NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. McNeil*, 2024 NSCA 57

Date: 20240529
Docket: CAC 524838
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

Brandon McNeil

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code of Canada*

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	May 16, 2024, in Halifax, Nova Scotia
Subject:	Criminal law. Verdict deliberation delay. s. 11(b) *Charter*. *R. v. K.G.K.*, 2020 SCC 7.
Summary:	The appellant's trial for sexual offences against two children was conducted before the trial judge over three days in July, August, and September 2021. It was a credibility case with the children and the appellant all testifying. Closing submissions were made in writing with Crown and defence confirming on October 26, 2021 there would be no further submissions. The trial judge advised she would render her decision in court on November 25, 2021. No decision was forthcoming. Counsel were informed the trial judge was on leave. They continued to hope the trial judge would return with a decision. On April 14, 2022 they were advised the leave was indefinite. Counsel reserved dates, the earliest being in May 2023, for the commencement of a two-day retrial, pursuant to s. 669.2 of

	the *Criminal Code*. This left open the possibility of the trial judge returning to deliver a verdict. On February 14, 2023, Crown and defence confirmed the retrial would go ahead as the trial judge had not returned. Defence counsel brought a s. 11(b) delay application. On June 12, 2023 the application judge found the 15.7 months' delay from October 26, 2021 to February 14, 2023 to be deliberative delay and a violation of the appellant's s. 11(b) rights and stayed the proceedings. She found the defence had not waived any of the delay.
Issues:	Did the application judge err in her determination that: (1) 15.7 months was properly characterized as deliberative delay subject to analysis under the *R. v. K.G.K.* framework; (2) having regard to all the circumstances, the 15.7 months of deliberative delay was markedly longer than it should have been in all the circumstances for a short credibility trial; (3) there was no defence waiver.
Result:	Appeal dismissed, the stay of proceedings upheld. The application judge committed no error in: (1) characterizing the 15.7 month delay between October 26, 2021 and February 14, 2023 as deliberative delay; (2) finding the delay was markedly longer than it reasonably should have been in all the circumstances; and (3) concluding there was no defence waiver.

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Judges:	Farrar, Fichaud, Derrick, JJ.A.
Appeal Heard:	May 16, 2024 in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Derrick, J.A.; Farrar and Fichaud, JJ.A. concurring
Counsel:	Mark Scott, K.C., for the appellant Zeb Brown, for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Reasons for Judgment:

Introduction

[1] This appeal is about whether the respondent's criminal charges should have been stayed for unreasonable delay. The delay occurred as a result of the trial judge never rendering a decision following the conclusion of the evidence and final submissions.

[2] The respondent has a constitutional right to a trial within a reasonable time. The trial itself was heard and concluded without delay, but no decision was forthcoming. The respondent eventually made a s. 11(b) unreasonable delay application. On June 12, 2023, Judge Bronwyn Duffy of the Provincial Court of Nova Scotia ("the application judge") found a violation of the respondent's s. 11(b) *Charter* rights and stayed the charges. The appellant says this was an error of law.

[3] The appellant asks for the stay to be overturned and the respondent's charges reinstated.

[4] As these reasons explain, I find no error and would dismiss the appeal.

Factual Background

The Respondent's Trial

[5] The respondent was charged on March 12, 2021 with sexual offences against two children, alleged to have occurred in February 2021—two counts of sexual exploitation, contrary to s. 153 (1)(a) of the *Criminal Code*, two counts of sexual interference, contrary to s. 151, and two counts of sexual assault, contrary to s. 271. The respondent denied the allegations, pleading not guilty.

[6] Despite the COVID pandemic, the trial proceeded with dispatch, over three days—July 28, August 19, and September 21, 2021—before Judge Rickola Brinton of the Provincial Court of Nova Scotia ("the trial judge").

[7] On August 19, 2021 the respondent was directed to return on September 21, 2021 for the continuation of cross-examination. In the discussion with the trial judge that followed, Crown and defence agreed they would submit their final submissions in writing, the defence by October 5, 2021 and the Crown by October 12, 2021.

[8] The respondent's cross-examination concluded on September 21, 2021 marking the end of the trial evidence. October 29, 2021 was set as the date for counsel to return to answer questions arising from their written submissions. The trial judge indicated she would deliver her decision on November 25, 2021 in court.

[9] The trial judge did not deliver her decision on November 25.

[10] Before I proceed to explain what transpired after September 21, 2021, I will indicate that up to and including the last court appearance before the trial judge on September 21, the respondent went by the name shown above in the style of cause—Brandon McNeil—and used he/him pronouns. The respondent now uses the name Brynn Milner and she/her pronouns. I will use the respondent's current name and pronouns where applicable in these reasons.

From September 21, 2021 to June 12, 2023

[11] Although October 29, 2021 had been scheduled as the return date, the next court appearance in the matter occurred on October 26, 2021 before Judge William Digby of the Provincial Court. Crown and defence indicated they had no further closing submissions to make and November 25, 2021 was confirmed for decision.

[12] On November 22, 2021 the Provincial Court Supervisor of Judicial Support, Lillian Fraser, emailed Crown and defence to advise that the trial judge would not be available for the decision hearing on November 25. Ms. Fraser indicated the hearing would be adjourned to December 20, 2021.

[13] Crown counsel responded by email on November 24, seeking confirmation the trial judge would be rendering her decision on December 20. She sought an explanation on behalf of the complainants for the delay and confirmation the decision would actually be delivered on the rescheduled date. She also noted the respondent was in pre-trial custody.

[14] Within hours the Crown's email was responded to by the Chief Judge of the Provincial Court, Pamela Williams, who said:

> With regret I am not able to say whether the decision will be rendered on December 20, 2021. Judge Brinton is currently on Short Term Illness and I am not sure how long this may continue. I appreciate and share the concern you express in your email. It is a very unfortunate situation. Judge Brinton is seized and no other judge can be assigned to take over carriage of the file at this juncture.

[15] The December 20 date for decision was confirmed in court on November 25, 2021.

[16] On December 16, 2021 the Crown emailed the Chief Judge's executive assistant asking for an update on the status of the decision scheduled to be delivered on December 20, 2021. Crown counsel noted December 20 was "now showing as a Hearing to Set a Date". She asked if it was possible to confirm that December 20 would be the date the decision would be delivered.

[17] Chief Judge Williams responded promptly on December 16 to advise:

> Judge Brinton continues to be off and I have not been able to reach her. I do not believe the decision will be delivered on December 20 but will be further adjourned. Should I hear anything to the contrary, I will notify you asap. My sincere apologies for this.

[18] No decision was forthcoming on December 20. The matter was dealt with by Judge Theodore Tax who told counsel he had been asked by court administration to put it over to February 1, 2022 to set a date for the decision.

[19] On January 19, 2022, Crown counsel again emailed the Chief Judge's executive assistant to request a further update as to when the decision might be expected. She noted early trial dates had been provided in 2021 as the respondent was in custody and closing submissions were made in writing to expedite the proceedings. She offered suggestions for obtaining the decision: could the trial judge give a bottom-line decision with reasons to follow? Alternatively, could she deliver her decision by telephone? And, if neither of the proposals were feasible, Crown counsel asked if a date certain for the decision could be provided.

[20] Chief Judge Williams once again responded promptly:

> Thank you, Ms. Mills, for your email. I understand completely the position in which you, the complainants, and the accused find yourselves. Although it is beyond my control I do apologize.
>
> Judge Brinton continues to be on short term illness. The last update I have from the insurer is dated December 22, 2021 indicating the leave will continue for at least another 6 weeks (taking us to February 2, 2022) with an update due in mid January, 2022. We have requested a further update but have not received one yet.
>
> While on leave, Judge Brinton is not permitted to work. Nor am I able to reach out to Judge Brinton to ask that she deliver her decision, even remotely. She has

> not been in the office since October 22, 2021 and I believe the materials are all in her office.
>
> I will provide a further update once I have one.

[21] The matter returned to court on February 1, 2022 before Judge Digby who put it over to March 22, 2022 for a status update. He said by then there at least should be "some concrete idea as to Judge Brinton's availability".

[22] On March 22, 2022 Crown and defence appeared before Chief Judge Williams who stated:

> This matter is awaiting a decision following a trial by Judge Brinton who's been on leave for a considerable period of time. I do not know when Judge Brinton may return to work, but it's not going to be before the middle of May by all indications…

[23] Chief Judge Williams adjourned the case to April 4, 2022. She suggested counsel consider proceeding under s. 669.2 of the *Criminal Code* which would allow the case to continue before a Provincial Court judge other than Judge Brinton, if she was unable to complete it. As no verdict had been rendered, the judge continuing the proceedings would have to commence the trial again "as if no evidence on the merits had been taken".[1]

[24] At the return date of April 4, 2022, Crown and defence informed Chief Judge Williams they were not prepared to make the application under s. 669.2. When asked by Crown counsel why the trial judge was not available to render her decision, Chief Judge Williams responded: "The best I can say is medical reasons". She added that she did not know "if or when she will return" and said she had been advised that in any event it would not be before the middle of May. The matter was set over to May 31, 2022 to afford counsel time to discuss how to proceed.

[25] In a letter to counsel dated April 14, 2022 Chief Judge Williams advised that "Judge Brinton will continue to be on leave for an indeterminate period".

[26] On returning to court on May 31, 2022, Crown and defence indicated to Chief Judge Williams they wanted to reserve new trial dates, "and if Judge Brinton comes back in the meantime, she can render her decision". Chief Judge Williams

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[1] *Criminal Code*, R.S.C., 1985, c. C-46, s. 669.2(3).

explained the s. 669.2 process was not a mistrial but a re-commencing of the proceedings.

[27] Re-trial dates of May 16 and 17, 2023 were reserved. A status date was set for February 14, 2023 to determine if the re-trial needed to proceed.

[28] On February 14, 2023, Crown and defence advised the court the re-trial would be proceeding on the May dates as the trial judge had not returned to deliver her decision. The option, pursuant to s. 669.2(3) of the *Criminal Code,* of a decision being made by another Provincial Court judge on the basis of the trial transcripts as evidence on the merits[2] was not acceptable to defence counsel.

[29] The re-trial did not proceed. Defence counsel brought the s. 11(b) application. It was heard before the application judge on May 16, 2023. In the course of her submissions opposing the application, Crown counsel provided the judge with the emails from 2021 and 2022 I referenced earlier. They had also been excerpted in the Crown's written brief.

The Respondent's Remand Status

[30] Before I proceed to discuss the application judge's decision, I will briefly review the circumstances of the respondent's remand and bail.

[31] The respondent was arrested on May 12, 2021 and granted bail on May 17, 2021 with one surety. On May 29, 2021 the surety rendered, but not because the respondent breached any release conditions. The surety indicated the role was attracting negative attention in the small town where he and the respondent were living.

[32] The respondent responded to the surety's withdrawal by surrendering into custody voluntarily. She remained on remand until February 8, 2022 when bail was granted with a new surety. Up until that time, the respondent did not have a viable fresh bail plan. Remand conditions were described by the respondent as challenging due to restrictions created by the COVID pandemic, no programming, and a shortage of correctional staff.

[2] See also: *R. v. J.D.*, 2022 SCC 15.

[33] On September 14, 2022 the respondent was back in custody. The surety from February 8 had gone missing. Two new sureties were put forward and the respondent was released that same day under strict conditions.

The Application Judge's Decision on the Respondent's s. 11(b) Application

[34] The application judge commenced her decision[3] by reviewing the relevant dates in the matter and noting what transpired at court appearances between September 21, 2021 and February 14, 2023. She then conducted her analysis in accordance with *R. v. Jordan*,[4] the Supreme Court of Canada decision on s. 11(b) delay incurred up to the case passing to the verdict deliberation stage.

[35] The application judge's *Jordan* analysis involved her calculating the total delay from the date the respondent was charged to May 17, 2023, the final reserved date for the re-trial—797 days or 26.2 months. The application judge stated her view that the end of the first trial to "the declaration of the mistrial is not properly considered within the *Jordan* analysis, but is to be evaluated within the *KGK* framework".[5]

[36] Here the application judge was referring to *R. v. K.G.K.*,[6] the Supreme Court of Canada decision that lays out the approach to be followed where the delay occurs while a trial judge is deliberating on the verdict. I will be discussing *K.G.K.* in more detail later.

[37] I will not be discussing *Jordan* as I find its analytical framework does not apply in this case. However, certain principles espoused in *Jordan*, relating to an accused person's s. 11(b) right to constitutional protection from delay, are relevant to this appeal. I will refer to those principles.

[38] The application judge found the case was turned over to the trial judge for deliberation on October 26, 2021 which she said was the date Crown and defence "confirmed there were no further submissions and the decision date of 25 November 2021 stood".[7]

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[3] *R. v. McNeil*, 2023 NSPC 32 [*Decision*].
[4] 2016 SCC 27 (*Jordan*).
[5] *Decision* at para. 10.
[6] 2020 SCC 7 (*K.G.K.*).
[7] *Decision* at para. 11.

[39] The application judge continued her analysis by assessing when the s. 669.2 procedure was initiated and factoring that into her *Jordan* framework. She considered the issue of defence delay. She concluded the *Jordan* delay was not unreasonable, that is, it did not violate the respondent's s. 11(b) rights.

[40] At this point, the application judge turned to *K.G.K.* and verdict deliberation delay. She acknowledged that under *Jordan*, the clock runs from the date a charge is laid to the end of the trial evidence and argument.[8] She acknowledged the respondent's constitutional right to be tried within a reasonable time is guaranteed through the period of verdict deliberation, which, as she explained: "is the time after which the case is no longer in the hands of the parties and their legal counsel, but has been turned over to the judge to render a decision".[9]

[41] The judge held:

> [29] The period that I conclude is properly within the analytical framework of *KGK* is 477 days, or 15.7 months. I have not located a case involving a matter awaiting verdict where the judge is on indeterminate leave – except in this Court (*R. v. Prosper*, 2023 NSPC 27). That case involved a 10-month period from case conclusion to mistrial declaration.
>
> [30] This is just shy of ten months beyond the legislated deadline for provincial court judges to render a decision (*Provincial Court Act*. R.S., 1989 c. 238. R.S., c. 238, s. 8, Reservation of judgment). The province does not have constitutional competency to legislate on criminal procedure, so if this statutory deadline is within the scope of criminal procedure, that leaves in question whether the time limit for rendering a decision in the provincial legislation is applicable to a criminal proceeding; however, it is at the very least a practical limit. The information on record is spare in relation to the absence of the sitting judge that heard the trial - the judge is on leave. When pressed by the Crown Attorney, the information provided by the institution was "the best I can say is medical reasons". A letter to involved counsel on cases affected by this circumstance, sent by administration on 12 April 2022, noted only that the judge will be "on leave for an indeterminate period." There is nothing on the record to indicate that there was actual verdict deliberation ongoing at any time after 25 October 2021. As earlier discussed, that point is of little import.

[42] The application judge calculated the verdict deliberation delay of 15.7 months from October 25, 2021, which she found was the date the trial judge had gone on leave, to February 14, 2023, which she identified as the date the "mistrial"

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[8] *Jordan* at para. 33.
[9] *Decision* at para. 26.

was declared "and it became a foregone conclusion that the case must be tried anew".[10] She went on to assess the implications of the decision to proceed with a re-trial, which she found to have no effect on her ultimate conclusion.

[43] The application judge identified and addressed factors *K.G.K.* has directed courts to consider in a verdict deliberation delay analysis:

- The case was not close to the *Jordan* delay ceiling when the deliberation clock started to run. (For a Provincial Court trial, the *Jordan* ceiling is 18 months after which the delay is presumptively unreasonable. From the date the respondent was charged—March 12, 2021—to the end of trial evidence and submissions—October 26, 2021—was 7.5 months.)

- The case, which as a re-trial was scheduled for only two days, was not complex.

- Unlike most cases requiring a *K.G.K.* analysis, there was little information available to explain why the trial judge was unable to return and render her decision.

[44] The application judge concluded the delay of 15.7 months was a violation of the respondent's s. 11(b) rights, to be remedied by a judicial stay of proceedings. She held that neither counsel were to be faulted for the delay:

> [58] It bears repeating that I am wholly satisfied the Crown did what they could to prioritize this case – there were emails filed asking for updates from administration, and the transcript speaks for itself. The proposal by Ms. Mills to reserve trial dates but not declare a mistrial was a thoughtful action that permitted the possibility of the judge returning and rendering a verdict rather than engage a second prosecution involving vulnerable complainants. Likewise, the Defence cannot be faulted or construed to be conceding delay for joining in this proposal; to do so would be misguided censure. Counsel did what they could. There is no easy answer to this quandary. To arrive at a conclusion, I return to the principles in *Jordan* and *KGK*. Any person charged with an offence has the right to be tried within a reasonable time. In *Jordan*, the Court established a framework to combat the complacency that had taken root in the criminal justice system and was causing excessive delays in bringing accused persons to trial. In *KGK*, recognizing the individual and societal interests protected by 11(b), trial fairness and timely trials among them, the Court set out a formulation within which to assess delay occasioned by verdict deliberation and encourage bringing

[10] *Decision* at para. 40.

> proceedings to an end in a timely way. Mr. McNeil's trial ended in October 2021. He has yet to receive a verdict.
>
> [59] This is not a failing on the part of the prosecution. Nevertheless, were the accused individual to bear this delay at the expense of *Charter*-enshrined rights, the public at large is disadvantaged - deprived of timely trials that are important for victims, for accused, and for public confidence in the system - and consequently the administration of justice is diminished. This is a problem of inherency that must be borne by the institution as a whole. A judicial stay of proceedings is recorded.

Issues

[45] The appellant states the issue as an error in law and/or fact by the application judge in staying the proceedings for unreasonable delay. The respondent breaks the issue down into components I will discuss. They are whether the application judge erred in her determination that:

(a) 15.7 months was properly characterized as deliberative delay subject to analysis under the *K.G.K.* framework;

(b) having regard to all the circumstances, this amount of time was markedly longer than should reasonably have been required for the Provincial Court to render a decision in a short credibility trial;

(c) there was no defence waiver.

Standard of Review

[46] Findings of fact made by the application judge, such as when the case was handed over to the trial judge for deliberation, are entitled to deference. They are not subject to appellate intervention in the absence of clear and material error.

[47] The issue of whether the period of deliberation was markedly longer than it reasonably should have been in the circumstances involves a legal standard. The application of a legal standard to the facts of a case is a question of law. "A 'reasonableness' standard does not foreclose appellate review on a correctness standard for errors of law…".[11]

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[11] *R. v. Kruk*, 2024 SCC 7 at para. 184; *R. v. Shepherd*, 2009 SCC 35 at para. 20.

[48] Whether there was defence waiver of delay is a question of fact. The application judge's finding that the respondent did not waive the delay is subject to deference on appeal unless it can be established she made a clear and material error.[12]

Analysis

Deliberative Delay – 15.7 Months

[49] In *R. v. Jordan*, the Supreme Court of Canada established a new framework for assessing when an accused person's s. 11(b) right to trial within a reasonable time has been infringed. However, the Court acknowledged in *K.G.K.* that *Jordan* did not deal with deliberative delay:

> [50] In sum, properly construed, *Jordan* did not resolve the issue of how to determine whether an accused's right to be tried within a reasonable time under s. 11(b) has been infringed by delay attributable to verdict deliberation time. As I have said, the presumptive ceilings set out in *Jordan* only apply until the actual or anticipated end of the evidence and argument at trial, and no further. This is consistent with the design of *Jordan* and it avoids the serious practical problems that would arise if the ceilings were extended to include verdict deliberation time. Put simply, the presumptive ceilings in *Jordan* do not provide an appropriate yardstick against which the reasonableness of delay attributable to verdict deliberation time may be measured.

[50] As the *Jordan* framework does not apply to delay in delivering a verdict, *Jordan* is inapplicable in this case. Respectfully therefore, I disagree with the application judge's incorporation of *Jordan* into her analysis. It is *K.G.K.* that governs.

[51] The application judge did apply *K.G.K.* and it ultimately drove the result, the judicial stay of proceedings.

[52] As I noted earlier, the application judge fixed the deliberative delay at 15.7 months. Although she started the clock at October 25, 2021 which she took as the date the trial judge had gone on leave, I find it is more in keeping with *K.G.K.* to use October 26, 2021—when Crown and defence indicated there would be no further final submissions. This one day difference is inconsequential.

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[12] *R. v. Cody*, 2017 SCC 31 at para. 31.

[53] The judge stopped the clock at February 14, 2023, the date counsel advised the re-trial would proceed in May. These parameters—October 26, 2021 to February 14, 2023—defined the application judge's verdict deliberation period of 15.7 months.

[54] I find no error in the application judge's characterization of what constituted deliberative delay—15.7 months.

[55] There is a further observation to be made. The application judge noted there was "nothing on the record to indicate that there was actual verdict deliberation ongoing any time after 25 October 2021".[13] That finding is amply supported by the record, notably the Chief Judge informing counsel in an email on January 19, 2022 the file materials were still in the trial judge's office where she had not been since October 22, 2021. As the application judge held, nothing turns on the fact verdict deliberations had not been commenced. *Jordan* was no longer in play once final submissions concluded. The *K.G.K.* clock was running once the case was out of the hands of counsel and had become the trial judge's responsibility.

[56] The issue then became whether the deliberation time of 15.7 months "took markedly longer than it reasonably should have in all of the circumstances".[14]

Applying the Markedly Longer than Reasonable Standard

[57] The appellant says the application judge made two principal errors in finding that 15.7 months of deliberative delay in this case was markedly longer for verdict deliberation than it should have been in all the circumstances. The alleged errors are a failure to take account of the trial judge's "illness" as a special circumstance in the reasonableness analysis, and a reliance on what the appellant characterizes as the "hard stop" of the *Provincial Court Act* six-month deadline for rendering a decision. The appellant argues the application judge found that at six months of deliberation delay there is a "hard stop" beyond which further delay violates s. 11(b).

[58] I will first deal with how the application judge dealt with the *Provincial Court Act*. She did not order a judicial stay of proceedings because the verdict deliberation delay in this case exceeded the legislated six months' limitation on reserved decisions in the Provincial Court. She did not use the *Provincial Court*

[13] *Decision* at para. 30.
[14] *K.G.K.* at para. 54.

Act as the basis for concluding the delay was markedly longer than it reasonably should have been in all the circumstances. She went no further than to say the six months in the *Act* was "a practical limit".[15]

[59] The application judge's conclusion that a judicial stay of proceedings was appropriate did not turn on an application of the *Provincial Court Act*. She did not find verdict deliberation by a Provincial Court judge that extended beyond six months breached an accused's s. 11(b) rights.

[60] The application judge found the deliberation delay was "markedly longer than reasonable" by correctly applying factors identified by *K.G.K.* as relevant to the analysis.[16] She looked at:

- Was the case close to the relevant *Jordan* ceiling of 18 months before the trial judge reserved judgment?
- Was the case complex?
- What had been the court communications on the length of deliberation? In this context the application judge made findings of fact based on the record I previously reviewed.

[61] As I noted in paragraph 43, the application judge found the trial judge reserved her decision when the *Jordan* clock sat at 7.5 months, well before the 18 month ceiling for trials in Provincial Court. She concluded the case did not qualify as complex. (It was a credibility case with the primary witnesses being the young complainants and the respondent.)

[62] I will add that the trial judge also clearly did not regard it as a complex case: on September 21, 2021, with the knowledge counsel would be providing their final submissions in October, she set November 25, 2021 as the date for her decision.

[63] I will now address the appellant's argument the *K.G.K.* framework required the application judge to incorporate the trial judge's "illness" into her delay analysis as a "special circumstance".

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[15] *Decision* at para. 30.
[16] *K.G.K.* at paras. 69-71.

[64] The appellant noted that *K.G.K.*, referenced the Canadian Judicial Council's ("C.J.C.") *Ethical Principles for Judges* (2004) and the "adjudicative duty" to render timely decisions, which stated:

> [T]he decision and reasons should be produced by the judge as soon as reasonably possible, having due regard to the urgency of the matter and other special circumstances. Special circumstances may include illness, the length or complexity of the case, an unusually heavy workload or other factors making it impossible to give judgment sooner.[17]

[65] The C.J.C. *Ethical Principles*[18] apply to federally-appointed judges, not the judges of the Provincial Court. The appellant's point is simply that a judge's illness is a special circumstance that can temper the application of the "markedly longer than reasonable" standard for verdict deliberation and should have been found by the application judge to have done so here.

[66] However, what the application judge found on the basis of the record before her were circumstances much less well defined than evidence of illness. She said:

> [35] Court communications on length of deliberation is relevant. As has been remarked throughout, and which is evident from the case chronology set out in paragraph two, there is little information to go on. **The trial judge went on leave, for duration unknown and reasons largely unknown.** The administration did say at one juncture that it was for medical reasons. In correspondence to the lawyers involved in affected cases, the information was thin - just that the leave was indeterminate…
>
> [*emphasis added*]

[67] A review of the record does not allow for any other conclusion than the one reached by the application judge. As I noted earlier, the record indicates the Chief Judge advised counsel on a couple of occasions the trial judge was on "short term illness", a leave that was never more clearly defined. The application judge noted that at one point counsel were told the leave "was for medical reasons".[19] On April 14, 2022 the Chief Judge advised the leave would be for "an indeterminate period".

[68] The application judge did not find the trial judge was absent due to illness. On the basis of vaguely worded communications from the court she found the judge's leave was for "reasons largely unknown". This finding of fact is owed

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[17] *K.G.K.* at para. 63.
[18] Updated in 2021.
[19] *Decision* at para. 35.

deference on appeal. It did not support an attenuation of the "markedly longer than reasonable" standard.

[69] Each deliberative delay case will be fact-specific. In this case, the application judge did not fail to take the trial judge's leave into account in her delay analysis under *K.G.K.* It simply did not satisfy her the 15.7 months of delay could be justified.

[70] Given the indeterminacy of the trial judge's absence, everyone waited in the hopes a verdict would be forthcoming and, as they did, the *K.G.K.* clock kept running. The application judge did not find the trial judge's leave stopped it. She made no error in how she factored the leave into her analysis.

[71] In her analysis the application judge took into account the nature of the trial judge's leave—duration unknown and reasons largely unknown. She did not fail to give effect to what may or may not have been, a leave due to illness. She found the unspecified leave by the trial judge was not a circumstance that, applying the principles in *K.G.K.*, reduced the potency of the respondent's s. 11(b) rights.

[72] I find no legal error in the application judge's determination the 15.7 months of deliberative delay was markedly longer than reasonable in all the circumstances.

No Defence Waiver

[73] The appellant does not suggest the respondent explicitly waived the deliberation delay. In the appellant's submission, the respondent waived the delay implicitly, by failing to be more proactive in bringing the stalled proceedings to a conclusion by way of a re-trial. The appellant says *Jordan* established the obligation of an accused to "be an active part of the solution to the problem of delay in criminal cases".[20]

[74] The appellant says the respondent waived the delay when informed on April 14, 2022 by the Chief Judge that the trial judge's leave would continue for an "indeterminate period". The appellant argues the respondent's agreement to set provisional trial dates for May 2023 was an indication she was not concerned about s.11(b) delay. The appellant says another indication was the respondent's decision to only make the application for a stay of proceedings for unreasonable delay in April 2023.

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[20] *R. v. J.F.*, 2022 SCC 17 at para. 31, citing *Jordan* at paras. 84-86.

[75] The issue is not whether deliberative delay can never be waived—I am satisfied on appropriate facts it can be. Indeed, in *R. v. Prosper*, a verdict deliberation delay case also decided by the application judge, it was.[21]

[76] The issue is whether delay was implicitly waived in this case. I find it was not.

[77] Waiver is not discussed by the Supreme Court of Canada in *K.G.K.* It was not argued before the application judge.

[78] The majority decision of the Supreme Court of Canada in *Jordan*, citing *R. v. Morin*, reiterated that defence waiver "can be explicit or implicit, but in either case, it must be clear and unequivocal".[22] It is in the minority judgment of Cromwell, J. that waiver is further discussed. In his reasons, Cromwell, J. noted that defence waiver "must be established by the Crown". He made the following comments, relevant to this case:

> [190] …As noted in *Morin*, the waiver must be done "with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights", and such a test is "stringent": [*citations omitted*]
>
> [191] I conclude that, when the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than "mere acquiescence in the inevitable" and that it meets the high bar of being clear, unequivocal, and informed acceptance that the period of time will not count against the state.

[79] What can have been more inevitable in the respondent's case than that a re-trial would be required if the trial judge did not return with a verdict? Neither Crown nor defence wanted a re-trial. A re-trial was a last resort.

[80] On May 31, 2022, Crown counsel told Chief Judge Williams she did not want to invite the court "to declare a mistrial". Responding to the Chief Judge's

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[21] 2023 NSPC 27 at para. 2: "…a date was scheduled, ostensibly for decision rather than to set a date for decision, for 18 May 2022. Defence provided a waiver of delay".

[22] *Jordan* at para. 61, citing *R. v. Morin*, [1992] 1 S.C.R. 771.

April 14, 2022 letter to counsel—indicating the trial judge's leave would continue for an indeterminate period—she said:

> So as I read that…it's not clear what the future looks like. And that, that indicates to me that the judge could actually return in a month, she could return in two weeks, she could return in six months. So I, I have a proposal, if, if the court will entertain it, which is basically that we reserve a trial date…

[81] After an exchange with Chief Judge Williams about not having the consent of defence to proceed with a transcript-based re-trial, Crown counsel continued:

> And, and so that is why I'm – that's why I'm respectfully suggesting this way forward, which is basically that we reserve trial dates today, and if Judge Brinton comes back in the meantime, she can render her decision.

[82] On May 31, 2022 Crown counsel was not prepared to concede that a re-trial was necessary. She suggested a status update three months before the provisional re-trial dates to determine if any hope remained for a verdict. If the trial judge had not returned by then, she said the Crown would have to accept the only option was to prosecute the case over again.

[83] Defence counsel confirmed Crown counsel had presented him with her proposal for moving forward and he had the respondent's instructions to accept it.

[84] The record indicates the prospect of a re-trial was equally unattractive to the Crown and defence. The Crown would have to recall the young complainants to give evidence and be cross-examined. The respondent would face testifying again. Both parties strongly and explicitly preferred the return of the trial judge to render her verdict.

[85] As the court clerk looked at the court docket for provisional trial dates, the Chief Judge told counsel about the Provincial Court's straitened circumstances. She was waiting for appointments to fill the court's five, soon to be six, judicial vacancies. The earliest dates available were found in May 2023.

[86] The appellant also cites the respondent only bringing her s. 11(b) application in April 2023 as an indication she was unconcerned about delay. This argument overlooks the fact there was no re-trial judge confirmed until February 14, 2023 when the parties gave up holding out for the trial judge's return—the judge seized with the case—and confirmed a re-trial would be required.

[87] I return to the question of defence waiver. The Supreme Court of Canada's statement in *R. v. Askov* is pertinent:

> [106] The term "waiver" indicates that a choice has been made between available options. When the entire record of the proceedings on the occasion when the last trial date was fixed is read, it becomes crystal clear that the appellants had no choice as to the date of the trial. The first available dates were given and allotted to these appellants. **Unless some real option is available, there can be no choice exercised and as a result waiver is impossible.**[23]
>
> [*emphasis added]*

[88] There was no "real option" here. As Crown counsel observed, the future as it related to the trial judge's return from leave was obscured by uncertainty. It was only on February 14, 2023 that the plug was pulled and Crown and defence abandoned hope for a verdict.

[89] At no point between October 25, 2022 and February 14, 2023 did the respondent waive the delay. Her agreement to the setting of provisional trial dates was not an implicit waiver of delay. When she agreed on May 31, 2022 to provisional trial dates, the respondent was no better informed about the future than she had been previously as the deliberative delay and the trial judge's leave stretched on. As Crown counsel acknowledged, it was not definite on May 31, 2022 that the trial judge would not be returning to deliver a verdict. In that informational vacuum, the respondent simply agreed to the back-up plan of provisional re-trial dates, and nothing more.

[90] Setting the provisional re-trial dates represented nothing more than the realistic view of both Crown and defence that ultimately a re-trial, however undesirable, might be the only option remaining. It was only on February 14, 2023 that counsel gave up waiting for a decision.

[91] Furthermore, the acceptance by defence of the dates the court had available for a re-trial in May 2023 did not constitute waiver. It was "mere acquiescence in the inevitable"[24] by defence counsel who had been informed by the Chief Judge about the challenges confronting the Provincial Court with a significant number of judicial vacancies.

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[23] [1990] 2 S.C.R. 1199, [1990] S.C.J. No. 196.
[24] *Jordan* at para. 191 per Cromwell.

[92] I am satisfied that whatever challenges were faced by those charged with administering the courts in this case, the deliberative delay cannot be laid at the feet of the respondent.

[93] The appellant has not established defence waiver.

Societal Interest and the Constitutionally-Protected Right to a Trial Within a Reasonable Time

[94] The appellant has argued that: "Societal interest in a re-trial on the merits had to factor into whether the drastic remedy of a stay was appropriate in these unique circumstances". The appellant says the application judge's analysis did not properly consider the interests of the young complainants, and the societal interest in the charges being dealt with on their merits.

[95] The appellant's submission effectively seeks to have the respondent's constitutional right to a timely verdict attenuated by the seriousness of the charges. This proposition looks for support in *obiter* from the Alberta Court of Appeal's decision in *R. v. Steadman*. The *Steadman* court questioned whether "the Supreme Court might be persuaded to reconsider the presumption of a stay remedy for breaches of s. 11(b) of the *Charter*" in cases involving serious charges.[25]

[96] In *Jordan* and *K.G.K.* the Supreme Court of Canada built frameworks for assessing an accused's s. 11(b) rights on the basis of providing "meaningful direction to the state on its constitutional obligations…". In *Jordan,* the Court went on to indicate that meaningful direction was intended for everyone who plays a role "in ensuring that the trial concludes within a reasonable time". The Court added that its re-tooled framework was:

> [50] …also intended to provide some assurance to accused persons, to victims and their families, to witnesses, and to the public that s.11(b) **is not a hollow promise.**
>
> [*emphasis added*]

[97] The societal interest issue was also taken up by Cromwell, J. in his minority judgment in *Jordan*:

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[25] 2021 ABCA 332 at para. 85. At para. 84, the Alberta Court of Appeal stated they were offering "some observations in *obiter*…"

> [156] Finally, the right to be tried within a reasonable time has a societal dimension: see e.g. *Askov*, at p. 1219, per Cory J. But societal interests do not all point in the same direction. On one hand, the wider community has an interest in "ensuring that those who transgress the law are brought to trial and dealt with according to the law" (pp. 1219-20) and in "preventing an accused from using the [s. 11(b)] guarantee as a means of escaping trial": p. 1227. On the other hand, there is a broad societal interest in ensuring that individuals on trial are "treated fairly and justly": p. 1220. The community benefits "by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law" and witnesses and victims benefit from a prompt resolution of a criminal matter: *ibid*.

[98] These principles are reiterated in *K.G.K.*:

> [25] Section 11(b) of the *Charter* provides that "[a]ny person charged with an offence has the right ... to be tried within a reasonable time". This provision reflects and reinforces the notion that "[t]imely justice is one of the hallmarks of a free and democratic society" (*Jordan*, at para. 1). Section 11(b) protects both an accused's interests and society's interests. The individual dimension of s. 11(b) protects an accused person's interests in liberty, security of the person, and a fair trial. The societal dimension of s. 11(b) recognizes, among other things, that timely trials are beneficial to victims and witnesses, as well as accused persons, and they serve to instill public confidence in the administration of justice (see *R. v. K.J.M.*, 2019 SCC 55, at para. 38).

[99] And they have been repeated by the Court in its 2022 judgment in *R. v. R.F.*:

> [22] Timely justice is one of the characteristics of a free and democratic society, and the conduct of trials within a reasonable time is of central importance in the administration of Canada's criminal justice system (*Jordan*, at paras. 1 and 19). Section 11(b) of the *Charter* reflects the importance of this principle by guaranteeing any person charged with an offence the right "to be tried within a reasonable time". The purpose of this provision is to protect both the rights of accused persons and the interests of society as a whole (*R. v. K.J.M.*, 2019 SCC 55, [2019] 4 S.C.R. 39, at para. 38). At the individual level, trials within a reasonable time are essential to protect the liberty, security and fair trial interests of any person charged with an offence, who, it should be remembered, is presumed to be innocent (*Jordan*, at para. 20; see also *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, at para. 30, citing *Morin*, at pp. 801-3). At the collective or societal level, timely trials encourage better participation by victims and witnesses, minimize the "worry and frustration [they experience] until they have given their testimony" and allow them to move on with their lives more quickly (*Jordan*, at para. 24, quoting *R. v. Askov*, [1990] 2 S.C.R. 1199, at p. 1220; see

> also *Jordan*, at para. 23). Timely trials also help to maintain public confidence in the administration of justice (*Jordan*, at para. 25; *Askov*, at pp. 1220-21).[26]

[100] Having found the deliberative delay in this case took "markedly longer than it reasonably should have in all the circumstances", the application judge granted the appropriate and only remedy for the violation of the respondent's constitutionally protected right—a stay of proceedings. I would not countenance a watering-down of an accused person's right to constitutional protection against delay in the criminal proceedings against them.

Conclusion

[101] The appellant has not established any errors in fact or law in the application judge's assessment of the verdict deliberation delay which precipitated the respondent's s. 11(b) application for a stay of proceedings.

Disposition

[102] I would dismiss the appeal and uphold the judicial stay of proceedings.

Derrick, J.A.

Concurred in:

Farrar, J.A.

Fichaud, J.A.

[26] *R. v. J.F.* note 20.