceilings were imposed on judicial delay.⁴⁴

Considering the nine months of decision delay, Cameron JA agreed that the time was long, but was not persuaded that Joyal CJQB’s assessment was unreasonable. She was likewise not persuaded that he erred in his assessment under the transitional exceptional circumstances regarding the pre-decision delay time period. Accordingly, she held that 11(b) was not infringed.⁴⁵

3. Justice Monnin calls for a Contextual Assessment

In brief reasons, Monnin JA agreed with the conclusion that judicial delay falls under 11(b), and moreover agreed with Hamilton JA that the Supreme Court in *Rahey* did not intend to establish “shocking, inordinate and unconscionable” as the test for judicial delay. However, he disagreed with Hamilton JA’s approach of evaluating decision delay under the *Jordan* ceilings, instead calling for “a separate and discrete approach recognising the ‘tension’ between the right to trial within a reasonable time and the

⁴¹ *Ibid* at paras 221-223.

⁴² *Ibid* at paras 191-192.

⁴³ *Ibid* at para 194, citing *Jordan*, *supra* note 1 (“the presumptive ceiling also reflects additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case” at para 53 [emphasis added]).

⁴⁴ *Ibid* at paras 209-210, citing *KGK (QB)*, *supra* note 9 at paras 54-55.

⁴⁵ *Ibid* at paras 245, 249-250. Cameron JA also dismissed other grounds of appeal raised that had no bearing on the delay arguments; see paras 251-283.

ability of a judge to take the time necessary to render a reasoned and just decision.”⁴⁶

In his view, a contextual approach is required to balance factors such as “the complexity of the trial, the decisions arising from the nature of the evidence, and a judge’s or court’s particular workload” in determining whether the decision delay is reasonable.⁴⁷ In this case, he agreed with the conclusion of Cameron JA that the delay, while long, was not unreasonable.⁴⁸

III. GOOD STORIES MAKE FOR HARD DECISIONS

Judges must develop, maintain and put into practice the mental discipline necessary to (i) only consider evidence deemed admissible, (ii) for the purpose(s) permitted by law, and (iii) apply the law to that evidence properly in order to yield a just result. But as everyone knows, once one has heard something it cannot be unheard.

More subtly, judges often hear evidence that is admissible for a particular purpose – narrative, for example, or to demonstrate a police officer had objectively reasonable grounds to arrest – but is not admissible for the judge to consider it in determining whether the accused committed the charged offence.⁴⁹ This is a challenging situation that requires a judge to compartmentalize their mind, a process that actors in the justice system tend not to question.

How evidence is delivered is also an important consideration for judges. A well-told account from a witness who is articulate, likable, and appears sincere may be difficult to disbelieve on first impression – especially when the witness is ‘sure’ of what they are testifying to. Conversely, the testimony given by a witness who is poorly-spoken and recalcitrant is easily dismissed. These understandable tendencies are not in accordance with a proper critical evaluation of evidence by a finder of fact. Demeanour evidence has,

⁴⁶ *Ibid* at paras 285-287.

⁴⁷ *Ibid* at para 288.

⁴⁸ *Ibid* at para 289.

⁴⁹ See e.g. David M Paciocco, “The Perils and Potential of Prior Consistent Statements: Let’s Get it Right” (2013) 17:2 *Can Crim L Rev* 181 (“[t]he primary challenge is that they are each rules of ‘restricted admissibility.’ In other words, while each exception permits a prior consistent statement to be proved, the use that can be made of that proof is limited and differs between exceptions” at 182).

therefore, been the subject of extensive commentary by courts, lest it assume a place of prominence in the fact finder's analysis.⁵⁰

William Twining writes that stories are “necessary,” explaining that “stories help us to make sense of events, to structure an argument, and to provide coherence.”⁵¹ One only needs to observe a criminal trial to see the truth of Twining's observation. Witnesses are often directed to give their evidence in a narrative form, as doing so is more likely to present a clear picture of their testimony than breaking it down in a non-linear fashion. However, Twining opines that stories are not just necessary, but also “dangerous,” warning:

[I]n legal practice they are also wonderful vehicles for ‘cheating’. For instance, they make it easy to sneak in irrelevant or unsupported facts, to appeal to hidden prejudices or stereotypes, and to fill in gaps in the evidence. ‘Good’ stories tend to push out true stories and so on.⁵²

Even when parties do not intend to “cheat” by introducing inappropriate evidence through the story telling mechanism, the same effect can be achieved through negligence or inadvertence. Consider, for example, the recent case of *R v Barton*, where all parties – Crown, defence, trial judge, and witnesses – described the victim as “a prostitute,” and a “‘Native girl’ or ‘Native woman’” throughout the trial.⁵³ Even if done without any intention of subverting the law of evidence, such pejorative references fall squarely within the types of narrative that Twining is concerned about.

The potential for prejudice is acknowledged in the general rule of evidence itself, under which even relevant evidence is inadmissible if the prejudicial effect outweighs its probative value. The common law has developed numerous exclusionary rules regarding specific types of evidence recognizing that admission would result in improper or prohibited

⁵⁰ See e.g., *NS (Ont CA)*, *supra* note 12 at para 55; *NS (SCC)*, *supra* note 12 at paras 99-108; *Law Society of Upper Canada v Neinstein*, 2010 ONCA 193 at para 66 1; *R v PG*, 2012 ONSC 4646 at paras 31-33; 9129-9321 *Quebec Inc v R*, 2007 TCC 2 at para 31, 155 ACWS (3d) 86; *R v Pelletier*, 1995 ABCA 128 at para 18, 165 AR 138; *New South Wales (State Rail Authority) v Earthline Constructions Pty Ltd (In Liquidation)* (1999), 160 ALR 588 (Australia HC); see also Olin Guy Wellborn III, “Demeanor” (1991) 76 Cornell L Rev 1075.

⁵¹ William Twining, “Evidence as a Multi-disciplinary Subject” (2003) 2:2 L Probability & Risk 91 at 102.

⁵² *Ibid* [footnotes omitted].

⁵³ *R v Barton*, 2017 ABCA 216 at paras 116, 124, leave to appeal to SCC granted, 37769 (8 March 2018).

reasoning, or that certain evidence simply has no probative value. Similarly, Parliament has codified the approach to admission of evidence surrounding other sexual conduct, in acknowledgement that it has been used in ways that cannot be supported.⁵⁴

Exclusionary rules are predicated on the notion that if a jury doesn't hear the inadmissible evidence, their deliberations will not be affected by it. In a judge-alone trial, our system depends on the ability of judges to put such evidence out of their mind. When dealing with appropriate uses of evidence, we rely on judges to provide correct and comprehensive jury charges. Naturally, it follows that judges are expected to apply the law properly when they are acting as finder of fact.⁵⁵

A. Judicial Decision-Making is Hard

Even for the judge who is keenly aware of the appropriate and inappropriate uses of a particular piece of evidence, the judicial decision-making process presents numerous challenges. One of the fundamental determinations for a trial judge is the evaluation of a witness's credibility and the reliability of their evidence. Justice Lynn Smith explained the quandary succinctly:

Human beings are not only deceptive but frequently unreliable. Most often this is unintended; we make mistakes for any number of reasons. Our powers of observation and recollection are what they are: imperfect. As well, we may firmly, but wrongly, believe that something happened in a certain way because we are thinking wishfully, or because we are fearful, confused or misled. But sometimes we are unreliable because we knowingly set out to deceive.⁵⁶

On first glance, a determination of credibility seems simple: do you believe the witness is telling the truth? People make similar judgements every day, in matters ranging from the trivial to the vital. Judges, though, bear the onus of explaining their belief: why have they come to the conclusion they have?⁵⁷ Furthermore, they are rarely called on to deal with trivialities: the

⁵⁴ *Criminal Code*, RSC 1985, c C-46, s 276.

⁵⁵ In fact, as a matter of doctrine, judges are presumed to know the law and apply it properly, taking all relevant evidence into account: *R v Pomeroy*, 2007 BCSC 142 at para 39. See also *R v Morrissey*, [1995] 22 OR (3d) 514 at para 27, 26 WCB (2d) 436 (CA); *R v Francis*, 2018 NSCA 7 at para 29.

⁵⁶ Justice Lynn Smith, "The Ring of Truth, the Clang of Lies: Assessing Credibility in the Courtroom" (2012) 63 UNB LJ 10 at 10.

⁵⁷ See *R v REM*, 2008 SCC 51 [REM] ("[t]he object is not to show *how* the judge arrived at his or her conclusion, in a 'watch me think' fashion. It is rather to show *why* the judge

decisions made by judges, even on the most minor criminal matters, may have far-reaching implications for the parties in the case.

The challenge presented in the ‘basic’ assessment of credibility and reliability was commented on, albeit indirectly, in the recent case of *R v Ryon*.⁵⁸ The appellant in *Ryon* was convicted of sexual assault after a trial in which the only issue was whether sexual intercourse had taken place. The complainant said there had been brief intercourse; the appellant said there had not been. The complainant had consumed LSD and MDMA, and the appellant had drunk alcohol on the evening in question.⁵⁹

Ryon appealed his conviction on several grounds, the first alleging that the trial judge had erred in failing to assess credibility in accordance with *W.(D.)*, referring to the well-known recommended instruction for dealing with circumstances where an accused testifies or calls evidence.⁶⁰ Beginning its comments on that ground, the Court indicated, “Whether ‘*W.(D.)*’ was properly considered and applied is perhaps the most popular ground of appeal arising from criminal trials.”⁶¹ The *per curiam* panel proceeded to explain a myriad of ways that even the simplified approach may be misunderstood and misapplied.⁶²

The fact that an alleged misapplication of the *W.(D.)* test is one of the most popular grounds of appeal is illustrative of the challenge faced by judges. *W.(D.)* itself was a response to a specific issue; it was intended to serve as a warning to the trier of fact to avoid the “credibility contest” or from simply “making a choice between two alternatives” when dealing with conflicting accounts.⁶³ As Smith explained, “it is wrong to draw a straight line from the acceptance of the evidence of a complainant, or a rejection of the evidence of the accused, to a conclusion that the accused is guilty of the alleged crime.”⁶⁴

made that decision” at para 17 [emphasis in original]).

⁵⁸ *R v Ryon*, 2019 ABCA 36 [*Ryon*].

⁵⁹ *Ibid* at paras 1, 4-5, 9, 11-12, 18.

⁶⁰ *Ibid* at para 19. See *R v W(D)*, [1991] 1 SCR 742 at para 11, 12 WCB (2d) 551.

⁶¹ *Ryon*, *supra* note 58 at para 20. See also the comments of Watson JA (“the guidance in *W.(D.)*... appears to have become almost a *pro forma* ground of appeal in both jury and non-jury trial cases” at paras 73-74).

⁶² *Ibid* at paras 26-54.

⁶³ Lisa Silver, “The WD Revolution” (2018) 41:4 Man LJ 307 at 308-309, citing *R v Nimchuk*, [1976] 33 CCC (2d) 209, 1977 CarswellOnt 980.

⁶⁴ Smith, *supra* note 56 at 20.

The simplified approach set out by Cory J in 1991 has achieved “iconic status” and is “the principles enshrined in the decision are readily identifiable by mere mention of the case initials.”⁶⁵ Yet despite this predominance in the area of credibility assessments, *W.(D.)* has not made a judge’s job any easier, and as detailed in *Ryon*, may result in misunderstanding or misapplication of the appropriate principles. Notably, the appeal in *Ryon* was allowed and a new trial ordered, on the basis of a misapplication of the *W.(D.)* framework.⁶⁶

The challenges faced by a trial judge in the area of decision-making extend far beyond credibility findings. Judges are often called upon to make findings of fact, sometimes in cases where the evidence is purely circumstantial. Judges, like juries, are expected to do so on the basis of their knowledge and experience with the world. But as Smith explains:

[O]ur assessments of plausibility depend upon our sometimes very modest store of personal or learned experience. To put it bluntly, what might seem wholly plausible to me might seem entirely implausible to someone who has lived a different and more sheltered life than I have, or a less sheltered life...

My point is that in assessment of plausibility, the subjective element is inescapable, often ineffable, and elusive of contradiction.⁶⁷

Thus, even for the judge who is consciously focusing on what she perceives to be the intrinsic believability of the evidence, such an approach still calls for caution. What is clear is that there is no approach or technology that if followed or used will allow judges to easily determine what evidence should be accepted and what should be dismissed.⁶⁸ Instead, judges will have to continue applying the principles summarized in *R v Bêland*:

[I]n the resolution of disputes in litigation, issues of credibility will be decided by human triers of fact, using their experience of human affairs and basing judgment upon their assessment of the witness and on consideration of how an individual’s

⁶⁵ Silver, *supra* note 63 at 308.

⁶⁶ *Ryon*, *supra* note 58 at paras 69-71.

⁶⁷ Smith, *supra* note 56 at 34-35.

⁶⁸ See e.g. *ibid* (“In six laboratory studies [of polygraph effectiveness], false positives were returned for 8% to 15% of participants, while false negatives were returned for 7% to 10% of participants. The results in field studies were even worse: in five studies, false positives were returned for 12% to 47% of participants. One study was an outlier that returned only 1% false negatives, but for the other four studies false negatives were returned between 11% and 17% of participants” at 28-29).

evidence fits into the general picture revealed on a consideration of the whole of the case.⁶⁹

B. The Benefits of Reserving for Consideration

While our system presumes that judges will make decisions in accordance with law, we also require judges to issue reasons for their decisions.⁷⁰ Whether oral or written, the critical functions of judicial reasons are to explain why the result is a conviction or acquittal, to provide public accountability, and permit appellate review.⁷¹ A subset of the latter is that they illustrate how evidence was used. Thus, a judge's reasons act as a check against improper application of evidence.

Of course, simply because a judge is compelled to give reasons does not preclude an improper weighing or application of evidence. If it was that simple, we would simply require judges to give written reasons for all trials and we could do away with 90-percent of appellate matters. Reserving their decision, though, allows a judge time to carefully consider the evidence they have heard and make prudent findings based on a measured weighing of the evidence. The Supreme Court of Canada has repeatedly acknowledged this. In *R v Sheppard*, Binnie J stated that “within the confines of a particular case, it is widely recognized that having to give reasons itself concentrates the judicial mind on the difficulties that are presented.”⁷² It was not long after in *R v R.E.M.* that McLachlin CJC wrote:

[R]easons help ensure fair and accurate decision making; the task of articulating the reasons directs the judge's attention to the salient issues and lessens the possibility of overlooking or under-emphasizing important points of fact or law. As one judge has said: “Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.”⁷³

Credibility findings are an excellent example of the type of findings that will benefit from this careful consideration. The challenges that may arise in making credibility findings was discussed above in relation to *W.(D.)*.

⁶⁹ *R v Bédard*, [1987] 2 SCR 398 at para 68, 36 CCC (3d) 481, cited in Smith, *supra* note 56 at 18.

⁷⁰ *REM*, *supra* note 57 at paras 10-14.

⁷¹ *Ibid* at paras 13, 15; see also *R v Sheppard*, 2002 SCC 26 [*Sheppard*]; *R c Dinardo*, 2008 SCC 24 at para 24.

⁷² *Sheppard*, *supra* note 71 at para 23 [emphasis added].

⁷³ *REM*, *supra* note 57 at para 12, citing *United States v Forness*, 125 F (2d) 928 at 942 (2d Cir 1942) [emphasis added].

This section, though, provides assistance in answer to those challenges. Taking credibility findings as an example, in *R v Rhayel*, Epstein JA minimized – nearly to the point of elimination – the use of demeanour when a judge is making credibility findings.⁷⁴ Her concern is obvious: that a judge may accept a witness's evidence simply because they present in a favourable way without conducting a critical examination of the evidence itself. While the position taken by Epstein JA may be viewed as extreme, she is undoubtedly correct that observations of demeanour should not be the lynchpin of a credibility assessment. The trial judge who reserves and conducts a careful review of all the evidence, though, has the opportunity to consider each witness and what value their evidence has. It may even result in a judge deciding opposite to their initial impressions.

In my view, written reasons provide the best opportunity for critical reflection. The judge has the benefit of making an unhurried decision, and, through the writing process, a second opportunity to critique their own reasoning. This permits the cautious judge to also recognize where they may be being influenced by those irrelevant, unsupported facts or hidden stereotypes that Twining is concerned with. Thus, thorough written reasons are invaluable in sorting true accounts from those which are merely good stories. For that reason, it is important for judges at all levels to reserve their decisions and issue written reasons when they feel it necessary. Aside from contributing to the jurisprudence and development of the law in their particular jurisdiction, judges would be assisting themselves in making better-reasoned and more reliable decisions.⁷⁵

⁷⁴ *R v Rhayel*, 2015 ONCA 377, 123 WCB (2d) 255 (“[c]ases in which demeanour evidence has been relied upon reflect a growing understanding of the fallibility of evaluating credibility based on the demeanour of witnesses. It is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom. One of the dangers is that sincerity can be and often is misinterpreted as indicating truthfulness” at para 85).

⁷⁵ See *REM*, *supra* note 57 (“Finally, reasons are a fundamental means of developing the law uniformly, by providing guidance to future courts in accordance with the principle of stare decisis. Thus, the observation in H Broom's *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* (2nd ed 1885) at 147-148: ‘A public statement of the reasons for a judgment is due to the suitors and to the community at large – is essential to the establishment of fixed intelligible rules, and for the development of law as science’” at para 12).

IV. *K.G.K.*: ONWARD AND UPWARD

The three-way split in the Court of Appeal serves to illustrate just a few of the options that will be available to the Supreme Court of Canada. The Court could adopt any of the appellate decisions, or could go in an entirely different direction. Certainly, the Court has shown its willingness to take a creative approach to delay in *Jordan*, and demonstrated its commitment to creating a more efficient system in *Cody*. The question here is how it will balance the competing constitutional interests at play and what impact its approach will have on trial judges.

A. Principled, but Practical

The question of how to deal with judicial delay engages important constitutional interests. The importance of the right to be tried in a reasonable time was explained in *Jordan*:

As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole. Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial.⁷⁶

Judicial independence is equally important. As Joyal CJQB summarized, it has its roots both in the preamble to the *Constitution Act, 1867* and in s. 11(d) of the *Charter*; has been acknowledged as an unwritten constitutional principle; and is "acknowledged as foundational for public confidence in the proper administration of justice and for the constitutional separation of powers."⁷⁷ The Supreme Court in *R v Beauregard* described judicial independence as:

[T]he complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.⁷⁸

⁷⁶ *Jordan*, *supra* note 1 at paras 19-20, cited in *KGK (QB)*, *supra* note 9 at para 17.

⁷⁷ *KGK (QB)*, *supra* note 9 at para 50, citing *R v Campbell*, [1997] 3 SCR 3, 10 WWR 417; *Ell v Alberta*, 2003 SCC 35 at para 19; *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13 at paras 37-38.

⁷⁸ *R v Beauregard*, [1986] 2 SCR 56 at 69, 26 CRR 59, cited in *KGK (QB)*, *supra* note 9 at

Dealing with competing, and sometimes conflicting *Charter* rights is one of the most challenging quandaries the courts face.⁷⁹ As a hierarchical approach to specific *Charter* rights has been soundly rejected, it falls to the courts to achieve a balance that “fully respects the importance of both sets of rights.”⁸⁰

In conducting its balancing, the Court will need to bear in mind the practical effects of its decision. In this regard, it would do well to remember its own caution in *Jordan*: “All courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials.”⁸¹ The majority decision in *Jordan*, which was grounded in a foundation of strong principles, nonetheless strived to be practical. This is illustrated in *Cody*, where the Court stated:

In setting the presumptive ceilings, this Court recognized that an accused person’s right to make full answer and defence requires that the defence be permitted time to prepare and present its case. To this end, the presumptive ceilings of 30 months and 18 months have “already accounted for [the] procedural requirements” of an accused person’s case. For this reason, “defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay” and should not be deducted.⁸²

This passage indicates that the Court was taking care to be mindful of the practical time requirements of not only a prosecution, but of the defence to prepare its case, including bringing pretrial applications. In *K.G.K.*, a significant practical question was highlighted by Joyal CJQB:

It is also worth noting that the inclusion of judicial reserve time in the presumptive ceiling would put both the Crown and the courts in the untenable position of having to schedule all matters in a manner so as to have them completed many months below the ceiling in order to accommodate potential judicial writing time. As noted by way of example, if as in the present case, nine months (of judicial delay) were considered as a reference point, all Superior Court trials would have to be completed within 21 months, and Provincial Court trials within nine months.⁸³

para 49.

⁷⁹ Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 5th ed (Toronto: Irwin Law, 2013) at 58.

⁸⁰ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at para 75, 120 DLR (4th) 12; *Gosselin c Québec (Procureur général)*, 2005 SCC 15 at para 2; *Same-Sex Marriage*, *supra* note 21 at para 50.

⁸¹ *Jordan*, *supra* note 1 at para 139.

⁸² *Cody*, *supra* note 3 at para 29 [citations omitted].

⁸³ *KGK (QB)*, *supra* note 9 at para 55 [emphasis added].

The majority's approach in *Jordan* was aimed at simplifying the 11(b) analysis, which had the desirable effects of providing a layer of predictability and certainty for judicial actors: the Crown can conduct itself with an eye on the constitutional clock, and defence is no longer left guessing as to whether it has been 'long enough' to prevail on a delay application.

It is challenging to reconcile the method of evaluating judicial delay within the *Jordan* framework with the Court's clear intention to provide predictability in the criminal process. Should the Court go this route, it is hoped that it will resolve its earlier approach with the unpredictability that would result from the parties (mainly the Crown) having to guess at how much time a particular judge may require to write a decision. Moreover, in circumstances like those arising in the instant case, one also hopes the Court would provide direction to the parties regarding what steps will need to be taken to remain within the spirit of *Jordan* while still respecting the independence of the judiciary. In short, while the Court must, of course, decide this case in a manner that reflects the purposive approach to *Charter* rights, it must also bear in mind the practical effects of its decision, and provide direction once again to all the actors in the justice system on how to properly exercise each party's particular role.

B. Approach Must Protect a Judge's Ability to Reserve and Consider

What must also not be lost in this analysis is that a trial is a search for truth. The ability of a judge to reserve their decision and conduct a detailed and thoughtful analysis of the evidence they have received is a vitally important tool in that search. In my view, protecting the ability of a trial judge to do that should not be viewed as being contrary to the accused's interests. In fact, there are many circumstances where it is to the accused's benefit.

Another practical impact of applying the *Jordan* ceilings to decision delay that was considered in the lower courts was the varying periods of time that would be allotted to trial judges to make a decision. As Joyal CJQB explained:

[W]ere judges subject to the categorical and unconditional obligation to come to determinations within the presumptive ceilings, the manner in which the case was conducted or unfolded would determine the manner in which a judge approaches and perhaps makes his own or her own decision. In other words, in some cases which might conclude well below the ceiling, a judge would have many months to

render well-crafted written reasons. In other cases which conclude very close to the ceiling, the judge might be left with mere days.⁸⁴

Putting aside the question of how to balance this potential result with judicial independence, the possibility – even likelihood – that trial judges will be placed in a position where their decision is ‘due’ in mere days is alarming. It takes little imagination to consider how rushed a judge in such a position may feel. This circumstance simply does not lend itself to a well-reasoned, thoughtful consideration of the evidence. Rather, it leads to missed details, overlooked nuances, and misunderstandings – all of which may contribute to a wrongful conviction. The comments of Trotter J in *R v Lamocchia* are apt: “Within reasonable limits, it is desirable that judges take the time that they need to prepare carefully reasoned decisions.”⁸⁵

We cannot be so zealous in our quest to eliminate delay that we hamper the ability of judges to properly exercise their judicial decision-making duties. Indeed, while the focus of *K.G.K.* will, quite rightly, be on the analysis to be applied to decision delay under 11(b), this case also provides an opportunity for the Supreme Court to emphasize the useful functions of a well-crafted decision, and encourage judges not to hesitate to take the time reasonably necessary to produce them.

This applies equally to provincial and superior court judges. As Joyal CJQB stated:

Whatever the unique requirements in a given case, it must always be remembered that in every case, judges should aim to provide considered reasons which ‘enhance the qualities of justice in the criminal process in many ways.’⁸⁶

It is well-known that provincial courts across the country are busy. They deal with the vast majority of criminal matters, and their dockets are correspondingly full. The Supreme Court has commented previously in the context of reviewing a trial judge’s reasons on appeal that an appellate court must consider the “time constraints and the general press of business in the criminal courts.”⁸⁷ This principle must also be borne in mind when evaluating decision delay. It is by no means uncommon for unanticipated issues to arise in the course of proceedings that do not lend themselves to

⁸⁴ *Ibid* at para 54 [emphasis added].

⁸⁵ *R v Lamocchia*, 2012 ONSC 2583 at para 7 [*Lamacchia*].

⁸⁶ *KGK (QB)*, *supra* note 9 at para 76, citing *Lamacchia*, *supra* note 85 at para 7 [emphasis added].

⁸⁷ *Sheppard*, *supra* note 71 at para 55; see also *REM*, *supra* note 57 at para 45.

an immediate ruling.⁸⁸ Nor can a judge be expected to focus all their time and energy on one matter. As Trotter J observed:

[I]t is not reasonable to expect judges in a busy trial court...to drop or re-arrange all other obligations when it becomes necessary to take time to consider a legal issue that surprisingly arises during a trial.⁸⁹

The Supreme Court in *Jordan* stated that all courts must be mindful of the practical impacts of their decisions on future cases.⁹⁰ It is hoped that the Court will heed its own caution when deciding *K.G.K.*, and will ensure that the ability of judges to reserve their decisions and conduct the vitally important process required of them is strongly protected.

V. CONCLUSION

We expect much of our judges. We expect them to adjudicate emotionally-charged and complex matters dispassionately, taking into account evidence from complainants, accused persons, police officers and third parties. They are required to not only know the law of evidence, but also have the mental discipline to disregard evidence they have heard that they subsequently deem inadmissible, and to only use admissible evidence for the appropriate purposes. We require them to determine who is telling the truth, who is lying, and who may be mistaken, and come to a conclusion of what happened in a particular circumstance. And after they have done all that, we expect and require them to explain why they have concluded as they have.

There is no denying that delay is a problem within the criminal justice system, and that all parties – including the judiciary – have a role to play in ameliorating it. The culture of complacency criticized by the *Jordan* majority simply must be addressed at all levels. Regardless of what framework the Supreme Court of Canada chooses to implement regarding decision delay, however, we cannot be so focused on delay that we fail to pay adequate attention to other important aspects of the trial process that by their very nature take time.

The value in a well-crafted decision that is the product of careful and thoughtful reflection cannot be understated. While being held to a

⁸⁸ See e.g. *Lamacchia*, *supra* note 85 at paras 5-6.

⁸⁹ *Ibid* at para 7.

⁹⁰ *Jordan*, *supra* note 1 at para 139.

reasonable standard, judges must be free to reserve their decision and take the time that is reasonably necessary to analyze the evidence, consider the issues, make their findings and properly apply the law. It is hoped that the Supreme Court in *K.G.K.* will reaffirm and protect this vitally important exercise, as it is in this careful reflection that judges are best able to sort true accounts from those which are merely good stories.