

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

Respondent

-and-

NEIL ALEXANDER BARRY

Applicant

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] The accused, Neil Barry (“Barry”) seeks a stay of proceedings based on violation of his right to be tried within a reasonable time under s 11(b) of the *Canadian Charter of Rights and Freedoms*. Specifically, the time between when he was charged and when his trial was scheduled to proceed exceeds the presumptive 30-month ceiling set out in *R v Jordan*, 2016 SCC 27 (“*Jordan*”).

[2] The Crown opposes the application and contends that although the delay exceeds the presumptive ceiling, it is due to exceptional circumstances resulting from the COVID-19 pandemic and therefore, Barry’s right to be tried within a reasonable time has not been violated.

[3] The World Health Organization declared the pandemic on March 11, 2020. Within days, the Northwest Territories’ Chief Public Health Officer (“CPHO”) declared a public health emergency and issued various orders pursuant to her powers under the *Public Health Act*, SNWT 2007, c 17. Among other things, the CPHO’s orders restricted travel both within and into the Northwest Territories, regulated private and public gatherings, imposed social distancing requirements in public areas, and imposed isolation requirements on individuals in certain circumstances.

[4] This Court and the Territorial Court adapted their respective practices to comply with the CPHO's orders, as evidenced by numerous practice directives, copies of which are found in the affidavit evidence the Crown tendered in this application. This Court issued 13 separate practice directives between March 13, 2020 and May 24, 2022, to reflect the CPHO's orders, including modified orders, which sometimes tightened and at other times loosened gathering restrictions.

[5] Importantly, this Court was forced to cancel all scheduled jury trials to comply with the CPHO's orders. The uncertainty of how, and for how long, the pandemic would continue to affect the Court's operations meant the cancelled jury trials could not be rescheduled, nor could new ones be set, in the foreseeable future. This created an instant jury trial backlog which continued to grow as new cases, including Barry's, entered the system and made their way onto this Court's Criminal Pending List.

PROCEDURAL HISTORY

[6] The procedural history is summarized below. It is based on the Court's record, as well as information is set out in affidavits and submissions filed by both Crown and defence counsel.

[7] The initial Information was sworn June 16, 2021, alleging four counts of sexual exploitation (s 153(1) of the *Criminal Code*). A first appearance was scheduled for August 10, 2021 in Territorial Court and subsequently adjourned to September 7, 2021. On that day, the Crown laid a replacement Information alleging two counts of sexual assault (s 271 of the *Criminal Code*) and two counts of sexual exploitation against the same complainant.

[8] Regular Territorial Court sittings were cancelled between September 28 and November 16, 2021 to comply with public health orders. There was an appearance in Territorial Court on November 16, 2021 at which time the Crown filed another replacement Information, alleging sexual assault and sexual exploitations against two other complainants. The matter was then adjourned to December 7, 2021. On that day, the Crown laid a third replacement Information alleging counts of sexual assault and sexual exploitation against a fourth complainant.

[9] The case was adjourned to January 4, 2022, but subsequently, regular proceedings were again cancelled to comply with public health orders. All matters were adjourned to February 15, 2022. By mutual agreement, however, Barry's

matter was brought forward with counsel appearing by telephone on January 19, 2022. At that time, Barry elected trial by judge and jury and his case was transferred to this Court. The matter was placed on this Court's Criminal Pending List.

[10] A standardized letter was sent to Crown and defence counsel from the Manager of the Supreme Court Registry on January 20, 2022 confirming Barry's case had been transferred to this Court. The letter also advised a pre-trial conference would not be scheduled automatically due to the pandemic, but Crown and defence counsel were invited to schedule one within 21 days of the letter if they felt it was necessary for any reason. The letter also contained the following paragraph:

Please note that if a trial date has not been set, it is your responsibility to attend at Criminal List Scheduling to speak to the matter. You can ascertain the date of the next Criminal List Scheduling by contacting the undersigned or by consulting the Court's website.

[11] Counsel requested a pre-trial conference, and one was held on March 11, 2022. Former Chief Justice Charbonneau presided. Her report notes she told counsel there were several older jury trial elections on the Criminal Pending List, so it would be "some time" until Barry's jury trial would be scheduled. Former Chief Justice Charbonneau also advised counsel they could take steps in the interim to schedule a pre-trial application to deal with third-party records, even if the trial was not scheduled.

[12] Dates for the third-party records application were submitted to the Court on May 11, 2022. In accordance with the procedure set out in s 278.3 of the *Criminal Code*, the four complainants were each entitled to appear and make submissions and therefore, the application had to be scheduled to include their respective counsels' availability, in addition to Crown and defence counsels' schedules. The earliest dates which would suit all counsels' calendars for the application were April 5 and 6, 2023.¹ The application proceeded at that time.

[13] Chief Justice Smallwood addressed setting Barry's trial when she presided at Criminal List Scheduling on December 16, 2022. The parties subsequently submitted their availabilities and on January 30, 2023 the Court notified them the

¹ By the time the application was argued the Crown had obtained waivers from three of the four complainants, but that was not a factor when the application was scheduled, *Affidavit of Saffron Holt. Paras 47-52*

trial was set for three weeks beginning April 22, 2024.² The trial would thus conclude approximately 34 months following the initial Information.

LEGAL FRAMEWORK

[14] Section 11(b) of the *Charter* guarantees the right to be tried within a reasonable time. In *Jordan*, the Supreme Court of Canada established presumptive net time frames, commonly called “ceilings”, within which a trial should occur and a framework for calculating those time frames. In superior court proceedings, such as this, the ceiling is 30 months from the date the Information is sworn, after subtracting any delay attributable to the accused. If this time period is beyond 30 months, it is presumptively unreasonable and thus a violation of s 11(b); however, the Crown can rebut this presumption if it establishes “exceptional circumstances” prevented the case from being tried within 30 months.

[15] “Exceptional circumstances” are described in *Jordan* at para 69. They are circumstances beyond the Crown’s, and in some cases the Court’s, control which are reasonably unforeseen or reasonably unavoidable, resulting in delay which cannot reasonably be remedied. Exceptional circumstances will generally fall into two categories: discrete events and particularly complex cases. *Jordan*, at para 71. In this case, the Crown relies on the former, ie. the pandemic and its affect on the Court’s operations.

[16] In addition to satisfying the Court the delay was caused by exceptional circumstances, the Crown must demonstrate it took reasonable steps to address the exceptional circumstances before the delay reached the presumptive ceiling. *Jordan*, at para 70. This does not, however, mean the Crown must prove it did everything “hindsight now suggests might have been ventured to speed things up”. Rather, the Crown must prove it acted reasonably in the circumstances. *R v Loiacono*, 2023 ABCA 157 at para 24; see also *R v Osifo*, 2023 ONCJ 416 at para 52.

[17] The pandemic (including its consequential effect on court operations) has been recognized as an exceptional circumstance by appellate courts in other Canadian jurisdictions, including *R v Agpoon*, 2023 ONCA 449 at paras 4-5 and 19-20, *R v RS*, 2023 BCCA 148 at para 48, *R v Loiacono*, at para 19, and *R v Gardener*, 2023 SKCA 12 at para 10. As stated in *Loiacono*:

² In June of 2023 Barry applied for and was granted an adjournment of that trial date to accommodate his counsel’s parental leave and the trial is now set for 2025. Barry has waived this delay.

[19] There can be no doubt that the delays caused by Covid-19 were neither foreseeable nor avoidable. Covid had far-reaching repercussions on the court system that affected every facet of its operations. Its impact affected all matters then in the system as well as matters that would later enter the system during the Covid period, all as the courts developed new and different strategies to cope with this unprecedented event.

[18] If the court finds exceptional circumstances caused the delay it must then determine how much of the delay can be so attributed and deduct this from the total time the case will take, or has taken, to be tried, minus defence delay. If that time frame is below the presumptive ceiling, it then falls to the accused to demonstrate the delay is nevertheless unreasonable. Specifically, the accused must show firstly, there were meaningful and sustained efforts to expedite the matter and secondly, the accused must demonstrate the case took “markedly longer than it reasonably should have”. *Jordan*, at paras 48 and 82. In determining the latter, judges must use their knowledge of how things work in their own jurisdiction, “. . . including how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances”. *Jordan*, at para 89. Further, the Court “. . . should not parse each day or month . . . [but] should step back from the minutiae and adopt a bird’s eye view of the case.” *Jordan*, at para 91. On this point *Jordan* also instructs trial courts to consider the surrounding circumstances in assessing whether the time taken to bring a case to trial is reasonable. *Jordan*, at para 103.

[19] Finally, *Jordan*, at para 114, reminds trial and appellant court judges they also play a role in ensuring trials occur within a reasonable time, by using their respective case management and scheduling processes to identify, and then minimize or avoid, sources of unnecessary delay.

THE PARTIES’ POSITIONS

[20] Crown and defence counsel agree the net delay in this case is 34 months and no delay is attributable to Barry. They also agree the pandemic represents an exceptional circumstance. Where they disagree is on whether the pandemic, more particularly, the effects of measures taken by the Court in response to it, are the source of the delay in Barry’s case.

The Crown’s Position

[21] Crown counsel argues the pandemic and its consequences for the Court’s operations are at the heart of the delay. With limited exceptions (discussed below),

the Court was not able to hold, nor reliably schedule, jury trials from March of 2020 until it returned to regular operations in May of 2022. During this time, the backlog continued to grow. There was, and continues to be, a ripple effect which carried over beyond the official “end” of the pandemic.

[22] The Crown also argues it was ready and willing to do all it could to move Barry’s case along, but in the circumstances, there was little it could actually do. Barry was charged in June of 2021. When he made his election in January of 2022, the Court was still unable to schedule and hold jury trials, the demand for which continued to grow. This was beyond both the Crown’s and the Court’s control. The Crown could not force the Court to set Barry’s trial. At most, the Crown could ask for a pre-trial conference (which, along with defence counsel, it did) and the parties were able to schedule the records application.

[23] The Crown says that but for the pandemic and its effects, Barry’s case would have been tried approximately a year earlier than it was scheduled. In support of this position, Crown counsel submitted evidence to quantify pandemic-related delay. Specifically, he submitted an analysis using the November 12, 2019 and September 29, 2023 Criminal Pending Lists which he says demonstrates the average lifespans of jury election cases where an accused is not in custody before and after the pandemic. According to Crown counsel, the analysis demonstrates the average lifespan for such cases before the pandemic was approximately one year from the time the file was opened in this Court. Following the pandemic, the average lifespan was two years. If the one-year difference is subtracted from the net delay in Barry’s case the total delay is 22 months, well below the 30-month presumptive ceiling.

Barry’s Position

[24] Barry argues there is not a sufficient causal link between the effects of the pandemic on Court operations and the delay in this case. It is his view the Court’s own scheduling practices, which he appears to characterize as unclear and arbitrary, are what drove the delay. His main concerns are set out in his written argument and can be summarized as follows:

- a. When he made his jury election on January 19, 2022, no “list” or date for his counsel’s attendance was provided, nor was information provided at the pre-trial conference on March 11, 2022.

- b. His counsel was not advised by either the Court or Crown counsel that there were dates for Criminal List Scheduling and further, his matter was spoken to in the absence of his counsel on May 6, September 23, and December 16, 2022. It was only in June of 2023 that his counsel became aware matters on the Criminal Pending List are formally addressed by counsel and the Court.
- c. Barry's counsel was not contacted by the Court about scheduling the trial until December of 2022 (when Chief Justice Smallwood addressed it during list scheduling), nor was she given "permission" to set trial dates.

[25] Barry argues in all of the circumstances, the Court ought to have granted counsel permission to provide dates for trial earlier.

[26] With respect to how much of the delay can be attributed to the pandemic and its effects, Barry argues the evidence the Crown relies on to support its position that a year should be deducted from the total delay is arbitrary and not a true statistical sample. Relatedly, he argues the pandemic can no longer be relied on to explain delay.

ISSUE

[27] There is nothing in the parties' submissions and evidence, nor on the Court's own record, to suggest the Crown did not do all it reasonably could to get Barry's case to trial. Moreover, and as noted, the Crown does not seek to attribute any of the delay to Barry. Thus, the key question is whether the Court took reasonable steps to mitigate delay in the face of the pandemic and its effects. If the answer to that question is "yes", then it can be concluded the delay resulted from a discrete, exceptional circumstance and the analysis will turn to how much delay can be attributed thereto.

ANALYSIS

[28] For reasons which follow, I have concluded the pandemic, including consequent public health measures and the resulting jury trial backlog, was an exceptional circumstance which caused the delay in Barry's case being set for trial. The Court's file management and scheduling practices played no role in the delay. I also find the Court did all it could reasonably do to mitigate delay. It deployed

what resources it had available and prioritized cases appropriately. Finally, while difficult to quantify precisely, I am satisfied based on the evidence that the temporal effect of pandemic-related measures caused a delay of one year in this case. When deducted from the total delay, Barry's case as originally scheduled would have been heard well below the ceiling in *Jordan*.

File Management and Scheduling Practices

[29] It is useful to start by explaining how this Court keeps track of, and schedules, criminal matters in the ordinary course, as well as how the Court adapted its general file management practices during the pandemic.

[30] The Court follows its files closely and is pro-active in its approach to their management and ultimate resolution. As Crown counsel pointed out in his submissions, this Court has not had an issue with systemic delay. In fact, there are only four reported decisions on s 11(b) applications since 1990 and none since *Jordan* was decided in 2016. With the exception of its inability to schedule jury trials, the Court's practice in file management was largely unchanged by the pandemic.

[31] All criminal matters which come to this Court are recorded on the Criminal Pending List. As cases are resolved, they are removed from it. The Criminal Pending List is available in the Supreme Court Registry. It is also posted on the Court's website and is available for public viewing at anytime. It runs in chronological order, beginning with the oldest case. Information is provided for each case on the Criminal Pending List, specifically, the date the file was opened in this Court, the file number, the community where the offence occurred, the name of the accused, the offence charged, the mode of action (e.g. jury trial, judge-alone trial, summary conviction appeal, sentencing etc.), the name of the accused's counsel (if represented), and the trial or hearing date if set.

[32] When a case is placed on the Criminal Pending List a letter from or on behalf of the Manager of the Supreme Court Registry is sent to Crown and defence counsel (or to the accused directly, if unrepresented). The letter is standardized and, in the year leading up to the pandemic, it contained a direction to counsel to prepare a pre-trial conference report setting out, among other things, a summary of the allegations, the names of the Crown witnesses, any anticipated pre-trial applications, the status of Crown disclosure, and a time estimate for the trial. It drew counsel's attention to the requirements in *Jordan* and directed counsel provide, within 21 days, dates they would be available for a pre-trial conference which the Court would seek to hold

within 60 days of the letter. Finally, as in this case, counsel were advised to attend Criminal List Scheduling, discussed below, to speak to the matter if a trial date had not been set.

[33] Turning first to pre-trial conferences, if the parties tell the presiding judge they are ready to have the case scheduled for trial (and for any pre-trial applications) they will ordinarily be directed to provide available dates to the Supreme Court Registry within a relatively short time frame. If they are not ready to schedule the trial for some reasons, such as where Crown disclosure is outstanding, they will typically be directed to submit available dates for a further pre-trial conference. It is the Court's practice to follow up to ensure the dates for trial, pre-trial applications, or a further pre-trial conference, are submitted as directed.

[34] Once the dates for trials and, where necessary, pre-trial applications are submitted, the Chief Justice enters the dates into the schedule and a docket is issued. This information is also entered onto the Criminal Pending List.

[35] In addition to pre-trial conferences, scheduling and other concerns are addressed at Criminal List Scheduling. Criminal List Scheduling is held at regular intervals, four times each calendar year. The dates are posted on the Court's website and communicated to the Law Society of the Northwest Territories which, in turn, sends a reminder to all members. It takes place in a courtroom. As with all court appearances, the proceedings are recorded. The Chief Justice or her delegate presides. Crown and defence counsel (or the accused, if unrepresented) can appear at Criminal List Scheduling, both in-person or remotely, and speak to any matter they have on the Criminal Pending List.

[36] In the past, cases were assigned trial dates at Criminal List Scheduling. That is no longer the practice. Cases are scheduled continually. Nevertheless, Criminal List Scheduling remains an important file management tool. From the Court's perspective, this exercise provides an opportunity to ensure matters do not languish but are moving along as they should. Where it appears a matter is not moving forward, Criminal List Scheduling provides the Court with an opportunity to seek an explanation and where necessary, provide direction. Commonly, the Court will give directions and set deadlines for submitting dates for a pre-trial conference where none has been held and, where it appears it would be useful, directions to the parties to submit dates for a further pre-trial conference. The Court may also direct that dates for any pre-trial applications and trial be submitted within a certain time frame.

[37] Criminal List Scheduling is also an opportunity for Crown and defence counsel to address summarily, on the Court's record, issues which may have arisen on a file such as an anticipated plea change, re-election, or a change in defence counsel. Counsel may also pro-actively advise the Court as to the status of a file, including whether it is ready to be set for trial and if there is concern about delay.

[38] Criminal List Scheduling continued during the pandemic, four times in each of 2020, 2021, and 2022. Counsel appeared remotely and/or adhering to social distancing and masking requirements imposed by the CPHO. The Criminal Pending List continued to be updated as new cases came into the Court and, as they did, the standardized letter issued from the Manager of the Supreme Court Registry. As noted, however, the version of the letter sent to Crown and defence counsel in this case advised counsel the Court had changed its practice respecting pre-trial conferences due to the pandemic and it would no longer be setting them automatically for jury cases.

[39] Barry's assertions, particularly that his counsel was neither aware nor advised of the Court's scheduling practices are perplexing. They lack any evidentiary foundation and in fact, they are contradicted by the evidence and the Court's own records. As noted, the letter sent to defence counsel from the Manager of the Supreme Court Registry on January 20, 2022, clearly advised of her responsibility to attend Criminal List Scheduling and speak to Barry's matter while the trial remained unscheduled. Further, and as noted, dates for Criminal List Scheduling, Criminal Chambers, and the Criminal Pending List itself were and are available on the Court's website and in the Registry. Barry's counsel could have attended at least three of the four Criminal List Scheduling sittings in 2022 to speak to his matter.

[40] Barry's suggestion his counsel required permission from the Court to request a trial date is equally puzzling. Ideally, Crown and defence counsel will submit trial availabilities jointly; however, there is nothing which prevents either party from seeking dates once they are ready to go to trial. Barry's counsel was not required to seek permission from the Court to submit her availabilities and seek a trial date before the matter was addressed by Chief Justice Smallwood at Criminal List Scheduling on December 16, 2022. There is no evidence the Court ever gave this direction.

[41] This Court's file management practices have always been, and continue to be, transparent, accessible, and effective. While they may differ from those in place in other superior courts, there were not, nor are there now, any hidden, confusing, or

arbitrary processes involved in the manner in which the Court manages and schedules criminal cases. Certainly, there is nothing to suggest the Court's ordinary file management practices caused or contributed to the delay in this case.

The Pandemic's Effect on Jury Trial Scheduling and the Court's Response

[42] While in-person, judge-alone trials and sentencing hearings had resumed by June of 2020, public health orders restricting gatherings and imposing social distancing requirements made it impossible to re-schedule cancelled jury trials and schedule and hold new ones. As noted, the result was an immediate jury trial backlog that continued to grow. The situation, which was shared by other jurisdictions, was aptly described by Renke, J in *R v Pettitt*, 2021 ABQB 84:

[20] The adjournment of jury trials in March 2020 did not freeze the number of jury trials and non-jury trials in the queue. Like river water accumulating behind a dam, the reservoir of unheard matters comprised not only the matters scheduled for trial over the months when jury trials were not heard, but the new jury and non-jury trials that moving through the system. And the Courts are responsible for more than criminal matters. Family, civil, commercial, and judicial review matters also accumulated. Bail and Chambers matters had to be dealt with. Emergency matters had to be dealt with. All this at sitting points across the Province.

[43] Chief Justice Charbonneau, as she was then, addressed this issue during Criminal List Scheduling on July 31, 2020. She noted there were over 40 jury trials on the Court's Criminal Pending List as of that date and she identified the challenges the Court would face in scheduling jury trials in the foreseeable future. Key among these: a lack of facilities, such as hotel conference rooms, community centres, and arenas, to safely accommodate jury trials and comply with public health orders; the need to obtain an exemption from the CPHO's restrictions on the number of people who could congregate in one place (which was contingent on the existence and availability of suitable facilities); and the need to prioritize jury trials for accused individuals in custody awaiting trial.

[44] The Court sought an exemption order from the CPHO and it was received on September 8, 2020. Shortly afterward, former Chief Justice Charbonneau issued a practice direction confirming the CPHO had granted the exemption to allow the Court to hold jury trials but still requiring certain protective measures be taken, including compliance with social distancing requirements. The practice direction also confirmed the Court's "triage" system for scheduling jury trials under which priority is given to matters where the accused is in custody, the matter was very dated, or both. This practice continues.

[45] Unfortunately, the CPHO's exemption had little ameliorative effect on the jury trial backlog. Even with the exemption, the social distancing and other public health requirements meant jury trials could not be accommodated in any of the Court's dedicated facilities in Yellowknife, Inuvik, and Hay River. There were few other options. The Court was able to identify only one hotel in Yellowknife with suitable facilities to accommodate a jury trial while allowing compliance with the public health orders. Suitable community facilities were also identified in each of Inuvik and Hay River. Importantly, none of the identified facilities are controlled by the Courts and thus scheduling jury trials was subject to availability. As a result of the limited facilities and public health restrictions, only a few jury trials could be scheduled during the pandemic. Two of them proceeded, one on August 9, 2021 and the other on February 7, 2022.

[46] On May 2, 2022, this Court's operations returned to normal, allowing it to address the jury trial backlog more substantively. For reasons discussed below, however, it would take some time to catch up.

[47] Jury trials demand more of potential facilities than judge alone trials. When additional facilities are required to meet the Court's needs, it is not as simple as renting a hotel conference room or a community centre. The chosen facility (or in some cases, facilities) must have a room large enough to accommodate all those who are summonsed as potential jurors for jury selection. The Court's practice is to summons a minimum of 300 people for jury selection in Yellowknife and a minimum of 250 people in other communities. This is required to ensure a jury can be empanelled to hear the trial, after taking into consideration the number of panelists who will be excused due to personal or financial hardship and conflicts of interest, among other factors. Further, the hearing room must be large enough that there is an area for the 12 to 14-person jury to sit during the trial, in addition to the regular requirements of a witness stand and desks or tables for each of the presiding judge, the clerk and the court reporter; and the open court principle requires the facility has sufficient room and chairs for members of the public to attend and observe the trial.

[48] The hearing room must allow for witnesses to be heard by everyone, especially the jury. Acoustic quality varies greatly. While actual courtrooms typically have reasonable acoustics and sound amplification, most non-court facilities do not. In some cases, the Court must arrange for the required equipment

to be brought to the facility where the acoustics are inadequate, and the facility must be capable of supporting the operational requirements of that equipment.

[49] There must be a separate, secure, and soundproof room available for jury deliberations. The room must accommodate 12 people at a reasonable level of comfort, given the importance of the work they are asked to do, as well as any required equipment. For example, the jury may need to review video or audio evidence, and it is not uncommon for juries to use whiteboards and flip charts during their deliberations.

[50] There must be a separate area where witnesses can wait to be called. In most cases, the Court will issue an order to exclude witnesses from the courtroom before they give testimony to preserve the integrity of evidence. Therefore, their waiting area must be located in a place where they will be unable to hear to testimony of others. There must also be a private area, ideally a sound-proof room, where defence counsel can consult with and take instructions from the accused. Where an accused is in custody, the facility must accommodate security measures as required by the circumstances, such as a private area to remove devices such as leg irons and hand cuffs, away from the jury's sight.

[51] Closed circuit television is commonly employed as a testimonial aid for witness testimony in jury trials. A separate room with specialized equipment must be available, along with a reliable wi-fi network. Relatedly, it is common practice to permit some witnesses to testify by video link from outside the community where the trial is being held. This also requires specialized equipment and reliable wi-fi and internet access.

[52] The reality is there are very few venues in the Northwest Territories which meet all these requirements and can accommodate jury trials in the ordinary course. Moreover, they are not always available. There are only three court-controlled facilities in the Northwest Territories, located in Yellowknife, Inuvik, and Hay River. The courthouse in Yellowknife has only one courtroom that can accommodate jury trials, so running more than one jury trial a week means an alternative facility must be booked. Court facilities in Inuvik and Hay River can accommodate jury trials, but in some cases, cannot accommodate the number of people summonsed for jury selection, making it necessary to book additional non-court facilities.

[53] Even if there were more facilities, there are other limits on the Court's ability to run multiple jury trials at the same time. The Northwest Territories has only four resident superior court judges who, in addition to jury trials, preside over other criminal, family, and civil proceedings. While there are deputy judges who can and do take on some cases here, most sit full-time on superior courts in other jurisdictions, so their availability is limited. Moreover, in addition to a judge, each jury trial requires a clerk, one or more sheriffs (depending on the security requirements of the particular case), a court reporter, and a jury guard.

[54] Despite the challenges presented by the lack of facilities and the volume of unscheduled jury trials, the Court has dealt successfully with the backlog. As of March 5, 2021, there were 66 unscheduled jury trials on the Criminal Pending List. By October 18, 2021 the number had grown to 74. As of March 4, 2022, approximately six weeks after Barry's case was added to the Criminal Pending List, there were 63 unscheduled jury trials, 60 of which pre-dated his election. When regular operations resumed May 2, 2022 there were still approximately 63 unscheduled jury trials, some dating back to charges from 2019 and 50 of which pre-dated Barry's election. As operations got up and running, however, the jury trial backlog began to get smaller. As of December 15, 2022, the day before Smallwood, CJ directed counsel to submit dates for trial in this case at Criminal List Scheduling, there were still 61 outstanding jury trial elections, but only 24 pre-dated Barry's matter. By January 2, 2024, all jury elections which came to this Court immediately before or during the pandemic, including Barry's, had been heard, scheduled, or otherwise resolved. Finally, as of February 7, 2024 there are only 21 unscheduled jury trial elections on the Criminal Pending List.

[55] Barry tendered no evidence to suggest the Court could have done anything more to clear the backlog and to have his jury trial concluded within 30 months of the initial Information. Case law reflecting what steps were taken in other jurisdictions, such as Alberta, are not helpful. While s 11(b) of the *Charter* applies equally to accused persons throughout Canada, *how* courts were able to respond to the demand for jury trials both during and after the pandemic necessarily varied. Each jurisdiction's response was uniquely influenced by available resources and facilities, as well as the extent of public health restrictions. There are, doubtless, far more facilities available to accommodate the backlog of jury trials in large jurisdictions than there are in the Northwest Territories.

[56] In all of the circumstances, it is my view this Court did everything in its power to deploy available resources and ensure jury trials were scheduled and heard as soon as reasonably possible.

The Amount of Delay Attributable to the Pandemic

[57] As noted, Crown counsel submitted an analysis based on data from this Court's own records to demonstrate the average lifespan of criminal matters where the accused has elected trial by jury and is not in custody pending trial, before and after the pandemic was declared. The Crown submits the pandemic and its effects added, on average, a year to the time an accused person, out of custody, would wait for a jury trial.

[58] The analysis was done by Kelsey McNabb, a paralegal in the Crown's office in Yellowknife. Her methodology and results are contained in an affidavit she swore on October 10, 2023 and can be summarized as follows:

- a. Iterations of the Criminal Pending Lists from November 12, 2019 (pre-pandemic) and September 29, 2023 (post-pandemic) were used to gather data.
- b. Matters with jury elections and assigned trial dates where the accused was not in custody were isolated and extracted from each list. There were 14 such matters on the 2019 list and 11 on the 2023 list. The detention status of the accused in each case was determined using the Crown's internal file management system.
- c. The time between when each of these files was entered onto the Criminal Pending List and the first day of the scheduled jury trial was calculated.³
- d. From this, the average number of days between when each matter was added to the list and the first day of the scheduled jury trial was determined by adding the total number of days together and dividing it by the number of cases.

³ An online program was used to calculate the time, but the calculation is purely arithmetic and could be made just as easily without a computer program.

- e. The average time to trial for matters on the 2019 list was 377 days. The shortest time was 309 days and the longest 629 days.
- f. The average time to trial for matters on the 2023 list, which included Barry's case, was 787 days. The shortest time was 543 days and the longest 1083 days.
- g. Overall, the average time to trial increased by approximately one year for jury election files opened by this Court during the pandemic.

[59] In addition, I note there were 18 unscheduled jury matters on the November 2019 list. That number had more than tripled, to 63, by the time Barry made his election.

[60] Barry argues the Crown's evidence is based on statistically insignificant and arbitrary data. I disagree. While the number of cases the Crown had to compare with Barry's case (ie. a jury election with an accused not in custody) is not large, the Northwest Territories is a small jurisdiction with a population of just under 45,000⁴. Naturally, the data set will be small; however, this does not make it insignificant or unreliable for determining how much delay was caused by the pandemic and its effects. The data was not chosen arbitrarily, nor is there anything to suggest it was chosen to favour the Crown's position. The data comes largely from the Court's own records, which are accurate. It includes all cases where an accused was not in custody pending trial, which the Crown determined through its own file management system. With respect to the time periods during which the data was accumulated, it makes sense for the Crown to compare the Criminal Pending List from immediately before the pandemic in November of 2019 to that from September of 2023. Using the September of 2023 Criminal Pending List made an allowance for a reasonable time to elapse after Court operations were allowed to return to normal in May of 2022, in turn providing a more accurate picture of the extent of the delay caused by the pandemic.

[61] It is open to me to reject the Crown's evidence on the extent of the delay, but I see no reason to do so. The methodology used to determine the amount of delay is simple, yet it is sound. It would be unrealistic for the Court to insist on a complicated, precise, statistical analysis, and that is not required. The Court must take a broad perspective, informed by its own context, in assessing delay in these circumstances. The analysis presented is straightforward and provides an objective

⁴ <https://www.statsnwt.ca/population/population-estimates/>

and transparent basis for the conclusion I am asked to draw. Finally, the Crown's evidence, while criticized by Barry, has not been contradicted. I therefore accept the Crown's evidence and I find the delay caused by the pandemic in Barry's case is 12 months.

CONCLUSION

[62] The pandemic was a discrete, exceptional circumstance which had significant effects on the Court's operations and the Crown's ability to move cases forward. Those effects did not end when the pandemic was declared to be over by the World Health Organization and they are squarely to blame for the delay in this case. Although the amount of delay to be attributed to the effects of the pandemic in Barry's case, or any other for that matter, cannot be quantified with mathematical precision, I am satisfied based on the evidence presented by the Crown that it is reasonable to attribute 12 months of the delay in this case to the pandemic and its effects. If this is subtracted from the total amount of delay, Barry's trial as originally scheduled would be completed within 22 months of the initial Information, well below the *Jordan* ceiling of 30 months.

[63] The application is dismissed.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
9th day of February, 2024

Counsel for the Applicant:

Amy Lind

Counsel for the Respondent:

Blair MacPherson

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HIS MAJESTY THE KING

Respondent

-and-

NEIL ALEXANDER BARRY

Applicant

MEMORANDUM OF JUDGMENT
THE HONOURABLE JUSTICE K.M. SHANER
