NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. LeRoy*, 2024 NSCA 30

Date: 20240313
Docket: CAC 523286
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

Raymond Shawn Daniel LeRoy

Respondent

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	January 19, 2024, in Halifax, Nova Scotia
Subject:	*R v. Jordan*, 2016 SCC 27. Trial delay. COVID-19. Exceptional circumstances.
Summary:	The respondent was charged with arson on August 21, 2018. His jury trial, scheduled for May 2020, was adjourned due to COVID. New trial dates were also adjourned on two further occasions, primarily due to COVID and challenges associated with conducting a jury trial during a global pandemic. At nearly 56 months' delay from the date of being charged, the respondent brought an unreasonable delay application pursuant to s. 11(b) of the *Charter* and his charge was stayed.
Issues:	(1) Did the trial judge err by entering a stay of proceedings?
Result:	The appeal is allowed and the stay set aside. The trial judge erred in his analysis, failing to apply the framework required by the Supreme Court of Canada in *Jordan* for s. 11(b) delay applications. He reached the incorrect conclusion that the respondent's s. 11(b) rights had been breached. The respondent was entitled to a trial within 30 months of being

charged subject to deductions for defence delay and the Crown showing exceptional circumstances applied. In this case, defence delay was seven months. The remaining 49 months was justified on the basis of 28 months of delay caused by the exceptional circumstances of the pandemic: waves of COVID variants coinciding with the respondent's trial dates, requiring the trial to be adjourned in the interests of the health of all participants, and limited institutional capacity to respond.

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Respondent

Judges:	Bryson, Fichaud, Derrick, JJ.A.
Appeal Heard:	January 19, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Derrick J.A.; Bryson and Fichaud, JJ.A. concurring
Counsel:	Glenn Hubbard, for the appellant David Mahoney, for the respondent

Reasons for judgment:

Introduction

[1] This Crown appeal concerns whether the trial judge, Justice Patrick Murray of the Supreme Court of Nova Scotia ("the trial judge"), erred in staying the proceedings against Mr. LeRoy on the basis he was deprived of his s. 11(b) *Charter* right to a trial within a reasonable time.

[2] The respondent was charged on August 21, 2018 with arson in North Sydney, Cape Breton, contrary to s. 434.1 of the *Criminal Code*. All the proceedings involving the respondent were conducted out of the Sydney Justice Centre (i.e., the Sydney courthouse). He elected to be tried by a judge and jury.

[3] On April 14, 2023 Justice Murray stayed the prosecution pursuant to *R. v. Jordan*[1] which establishes an accused person's entitlement to a trial in Supreme Court within 30 months. A delay beyond 30 months is presumptively unreasonable and a violation of s. 11(b). After a series of delays, the respondent's trial was scheduled to proceed on April 24 to 28, 2023. By April 28, 2023 the total delay would have been just over 56 months.

[4] Whether the presumptive 30-month *Jordan* "ceiling" has been exceeded involves calculating the total delay from the date an accused is charged to the end of evidence and submissions[2] minus delay that can be attributed to the defence.[3] Defence delay may be the result of waiver and/or defence conduct. If the net delay (total delay less defence delay) exceeds the presumptive ceiling, the onus shifts to the Crown to show that exceptional circumstances or complexity justify the delay. Neither party is suggesting this was a complex case.

[5] There is no dispute there were exceptional circumstances in this case—the COVID-19 pandemic. On each of three occasions in May 2020, May 2021, and January 2022 when the respondent's jury trial was to proceed, the courts were shut down due to the pandemic. The trial judge granted the respondent a stay of proceedings pursuant to s. 11(b) just before his trial was due to start on April 24, 2023.

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[1] 2016 SCC 27 ("*Jordan*").
[2] *R. v. K.G.K.*, 2020 SCC 7 at para. 31.
[3] *Jordan* at para. 47.

[6] The appellant alleges errors of law by the trial judge as follows: (1) failure to apply his findings to the *Jordan* framework; (2) failure to deduct the amount of time attributable to the exceptional circumstance of the pandemic; and (3) failure to properly calculate defence delay. The appellant says these failures led the judge to erroneously conclude the presumptive ceiling of 30 months had been exceeded. The appellant submits a proper application of *Jordan* would have resulted in a finding of delay below the 30 month ceiling in which case there would have been no basis for entering a stay of proceedings.

[7] I am of the view the trial judge's flawed analysis caused him to reach the incorrect result. As the following reasons explain, re-doing the analysis produces a delay below the 30-month *Jordan* ceiling. I would allow the appeal and set aside the stay of proceedings.

The *Jordan* Framework

[8] For the purposes of this appeal, the following *Jordan* steps and principles are relevant:

- A determination of the total length of time between the charge and the anticipated or actual end of trial.

- An assessment of whether portions of the total delay were waived or caused solely by the defence. Any such portions are subtracted from the total delay. A waiver by the defence can be explicit or implicit but in either case, it must be informed, clear and unequivocal.[4]

- If the net delay exceeds the applicable presumptive 30 month ceiling, the Crown must justify the delay by showing there were exceptional circumstances. Exceptional circumstances include discrete, unforeseen events. As noted, complexity is not an issue in this case.

- Exceptional circumstances "lie outside the Crown's control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise".[5]

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[4] *Jordan* at para. 61; *R. v. Cody*, 2017 SCC 31 at para. 27 ["*Cody"*].
[5] *Cody* at para. 45, citing *Jordan* at para. 69.

- There is an onus on the Crown and the justice system to mitigate the effects of discrete exceptional events to the extent it is reasonably possible to do so.[6]

- It may not be appropriate to deduct the entire period of delay occasioned by discrete exceptional events. "Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events".[7]

The Timeline of the Case

[9] The respondent's first court appearance was August 21, 2018. He was remanded to the next day when he was released on a recognizance. Throughout the time the case was before the court he was subject to release conditions and also remanded, including on other charges. It appears that during 2021 to 2023, the respondent was in custody. The respondent complained about this fact when his trial was adjourned for a third time in September 2022. However, in Crown counsel's submissions on the s. 11(b) application before the trial judge he noted that all of the respondent's remand time was credited toward a sentence he received for other offences.

[10] On March 11, 2019 the respondent's first trial dates of May 19 to 22, 2020 were set with the agreement of the Crown and the respondent's counsel, Tony Mozvik. At this point, 21 months from the laying of the charge on August 21, 2018, the trial was scheduled to conclude within the 30 month *Jordan* ceiling.

[11] On April 20, 2020 the Crown and Mr. Mozvik appeared on the telephone with the trial judge to discuss the pandemic shut down of the courts. Crown counsel, Mr. MacPherson, said he had instructions from his "boss" to ask for an adjournment. Mr. Mozvik did not have instructions. He had not been able to track down his client who had been living in a homeless shelter. The issue of an adjournment was left in the court's hands. The trial judge made the "call" and adjourned the trial without date "for the reasons I've mentioned". His reasons had to do with preparing a jury and the trial so soon after the time when the suspension of jury trials was to be lifted. Crown and defence were satisfied with that approach.

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[6] *Cody* at para. 48; *Jordan* at para. 75.
[7] *Jordan* at para. 75.

[12] Notices issued by the Nova Scotia Supreme Court in March 2020 indicated the court was adopting an Essential Services Model which limited all proceedings not underway to those deemed urgent or essential by the presiding judge. For matters deemed urgent or essential, judges were to consider whether alternative measures, such as telephone or video conferencing, might be used.

[13] As of March 16, 2020, jury trials in the province were postponed for a period of 60 days, to be then re-evaluated. This is what the trial judge had to take into account in assessing whether it was feasible for the respondent's jury trial to commence on May 19, 2020.

[14] The adjournment on April 20, 2020 was the first adjournment of the respondent's trial.

[15] On May 19, 2020 Crown and defence appeared before Justice Robin Gogan. She advised there was a directive that no jury trials could proceed before September 8, 2020. She was referring to a notice from the Nova Scotia Supreme Court dated May 11, 2020 suspending all jury trials in the province until that date. She said even that could not be counted on. The matter was adjourned to June 8, 2020 to set new dates. Mr. Mozvik had still not located the respondent.

[16] By June 8, 2020, the respondent had not shown up or been found. Mr. Mozvik asked for the matter to be put over for a week with a bench warrant held so he could try to track down his client.

[17] On June 15, 2020 Mr. Mozvik advised the trial judge despite his best efforts he had been unable to find the respondent. An unendorsed warrant was issued so the respondent could be brought to court for trial dates to be set.

[18] The respondent came to the courthouse on July 15, 2020 of his own accord to deal with a scheduled matter in Provincial Court. It was learned he had previously come from hospital to the courthouse on May 19, 2020 for the start of his trial and was denied entry. Crown counsel accepted that explanation. New dates for a judge and jury trial were discussed. Justice Gogan offered October 26-29, 2020 but Mr. Mozvik only had two of those dates available and Mr. MacPherson for the Crown had a four day jury trial the week before allowing him insufficient time to prepare.

[19] In light of the unavailability of both counsel, May 17 to 20, 2021 was offered with Justice Murray as the trial judge. The dates were accepted by both

counsel and emphasized with the respondent. He indicated he understood he must appear for the trial dates and confirmed he would do so. A telephone pre-trial was set for April 6, 2021.

[20] The new trial dates in May 2021 brought the conclusion of the trial to 33 months from the laying of the charge on August 21, 2018. Neither the respondent nor his counsel raised any concerns about delay.

[21] On April 6, 2021 Mr. Mozvik did not attend the pre-trial as he was occupied in another courthouse. The respondent attended by phone. He was in custody. The matter was adjourned to April 26, 2021 to confirm a new pre-trial date of May 10, 2021.

[22] On April 28, 2021 a notice from the Nova Scotia Supreme Court directed that an Essential Services Model for Halifax previously announced by Chief Justice Deborah Smith on April 24, 2021 was being expanded to all locations in the province. This was in response to rising COVID-19 cases and additional public health restrictions that had been announced.

[23] The trial judge wrote Crown and defence counsel on May 5, 2021 to indicate his concerns about "the Court bringing together large groups of people at this time, especially when the pool of jurors consists of persons from a large geographic area". He advised:

> Unless there is a very quick change in the public health situation, which seems unlikely, there may be little choice but to adjourn the upcoming trial. Of course, I do not consider this lightly, because this trial has been previously adjourned (by consent) on April 20, 2020 also due to the pandemic. A further adjournment will create further delay in this case, but we are living in extraordinary times.[8]

[24] At a telephone appearance by counsel on May 10, 2021, the trial judge advised he would be adjourning the trial. Mr. MacPherson indicated resolution discussions were underway in any event. The trial judge said the respondent (who wasn't present) would need to attend on May 17 to "set the matter over unless it settles".

[25] On May 17, 2021, the date that was to have been the start of the respondent's trial after the first adjournment, the trial judge noted this second adjournment was due to another COVID wave. He remarked on the respondent's

[8] Appellant's Factum, Appendix C.

right to a trial within a reasonable time. He referred to the May 10, 2021 pre-trial and the fact counsel had advised at that time they were working toward a resolution. He said the third wave of the pandemic "has hit Cape Breton somewhat harder than…the previous two waves…".

[26] New trial dates were offered of August 25, 26, 29 and 30, 2022. The trial judge apologized for the delay stating the dates were not ideal but they represented what was available. He said he had been hoping for "something earlier in 2022" and ruminated about setting a Chambers date "to look for earlier dates".

[27] The respondent expressed concern about his continued remand (which was on other charges) saying this prosecution was hanging over his head and "detrimental to a bail application". In response, the trial judge proposed setting the August 2022 trial dates but finding a date "to see if we can offer earlier dates". He made no guarantee earlier dates would be available, indicating the courts were juggling cases being disrupted by the pandemic: "I'm not guaranteeing that we can because this is what we've been doing almost on a daily basis".

[28] May 31, 2022 was set for Chambers as proposed by the trial judge.

[29] On May 31, 2021, court scheduling was able to offer earlier trial dates – January 24 to 27, 2022. Counsel accepted those dates. Resolution discussions had not been fruitful. Mr. Mozvik indicated the respondent wanted a trial.

[30] Concluding the trial on January 27, 2022 would have put it at 41 months from the August 21, 2018 laying of the charge. There was no discussion about delay by defence counsel or the respondent at the May 31, 2021 Chambers hearing.

[31] At a brief appearance on October 25, 2021 Crown counsel indicated there was a very real prospect of a resolution. There was no discussion about delay.

[32] Ultimately no resolution was achieved in the matter and it remained scheduled for trial in January 2022.

[33] On December 28, 2021 a notice from the Nova Scotia Supreme Court suspended jury trials across the province until January 17, 2022. It said:

> In light of record-breaking COVID-19 case numbers in Nova Scotia and the threat of the highly transmissible Omicron variant, the Chief Justice of the Supreme Court of Nova Scotia is directing that all jury trials in the province be suspended until Jan. 17, 2022.

> This directive is effective immediately and applies to all jury trials in Nova Scotia that have not yet commenced. Any affected jury trials will be rescheduled at the earliest opportunity.
>
> "We know that we are able to hold jury trials in Nova Scotia while still respecting public health restrictions, but the question right now is should we," said The Hon. Deborah K. Smith, Chief Justice of the Supreme Court. "Cases are surging and it's unlikely that the situation will be under control in the near future.
>
> "With that in mind, and after careful consideration, our Court has decided that the responsible thing to do is to suspend these matters until we are confident that jury selections can proceed safely in this new stage of the pandemic."

[34] The notice indicated the Supreme Court was "currently operating under a modified essential services model" that remained in effect until January 4, 2022. By further notice dated December 29, 2021, the Modified Essential Services Model was extended to all locations until January 14, 2022.

[35] The trial judge, counsel and the respondent convened virtually for a pre-trial conference on the record on January 11, 2022. It was not transcribed. However the respondent's comments at the end of the pre-trial are contained in the Appeal Book. He told the trial judge that the *Jordan* time limits had been "exceeded". He was correct: almost 41 months had elapsed since the laying of the charge. It was the second time the respondent had raised with the trial judge a concern about delay.

[36] The respondent's complaint about delay was made to the trial judge after his lawyer, Mr. Mozvik, had to disconnect from the pre-trial call for an appointment. The judge advised the respondent the pre-trial would continue the next day.

[37] The continuation of the pre-trial on January 12 was also not transcribed for the Appeal Book but the audio-recording for both dates disclosed the delay issue was prominent in the trial judge's mind.

[38] At the January 11 pre-trial, the trial judge had put two topics on the table: legal issues relating to the trial itself, and the COVID-19 pandemic. He indicated an awareness that *Jordan* had been raised by the respondent and "discussed with counsel" with Mr. Mozvik to take instructions. The judge said it was "unlikely" that a delay motion would be forthcoming. There is nothing in the record for the appeal to explain why this was said.

[39] The trial judge noted the Nova Scotia Supreme Court had issued, "due to the ongoing situation with the COVID-19 pandemic", a January 10, 2022 notice[9] extending to January 21, 2022 the Modified Essential Services Model that had been instituted for all locations on December 17, 2021. The emergence of the "highly transmissible Omicron variant" had led to the court returning to the Modified Essential Services Model which, the trial judge explained, required the limiting of in-person proceedings in the Supreme Court to those "deemed urgent or essential by a judge".

[40] The trial judge read the notice to counsel and the respondent and observed that the Modified Essential Services Model was due to lapse only three days prior to the scheduled start of the trial. He said the decision about whether the trial could safely proceed was up to him. He acknowledged the importance of the respondent's rights but noted the "unprecedented" COVID infection numbers.

[41] On January 12, 2022 when the pre-trial continued, the trial judge returned to the theme of whether the trial would be proceeding in light of the COVID "situation". The "situation" was the increase in COVID infections in the community. He then discussed how existing court facilities had had to be adapted to accommodate jury trials during the pandemic.

[42] The trial judge explained that jury trials had been held at the Sydney Justice Centre during the pandemic, although "not too many". He described how courtrooms had been reconfigured to accomplish physical distancing with participants, including the jury, being repositioned. The logistics of accommodating the jury outside of the courtroom when objections were being dealt with or deliberations were underway, had proved to be challenging. Movement of jury members up and down the elevator one by one was time consuming. Witnesses and counsel also had to be accommodated at the courthouse where there was limited space to achieve physical distancing.

[43] The Crown and Mr. Mozvik reacted to these specifics with an expression of concern that the four days scheduled for the trial would not be sufficient to manage the logistics. The respondent wanted to know how many adjournments "will be allowed". He said he wanted "to get this over and done with".

[9] The January 10, 2022 notice from the Nova Scotia Supreme Court was not included in the materials filed by the parties for the appeal but was available from the Director of Communications for the Judiciary.

[44] The trial judge remarked on the current Omicron variant causing a record number of cases, creating "a very tentative situation". He told the respondent there was "no set number" of adjournments and indicated, without elaborating, that concerns about delay would have to be dealt with "by way of a motion".

[45] The pre-trial concluded with the trial judge indicating he would decide "by Friday" (January 14) whether to adjourn the trial.

[46] On January 13, 2022 the trial judge sent counsel a letter in which he advised he had concluded the respondent's January 2022 trial had to be adjourned yet again due to the Omicron COVID variant circulating in the community. The letter addressed the following points:

- A pre-trial had been held on January 11 and 12, 2022 with the respondent in attendance by video.

- During the pre-trial appearances numerous matters were discussed "in an attempt to ensure a fair and expeditious trial (s. 625.1 of the *CCC* [10])". Also discussed (including at a pre-trial held on October 25, 2021) was the importance of completing the respondent's trial "on a timely basis".

- The respondent's trial scheduled for January 24 to 27, 2022 "unfortunately" coincided with "the current variant (Omicron) nearing its peak" according to Nova Scotia Public Health.

- Omicron was well known to be extremely contagious and to have caused severe outcomes in certain cases.

- Due to the Omicron variant the Nova Scotia Supreme Court was operating under a Modified Essential Services Model, "which limits in-person appearances to those matters deemed essential by the Court".

- The competing tensions were the respondent's entitlement to a trial within a reasonable time, the need to make "every effort … to prioritize the scheduling of his trial", and the health and safety of all justice system participants, including the respondent, the jury panel, court staff and counsel.

[10] *Criminal Code of Canada*.

- Even with the requirement of proof of double-vaccination against COVID, a third vaccination dose was advisable for "additional protection [from] the present variant, which is widespread".

[47] The trial judge concluded his letter by indicating he was not satisfied the scheduled jury trial could proceed safely: "Having considered the matter as best I can and weighing the various factors…". He found it was "not essential that the trial be held at this time" and indicated he would be directing the scheduling office to canvas the earliest dates for proceeding with the trial when safety "for the Accused, the public, Counsel and all participants" could be assured.

[48] On January 19, 2022, the Nova Scotia Supreme Court extended the Modified Essential Services Model to January 31, 2022 in all locations. This again limited in-person proceedings in the Supreme Court to those "deemed urgent or essential by a judge".

[49] The formal adjournment of the respondent's trial occurred on January 24, 2022. September 2022 was identified for re-scheduled dates. The respondent complained about the delay. He said "They've…now really exceeded their timeframe with the *Jordan*, so like I said…I've been patient". He added:

> …it's just being frivolous to be so because I'm being violated…Like this is my life and I'm being held for another nine months, eight months it's, it's not right…It's not good.

[50] The trial judge responded by telling the respondent "there are remedies available" that could be granted, or not, "depending on the circumstances". He said: "So I'm going to leave that, sir, between you and your…counsel, okay? Thank you".

[51] September 26 to 30, 2022 were reserved for the trial. Crown counsel advised he was going to see if Justice Frank Hoskins would be available to conduct the trial sooner, in the period of February 14 to March 1, 2022. The Crown indicated another jury trial in that time period might not go ahead which would liberate Justice Hoskins to preside at the respondent's trial. The trial judge said if the last week of February came available for the Crown, the trial could be moved up from the September dates.

[52] By the next court appearance on January 31, 2022, the Justice Hoskins alternative had not yet borne fruit. In any event, Mr. Mozvik indicated he had

looked at his calendar and determined that obligations to other clients made the September trial dates more realistic. The Crown and the trial judge viewed Mr. Mozvik's comments as an acknowledgement he was not available in February. The September 26-30, 2022 trial dates were confirmed.

[53] The scheduled conclusion of the trial on September 30, 2022 would put the matter at 49 months after the charge was laid on August 21, 2018.

[54] At a court appearance on September 23, 2022 the trial judge was apprised of the breakdown in the relationship between the respondent and Mr. Mozvik. Mr. Mozvik explained the respondent had lost confidence in him and their relationship could not be rehabilitated. Mr. Mozvik was permitted to withdraw as trial counsel. The respondent complained about the continued delay and what he asserted was a violation of his s. 11(b) rights. He indicated he intended to proceed with an application for a stay of proceedings on the basis of unreasonable delay.

[55] When the matter returned before the trial judge on January 11, 2023, the respondent had secured new counsel. Trial dates of April 24 to 28, 2023 were confirmed. April 28, 2023 was 56 months after the respondent was charged.

[56] The respondent's s. 11(b) delay application was argued on April 11, 2023. The trial judge rendered his decision on April 14.

The Trial Judge's Decision

[57] The trial judge recognized the total delay of 56 months was presumptively unreasonable. He correctly found the Crown had to show exceptional circumstances to rebut the presumption the net delay violated the respondent's s. 11(b) rights.

[58] The judge found there was "little defence delay". He allocated eight months to the respondent as a result of the trial being adjourned in September 2022 when the relationship with his trial lawyer broke down and time was needed for him to obtain new counsel.

[59] The respondent does not dispute this delay, extending to the new trial dates in April 2023, was defence delay. Both parties note the trial judge made a slight arithmetical miscalculation: the actual delay was seven, not eight, months.

[60] Although the trial judge did not specifically indicate the subtraction of defence delay left a net delay of 49 months[11] he said there was net delay exceeding the *Jordan* ceiling "before any deduction for exceptional circumstances, which the Crown argues exists here". He then dealt with the exceptional circumstances:

> Based on my review of the record, it is evident that Mr. LeRoy had three of his trials adjourned, primarily for reasons of public health and safety due to the pandemic. The total time of these adjournments alone amounted to a period of 28 months from the first adjournment in May 2020, to the last adjournment, granted in September 2022. The record will also show the court approached each adjournment seriously, attempting to balance the, the competing interests.

[61] The trial judge's allocation of 28 months to exceptional circumstances led him to conclude the remaining delay "was close to, above or below, the 30-month ceiling". He held that *Jordan* favoured judges avoiding "micro-accounting…which can be unprecise and imperfect". This led to his conclusion that:

> …whether the remaining delay is 28 months or 32 months, it is not a complete answer, in my respectful view, in determining whether Mr. LeRoy's right to be tried within a reasonable time has been violated.
>
> At the end of the day, Mr. LeRoy has been awaiting – has been waiting a period of four and a half years to be tried on the charge in the indictment which is alleged to have occurred on June 23rd, 2018. Complexity is not a factor that would warrant an exceptional circumstance in this case. Mr. LeRoy's rights, as guaranteed under the *Charter*, should not be held in abeyance. The analysis must always be contextual.

[62] Staying the proceedings, the trial judge found "it was one long event, that caused the respondent's trial to be delayed too often". He said:

> While the adjournments were reasonable in the sense that they were necessary, with new trial dates being set at the earliest date, the total period overall was unreasonable as far as Mr. LeRoy awaiting trial is concerned.

Issue – Did the Trial Judge Err in Entering a Stay of Proceedings?

[63] The parties agree the trial judge correctly deducted defence delay from the total delay. The judge is credited with correctly concluding the COVID-19 pandemic qualified as an exceptional circumstance.

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[11] With the correct arithmetical calculation of seven months.

[64] The appellant says the trial judge's treatment of the pandemic as "one long event" that caused delay is supported by the characterization it has been given by other Canadian courts. In its factum the appellant references the Ontario Court of Appeal's decision in *R. v. Agpoon*[12] and further states:

> …other criminal courts from across Canada have agreed that the entire period of time, from when the Canadian Criminal Justice System was blindsided by the Covid-19 pandemic, until the dates that trials were ultimately rescheduled, is properly characterized as a Covid-19 related discrete event. [13]

[65] The appellant lists a number of s. 11(b) cases from Ontario, British Columbia and Alberta trial courts[14] and the Alberta Court of Appeal[15] as examples of courts deducting the entire time period during which courts underwent waves of closures.

[66] The appellant emphasizes the importance of contextualizing the mitigation required of the Crown and justice system faced with the discrete exceptional event of the pandemic and notes the following statement from the Ontario Superior Court in *R. v. Simmons*:

> [72] …the discrete exceptional event caused by the COVID-19 public health crisis does not end the moment the courts are again hearing jury trials. The trial takes place in the reality of the courthouse the case is being heard in. That reality must be recognized when calculating the appropriate time period and in assessing what the Crown and the court can reasonably do in mitigating the delay.[16]

[67] The appellant says the trial judge made a finding of fact, owed deference on appeal, that the Crown could not have done anything more than it did to mitigate the delay caused by the pandemic. In its factum the appellant says:

> The reality for the criminal courts in Nova Scotia was that even if they started to hear some out of custody matters, including jury trials, following the implementation of an essential services model, it was not business as usual. The courts were dealing with how they could have matters heard safely while trying to resolve the backlog of cases.[17]

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[12] 2023 ONCA 449.
[13] Appellant's Factum at para. 75.
[14] *R. v .Ali*, 2021 ONSC 1230; *R. v. Simmons*, 2020 ONSC 7209; *R. v. Pinkowski*, 2021 ONCJ 35; *R. v. Grouhel*, 2021 BCSC 1840; *R. v. Kalashnikoff*, 2021 ABQB 327; *R. v. Attwater*, 2022 ONCJ 368.
[15] *R. v. Loiacono*, 2023 ABCA 157.
[16] 2020 ONSC 7209 note 14.
[17] Appellant's Factum at para. 82.

[68] The appellant describes the restarting of trials for accused not in custody as "a complex operation" that did not permit the courts to "expand and contract at will to accommodate every contingency".[18] The respondent was in custody from 2021, but on other charges.

[69] The appellant references the trial judge's finding, which I cited at paragraph 62 of these reasons, that the re-scheduling of the respondent's trial was undertaken with care by the court, involved reasonable adjournments and the earliest possible new dates.

[70] However, as I will discuss, the trial judge needed to apply the *Jordan* framework in conducting his analysis of the respondent's delay application. He did not do so and, consequently, committed an error of law. Furthermore, a proper *Jordan* analysis does not lead to a conclusion that the delay in this case was a violation of the respondent's s. 11(b) rights.

Standard of Review

[71] In *R. v. Pearce*, (2021 NSCA 37) this Court set out the standard of review to be applied in appeals from s. 11(b) stays of proceeding:

> [53] The standard of review for s. 11(b) appeals is a three-step process as this Court has stated previously: palpable and overriding error for findings of fact and the categorization or attribution of delay, and correctness for the allocation or characterization of the delay and the ultimate determination of whether the delay was unreasonable and warrants a judicial stay. Deference is owed to a trial judge's assessment of responsibility for the delay because it involves findings of fact.
>
> [54] Appellate courts must show deference to a trial judge's underlying findings of fact and to the judge's determination of the legitimacy of defence conduct. Those decisions are "by no means an exact science" and "first instance judges are uniquely positioned to gauge" whether the defence actions were legitimately taken to respond to the charges (*Jordan*, at para. 65; *Cody*, at paras. 31-32).
>
> …
>
> [56] A trial judge's allocation of the delay under the *Jordan* framework, also referred to as the characterization of the delay, which includes calculating the total delay, subtracting the delay assessed against the defence, and then comparing the net delay to the applicable *Jordan* ceiling, is subject to a standard

[18] Appellant's Factum at para. 83.

> of correctness. Also subject to a standard of correctness is the judge's ultimate determination of whether the delay was unreasonable and violated s. 11(b).

Analysis

[72] The trial judge's visceral sense that the respondent's trial by its scheduled end date of April 28, 2023, had taken too long, is understandable. Fifty-six months from the date the respondent was charged seems like an inordinate amount of time to conclude a four-day trial. But the Supreme Court of Canada in *Jordan* and related cases established a framework to be applied when determining whether a lengthy delay constitutes a violation of an accused's s. 11(b) *Charter* rights and the trial judge did not apply the framework. His failure to do so requires the analysis to be undertaken on appeal.

[73] The *Jordan* ceiling was reached in this case on February 21, 2021. Determining whether there has been a violation of the right to be tried within a reasonable time is very fact-specific and must be assessed in the context of the particular case. As *Jordan* notes: "The reasonableness of a period of time to prosecute a case takes its colour from the surrounding circumstances".[19] The surrounding circumstances in this case include:

- The court closures and Essential Services Model/ Modified Essential Services Model obliged the trial judge to repeatedly assess whether the respondent's trial could proceed safely for all participants. COVID evolved into more contagious variants, such as Omicron, that led to the adjournment of the respondent's trial in January 2022. The adjournments in May 2020[20] and May 2021 were also due to COVID.

- It is apparent from the trial judge's discussion at the pre-trial on January 12, 2022 there were no alternative facilities available to the Sydney Supreme Court for the conduct of jury trials during the various waves of COVID variants. In the Halifax Regional Municipality, two purpose-built jury courtrooms were constructed off-site from the Law Courts and jury trials got underway there in March 2021. There is no evidence of any such alternative for Sydney. It would have had to be approved and funded by the provincial government.

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[19] *Jordan* at para. 103.
[20] As noted in paragraph 14 of these reasons the adjournment occurred on April 20, 2020.

- With the adjournments occasioned by COVID, there does not appear to have been anything defence counsel could have done to accelerate the trial. Although neither defence nor Crown counsel showed any particular concern about the mounting delay, which in much less constrained circumstances could result in a s. 11(b) application succeeding or failing[21], there is nothing to indicate what remedial steps could have been taken. The trial judge made a finding that the "repeated waves [of COVID] over a period of years" was not "something that was easily remedied". Acquiescence by Crown and defence counsel to the lengthening delay must be viewed in the context of the continued threat posed by the pandemic.

- Given the very significant delay it is tempting to assume the Crown could have done more to prioritize the respondent's trial. But there is no evidence of what that "more" could have been. The available facts are those found by the trial judge, that the adjournments were reasonable and the trial was set for the earliest available dates. The judge's factual findings are entitled to deference.

- Crown counsel did raise the possibility of Justice Hoskins conducting the respondent's jury trial on earlier dates in 2022. However, there is no evidence to confirm he became available or even that a jury trial could have been mounted then.[22] This means the realization by Mr. Mozvik that the dates in September 2022 were more suitable for his schedule cannot be said to amount to any delay by defence.

- The respondent did not actively pursue his s. 11(b) rights until September 2022 when the relationship with Mr. Mozvik broke down. He indicated on January 24, 2022 that his patience was wearing thin ("I've been patient") and was advised by the trial judge there were "remedies" he could discuss with his lawyer. However, no delay application was pursued in 2022.

[74] The respondent complained about delay on January 11, 2022 at which time it had been almost 41 months since the arson charge had been laid. He was then still represented by counsel. It is not clear from the record whether the respondent had

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[21] For example, *Jordan* notes that defence counsel have an obligation to "actively advanc[e] their clients' right to a trial within a reasonable time". Crown counsel are also required to avoid or mitigate delay. (para. 138)

[22] According to a notice from the Nova Scotia Supreme Court dated February 9, 2022, the Supreme Court did not pause the Modified Essential Services Model until February 14, 2022. We do not know how jury trials in Sydney were affected by this.

instructed Mr. Mozvik to bring a delay application and ultimately lost confidence in him because that did not transpire. He appears to advert to this in his comments on September 23, 2022 when Mr. Mozvik applied to withdraw. In any event, an earlier delay application would have encountered the headwind of the exceptional circumstance of COVID and its impact on the operation of the courts. Whether it would have succeeded is unknown and unknowable.

[75] I find the correct application of the *Jordan* framework starts with 56 months as the total delay. The deduction of seven months for defence delay associated with the respondent securing counsel to replace Mr. Mozvik is not contested.

[76] Therefore the net delay before considering the exceptional circumstance of the pandemic is 49 months. I find the delay between May 19, 2020 and October 29, 2020 to have been caused by COVID. The delay from October 29, 2020 to the new trial dates in May 2021 was the result of the knock-on effect of COVID. The Sydney Justice Centre had to juggle all the cases that had been disrupted in 2020 by the pandemic. These were exceptional circumstances.

[77] Before I proceed to discuss the further impact of the exceptional circumstances of the pandemic I want to touch on the resolution discussions that the trial judge was made aware of on May 10, 2021.

[78] The trial judge did not make any comment about the resolution discussions in his reasons. They did not occasion an adjournment of scheduled trial dates of May 17 to 20, 2021 as the reason for the trial not proceeding was a further wave of COVID. However, where resolution discussions may factor into a *Jordan* analysis it should be understood they "play a significant and positive role in the criminal courts".[23] As Justice Moldaver[24] stated in *R. v. Anthony-Cook*:

> [1] Resolution discussions between Crown and defence counsel are not only commonplace in the criminal justice system, they are essential. Properly conducted, they permit the system to function smoothly and efficiently.[25]

[79] Resolution discussions are a legitimate and necessary part of the trial process. Their failure, with a resulting delay to the trial, will not necessarily be "a

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[23] *R. v. Lim*, 2017 ONCJ 769 at para. 80 [*Lim*].
[24] Justice Moldaver also wrote the majority reasons in *R. v. Jordan* decided three months earlier.
[25] 2016 SCC 43.

factor which suddenly transforms an agreed upon process to an unconstitutional one".[26]

The Exceptional Circumstance of COVID-19

[80] I find the Crown's onus to justify the presumptively unreasonable delay in this case of 49 months is discharged by the exceptional circumstance of the pandemic. The respondent's trial scheduled in July 2020 for dates in May 2021 was once again adjourned, due to COVID, formally on May 17, 2021. The court was successful in finding new trial dates in January 2022. These also fell victim to COVID when the highly contagious Omicron variant began stalking the community.

[81] In my view, there is no evidence anything could have done by the trial judge or Crown counsel to mitigate the delay. At the January 12, 2022 pre-trial the trial judge canvassed the reality of the Sydney courthouse facilities and the logistical challenges and risks associated with conducting a jury trial in January 2022. He made the reasonable and prudent decision to adjourn the trial. Given the public health considerations, the trial judge really had no choice. I find he was in error in his analysis of the delay application but he was best positioned to know, when he was adjourning the trial dates, what the scheduling options were for the respondent's jury trial.

[82] New trial dates were scheduled for September 2022. The delay from January 2022 to September 2022 was a function of the exceptional circumstance of COVID. A jury trial cannot be turned on a dime. The respondent's trial was not the only criminal trial the Sydney Justice Centre was endeavouring to accommodate. It will not have been the only jury trial in the scheduling mix. We know Justice Hoskins was to have presided over a jury trial in February 2022. On January 24, 2022, when the respondent's trial was adjourned for a third time, Omicron had become a significant threat to public health. A further suspension of jury trials in the province to January 31, 2022 had been announced on January 19, 2022. New trial dates would have had to be found for all the displaced trials.

[83] The COVID pandemic was an exceptional circumstance that, in the respondent's case, was responsible for much of the delay. Of the 49 months of net delay, 28 months was caused by the exceptional circumstance of COVID which repeatedly emerged to throw a spanner in the works of the respondent's trial. This

[26] *Lim* note 23 at para. 101.

28 month delay is subtracted from the 49 months which leads to a determination the *Jordan* ceiling of 30 months was not exceeded in this case.[27] It is not reasonable to conclude that the Crown and the justice system, confronted with the pandemic's resurgent waves, could have mitigated the delay.

[84] The exceptional circumstance of COVID will not inevitably lead to the conclusion that the delay in a particular case could not be alleviated. Timely justice serves to maintain public confidence in the criminal justice system. In this case, timely justice was frustrated by waves of COVID variants coinciding with the respondent's trial dates and limited institutional capacity to respond.

[85] In the circumstances of this case the delay was not unreasonable and a stay of proceedings should not have been entered.

Conclusion

[86] While unfortunate, and understandably frustrating for the respondent, most of the delay in this case was due to the evolving nature of COVID, its unprecedented threat to public health and its particular impact on this case. The proceedings against the respondent should not have been stayed. A fact-specific and contextualized analysis leads me to the conclusion the net delay did not violate the respondent's constitutional rights under s. 11(b) of the *Charter*.

Disposition

[87] The appeal is allowed and the stay of proceedings is set aside.

Derrick, J.A.

Concurred in:

Bryson, J.A.

Fichaud, J.A.

[27] 49 months less 28 months = 21 months.