PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Callahan-Tucker*, 2022 NSPC 58

Date: 20221216
Docket: 8227555
Registry: Pictou

Between:

His Majesty the King

v.

David George Callahan-Tucker

Restriction on Publication: s. 486.4

CHARTER SECTION 11(B) APPLICATION DECISION

Judge:	The Honourable Judge Alain Bégin
Heard:	September 13 and 14, 2022, in Pictou, Nova Scotia
Decision	December 16, 2022
Charge:	271 CC
Counsel:	Patrick Young, for the Crown Douglas Lloy, for David George Callahan-Tucker

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

By the Court:

Outline

[1] This is a matter with a very unusual history that involved a judge recusing himself, the replacement judge becoming ill and unable to complete the trial, two resulting mistrials, Covid-19 pandemic delays, and four s. 276 prior sexual history applications by counsel for the accused.

[2] The information for a single count of s.271 sexual assault was laid on May 2018, and the final trial concluded on September 14, 2022, **a period of approximately 48 months and 29 days (as presumed trial end date of June 16, 2022)**. The Crown proceeded by Indictment.

[3] Has there been a breach of Mr. Callahan-Tucker's s. 11(b) right to a trial within a reasonable time?

Was the *Jordan* Application pursuant to the *Rules*?

[4] The *Nova Scotia Provincial Court Rules* state that an application for *Charter* relief for an alleged breach of 11(b) of the *Charter* must be heard at least 60 days prior to trial. That would necessitate the application being filed in advance of that date, so that a hearing could be scheduled 60 days before the trial.

[5] The unreasonable delay application for this matter case was scheduled for June 8, 2022, only one week before the trial dates of June 15 and 16, 2022. Pursuant to the rules, the *Charter* hearing should have been heard by at least April 15, 2022, however, the Applicant only filed their Notice of Application on May 9, 2022 for the hearing scheduled for June 8, 2022, and the Applicant did not serve the Respondent with its Application materials until May 24, 2022.

[6] While the trial was subsequently adjourned to September 13 & 14, 2022, this would not retroactively cure the failure to provide 60 days notice before trial as the lack of proper notice affected the ability of the Crown to fully respond to the Application.

[7] The magnitude of *Charter* applications in criminal litigation, and their potential impact on serious criminal matters, prompted courts of criminal jurisdiction and superior courts of criminal jurisdiction to develop and implement Rules of Court designed to ensure fair and consistent procedures. The *Nova Scotia Provincial Court Rules* implemented on January 1, 2013 set out the time for pre-trial applications:

> 2.4(1) Except with the permission of the Court, a pre-trial application **shall be heard at least 60 days** before trial.
>
> 2.4(2) For the purposes of sub-rule (1), pre-trial applications include…

> (e) applications for a stay of proceedings for unreasonable delay under clause 11(b) of the *Charter*.

[8] There was no determination made by this Court on the validity of the Application due to insufficient notice, but rather this Court heard arguments on the S. 11(b) Application to prevent any further delays.

[9] In ***R. v. Doncaster* 2013 NSPC 13** Judge Campbell noted the importance of the 60 days notice requirement for s. 11(b) *Charter* Applications:

> 8. The *Nova Scotia Provincial Court Rules*, which were implemented on January 1, 2013, provide that pre-trial applications, which include applications for a stay of proceedings under section 11(b) of the *Charter*, should be heard at least 60 days before the trial date, not on the date of trial. Given that the Rules came into effect less than 60 days before the trial date it would not have been possible for Mr. Doncaster to have complied with that requirement.
>
> 9. The Rules also provide, in paragraph 3.1(1), that a notice of application must be served 7 days before the first appearance on the application. Mr. Doncaster's application is not timely. The purpose of that rule is to prevent litigation by ambush by **permitting both parties an opportunity to respond with appropriate argument and materials** and also to avoid the delays that arise from requests for adjournments.

[10] In ***R. v. Bull*, 2010 ABPC 68** Rosborough, J. noted the implications of failing to adhere to procedural rules for *Charter* Applications:

> 48. The importance of developing appropriate procedures for the litigation of *Charter* applications has been underscored by the nature of the remedies available and the pressing concern for access to justice. *Charter* remedies can have profound consequences both in individual cases and beyond. Failure to observe fundamentals of procedural fairness and do so in an efficient manner will adversely affect the administration of criminal justice and diminish public confidence in that process.

[11] As noted by the Crown, the presumptive ceiling for Provincial Court trials was established 8 years ago in ***Jordan*** and that did not change with any recently published Provincial Court decisions, yet the Applicant waited until almost a month prior to the start of the trial to file an Application for delay.

[12] Crown also points out that that was not the first time that the Applicant had made a last-minute application. The Applicant made their first s. 276 application on May 3, 2019, for a trial which was scheduled to begin on May 7, 2019, and that caused an adjournment of the trial. The Applicant then made their second s. 276 application on October 24, 2019, after Judge Atwood dismissed the first one the previous day. That application was dismissed for non-compliance with the notice provision of the *Criminal Code*. Both of those defence Applications tactics caused significant delay with this matter.

[13] Crown also notes that the Defence had not filed a complete Application as it had failed to file the necessary supporting materials for their Application, such as the transcripts of the proceedings of October 23 and 25, 2019 that had led to Judge Atwood's reasons for having to recuse himself.

[14] Crown submits that the cause of that recusal, and the subsequent adjournment of the trial was "a watershed event" in the trial, and that all of the resulting delay can

be traced back to that decision. The Crown submits that the Applicant should have filed a transcript of every court appearance in this case to support their application, as is usual practice for these applications.

[15] **This Court is in agreement with the Crown's position, and it adopts the principles noted in *R. v. Doncaster* and *R. v. Bull,* and it dismisses the Defence application based on its failure to comply with the *Nova Scotia Provincial Court Rules*. Adherence to the *Rules* is critical to the effective management of our over-burdened Courts.**

[16] **Should this matter be appealed, this Court will consider the s. 11(b) Application on its merits in the alternative.**

The Law on Unreasonable Delay

[17] Section 11(b) of the *Charter* states:

> 11. Any person charged with an offence has the right
> … (b) to be tried within a reasonable time;

[18] In ***Jordan***, the Supreme Court established a framework for evaluating trial delay, setting an 18-month presumptive ceiling of 18 months for Summary matters, and 30 months for Indictable matters in superior court, after which delay is unreasonable. That time frame spans from the date the Information is sworn to the

conclusion of the trial. The analysis begins by first calculating the total delay and deducting delay attributable to the defence and delay attributable to exceptional circumstances, including discrete events (***Jordan*** at paras. 48 and 60; ***R. v. Coulter***, 2016 ONCA 704 at paras. 34-40).

[19] The Crown can rebut the presumption of unreasonable delay by showing on a balance of probabilities excessive delay was caused by “exceptional circumstances” (***Jordan***, at para. 68). Exceptional circumstances are matters that “lie outside the Crown’s control” and are “reasonably unforeseen or reasonably unavoidable” and the Crown could not “reasonably remedy the delays emanating from those circumstances” (***Jordan***, at para. 69.)

[20] Exceptional circumstances fall into two categories, “discrete events and particularly complex cases” (***Jordan***, at para. 71). Discrete events include such things as “medical or family emergencies (***Jordan***, at para. 72). The period of delay caused by a discrete event is subtracted from the net delay to determine whether the ceiling has been exceeded (***Jordan***, at para. 75). Particularly complex cases include those with numerous co-accused and those involving complex legal issues.

[21] This was not a complex case, but it does have a complicated history.

[22] When a prosecution is at risk of breaching the presumptive ceiling, Crown counsel is responsible to consider and take action to mitigate the risk showing it "took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling" (***Jordan***, at para. 70). The Crown is not, however, required to show its steps were successful, simply that it "took reasonable steps to attempt to avoid the delay" (***Jordan***, at para. 70).

[23] The first step is to calculate the total delay from the charge to actual or anticipated end of trial (*Jordan*, para. 60; *Cody*, para. 21). The next step is to subtract from the total delay the delay attributable to the defence (*Jordan*, para. 60; *Cody*, para. 22). The result, or the net delay, must be compared to the applicable presumptive ceiling. (*Cody*, para. 22).

[24] If the net delay exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable, and a stay will follow. (*Jordan*, para. 47; *Cody*, para. 24).

Defence Delay

[25] Defence is not permitted to create delay and then rely upon it to claim a breach of the *Charter* protected right. ***Jordan*** provides a non-exhaustive list of what will constitute deductible defence delay at paragraph 65:

> [65] To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence.

[26] In ***R. v. Cody***, 2017 SCC 31, at paragraphs 32 and 33 the Court provided further guidance for assessing whether delay is caused by defence conduct:

> [32] Defence conduct encompasses both substance and procedure — the decision to take a step, **as well as the manner in which it is conducted, may attract scrutiny**. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the *Jordan* ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, **a defence action may be deemed not legitimate in the context of a s. 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay**.
>
> [33] As well, inaction may amount to defence conduct that is not legitimate…Illegitimacy may extend to omissions as well as acts … . Accused persons must bear in mind that a corollary of the s. 11(b) right "to be tried within a reasonable time" is the responsibility to avoid causing unreasonable delay. Defence counsel are therefore expected to 'actively advanc[e] their clients' right to a trial within a reasonable time, collaborat[e] with Crown counsel when appropriate and…us[e] court time efficiently'…"

[27] Exceptional circumstances as they relate to the Court were also addressed at para. 75:

> [75] The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course, the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see ***R. v. Vassell***, 2016 SCC 26, [2016] 1 S.C.R. 625). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e. it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).

Verdict Deliberation

[28] The Supreme Court of Canada case of ***R. v. K.G.K.*** **2020 S.C.C. 7** clearly stated that *Jordan* ceilings beyond which delay was presumed to be unreasonable did not include deliberation time by the tier of fact. *Jordan* ceilings applied from date of charge until actual or anticipated end of evidence and argument, when parties' involvement in trial was complete and case was turned over to trier of fact. An Accused's right to be tried within reasonable time would be infringed where verdict deliberation time took markedly longer than it reasonably should have.

[29] The Accused bears a heavy burden to establish such infringement is unreasonable due to the presumption of judicial integrity that presupposes that trial judges are best placed to balance various considerations that inform deliberation time. In the ***K.G.K.*** matter the trial judge took nine months of deliberation time, in a relatively straightforward case of minimal to modest complexity, and the Court found that delay, while lengthy, was not unreasonable.

The Chronology

[30] The chronology of this case as detailed in the Crown's brief:

DATE	APPEARANCE	REASON FOR THE ADJOURNMENT	DAYS UNTIL NEXT APPEARANCE	SYSTEMIC DELAY?
May 17, 2018	Information sworn.	--	--	--
June 18, 2018	First Appearance	- Accused elects Prov. Court. Pleads not guilty. Adjourned to Nov. 28/18 for trial. - Telephone PTC scheduled for Oct. 24/18.	32	Yes
October 24, 2018	Pre-Trial Conference	- Defence says no s. 276 or 278 issues, no pre-trial applications. - Remitted to currently-scheduled trial date of Nov. 18/18.	128	Yes
November 21, 2018	Brought Forward by Defence	- Brought forward by Defence. - 1 day for trial insufficient. -Trial adjourned by consent to May 7 and 9, 2019, Pictou Prov. Court, at 9:30. - Defence waived delay.	28	Yes
May 3, 2019	Pre-Trial Conference	Defence indicates it may bring a s. 276	163	No

		application. Remitted to trial date of May 7 and 9, 2019.		
May 7, 2019	Trial, Day 1	- Defence application to adjourn trial to make a s. 276 application. - Crown opposed the adjournment application, and the application to abridge notice period required by Rules of Court. - Trial adjourned to Oct. 23 and 25, 2019. - **Defence waived delay**	4	Yes
October 23, 2019	Trial Day 1	- Court hears Defence s. 276 application. - Application dismissed at Stage 1. - Adjourned to Oct. 25/19 for trial.	162	No
October 25, 2019	Trial Day 2	- Defence files a new s. 276 Application. -Court dismisses application as non-compliant with the *Criminal Code* notice requirement. - Judge Atwood recuses himself on grounds defence affidavit admits essential elements of	2	Yes

		the offence, and undermines defence.		
November 4, 2019	To Set Trial Date	Judge MacKinnon presiding. - Adjourned to December 13, 2019 for s. 276 hearing issues. - Trial set for February 11 and 21, 2020, Pictou Prov. Ct.	10	No
December 13, 2019	Hearing	- Hearing on Defence application for leave to make a 3rd s. 276 application. - Adjourned to January 20, 2020 for decision.	39	No
January 20, 2020	Decision	- Defence application for leave to file a 3rd s. 276 application allowed and granted, over the Crown's objection.	38	No
February 11, 2020	Trial, Day 1	- Court hears third Defence s. 276 application. - Judge MacKinnon dismisses the application at Stage 2. -Crown presents evidence and closes its case.	22	No

		- Adjourned to February 21, 2020 for trial continuation.		
February 21, 2020	Trial, Day 2	- Defence calls evidence. - Court sits until 5:30 p.m. defence closes its case. Adjourned to May 1, 2020 for closing arguments	10	No
April 28, 2020	Brought Forward by Court	- Court-directed adjournment because of the Covid-19 pandemic. -Adjourned to July 8, 2020 for PTC. - August 21, 2020 for closing arguments.	67	No
July 8, 2020	PTC	- Court confirmed August 21, 2020 for closing arguments to be an in-person proceeding.	71	No
August 11, 2020	Correspondence from Court	- Counsel informed by e-mail that the case has been adjourned to October 2, 2020 for closing submissions, and a PTC scheduled for September 11, 2020. Adjournment due to illness of Judge MacKinnon.	34	No
September 10, 2020	Correspondence from Court	- Counsel advised by e-mail that the PTC scheduled for the following day	31	No

		"requires further adjournment." -Adjourned to November 9, 2020 _Adjournment due to illness of Judge MacKinnon		
November 2, 2020	Brought Forward by Court	- Judge Atwood adjourns the case so Judge MacKinnon's medical status can become better known. - Adjourned to January 21, 2021	39	No
November 11, 2020	PTC	- Chief Judge Pam Williams presiding, Williams CJ not yet prepared to re-assign case as Judge MacKinnon expected back to work Jan. 21/21. - Remitted to the Jan. 21/21 PTC date.	9	No
January 21, 2021	To Set Trial Date	Judge Atwood adjourns the case to April 29, 2021 to set new trial dates	71	No
April 29, 2021	To Set Trial Date	- Judge Bégin presiding. Trial set for June 15 and 16, 2022, Pictou Prov. Ct. - Defence s. 276 hearing set for November 18, 2021,	98	No

		Pictou Prov. Ct. at 9:30 a.m.		
November 18, 2021	Hearing	- Defence makes their fourth s. 276 application. - Court dismisses the application at Stage 1. -Remitted to the currently-scheduled trial date of June 15 & 16, 2022	196	No

[31] Subsequent to the November 18, 2021 Court date, an application was made by Defence for a s. 11(b) breach which is the subject of this decision. No delays arose because of this application as the Court scheduled the application for June 8, 2022, prior to the scheduled trial dates of June 15 & 16, 2022.

[32] On June 13, 2022, the Court was advised by counsel for Mr. Callahan-Tucker that the accused thought that he might have Covid. The trial was consequently adjourned on June 15, 2022 to September 13 &14, 2022. There has been no notice by Defence that this further delay should be added to the overall claim of delay, and it will not be considered. In any event, this delay would be wholly attributed to the Defence.

Defence Delay – Waived or Caused

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

[34] A waiver of delay by the defence may be explicit or implicit, and it must be informed, clear and unequivocal (***Jordan***, para. 61; ***Cody***, para. 27).

Defence Delay Expressly Waived

[35] The Applicant expressly waived 11 months of delay, being (1) the period between November 21, 2018 and May 7, 2019 (**5 months and 16 days**); and (2) the period between May 9, 2019 and October 23, 2019 (**5 months and 14 days**). Therefore a total of 330 days (or **11 months**) should be deducted from the total delay.

[36] **Delay Sub-total: 48 months and 29 days less 11 months = 37 months and 29 days.**

Delay Caused by Defence Conduct

[37] The Applicant cannot benefit from "its own delay-causing action or inaction." (***Jordan***, para. 66; ***Cody***, para. 28). This includes "deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests"

(***Jordan***, para. 63); where the Court and Crown are ready to proceed, but the defence is not" (***Jordan***, para. 64).

[38] The list of Defence tactics/actions is not exhaustive. It is open to trial judges to find other defence actions or conduct caused delay warranting deduction. (***Cody***, para. 30). The Court in ***Cody*** wrote at paragraph 31-32:

> While trial judges should take care not to second-guess steps taken by the defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.
>
> Defence conduct encompasses both substance and procedure – the decision to take a step, as well as the manner in which it is conducted, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. The overall number, strength, importance, proximity to the Jordan ceilings, **compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate in the context of a s. 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay**" (*R. v.* ***Cody***, paras. 31-32).

[39] Inaction on the part of defence counsel may also be conduct that is not legitimate (***Jordan***, para. 113 and 121).

[40] As noted by the Crown, Defence counsel are expected to use Court time efficiently (***Jordan***, para. 138). In the post-***Jordan*** world, defence counsel must accept that many practices that were formerly commonplace or merely tolerated are no longer compatible with the s. 11(b) right to be tried within a reasonable time.

[41] Of particular note in this case are the four s. 276 applications that did cause delays in the hearing of the trial. The Applicant's position is that the four s. 276 applications were not done "frivolously, or without forethought."

[42] On May 3, 2019, the Judge Atwood queried whether the Defence was planning to advance a s. 276 application. The original trial date was scheduled to take place on May 7, 2019. On May 4, 2019, the Defence filed a s. 276 application and an Affidavit sworn by the Accused on May 7, 2019. The Defence also filed an application to abridge the notice period set out in s. 276(4)(b) of the *Criminal Code.* The s. 276 application was adjourned to be heard on the first day of the trial, which was adjourned to October 23 and 25, 2019.

[43] Judge Atwood was the initial trial judge who heard the Application, and he dismissed the Application. The Court held that the evidence that the Accused sought to have admitted would not support an air of reality to the proposed defence of honest, but mistaken, belief in communicated consent, because it demonstrated a failure by the Accused to take reasonable steps to ensure that the victim was consenting.

[44] Judge Atwood also found that the proposed evidence was based on one of the 'twin myths' and stated that, "In my view, that supports a rape myth theory and it is inadmissible on that basis."

[45] The case was adjourned to October 25, 2019, with the trial to commence on that date, however, on October 24, 2019 (the day before trial was to commence), the Applicant filed the second (of four) s. 276 Application concerning allegations of sexual contact between the Accused and the complainant post-offence. The Court dismissed the Application as not being in compliance with the notice requirement set out in s. 298.94(4) of the *Code*.

[46] The Crown submits that the Applicant was instrumental in making pre-trial applications that were not filed on time, or lacked merit, or both. The Applicant conceded on October 25, 2019, that its failure to bring a timely s. 276 Application was based on a lack of understanding of the law. Counsel for the Applicant described their position in response to the Crown's application to dismiss the second s. 276 application that they filed the previous day:

> It was thought perhaps erroneously by the defence that the post-impugned event evidence would not be caught by Section 276…Given the court's decision on Wednesday, this has informed the Defence that this may not be so. And I'm now aware of that. As a result, and realizing that lapses here completely belong to me. I'm not trying to weasel out of anything. I'm standing up and I'm facing the music. The Defence has taken a number of steps to try to react to the Wednesday decision and figuring that a Section 276 case may be in the offing.

[47] **Judge Atwood concluded that the Defence's roving strategy was to blame for the delays in the case up to that point. He said:**

> **First of all, I recognize the passage of time and the *Jordan*-related issues. In my view the lapse of time or the elapse of time since arraignment, the myriad delays in bringing this matter to trial have arisen from what I feel compelled to describe as improvident defence strategy…the strategies have resulted in significant delay.**

[48] Judge Atwood then recused himself from hearing the trial, on his own motion, based on the contents of the s. 276 Application documents filed by the Applicant. The Crown submits that the Applicant's actions were a direct cause to Judge Atwood's decision to recuse himself, referring to the Court transcript where Judge Atwood stated:

> The affidavit, in my view, essentially sees Mr. Callaghan-Tucker admitting in his own words essential elements of the offence. Furthermore, the affidavit has Mr. Callaghan-Tucker presenting facts to the court that undermine significantly what would appear to be the main defence that Mr. Callaghan-Tucker would intend to present to the court; that is, honest, but mistaken, belief in consent. I can't, as much as I have tried to do so, I do not believe that I would be able to embark upon a trial of this matter and disabuse myself of that affidavit. The damaging statements that appear to admit to essential elements of the offence and the damaging statements of fact appear to undermine [the Accused's] access to the defence…

[49] The Crown submits, and this Court agrees, that the Applicant cannot now benefit from the delay that naturally resulted from their actions such that the time between Judge Atwood's recusal on October 25, 2019, to the beginning of the new

trial before Judge MacKinnon on February 11, 2020 should be characterized as delay attributed to the Applicant.

[50] **The total delay between October 25, 2019, and February 21, 2020 is 3 months and 26 days.**

[51] The Applicant made its third (of four) s. 276 Application before the new trial judge, Judge MacKinnon, on December 13, 2019. On February 11, 2020, Judge MacKinnon dismissed the Application.

[52] Health issues arose for Judge MacKinnon that prohibited his completion of the decision after the end of the trial and Judge Bégin (myself) was assigned to this matter.

[53] Defence used the assignment of a new trial judge as the opportunity, despite three previous rulings against such an Application, to file its fourth s. 276 Application.

[54] This Court dismissed the Application on November 18, 2021 at Stage 1 as it was found that the s. 276 Application was rooted in myth and stereotype.

[55] In ***R. v. Ste. Marie***, Karirer J. wrote:

> The evidence in the record shows that the respondents directly caused most of the delays of which they complain and that **they attempted to derail the trial by filing multiple applications,… which were unsuccessful for the most part. These delays are largely but not exclusively attributable to the defence and must be subtracted from the total delay.**

[56] **The total delay between October 25, 2019, and February 21, 2020, of 3 months and 26 days is attributed to the Defence.**

[57] **Delay Sub-total: 37 months and 29 days less 3 months and 26 days = 34 months and 3 days**

<u>Do Extraordinary Circumstances Exist in this Matter if the Net Delay Exceeds the Presumptive Ceiling?</u>

[58] As the net delay exceeds the presumptive ceiling of 18 months, the Crown may still rebut the presumption of unreasonable delay by pointing to the presence of exceptional circumstances. The Crown relies on two discrete exceptional events to justify delay should the Court find that the net delay exceeds the presumptive ceiling:

> As the net delay exceeds the presumptive ceiling of 18 months, the Crown may still rebut the presumption of unreasonable delay by pointing to the presence of exceptional circumstances. The Crown relies on two discrete exceptional events to justify delay should the Court find that the net delay exceeds the presumptive ceiling:
>
> > (1) Exceptional delay reasonably attributed to the *de facto* mistrial on October 25, 2019 and the recusal of Judge Atwood; and
> >
> > (2) The unexpected illness and retirement of Judge Richard MacKinnon.

[59] Discrete events can result in quantitative deductions of particular periods of time. As the Supreme Court held in *Cody*:

> The delay caused by discrete exceptional events or circumstances that are reasonably unforeseeable or unavoidable is deducted to the extent it could not be reasonably mitigated by the Crown and the justice system.

[60] Exceptional circumstances generally involve (1) discrete events and (2) particularly complex cases. In this case, the Crown relies only on the discrete events category. The burden is in the Crown to show that the discrete event was:

> (1) Reasonably unforeseeable or reasonably unavoidable, and
>
> (2) The Crown could not reasonably remedy the delays emanating from those circumstances once they arise

[61] In ***Jordan*** the Court declined to identify all the circumstances that may make a circumstance exceptional, but any circumstance that meets the definition would qualify. The Crown does not have to demonstrate that the extraordinary circumstance or event is “rare or entirely uncommon”. The determination of whether an event or circumstance is exceptional relies on a “trial judge’s good sense and experience.” (*Jordan*, para. 71).

<u>Was The Recusal of Judge Atwood is an Exceptional Circumstance?</u>

[62] On January 20, 2020, Judge MacKinnon allowed the Accused's application for leave to make a third s. 276 application on the basis that **Judge Atwood's decision to recuse himself from the trial was tantamount to declaring a mistrial**.

[63] There is no doubt that a mistrial is a "discreet event." To hold otherwise would encourage accused persons to take whatever steps are necessary to have a mistrial declared in the hopes of 'running out the *Jordan* clock.'

[64] Although the *Jordan* clock continues to run after a mistrial, the resulting gap in time between the mistrial to the start of the second trial is an exceptional circumstance which is to be deducted from the total delay (***R. v. Way***, 2022 ABCA 1; ***R. v. Mallozi***, 2017 ONCA 644).

[65] The accused in ***Way*** was convicted of sexual assault following a second trial by judge and jury. His first trial ended in a mistrial when the jury could not reach a verdict. The total time from the date the accused was charged to the end of the second trial was 35 months. The accused made two pre-trial *Charter* applications before the second trial, alleging breaches of s. 11(b), 7, and 11(d). Both applications were dismissed.

[66] In ***Way*** the Court held that a mistrial is a discrete event, stating as follows:

> 17 …the trial judge correctly found that a mistrial is a discrete event;…We agree with what was found in *R. v. Melvin*, 2017 NSSC 149 at para 86, that "…[w]hile not unheard of, mistrials do not occur as a matter of routine or regularity. The court cannot expect that the prospect of one emerging during the course of the first trial ought to have been a contingency in everyone's mind." In other words, it is precisely because mistrials are relatively rare and vary in cause, that they will often meet the definition of exceptional circumstances caused by a discreet event."

[67] This Court finds that the mistrial arising from Judge Atwood's recusal was a discrete event as neither party planned, caused, nor could they have reasonably anticipated that Judge Atwood would recuse himself after hearing the first defence s. 276 application on October 23, 2019.

[68] Delay from a discrete exceptional event is to be subtracted from the total delay to determine whether the presumptive ceiling is exceeded.

[69] The trial with Judge MacKinnon took place on Feb 11 & 21, 2020. The matter was then adjourned until May 1, 2020, for closing arguments. The Covid-19 global pandemic intervenes and on April 28, 2020 the matter is adjourned until July 8, 2020 for a pre-trail conference to assign a new date once the pandemic's effects on the Courts is better understood. On July 8, 2020, the court confirmed the date of August 21, 2020 for closing arguments.

[70] **The period between April 28, 2020, and August 21, 2020 shall be deducted as the Covid-19 global pandemic was a discreet event. The period of April 28, 2020, to August 21, 2020, was 3 months and 24 days.**

[71] **Delay Sub-total: 34 months and 3 days less 3 months and 24 days = 30 months and 9 days**

[72] Prior to the August 21, 2020 date scheduled for closing arguments, the Court advised counsel on August 11, 2020 that Judge MacKinnon was ill and that closing arguments would be adjourned to October 2, 2020. Reference to the table above shows that there were subsequent adjournments with the eventual expectation that Judge MacKinnon would return to work on January 21, 2021. Judge MacKinnon was never able to return to work due to his health issues so on January 21, 2021 Judge Atwood sets the date of April 29, 2021 to set a new trial. **There is a second mistrial**.

Is Judge MacKinnon's Illness an Exceptional Circumstance?

[73] Defence concedes that Judge MacKinnon's unexpected illness was an exceptional circumstance and in their brief attribute the total period of delay that should be deducted as 290 days. However, the Applicant's Case Timeline at TAB

A of their materials has the period to be deducted as 361 days (the period between the second day of the trial on February 21, 2020, and January 21, 2021).

[74] Crown submits that the proper period to be deducted is between February 21, 2020 (the second day of the trial with Judge MacKinnon) to April 29, 2021 (the date that the new trial dates were scheduled this Honourable Court) to be deducted from the total delay, which totals 15 months and 8 days. Crown relies on ***R. v. Botsford et al.*, 2022 ONSC 2177** as Crown and Defence were not conclusively informed that the case had been re-assigned until January 21, 2021:

> Hindsight cannot be the standard through which to assess the court's actions. The question is what was reasonably known and understood at the time of each step as it related to the judge's illness.

[75] This Court finds the time period to be deducted attributable to Judge MacKinnon's illness should be February 21, 2020 to April 29, 2021. The illness of Judge MacKinnon precluded the trial from commencing/ reassignment before April 29, 2021. This would equate to a total of 15 months and 8 days, however the period of April 28, 2020, to August 21, 2020 (3 months and 24 days) was already deducted due to Covid-19 delay, leaving 11 months and 14 days to be deducted for the exceptional circumstance of Judge MacKinnon's illness.

[76] **Delay Sub-total: 30 months and 9 days less 11 months and 14 days = 18 months and 17 days**

Was the Covid-19 Pandemic is a Discreet Event Amounting to an Exceptional Circumstance?

[77] The final trails dates were set on April 29, 2021, but due to the Covid-19 global pandemic and the shutdown of courts across Nova Scotia, backlogs occurred in setting trail dates. The earliest available trial dates were for June 15 & 16, 2022, a delay of a further 15 months and 8 days.

[78] The Covid-19 pandemic has consistently been found to be an exceptional circumstance which may lead to a deduction from the s. 11(b) calculation if it can be proved on a balance of probabilities that the delay was caused by the pandemic (***R. v. Truong***, 2020 ONCJ 613; ***R. v. Greenidge***, 2021 ONCJ 57; ***R. v. Toor***, 2022 ONCJ 8). On the issue of the effect Covid-19 has had on the Court system as an extraordinary circumstance (***R. v. Khan***, 2021 ONCJ 195; ***R. v. Simmons***; ***R. v. Ismail***, 2020 BCPC 144).

[79] Crown submits that the delay in setting trial dates in this case was the result of the Covid-19 backlog in Pictou Provincial Court, the Applicant's decision to make a fourth s. 276 Application, and the need to find a third judge for this matter and the

ability to accommodate that judge's schedule. There was no delay associated with the fourth s. 276 application as it was scheduled prior to the trial.

[80] As Judge Atwood noted in ***R. v. Graham*, 2022 NSPC 10,** "The impact on court services has been profound and will be enduring."

[81] As noted by the Crown, reasonableness under s. 11(b) has always accounted for the reality that no case is an island to be treated as if it were the only case with a legitimate demand on court resources (***R. v. K.G.K.*,** 2020 SCC 7; ***R. v. Botsford et al.***, 2022 ONSC 2177).

[82] In ***R. v. Kalashnikoff*, 2021 ABQB 327**, the Court outlined the Covid-19 pandemic's impact on the Court system and the backlog it created. The Court took judicial notice of many of these points and rejected the accused's argument that the Court system had failed to take steps to mitigate the delay caused by the suspension of the Court operations due to the pandemic. The Court found that time was needed to deal with the backlog caused by the suspension of normal court operations and that this delay was extraordinary in the sense it could not be fully mitigated by the Crown and the court system. It is no different in Nova Scotia.

[83] **This Court will attribute half of the 15 months and 8 days of delay to the Covid-19 pandemic and its effects on the Nova Scotia Courts, the**

remaining half will be attributed to systemic delays that can, and do, arise in all Courts for the setting of multi-day trials. This results in a deductible delay of 7 months and 19 days.

[84] **Final Delay Total: 18 months and 17 days less 7 months and 19 days = 10 months and 18 days.**

[85] **The net delay in this case is 10 months and 18 days which falls below the presumptive ceiling of 18 months. The s. 11(b) *Charter* application for unreasonable delay is dismissed.**

Bégin, JPC