Moniz c. R. **2018 QCCQ 1441**

COURT OF QUEBEC

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL
CRIMINAL DIVISION

No: 500-73-004121-147, 500-73-004120-149
500-61-381293-142, 500-61-381292-144

DATE: February 1st, 2018

BY THE HONOURABLE ALEXANDRE ST-ONGE, J.C.Q.

ROBERT MANUEL MONIZ
Petitioner-accused
v.
HER MAJESTY THE QUEEN
L'AGENCE DU REVENU DU QUÉBEC
Respondents-prosecutors

JUDGMENT
on a motion for Stay of Proceedings pursuant to Section 11(b)
of the *Canadian Charter of Rights and Freedoms*

INTRODUCTION

[1] Robert Manuel Moniz is accused of being implicated in an illegal scheme, between December 2007 and September 2009, where 17 properties were sold, with GST/QST, to a total of 20 individuals used as cover names. The taxes collected by the two corporations from the sales totalize $373,745 in QST and $248,157 in GST.

[2] Revenu Quebec never received any amount of GST/QST from the two corporations. It is the prosecution's theory that Moniz participated in, acquiesced to or ordered, through both corporations, the willful evasion or attempted evasion or compliance within a fiscal law or payment or remittance of a duty imposed under such law. Moniz is being charged under The *Excise Tax Act*[1] in the "73" files and under the *Tax Administration Act*[2], a provincial law, in the "61" files.

[3] There were multiple Court appearances (the Court counted 19) before the start of the present hearing on December 12, 2017. The accused was present in Court on every occasion, except on April 28, 2014, where he was not brought in front of the Judge even though he was in the courthouse.

[4] The total delay in the present case is around **48 ½ months**.

Position of the parties

[5] Moniz is alleging that the delay of four years between the moment charges were laid against him until the end of the trial is unreasonable and he is asking the Court to order a stays of proceedings.

[6] He is arguing that the disclosure of evidence was problematic, the motions he presented were not frivolous and that the transitional exceptional measure should not apply.

[7] The prosecution essentially pretends that Moniz introduced different motions that had low chances of success and that he clearly waived some of the delay in his motions. Finally, the exceptional transitional measure should apply if needed because of his attitude towards the delay in the file.

[8] For the analysis of the present motion, the Court will consider all of the evidence (witnesses heard in Court and documentary evidence), the submissions made by all counsels and the case law submitted.

LEGAL FRAMEWORK FOLLOWING *JORDAN*

[9] In *R. v. Jordan*[3], the majority established a new framework to be applied where a breach of section 11(b) *Charter*[4] is alleged.

[10] At the heart of the new framework lies a ceiling, beyond which delay is presumptively unreasonable. The presumptive ceiling is 18 months for cases going to trial in the provincial court and 30 months for cases going to trial in the superior court or cases going to trial in the provincial court after a preliminary hearing.[5]

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1 Excise Tax Act, R.S.C., 1985, chap. E-15.
2 Tax Administration Act, R.S.Q., c. A-6.002.
3 *R. c. Jordan, 2016 SCC 27*.
4 Canadian Charter of Rights and Freedoms, the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
5 *R. v. Jordan, supra,* para. 46.

A. The new framework summarized

[11] In *R. v. Coulter*[6], The Ontario Court of appeal summarized the new framework. Herein is that summary.

[12] Calculate the **total delay**, which is the period from the charge to the actual or anticipated end of trial (*Jordan*, at para. 47).

[13] Subtract **defence delay** from the total delay, which results in the "**Net Delay**" (*Jordan*, at para. 66).

[14] Compare the Net Delay to the presumptive ceiling (*Jordan*, at para. 66).

[15] 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** (*Jordan*, para. 47). If it cannot rebut the presumption, a stay will follow (*Jordan*, para. 47). In general, exceptional circumstances fall under two categories: **discrete events** and **particularly complex cases** (*Jordan*, para. 71).

[16] 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 (*Jordan*, para. 75).

[17] 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 (*Jordan*, at para. 80).

[18] If the **Remaining Delay falls below the presumptive ceiling**, the onus is on the defence to show that the delay is unreasonable (*Jordan*, para. 48).

[19] The new framework, including the presumptive ceiling, applies to cases already in the system when *Jordan* was released (the "**Transitional Cases**") (*Jordan*, para. 96).

B. Key Elements in the New Framework

(1) Defence Delay

[20] Defence delay has two components: (1) that arising from **defence waiver**; and (2) delay caused solely by the conduct of the defence ("**defence-caused delay**") (*Jordan*, paras. 61 and 63).

[21] Waiver can be explicit or implicit but, in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights (*Jordan*, para. 61).

[22] Defence-caused delay is comprised of situations where the acts of the defence either directly caused the delay or are shown to be a deliberate and calculated tactic employed to delay the trial. Frivolous applications and requests are the most straightforward examples of defence delay (*Jordan*, para. 63). Where the court and the

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6 *R. v. Coulter*, 2016 ONCA 704, para. 34-58.

Crown are ready to proceed but the defence is not, the defence will have directly caused the delay (*Jordan*, para. 64).

(2) Exceptional Circumstances

[23] If the Net Delay exceeds the presumptive ceiling, the onus is on the Crown to rebut the presumption of unreasonableness based on the presence of exceptional circumstances.

[24] Exceptional circumstances lie outside the Crown's control in that: (1) they are reasonably unforeseen or reasonably unavoidable; and (2) Crown counsel cannot reasonably remedy the delays emanating from the circumstances once they arise. Such circumstances need not be rare or entirely uncommon (*Jordan*, para. 69).

[25] An exceptional circumstance is the only basis upon which the Crown can discharge its burden to justify a Net Delay that exceeds the ceiling. The seriousness or gravity of the offence cannot be relied on. Nor can chronic institutional delay or the absence of prejudice to the accused (*Jordan*, para. 81).

[26] The list of exceptional circumstances is not closed but, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases (*Jordan*, para. 71).

(a) Discrete Events

[27] An illustration of a discrete event that will generally qualify is a medical or family emergency on the part of the accused, significant witnesses, counsel or the trial judge (*Jordan*, para. 72).

[28] The period of delay caused by any discrete event must be subtracted from the Net Delay for the purpose of determining whether the presumptive ceiling has been reached. However, any portion of the delay caused by a discrete event that the Crown or system could reasonably have mitigated may not be subtracted (*Jordan*, para 75).

(b) Particularly Complex Cases

[29] Particularly complex cases are cases that, because of the nature of the evidence or issues (or both), require an inordinate amount of trial or preparation time such that the delay is justified (*Jordan*, para. 77). The seriousness or gravity of the offence cannot be relied on to establish that the case is particularly complex (*Jordan*, para. 81).

[30] Where the trial judge finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No further analysis is required (*Jordan*, para. 80).

(3) Remaining Delay is Below the Presumptive Ceiling

[31] If the Remaining Delay falls below the presumptive ceiling, the onus is on the defence to show that the delay is unreasonable (*Jordan*, para 48). To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a

sustained effort to expedite the proceedings ("**defence initiative**"); and (2) the case took markedly longer than it reasonably should have. Absent both of these two factors, the section 11(*b*) application must fail (*Jordan*, para. 82).

[32] Stays beneath the presumptive ceiling should be granted only in clear cases (*Jordan*, para. 83).

(4) Transitional Cases

[33] The new framework applies to cases currently in the system (*Jordan*, para 94). The analysis of transitional cases differs depending upon whether the Remaining Delay exceeds or falls below the presumptive ceiling.

(a) Remaining Delay Exceeds the Presumptive Ceiling

[34] Where the Remaining Delay exceeds the presumptive ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to July 8, 2016, the date that *Jordan* was released. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case took is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and to the fact that the parties' behavior cannot be judged strictly against a standard of which they had no notice. Considerations of prejudice and the seriousness of the offence can inform whether the parties' reliance on the previous state of the law was reasonable (*Jordan*, para. 96).

[35] Moreover, the Remaining Delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with significant institutional delay problems. Judges in jurisdictions plagued by lengthy, persistent and notorious institutional delays should account for this reality, as Crown counsel's behavior is constrained by systemic delay issues (*Jordan*, para. 97).

(b) Remaining Delay Falls Below the Presumptive Ceiling

[36] For cases currently in the system in which the Remaining Delay falls below the ceiling, the two things that the defence must establish (i.e. defence initiative and whether the time the case took markedly exceeds what was reasonably required) must also be applied contextually, sensitive to the parties' reliance on the previous state of the law (*Jordan*, para. 99).

PROCEDURAL HISTORY

February 18, 2014 - April 28, 2014

[37] The Court files are open on February 18, 2014, and the tickets are served February 20, 2014. Hence, the starting point for the *Jordan* analysis is February 18, 2014, for files 500-73-004121-147 and 500-73-004120-149 compared to February 20, 2014, for the files 500-61-381293-142 and 500-61-381292-144.

[38] On April 28, 2014, in Court, Catherine Ranalli appears for Moniz. The evidence is not disclosed. The prosecutor mentions that he does not have anything with him to disclose that morning.[7]

April 28, 2014 - September 17, 2014

[39] On May 7, 2014, Moniz fires his lawyer, Me Ranalli. Moniz told the Court on September 17, 2014, that he fired her because she postponed the case without him being brought in front of the Judge as he was in the courthouse that day.[8]

[40] On May 13, 2014, a prosecutor receives a letter from Moniz stating that he is now representing himself and that he asks for:

1- A copy of the summons in English;

2- The disclosure of evidence in English; and,

3- All correspondence to be in English.

[41] He also states that English is the language that he understands.

[42] On June 13, 2014, a prosecutor sends a copy of the summons and the tickets to Me Elaine Châteauvert who works for the Legal Aid Office in Montreal.[9]

[43] On July 23, 2014, Moniz produces a motion according to section 603 of the Criminal Code to be presented for adjudication on September 17, 2014, in which he requests full disclosure in English and a "detailed way of the motifs for the accusations".[10]

[44] On August 11, 2014, Moniz sends an email[11] to prosecutor Daniel Martel-Croteau in which:

1- He states that he was present in the courthouse on April 22, 2014;

2- He requests to be present in Court on September 17, 2014;

3- He reaffirms his request for disclosure of the evidence in English and a copy of the accusations also in English.

[45] Kim Marcil, for the prosecution, answers Moniz on August 12, 2014, and explains that the disclosure will be ready soon and that the disclosure will be a copy of the original documents and that the documents will not be translated in English.[12]

[46] On August 12, 2014, Moniz sends an email to the prosecution in which he asks who the witnesses are in his files and demands the assistance of an English interpreter.[13]

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7 See exhibit VDR-1, tab 1.
8 See exhibit VDR-2, tab 3.
9 See exhibit VDR-2, tab 5.
10 See exhibit VDR-2, tab 6.
11 See exhibit VDR-2, tab 7.
12 See exhibit VDR-2, tab 7.

September 17, 2014 - Court Appearance

[47] On September 17, 2014, the evidence is disclosed to Moniz seven months after the summons, around 5 months after the first appearance in Court. Moniz advises the Court that he wishes to present a motion for disclosure in English. The Judge explains that he cannot decide that motion because he is not the trial judge.

[48] The Judge verifies how much time the prosecution needs to present its evidence. Three days are mentioned by the prosecution. The Judge mentions that he cannot set a trial date considering the potential length of the trial. Therefore, the files are fixed on October 15, 2014, to have a Case Management Judge appointed to hear the motions Moniz wishes to present. Moniz hints about a potential *Rowbotham*[14] motion to be presented.

[49] Moniz also mentions that: “I want to get this file done as quickly as possible” and he objects to the case being postponed to November 2014 and asks to get a closer date.

September 17, 2014 - October 15, 2017

[50] On October 1, 2014, Moniz writes to prosecutor Kim Marcil and seems to ask what his sentence would be if he pleads guilty. She answers the question and writes to him that, if there is no disposition, the prosecution will ask the Court to set a trial date.[15]

[51] On October 14, 2014, the prosecution (Me Marcil) sends an email to Moniz asking him if he spoke to a lawyer and/or took a decision about his files.[16] She also mentions the prosecution is ready to fix a trial date.

October 15, 2014 - Court Appearance

[52] On October 15, 2014, Moniz wishes to present his motion but an *amicus curiae* (Me Caron) is absent. The files are sent for Case Management. Moniz mentions his intention to present a motion to obtain a lawyer and is told that he may present his motion at the next court date. The case is postponed to December 9, 2014.

October 15, 2014 - December 8, 2014

[53] On November 10, 2014, disclosure is made to Me Jean-Philippe Caron (*amicus curiae*).[17]

[54] On December 5, 2014, a motion to obtain an attorney for the defence is filed by Moniz.[18] The motion asks for an attorney to be present in Court for Moniz, so he can

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13 See exhibit VDR-2, tab 8.
14 *R. c. Rowbotham*, 1988 ONCA 147.
15 See exhibit VDR-2, tab 9.
16 See exhibit VDR-2, tab 9.
17 See exhibit VDR-2, tab 10.
18 See exhibit VDR-2, tab 11.

have a fair trial and secondly, that the attorney be paid on an hourly rate. A reference is made to the decision in *Rowbotham*.[19] The motion is filed to be adjudicated on December 9, 2014.

[55] On December 8, 2014, Moniz files two motions:

1- A motion according to section 530(1) of the Criminal code to have a trial in English[20];

2- A motion named by Moniz "motion for an adjournment in which he asks for: (1) an adjournment until March 2015 to "obtain a *Rowbotham* for an attorney," and (2) a request of the disclosure in the English language. [21]

December 9, 2014 - Court Appearance

[56] On December 9, 2014, Moniz is ready to present his *Rowbotham* motion. The respondent is ready to present a "motion for inadmissibility." However, the Judge present is not a designated judge to hear the motions.

[57] During the hearing, Justice Morin mentions:

> "OK. So That is definitely a case that should be heard. The motion should be heard by a 551 Judge. Juge de gestion d'instance will specifically address that question before there is any trial".[22]

[58] Moniz also mentions to Justice Morin that there is a motion for a trial in English, a motion to adjourn and a motion to disclose. He then says that the detention centre lost his disclosure because of transfers to other jails. **The Judge then reviews all the motions and asks if the motion for an English trial is contested. The prosecution answers yes**.[23]

[59] Finally, Justice Morin decides that all motions will be addressed by a designated judge (551 Cr. c.) starting with the *Rowbotham* issue and a date is set for the *Rowbotham* motion, to wit September 30, 2015. Justice Morin mentions that the *Rowbotham* motion will most probably be heard in English.

December 9, 2014 - September 30, 2015

[60] Disclosure is served to Moniz at his home[24] in January 2015.

[61] On July 29, 2015, a Legal Aid Certificate is issued for Franco Schiro to represent the accused.[25]

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19 See exhibit VDR-2, tab 11; *R. c. Rowbotham*, supra.
20 See exhibit VDR-2, tab 12.
21 See exhibit VDR-2, tab 13.
22 See exhibit VDP-2, tab 12.
23 See exhibit VDR-2, tab 12.
24 See exhibit VDR-2, tab 14.
25 See exhibit VDR-2, tab 15.

[62] On September 18, 2015, Justice Morin is informed by a lawyer from the Attorney General's office that Moniz is represented by Me Franco Schiro on a Legal Aid certificate and hence, the motion (*Rowbotham*) will not be advocated on September 30, 2015. Since the other motions do not concern the Attorney General's office but Revenu Quebec, no lawyer from their office will be present.[26] The prosecutor in the file, Me Shura Abdulhaq and Moniz's lawyer are sent copies of his letter.

[63] On September 22, 2015, an email is sent to the prosecutor in the file by Melissa Podilchuk, a lawyer working with Franco Schiro on Moniz's file stating that the motions for disclosure in English and trial to be held in English still stand.[27]

September 30, 2015 - Court Appearance

[64] On September 30, 2015, Moniz withdraws the *Rowbotham* motion. The prosecution declares not contesting the English trial motion. A new date is set for the motion for disclosure in English. The first dates available are in January 2016. Moniz's lawyer is only available on May 5, 2016.

May 5, 2016 - Court Appearance

[65] On May 5, 2016, Moniz's lawyer is absent in front of Justice Dominique Joly, who is a designated judge to hear the disclosure in English motion. The file is postponed to the next day.

May 6, 2016 - Court Appearance

[66] On May 6, 2016, Moniz's lawyer is not ready to present the motion. A mistake was made in the entering of the date as being pro forma versus to proceed in Me Schiro's agenda so the files are postponed to May 17, 2016.

May 17, 2016 - Court Appearance

[67] On May 17, 2016, Moniz withdraws his motion for disclosure in English and his lawyer asks for a pro forma date to verify the possibility of a settlement. The case is postponed to June 17, 2016.

June 17, 2016 - Court Appearance

[68] On June 17, 2016, Moniz's lawyer asks the Court to cease to represent him because the accused did not accept a settlement offer. Asked by the Judge if he agrees with his lawyer not representing him anymore, Moniz responds: "I have no choice." Moniz mentions he wants to proceed in the files and that he wishes to present a *Rowbotham* motion. The case is sent for Case Management on September 19, 2016.

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[26] See exhibit VDR-2, tab 16.
[27] See exhibit VDR-2, tab 17.

June 17, 2016 - September 19, 2016

[69] On July 8, 2016, the *Jordan*[28] decision is rendered by the Supreme Court of Canada.

[70] During the month of July 2016, the prosecution discloses the following:

1-Interviews and questionnaires with buyers that were completed by investigator Jessica Laguerre from 2015 to February 2016;

2-Bankruptcy and fiscal documents.

[71] According to Laguerre's testimony, those documents did not change the evidence the prosecution wanted to adduce during the trial.

[72] On August 22, 2016, Moniz sends a motion[29] to the prosecution concerning:

1- Disclosure;

2- Disclosure in English;

3- An adjournment until March 2017 to obtain a *Rowbotham*;

4- The fact that he is unable to obtain the disclosure from his previous attorney.

[73] On August 23, 2016, the prosecution sends an email to Moniz to inform him that the motion will be contested and that a trial date will be requested. The evidence will be sent to him once again at his address.[30]

[74] On September 13, 2016, Moniz presented himself to the *Legal Aid* office in Joliette. According to documentary evidence, Me Michel Leclerc accepted to cover the legal services asked by Moniz and transferred the file to the *Legal Aid* office in Montreal to name a staff lawyer to represent him.[31]

CASE MANAGEMENT BY JUSTICE CLAUDE LEBLOND

September 19, 2016 - Court Appearance

[75] On September 19, 2016, Moniz wishes to present a *Rowbotham* motion. The prosecution is not ready to present Moniz with a list of admissions. The *Rowbotham* motion is set to be heard at the next court date. Justice Leblond asks for a detailed summary and an admission project. Moniz asks for a lawyer and there is discussion about Chapter 3 of the *Legal Aid Act*[32].

[76] On September 23, 2016, Moniz sends the prosecution a motion[33] where:

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28 *R. v. Jordan*, supra.
29 See exhibit VDR-2, tab 22.
30 See exhibit VDR-2, tab 23.
31 See exhibit VDP-3.
32 Act respecting legal aid and the provision of certain other legal services, CQLR c A-14.
33 See exhibit VDR-2, tab 25.

1- He requests to receive the disclosure in the English language;

2- Ask for an adjournment until March 2017 to obtain a *Rowbotham*.

September 26, 2016 - Court Appearance

[77] On September 26, 2016, Moniz explains the steps he took to retain an attorney. Justice Leblond mentions that :

> "The way to have a lawyer paid by the state would be through a Rowbotham application. The problem with that is that you may very well be admissible to legal aid and I would have to have some proof of the impossibilities of the lawyer doing this case, on the legal aid tariff. Did you ask for any staff lawyer?"

[78] Also, Justice Leblond notes that no summary or "will say" in English was made to be disclosed to the accused. He suggests that the prosecution translate the summary and the "will say" for each witness into English. As for the length of the trial, the prosecution asks for three days to present its evidence. Moniz announces 30 witnesses. A trial is set for 6 days; September 4, 5, 6, 7, 10 and 11 2018.

[79] Concerning the complexity of the case, Justice Leblond mentions:

> "It does not seem that this is a very complex case. We are talking about 17 properties sold to 15 individuals used as cover names and the taxes collected have not been remitted to the state. This is the case."

[80] Finally, a Case Management date is set for October 19, 2016, to have a Legal Aid lawyer testify to clarify the situation concerning Legal Aid. Also, Justice Leblond orders that an admission project be sent in English to Moniz.

October 19, 2016 - Court Appearance

[81] On October 19, 2016, Me Karine Giguère, a senior Legal Aid lawyer, explains the different scenarios for Legal Aid to get involved. The case is postponed to November 29, 2016, to see what can be done from Legal Aid.

November 29, 2016 - Court Appearance

[82] On November 29, 2016, Me Karine Giguère announces that she received the authorization to assign a Legal Aid lawyer for the trial. The lawyer will be known in two weeks. Finally, Me Giguère mentions that she thinks that the trial will be longer than the six days planned. The case is fixed for Case Management on February 28, 2017.

February 28, 2017 - Court Appearance

[83] On February 28, 2017, Me Dahlia Gaiptman enters the file as Moniz's lawyer. She asks for another date because she did not have time to look over the entire file. May 3, 2017, is set for Case Management.

May 3, 2017 - Court Appearance

[84] On May 3, 2017, Moniz's lawyer informs the Court of possible motions for abuse of process and unreasonable delay to be presented at trial.

September 13, 2017 - Court Appearance

[85] On September 13, 2017, Me Caroline Braun, for the accused, mentions that a *Jordan* motion will be presented. The defence also wants to present a pre-trial delay motion and an abuse of process motion. The Judge asks the parties their position if the trial is advanced to November 2017. The defence answers that it is "too tight" for them to start the trial in November 2017. The trial is then advanced, for a length of 12 days, to December 2017, starting the 4th, and ending the 21st. The case is sent for Case Management on October 25, 2017.

September 13, 2017 - December 4, 2017

[86] On October 25, 2017, Moniz rejects a settlement offer.

[87] On November 17, 2017, the prosecution sends a notice according to section 714.2 of the *Criminal code* to the defence. The defence objects.

[88] On November 27, 2017, the prosecution discloses evidence to the accused, consisting of the discovery of originals in boxes that were not on CD's previously communicated. According to the prosecution, every document had already been communicated except for the e-documents.[34] Initially, on April 19, 2016, Laguerre executed a production order. It consisted of a hard drive originating from the RCPM. Since Laguerre was unable to look into it, she sent the hard drive back to the RCMP.

[89] In November 2017, during the trial preparation, Laguerre got working copies of the hard drive from the RCMP. Those copies were then disclosed to the defence November 27, 2017. Amongst the documents disclosed for the first time were files concerning Placements Immobiliari Inc.[35] Clearly, those were relevant to the present case. Also, Laguerre received from the RCMP, on November 23, 2017 a "judicial summary" or "Court Brief" that is the subject of an *O'Connor*[36] motion. Finally, in November 2017, Patrice Duliot, is announced as a witness for the prosecution. He was not originally scheduled to testify but his existence and relevant information was in the initial disclosure.

December 4, 2017-Trial Begins

[90] On December 4, 2017, the first day of trial in front of Justice Christian Tremblay, Moniz asks for a postponement because of the late disclosure. The prosecution objects. The motion for postponement is suspended until the next day to permit the defence to take notice of the disclosure.

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34 See exhibit VDR-2, tab 29.
35 See exhibit VDR-6.
36 *R. v. O'Connor*, [1995] 4 SCR 411.

December 5, 2017- Recusal of the Trial Judge

[91] On December 5, 2017, a motion for the recusal of Justice Tremblay is presented by the defence because he was the preliminary hearing Judge in the original criminal file. The motion is granted. The prosecution did not object to the motion.

[92] The weeks of January 15 and January 22, 2018, and the dates of January 28 and 29 are offered for the trial but one of Moniz's lawyer (Me Gaiptman) is not free. Moniz says he is willing to waive his section 11 (b) of the *Charter* rights to have both lawyers defend his case. The prosecution objects. The case is set for Case Management the next day.

[93] On December 6, 2017, the case is set for trial starting February 16, 2018, and finishing March 2, 2018. Moniz waives the delays from January 15 to February 16, 2018. A Judge is appointed to hear the *Jordan* motion and the section 714.2 *Cr. c.* application on December 12 and 13, 2017.

Credibility Issues

[94] The testimony of Robert Manuel Moniz was sincere and credible. The Court accepts it. The Court reaches the same conclusion for the testimony of Caporal Michèle Guay.

[95] The Courts believes the accused especially when:

1- He mentions that the initial disclosure was lost by the Prison's authorities;

2- He says he did not know the Amicus Curiae, Me Jean-Philippe Caron, had a copy of the disclosure;

3- He mentions that the lawyer he retained, Me Schiro, did not give him back the disclosure despite his demands to that effect;

4- He describes all the efforts he made and steps he took to be represented by a lawyer;

5- He testifies in Court and said that he "wanted a lawyer" and that he "wanted to go to trial and regulate this as fast as possible".

[96] As for the testimony of Jessica Laguerre, the Court will accept it even though she was on the defensive when trying to explain the differences concerning the elements disclosed in November 2017 compared to the ones in September 2014.

ANALYSIS

A. Total delay

[97] The starting point for the *Jordan* analysis is February 18, 2014, for the files: 500-73-004120-149 and 500-73-004121-147 and February 20, 2014 for the files 500-61-381293-142 and 500-01-381292-144. The anticipated end of the trial is March 2, 2018. Therefore, the total delay is 48 months and 12 days for the "73" files and 48 months and 10 days for the "61" files.

[98] To simplify the analysis, the Court is taking into account a total delay of **48 ½ months**.

B. Defence delay

[99] Defence delay is divided into two components: (1) delay waived by the defence, and (2) delay that is caused solely by the conduct of the defence.[37]

1. Waiver (2 months)

[100] A waiver of delay by the defence may be explicit or implicit, but must be informed, clear and unequivocal.[38]

[101] In the present case, the Court finds the accused implicitly waived the delay of the month of November 2017 (**1 month**), when, on September 13, 2017, Me Braun indicated that the defence was not ready to advance the trial to November 2017. It was advanced to December 2017 instead.

[102] Also, the accused waived the delay from January 15, 2018, to February 16, 2018 (**1 month**), when he did so in Court, to have his two lawyers present during the trial.

Is there a defence waiver from December 8, 2014, to March 2015?

[103] The prosecution argues that Moniz waived the delay from December 8, 2014, to March 2015 because Moniz filed a motion for an adjournment in which he asks for: (1) an adjournment until March 2015 to obtain a "*Rowbotham* for an attorney, "and (2) a request for the disclosure in English. The Court disagrees for the following reasons:

1- There is no express mention of a waiver in the motion;

2- The case was postponed to September 30, 2015, to have a judge hear legitimate motions (the trial in English motion and the *Rowbotham* motion) that were not frivolous;[39]

3- The motions filed by Moniz were not a tactic to delay the file since Moniz was under the impression that the trial was starting December 9, 2014. In fact, he

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37 *R. v. Jordan*, supra, paras. 61 and 63.
38 *R. v. Cody*, 2017 SCC 31, para. 25.
39 See paras. 110 to 125 of the present judgment.

was ready to present his motions. The judge present could not hear the motions because she was not a designated judge. The evidence is to the effect that Moniz wanted an adjournment in the event of being successful in the *Rowbotham* motion to have enough time for a lawyer to be retained and ready for trial. Meanwhile, the trial in English motion still stood;

4- Therefore, the Court concludes that the accused's actions cannot be considered a clear and unequivocal waiver. Nor that they can be considered a defence-caused delay.

Is there a defence waiver from August 22, 2016, to March 2017?

[104] The prosecution also argues that Moniz waived the delay from August 22, 2016, to March 2017 because on that date Moniz filed a motion for an adjournment in which he asks for: (1) an adjournment until March 2017 to obtain a "*Rowbotham* for an attorney, "and (2) a request the disclosure in English. The Court disagrees for the following reasons:

1- There is no express mention of a waiver in the motion;

2- The motions were not adjudicated on September 26, 2016. Instead, a trial date was set in September 2018. Hence, these motions did not cause any delay in the file since they were discussed by Justice Leblond and the parties well before the scheduled trial date, during Case Management on September 19, 2016, October 19, 2016, and November 29, 2016;

3- The motions filed by Moniz were not tactics to delay the file. They were not frivolous in the context of an unrepresented accused and the facts in the present case.[40] In the end, Moniz did get Legal Aid staff lawyers to represent him and a summary of the case and a "will say" of potential witnesses in English;

4- Therefore, the Court concludes that Moniz's actions cannot be considered a clear and unequivocal waiver. Nor that they can be considered a defence-caused delay.

2. Defence - caused delay

[105] In the case of *Fracasso v. R.*[41], Justice Salvatore Mascia summarized the obligations of the accused under the new framework:

> 78 As mentioned earlier, the *Jordan* framework required that all persons associated with the criminal justice system adopt a proactive approach to prevent unnecessary delays.[46] This directive, of course, included the defendants in a criminal case. More particularly, defence counsels were enjoined to actively advance their clients' right to a trial within a reasonable time, to collaborate with

[40] See paras. 118 to 125 of the present judgment.
[41] *Fracasso v. R.*, 2017 QCCQ 10552.

Crown counsel when appropriate and to use court time efficiently.http://www.lexisnexis.com/ca/legal/frame.do?tokenKey=rsh-20.205397.89013412234&target=results_DocumentContent&returnToKey=20_T27079981883&parent=docview&rand=1516737351525&reloadEntirePage=true - fn-47 Like the Crown, defence counsel should focus on making reasonable admissions, streamlining the evidence, and anticipating issues that need to be resolved in advance.http://www.lexisnexis.com/ca/legal/frame.do?tokenKey=rsh-20.205397.89013412234&target=results_DocumentContent&returnToKey=20_T27079981883&parent=docview&rand=1516737351525&reloadEntirePage=true - fn-48

79 Also, defence initiatives in advancing the case to trial will be a factor in a court's assessment of a s. 11 (b) violation for a transitional case. At para 86 in *Jordan,* the Court held that:

- [T] he level of diligence displayed by the accused is relevant in the context of other Charter rights as well, like the s. 10 (b) right to counsel (R. v. Tremblay, 1987 CanLII 28 [SCC], [1987] 2 S.C.R. 435, at p. 439). Second, as mentioned, the requirement of defence initiative below the ceiling is a corollary to the Crown's justificatory burden above the ceiling. Third, this requirement reflects the practical reality that a level of cooperation between the parties is necessary in planning and conducting a trial. Encouraging the defence to be part of the solution will have positive ramifications not only for individual cases but for the entire justice system, thereby enhancing—rather than diminishing—timely justice.

80 The trial judge must also still consider action or inaction by the accused that may be inconsistent with a desire for a timely trial.http://www.lexisnexis.com/ca/legal/frame.do?tokenKey=rsh-20.205397.89013412234&target=results_DocumentContent&returnToKey=20_T27079981883&parent=docview&rand=1516737351525&reloadEntirePage=true - fn-49

81 In *Cody,* the Supreme Court reiterated its position that defence counsels are expected to actively advance their clients' right to a trial within a reasonable delay and that illegitimate conduct will be subtracted from the total delay. Illegitimate defence conduct encompasses both substance and procedure—the decision to take a step, as well as the manner in which it is conducted.[50] At para 32 of the judgment, the Court added the following considerations for a trial judge on the matter of assessing the legitimacy of defence conduct:

- To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11 (*b*) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.

82 In short, defence counsel is not given free rein to run out the *Jordan* clock. Delay that is solely or directly caused by the accused person and defence action

that is illegitimate (insomuch as it is not taken to respond to the charges) will have to be deducted.http://www.lexisnexis.com/ca/legal/frame.do?tokenKey=rsh-20.205397.89013412234&target=results_DocumentContent&returnToKey=20_T27079981883&parent=docview&rand=1516737351525&reloadEntirePage=true - fn-51 This illegitimate conduct includes deliberate tactics aimed at creating more delay, such as frivolous applications and requests.[52] Similarly, where the court and Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted[http://www.lexisnexis.com/ca/legal/frame.do?tokenKey=rsh-20.205397.89013412234&target=results_DocumentContent&returnToKey=20_T27079981883&parent=docview&rand=1516737351525&reloadEntirePage=true - fn-53].

84 The defence can also cause delays that do not count toward the ceiling by inaction or omission.http://www.lexisnexis.com/ca/legal/frame.do?tokenKey=rsh-20.205397.89013412234&target=results_DocumentContent&returnToKey=20_T27079981883&parent=docview&rand=1516737351525&reloadEntirePage=true - fn-54 defence counsel would be wise, therefore, to take positive steps in moving the case along and in placing on the record their objections to delays as well as their readiness to proceed with dispatch at the first available date.

85 The Court's pronouncements on delay caused by the conduct of the defence, however, should not deter an accused from taking advantage of his right to a fair trial. In *Jordan,* the Court was clear that motions that are not frivolous and represent a legitimate effort to make full answer and defence to the charges do not constitute defence delay.http://www.lexisnexis.com/ca/legal/frame.do?tokenKey=rsh-20.205397.89013412234&target=results_DocumentContent&returnToKey=20_T27079981883&parent=docview&rand=1516737351525&reloadEntirePage=true - fn-55 In *Cody*, the Court made similar pronouncements regarding non-frivolous applications and requests:

- This understanding of illegitimate defence conduct should not be taken as diminishing an accused person's right to make full answer and defence. defence counsel may still pursue all available substantive and procedural means to defend their clients. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count toward the Jordan ceiling. In this regard, while we recognize the potential tension between the right to make full answer and defence and the right to be tried within a reasonable time—and the need to balance both—in our view, neither right is diminished by the deduction of delay caused by illegitimate defence conduct. (para 34)

86 Given defence counsels obligation of upholding their client's Charter and procedural rights, the threshold for delay attributable to the defence must be high. In *Cody*, at para 35, the Court explained that illegitimate defence conduct does not necessarily amount to professional or ethical misconduct on the part of defence counsel. Instead, "legitimacy takes its meaning from the culture change demanded in *Jordan*-that is, all participants in the justice system-defence counsel included-must now accept that many practices which were formerly commonplace or merely tolerated are no longer compatible with the right guaranteed by s. 11 (*b*) of the *Charter*."http://www.lexisnexis.com/ca/legal/frame.do?tokenKey=rsh-20.205397.89013412234&target=results_DocumentContent&returnToKey=20_T

> 27079981883&parent=docview&rand=1516737351525&reloadEntirePage=true - fn-56 Ultimately, the legitimacy of defence actions will be gauged by first instant judges who are uniquely positioned to do so.http://www.lexisnexis.com/ca/legal/frame.do?tokenKey=rsh-20.205397.89013412234&target=results_DocumentContent&returnToKey=20_T27079981883&parent=docview&rand=1516737351525&reloadEntirePage=true - fn-57
>
> 88 defence delay may include not only the illegitimate actions of an accused but also the periods of time waived-implicitly or explicitly-by an accused. A waiver of an accused's 11 (b) rights, however, must be clear and unequivocal. Also, a waiver of the right is only for a discrete period of time:
>
> Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the past, "[i] n considering the issue of 'waiver' in the context of s. 11 (*b*), it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness" (*R. v. Conway*, 1989 CanLII 66 [SCC], [1989] 1 S.C.R. 1659, per L'Heureux-Dubé J., at p. 1686).

[106] In her written submissions, the prosecution indicated that the inherent delays should be subtracted for the purpose of the *Jordan'*s analysis. The Court disagrees. In *R. v. Baron*[42], the Ontario Court of appeal stated:

> [45] This case demonstrates the difficulties involved in reviewing a Morin-based decision under Jordan. Morin focused on institutional delay. The other categories of delay – defence delay, neutral time, intake time, and the inherent time requirements of the case – could not be visited upon the Crown. Thus, under Morin, it did not matter if a specific period of delay was considered defence delay or neutral because neither could be held against the Crown.
>
> [46] Jordan discarded this classification scheme. Concepts such as neutral time, intake time, and the inherent time requirements of the case are no longer direct lines of inquiry – they are reflected in the presumptive ceilings: see Jordan, at para. 53. Now, it is critical to identify defence delay, as well as delays caused by discrete events.

Application

February 18, 2014, to December 9, 2014 (No defence-caused delay)http://www.lexisnexis.com/ca/legal/frame.do?tokenKey=rsh-20.205397.89013412234&target=results_DocumentContent&returnToKey=20_T27079981883&parent=docview&rand=1516737351525&reloadEntirePage=true - fn-58

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42 *R.* v. *Baron*, 2017 ONCA 772, paras. 45 and 46.

[107] Analyzing the procedural history of the present case, the Court is of the opinion that the delay between February 18, 2014, to December 9, 2014, is not a defence-caused delay.

[108] The Court notes that it took nearly 5 months (April 28, 2014, to September 17, 2014) to disclose the evidence to the accused. The disclosure supposedly contained the same evidence as the disclosure in a criminal case for which the accused was previously charged, detained and ultimately pleaded guilty. In *R. v. Egger*[43], the Supreme Court held that initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead.

[109] The Court is of the opinion that the firing of the accused's lawyer on May 7, 2014, was legitimate for the reasons explained by Moniz. It did not cause any delay since, during the hearing on September 17, 2014, Moniz did not object to a trial date being set, Moniz mentioning: " I want to get this file done as quickly as possible"

December 9, 2014 - September 30, 2015 (No defence-caused delay).

[110] The delay between December 9, 2014, to September 30, 2015, is not a defence-caused delay. The accused, in the files 500-73-004121-147 and 500-73-004120-149, is charged with a criminal offence even if it does not originate from the Criminal code. Moniz, in the present file, is charged with a summary conviction offence, but he could also have been charged by way of an indictment. [44]

[111] Either way, since he is charged with a criminal offence, section 530 of the Criminal Code applies to the present case and the accused has a right to trial, in English.

[112] Finally, section 530 of the *Criminal code* specifically mentions "[…] offence in section 553 or **punishable on summary conviction**, or […]".

[113] Section 530 of the *Criminal code* was interpreted by the Supreme Court in *R. v. Beaulac*[45]:

> Section 530 (1) creates an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own. The courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada. In my view, this is a substantive right and not a procedural one that can be interfered with. The interpretation given here accords with the interpretative background discussed earlier. It is also an important factor in the interpretation of s. 530 (4) because that subsection simply provides for the application of the same right in situations where a delay has prevented the application of the absolute right in subs. (1). One of the main questions facing this Court is the interpretation of this scheme when it interacts with the

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43 *R. v. Egger*, [1993] 2 SCR 451, p. 467.
44 Excise Tax Act, R.S.C., 1985, chap. E-15, art. 327 (2), *Cr. c.*
45 *R. v. Beaulac*, [1999] 1 RCS 768, para. 28.

> requirement of a new trial. In reading s. 530, I am left with the impression that the drafters of the section did not consider the particular situation of the retried accused. This leaves the courts with a very unsatisfactory set of rules to apply in such a case. Nevertheless, we must endeavour to provide a solution that will not only respect as much as possible the words of the provision, but most importantly its spirit.

[114] Section 530 (3) of the *Criminal code* states that:

> The justice of the peace or provincial court judge before whom an accused first appears shall ensure that they are advised of their right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

[115] Firstly, the accused was not advised of that right when he first appeared in Court on April 28, 2014. Secondly, it is therefore clear that the accused's motion for an English trial is legitimate. By confirming on September 22, 2015, that the motion still stands, Moniz is not retarding the trial but only affirming an important substantive right. The prosecution decided not to contest that motion on September 30, 2015.

[116] It is true that the situation is different for the files 500-61-381293-142 and 500-61-381292-144 as these are provincial penal offences. Indeed, section 530 of the *Criminal Code* does not have an equivalent in the *Code of Penal Procedure*.[46]

[117] Nevertheless, since Moniz is accused at the same time of criminal offences and provincial offences and the trial is supposed to proceed in all the files, at the same time, he has the right to have an English trial. On September 30, 2015, 17 months after Moniz's first Court appearance and more than 9 months after a formal demand, the prosecution declares not to be contesting the trial to be held in English.

[118] Also, the Court is of the opinion that the *Rowbotham* motion filed by Moniz is not a frivolous applications as defined in *Jordan*.[47]

[119] This application warranted a hearing and was not frivolous. Even though Moniz was admissible to Legal Aid, he was unable to retain a lawyer on a normal legal aid certificate.[48] Also, it was arguable that the case against him is moderately complex and he was facing jail time and considerable fines if found guilty.

[120] Moniz's affidavit in support of the motion to obtain an attorney for the defence, mentions that he has no more money to afford an attorney and that he filed for bankruptcy in 2011.

[121] Therefore, there was a valid argument to be made in favour of either a *Rowbotham motion* or a section 7 of the *Charter* motion.

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46 *Code of Penal Procedure*, CQLR c C-25.1
47 *R. v. Jordan*, supra, para. 63.
48 See exhibit VDR-2, tab 11.

[122] The Court notes that when Moniz became unrepresented again on June 17, 2016, these same motions were discussed by Justice Leblond on September 26, October 19 and November 29, 2016.

[123] In the end, after the testimony of a senior legal aid lawyer (Me Giguère) and verification made by her, the Court learns on November 29, 2016, that a staff lawyer from legal aid will be named to represent Moniz.

[124] The Court is not deciding the merit of this application, but only stating it was not frivolous. Therefore, from the time it was filed, until July 29, 2015 (Legal Aid Certificate in the name of Me Franco Schiro) this motion was not frivolous. It became moot at that date because Moniz was now being represented by a lawyer.

[125] But since the motion for a trial to be held in English still stood[49], the Court reaffirms that the delay between December 9, 2014, to September 30, 2015, is not caused solely by the conduct of the defence.[50] .

[126] Concerning the motion to have the evidence translated into English, the Court, at this stage of the analysis, will not discuss whether that motion was frivolous or not because the accused withdrew it on May 17, 2015, and so, the Court concludes that the period from September 30, 2015, to May 17, 2016, is a 7 ½ months defence-caused delay.

September 30, 2015 - May 17, 2016 (7 ½ months defence-caused delay)

[127] The Court is of the opinion that this delay is solely caused by the conduct of the defence because the motion for disclosure in English was withdrawn on May 17, 2016.

May 17, 2016 - June 17, 2016 (No defence-caused delay)

[128] The Court is of the opinion that this delay is not solely caused by the defence. In the case of *Guimond v. R*.[51], the Court of Appeal of Quebec decided that a postponement to seek out a settlement is not a defence caused delay if there is consent from the prosecution to do so and if there is no express waiver of 11 (b) rights.

[129] In the present case, the Court is of the opinion that the prosecution *de facto* consented to the postponement and there is no waiver noted on the minutes of May 17, 2016.

June 17, 2016 - September 19, 2016 (3 months defence delay)

[130] The Court is of the opinion that this 3-month delay is caused by the defence because of Moniz's lawyer's decision to withdraw from the files. A similar matter was discussed in *Guimond v. R*.[52] but not settled by the Quebec Court of appeal.

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49 See exhibit VDR-2, tab 17.
50 *R. v. Jordan*, supra, paras. 61 and 63.
51 *Guimond v. R*., 2017 QCCA 1754.
52 *Id*.

[131] The Court notes that the prosecution suggests setting the files for case management as opposed to trial, or at least in front of a judge to hear the motions on the merit that were already filed with the Court. Moniz is pretty clear in his intention to have a trial and in his intention to present a *Rowbotham* motion. Moniz did not ask to have the case go to Case Management.

September 19, 2016 - September 26, 2016 (No defence-caused delay)

[132] This delay is not solely caused by the defence because it originates from Justice Leblond (Case Management) asking the prosecution for a detailed summary and an admission project.

September 26, 2016 - September 11, 2018 (No defence-caused delay)

[133] On September 26, 2017, Justice Leblond asks the parties if they agree to advance the trial to November 2017. Since the defence felt it was too tight in time to start the trial in November 2017, the case is advanced to proceed in December 2017. The Court considers therefore a 14-month institutional delay (September 26, 2016 - November 2017) considering the trial is scheduled for 12 days in December 2017, but the defence implicitly waived the month of November 2017.

[134] Since the delay from September 26, 2016, to the end of November 2017 is institutional, it will obviously not be subtracted from the total delay.

[135] On February 28, 2017, Me Gaiptman enters the file for Moniz and sets another date for Case Management. This action did not cause any delay in the file as the trial was scheduled to proceed in 16 months and it is not an indication that Moniz does not want his case to move along;

Conclusion concerning the Net Delay

[136] Since the defence-caused delay amounts to 12 ½ months, the net delay is around 36 months.

[137] Since the net delay of 36 months exceeds the presumptive ceiling of 18 months, it is presumptively unreasonable. To rebut the presumption, the prosecution must establish the presence of exceptional circumstances. If it cannot rebut the presumption, a stay of proceedings will follow. In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

3. Discrete events (1 ½ months)

[138] Were there any discrete events in the present case?

[139] Discrete events are exceptional events that arise at trial. They are unforeseeable or unavoidable developments that cause delay.[53] The delay caused by any discrete events must be subtracted from the total period of delay.[54]

[140] The Court is of the opinion that the motion for the recusal of Justice Tremblay presented on December 5, 2017, is a discrete event since it was unforeseeable[55]. The delay caused by that discrete event is 1 ½ months because dates were offered and refused by Moniz's lawyers to restart the trial starting January 15, 2018. Therefore, a delay of 1 ½ months must be subtracted from the net delay.

Remaining delay

[141] Therefore, the Court is of the opinion that the remaining delay is **34 ½ months**, well above the 18 months ceiling in *Jordan*.

Complexity

[142] Was the case against the petitioner a particularly complex case? Particularly complex cases are cases that because of the nature of the issues require an inordinate amount of trial or preparation time such that the delay is justified.[56] If the Court finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will be issued.[57] Case complexity requires a qualitative, not quantitative, assessment. Complexity cannot be used to deduct a specific period of delay.[58]

[143] The Court rules that the case against Moniz is not a "particularly complex" case according to the *Jordan* guidelines on the subject. Also, the respondent did not ask the Court for a finding of "particularly complex case".

[144] In the trial book, the facts are described as follows[59]:

> According to Revenu Quebec, between May 2007 and February 2009, the corporations 6747582 Canada Inc. and 9184-4837 Quebec Inc. allegedly bought a total of seventeen (17) new properties from several contractors and sold the seventeen properties just a few days later, well above retail price, while collecting the goods and service tax (GST) and the Quebec sales tax (QST).
>
> The seventeen properties were sold, with GSTIQST, to a total of twenty (20) individuals used as cover names. The taxes collected by the two corporations from the sales totalize $373,745 in QST and $248,157 in GST.

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53 *R. v. Jordan*, supra, para. 73.
54 *Id*., para. 75.
55 *Amyot v. Autorité des marchés financiers*, 2017 QCCQ 9003.
56 *R. v. Jordan*, supra, para. 77.
57 *Id*., para. 80.
58 *R. v. Cody*, supra, para. 64.
59 See exhibit VDR-13b), p. 14.

> Revenu Quebec never received any amount of GST/QST from the two corporations.
>
> According to the Enterprise Registry, the administrators of 6747582 Canada Inc. and 9 184–4837 Quebec Inc. are respectively Sergey Maltsev and Stanislav Goustov. However, the prosecutors believe that Robert Manuel Moniz is, in fact, the one who controls both corporations and acts as their sole administrator.
>
> The twenty individuals who bought the properties from the corporations were used as cover names in exchange of a monetary compensation from Mr. Moniz. They were wrongfully informed by the accused, Mr. Moniz, that he will be the one taking care of paying off the mortgage that the buyers had contracted with the Bank.
>
> The prosecutors are accusing Mr. Moniz of collecting $621,000 approximately in GST/QST through the described scheme, without remitting it to Revenu Quebec.
>
> The accusations will be proven through documentary and testimonial evidence composed of notarized documents supporting the purchases and sales, the power of attorneys in favour of the accused, Mr. Moniz,
>
> and the testimony of the main investigator from Revenu Quebec, one auditor from Revenu Quebec, the RCMP investigator in the criminal case, one notary and seventeen buyers who were used as cover names.

[145] These are not the facts of a particularly complex prosecution. Finally, Justice Leblond, when acting as managing Judge, mentioned: “It does not seem that this is a very complex case”.

[146] The Court finds the case against Moniz to be a simple case. However, for the following reasons, the Court is of the opinion that it should be considered a moderately complex case for the purpose of the *Jordan* analysis:

1. The estimated length of the trial (12 days) for a case heard in Provincial Court;
2. The fact the accused was unrepresented for a significant period of time;
3. The *Rowbotham* and Legal Aid issues;
4. The abuse of process and pre-trial delay issues;
5. Disclosure issues.

Transitional exceptional circumstances

[147] For cases in which the delay exceeds the ceiling a transitional exceptional circumstances may arise where the charges were brought prior to the release of the *Jordan* decision.[60]

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[60] *R. v. Jordan*, supra, para. 96.

[148] This transitional exceptional circumstances will apply when the prosecution satisfies the Court that the time the case has taken is justified based on the parties' reasonable reliance on the law, as it previously existed.

[149] The prosecution may show that it cannot be faulted for failures to take further steps, because it would have understood the delay to be reasonable given its expectations prior to *Jordan* and the way the delay and the other factors such as the seriousness of the offence and prejudice would have been assessed under *Morin*.[61]

[150] The Court agrees with the following passage from *Nguyen v. R*.[62] where Justice Daniel W. Payette mentions:

> Cela dit, il n'existe pas de recette ni d'algorithme immuable à cet exercice qui se veut individualisé. Il ne s'agit pas de rechercher tous les facteurs, ni d'y attribuer la même valeur d'une affaire à l'autre, mais de pondérer les facteurs d'un dossier donné[52] en fonction de sa réalité propre, à la lumière du droit antérieur, mais aussi en tenant compte du nouveau cadre d'analyse et du temps requis pour changer les choses.

[151] This requires a contextual assessment.[63] The onus is on the prosecution to demonstrate the time it took to complete trial proceedings is justified by the parties' reasonable reliance of the framework that existed under *R. v. Morin*[64], for the determination of section 11 (b) breaches prior to *Jordan*.[65]

[152] This assessment is to be contextual and take into account the manner in which the prior framework was applied.[66] Under the *Morin* framework, prejudice and seriousness of the offence often played a decisive role in whether the delay was unreasonable.[67]

[153] Additionally, some jurisdictions are plagued with significant and notorious institutional delay.[68] These considerations can inform the Court whether any excess delay may be justified as reasonable.

[154] Consideration of prejudice and the seriousness of the offence can inform the Court whether the parties' reliance on the previous state of the law was reasonable.[69] Also, the Court must look at the following circumstances to decide whether transitional exceptional circumstances would justify a delay above the presumptive ceiling[70]:

1. The complexity of the case;

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61 *R. v. Cody*, supra, para. 68.
62 *Nguyen c. R*., 2017 QCCS 2047.
63 *R. v. Jordan*, supra, para. 96.
64 *R. v. Morin*, [1992] 1 SCR 771.
65 *Id*.
66 *R. v. Cody*, supra, para. 69.
67 *R. v. Jordan*, supra, para. 97.
68 *Id*.
69 *Id*., para. 96.
70 *R. v. Williamson*, 2016 SCC 28, paras. 26-30.

2. The period of delay in excess of the *Morin* guideline;
3. The prosecution's response to any institutional delay;
4. The defence efforts, if any, to move the case along.

[155] Moreover, the delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with institutional delay problems.[71] Judges in a jurisdiction plagued by lengthy, persistent and notorious institutional delays should account for this reality, as the prosecution is constrained by systemic delay issues.[72] The analysis must always be contextual.[73]

[156] Where a balancing of the factors under the *Morin* analysis, such as seriousness of the offence and prejudice, would have weighed in favour of a stay, the prosecution will rarely, if ever, be successful in justifying the delay as an example of transitional exceptional circumstances under the *Jordan* framework.[74]

Should the Court apply the transitional exceptional circumstances based on the parties' reasonable reliance of the law as it previously existed?

The seriousness of the alleged offences

[157] The alleged offences against Moniz are not serious for the purpose of a *Jordan* analysis. They consist of offences liable on summary conviction and penal offences. The accused, if found guilty, faces a fine and a short jail sentence. Indeed, the prosecution told the Court it was asking for a 6-month jail sentence in that event.

[158] Those offences cannot compare, in any way, to murder, sexual assault, fraud, criminal organization offences, Schedule 1 drug trafficking, etc. Looking at the scale of seriousness of the offences, the ones Moniz is charged with tend to be more at the low end compared to the high end of the scale.

[159] Also, the Court notes that Moniz was previously charged for other criminal offences that originated from some of the same facts relied upon by the prosecution in the present case. In fact, the testimonies heard in support of the present motion are to that effect. According to Caporal Michèle Guay, Moniz was sentenced to six years in the criminal trial that preceded the present accusations.

Complexity

[160] The Court already explained that the case against the accused is a simple case. However, the Court categorized it as moderately complex because of certain complexity issues.[75]

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71 *R. v. Jordan*, supra, para. 97.
72 *Id*.
73 *Id*. para. 98.
74 *R. v. Cody*, supra, para. 74.
75 See paras. 142-146 of the present judgment.

The Period of delay in excess of the Morin guidelines

[161] The *Morin* framework required the Court to balance the following factors in determining whether a breach of section 11 (b) had occurred: (1) the length of the delay (2) defence waiver (3) the reason for the delay, including the inherent needs of the case, defence delay, prosecution delay, institutional delay and other reasons for delay, and (4) prejudice to the accused's interests in liberty, securities of the person and a fair trial.[76] Institutional delay in particular is assessed against a set of guidelines developed in *Morin*, eight to 10 months in Provincial Court.

[162] Applying the *Morin* framework in the present case, the Court finds that the institutional delay is 14 months, four to six months over the *Morin* guidelines. Also, the delay from December 9, 2014, to September 30, 2015 (9 months) can be considered institutional because it consists of the time it took to fix a one-day pre-trial motions hearing. In the end, a 23-month institutional delay is well above *Morin* guidelines concerning institutional delay.

The prosecution's response, if any, to any institutional delay

[163] The prosecution accepted Justice Leblond's suggestion, on September 26, 2017, to have the trial advanced 10 months (November 2017) before the original date scheduled (September 2018). Therefore, the Court is of the opinion that this action was aimed at reducing the institutional delay.

[164] However, the Court considers that the prosecution could have done more to reduce the overall delay in the file, especially since the initial disclosure in the present file seems to be the same the prosecution had in the original criminal file[77] . Therefore, the prosecution:

1. Could have disclosed the evidence at the start of the proceedings, since the evidence was already in its possession before the start of the present proceedings;
2. Should not have objected for nine months to a trial in English;
3. Could have given Moniz a summary of the facts and a "will say" of potential witnesses, in English. The Court is not deciding if the prosecution had the constitutional obligation to do so (give an unrepresented accused a summary of the facts and a "will say" of potential witnesses, in English), since Moniz withdrew his motion to have the complete disclosure in English on May 17, 2016. Still, the Court is of the opinion it could have reduced the overall delay in the file.

[165] The disclosure in November 2017 did not cause any delay but the Court is of the opinion that Laguerre should have notified a prosecution lawyer immediately, upon

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[76] *R. v. Jordan*, supra, para. 30.
[77] See the testimonies of Caporal Michèle Guay and Jessica Laguère.

realizing she was unable to look into the hard drive, instead of sending it back to the RCMP, to insure steps would be initiated to find a solution to the problem and advise the defence.

[166] Even though the prosecution immediately disclosed the information, in good faith, on November 27, 2017, still, it risked a postponement longer than half a day if the new documents disclosed were voluminous.

The defence efforts, if any, to move the case along

[167] By agreeing to have the case advanced to December 2017 from the original scheduled date of September 2018, the defence showed it wanted to move the case along. The Court accepts the defence explanations to the effect that the Legal Aid staff lawyers were too tight on six weeks' notice to advance this 12 days trial to November 2017. While the Court considers it an implicit defence waiver, it does not demonstrate an intent not to move the case along, quite the contrary since the institutional delay was reduced by 9 months.

[168] It is true that Moniz was persistent in his wish to have a lawyer paid by the state representing him. In the end, it paid off because he is now represented by Legal Aid staff lawyers. It was not a tactic to delay the file.

[169] Moniz prioritized a fair trial with a lawyer over a speedy trial with none. Nevertheless, by agreeing to have the case proceed more rapidly in December 2017, the defence showed the Court its intention to move the case along, reducing the institutional delay by 9 months. His explanation in Court as to why he withdrew his motion for disclosure in English (because he did not need it any more since he was represented by a lawyer) is accepted and demonstrates that he was not stalling the procedures.

[170] The Court considers the fact that the defence did not file its *Charter* motions (section 11b), pre-trial delay, abuse of process) in the summer of 2017. While it is an indication that the defence was not ready to proceed in the summer of 2017, the Court is not concluding it was a defence tactic to delay the case, as the trial, at that time, was still scheduled to start in September 2018;

[171] Also, the defence has the right to cross-examine the witnesses the prosecution wants to produce during the trial. The fact that the defence indicated its intention to do so is not an illegitimate defence tactic nor an indication that it does not want the case to move along. As for the fact that the defence contests the application of section 714.2 of the criminal Code, it is neither an indication of bad faith nor a strategy to delay the trial, particularly since it consists of a very short hearing.

[172] The Court is of the opinion that the motion to have a short adjournment presented on the first day of the trial (December 4, 2017) is not a defence tactic to delay the trial but a legitimate response to disclosure that occurred one week before the trial was scheduled to begin.

[173] The motion for the recusal of Justice Tremblay cannot be qualified as a strategic move by the defence. It was a legitimate motion, not contested by the prosecution and granted by the Court. It must be qualified for what it is: a discrete event. The delay caused by it is subtracted from the overall delay for the *Jordan* analysis and the defence did not gain any strategic advantage.

[174] Concerning the *O'Connor*[78] motion the defence filed during the present hearing, the Court, without making a final ruling on the matter, is of the opinion that it is neither frivolous nor a tactic to delay the trial. Caporal Guay, a prosecution witness in the present hearing and on its witness list for the trial, had her notes with her when she testified but decided not to consult them to refresh her memory. Also, the judicial summary or Court brief the defence wants disclosed seems to be, because of what it is, somewhat relevant for disclosure purposes. If those documents are covered, or not, by a privilege, is a matter for the Court to decide later during the hearing. It is important to note the defence learned of their existence during the course of present hearing.

Prejudice to the accused

[175] Under the *Morin* analytical grid, the total delay in the present file is so long that the Court concludes there is a presumption of prejudice.[79] Prejudice may clearly be inferred from the length of the delay.[80]

[176] Moniz testified in the present motion and said that the passage of time affected his memory. The Court took notice when Moniz had trouble with dates in his testimony. Nevertheless, the evidence cannot support the conclusion that the loss of memory advanced by Moniz is caused by the long delay in the present file as opposed to the fact that he was charged with offences allegedly committed in 2007 and 2008. Therefore, for the purpose of the present motion, the Court will take into account only a presumption of prejudice because of the long overall delay.

[177] In *R. v. Williamson*[81], the Supreme Court said on the question of Mr. Williamson's prejudice:

> […] Not even the absence of significant prejudice to Mr. Williamson's *Charter*-protected interests can stretch the bounds of reasonableness this far.

Application

[178] When considering the seriousness of the alleged offences, the complexity of the case, the delay in excess of the *Morin* guidelines, the prosecution's response to the institutional delays, the defence efforts to move the case along, the presumed prejudice to Moniz, the Court concludes, after weighing those aspects, the transitional exceptional circumstances should not apply in his case.

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78 *R. v. O'Connor*, supra.
79 *R. c. Godin*, 2009 SCC 26, paras. 30-31.
80 *Id*.
81 *R. v. Williamson*, supra, para. 30.

[179] The transitional exceptional circumstances do not apply since the Crown did not convince the Court that the time the case took is justified based on the parties' reasonable reliance on the law as it previously existed.

[180] The balance weighs in favour of a stay of proceedings, over the societal interest in a trial on the merits particularly since Moniz was already tried, convicted and served prison time for more serious offences where the underlying facts were also the basis for the present accusations.

Second transitional exceptional circumstances for cases of moderate complexity in a jurisdiction with significant institutional delay problems.

[181] The delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with significant institutional delay problems.[82] Change takes time and institutional delay even if it is significant will not automatically result in a stay of proceedings.[83]

[182] In *Palma v. R*.[84], Justice Eric Downs acknowledges that Montreal is a jurisdiction with significant institutional delay:

> Aussi, le Tribunal estime qu'il est maintenant notoire que les délais en matière criminelle autant à la Cour du Québec qu'à la Cour supérieure dans l'ouest de la province de Québec incluant plus particulièrement les districts formés des régions de Montréal, de Laval-Laurentides-Lanaudière-Labelle, de la Montérégie ainsi que la région de l'Outaouais se classent actuellement parmi les pires délais au Canada[51].

[183] In *R. v. Antoine*[85], Justice Guy Cournoyer mentions the following:

> Toutefois, en l'absence d'une conduite répréhensible de la poursuite responsable de délais ou de l'accroissement de ceux-ci dans la présente affaire, le seul fondement pour justifier un arrêt des procédures repose sur la conclusion que de tels délais doivent néanmoins être considérés comme tout simplement déraisonnables[112] ou que le problème des délais systémiques ne peut faire reculer à ce point les limites du caractère raisonnable d'un délai[113].

Application

Contrary to the present case (moderately complex case and offences liable on summary conviction), Antoine was accused of murder and the case was a particularly complex one. Also, the Court is of the opinion that contrary to facts in *Antoine*, where Justice Cournoyer found it was systemic delays that prevented the prosecution from limiting the delay, in the present case, the prosecution could have done something to reduce significantly the overall delay by:

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82 *R. v. Jordan*, supra, para. 97.
83 *Id*.
84 *Palma c. R*., 2016 QCCS 6543.
85 *R. v. Antoine*, 2017 QCCS 1325, para. 239.

1. Disclosing to Moniz, at the start of the proceedings, the evidence it already had for months, instead of waiting 5 months after the first appearance to do so;
2. Not objecting to a trial in English for more than 9 months.

Therefore, the transitional exceptional circumstances for cases of moderate complexity in a jurisdiction with significant institutional delay problems do not apply.

CONCLUSION

[184] The delay in the present file vastly exceeds the presumptive ceiling of 18 months for the above-mentioned reasons. The Court is convinced that no transitional exceptional circumstances should apply. The presumption of unreasonable delay applies. The Court concludes that this presumption was not rebutted by the balance of probabilities.

FOR THESE REASONS; the Court:

[185] **GRANTS** the present motion;

[186] **ORDERS** a stay of proceedings against Robert Manuel Moniz.

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ALEXANDRE ST-ONGE, J.C.Q.

Me Dahlia Gaiptman
Me Caroline Braun
Aide juridique de Montréal
For Petitioner-accused

Me Caroline McKenna
Direction principale des poursuites pénales-Revenu Québec
For Respondents-prosecutors

Dates of hearing: December 12, 13, 20, 2017.