PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Longaphy*, 2017 NSPC 67

Date: 2017-11-21
Docket: 2668787, 2668788, 2668789, 2668790
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Christopher Longaphy

Section 11(B) Charter - Decision - Unreasonable Delay

Judge:	The Honourable Judge Theodore Tax,
Heard:	September 25, 2017; October 16, 2017; November 14, 2017, in Dartmouth, Nova Scotia
Decision:	November 21, 2017
Charge:	Section 267(a), 267(b), 266 & 264.1(1)(a) of the Criminal Code.
Counsel:	Eric Taylor, for the Public Prosecution of Nova Scotia Jonathan Hughes, for the Defence

By the Court:

[1] Mr. Christopher Longaphy was originally charged in an Information sworn on February 22, 2012, with three offences, namely, an assault of Tristan Guibault by using or threatening to use a weapon, to wit a baseball bat, contrary to section 267(a) of the **Criminal Code**, an unlawful assault of James Beaver contrary to section 266 of the **Criminal Code** and knowingly uttering threats to cause death or bodily harm to Mr. Beaver contrary to section 264.1(1)(a) of the **Criminal Code**. The offences were alleged to have occurred on or about January 20, 2012 at or near Sackville, Nova Scotia. The Crown proceeded by way of summary conviction.

[2] Mr. Longaphy was served with a summons to appear in the Provincial Court in Dartmouth on that Information on April 18, 2012. On his fourth appearance in court, Mr. Lyle Howe confirmed that he was Defence Counsel for Mr. Longaphy and the first trial date was set for June 26, 2013. However, the trial was adjourned on June 20, 2013 and rescheduled to start on June 9, 2014. On that trial date, the trial was, once again, adjourned and rescheduled to start on September 3, 2015. The Court granted a short adjournment and the trial actually commenced on October 7, 2015.

[3] When the first trial date was confirmed by counsel, they estimated that the trial would require two hours of court time. On June 20, 2013, six days before the first scheduled trial date, the trial was adjourned and rescheduled to start on June 9, 2014. Counsel advised the Court that one-half day of trial time would be required, since the Crown stated that they would now be disclosing additional medical evidence and that a Medical Doctor might be called as a witness.

[4] The second date scheduled for the start of the trial on June 9, 2014, was postponed on that date, due to the fact that Mr. Howe had recently been suspended from the practice of law in Nova Scotia by the Nova Scotia Barrister's Society. The Receiver for the Barrister's Society informed the Court that they were required to review Mr. Howe's files and that it would take some time before Mr. Longaphy's file could be forwarded to another lawyer.

[5] On September 3, 2015, which was the third scheduled date for the start of this trial, the Court granted an adjournment request made essentially by both sides and rescheduled the trial for approximately one month later. Finally, on October 7,

2015, which was the fourth date scheduled to start of this half-day trial, the Crown called its first witness, but he was only able to complete his direct examination.

[6] Following that first day of evidence, the Court scheduled additional half days for trial evidence on December 2, 2015, June 20, 2016 and June 28, 2016. Trial evidence was heard on each of those dates, but the Crown Attorney was not able to call his final witness, the investigating police officer. In addition, since Defence Counsel had planned to call three witnesses during the trial, an additional full day was scheduled for trial continuation on December 9, 2016.

[7] However, on November 3, 2016, the Receiver for the Barrister's Society requested an adjournment of the December 9, 2016 trial continuation date on behalf of Mr. Longaphy, because Mr. Howe had been suspended for the second time from the practice of law in Nova Scotia. The Receiver advised the Court that Mr. Howe had recently been suspended and that it would take some time to review the file and forward it to another counsel. As a result, the December 9, 2016 trial date was adjourned and the Court rescheduled an additional full day for the trial continuation on April 7, 2017. Status dates were scheduled for Mr. Longaphy to advise the Court whether he had retained counsel who would be available on that trial continuation date.

[8] On April 7, 2017, Mr. Longaphy appeared with counsel and the Crown called its last witness and closed its case. Defence Counsel indicated that there would be witnesses called by the defence, but Defence Counsel advised the Court that he would be filing a section 11(b) **Charter** application. In those circumstances, it was agreed that April 7, 2017 would be considered as the date upon which the trial would have concluded and that the Court would determine the **Charter** application before hearing any witnesses called by the defence.

[9] Therefore, for the purposes of the section 11(b) **Charter** application, the prosecution of Mr. Longaphy commenced on February 22, 2012 when the "original" Information was sworn. The parties have agreed that the anticipated end of the trial would have been April 7, 2017 and that this represents a total period of approximately sixty one and a half (61.5) months that this matter has been before the court.

[10] The parties have based their submissions with respect to the issue of whether Mr. Longaphy has been tried within a "reasonable time" on the cases of **R. v. Jordan**, 2016 SCC 27 which was decided on July 8, 2016, **R v. Williamson**, 2016 SCC 28, also decided on July 8, 2016 and **R. v. Cody**, 2017 SCC 31 decided on

June 16, 2017. It is obvious that the large majority of the time scheduled for trial and ultimately used for the hearing of trial evidence occurred well before the Supreme Court of Canada released its **Jordan** decision.

[11] Defence Counsel submits that only four months of the "total delay" has been explicitly waived by Mr. Longaphy due to Mr. Howe's second suspension from the practice of law. Mr. Howe's first suspension would probably qualify as "exceptional circumstance," but the delay caused by his suspension only contributed a month and a half of delay until the new trial date was scheduled. Defence Counsel submits that even if the Court was to deduct some delay due to the parties' underestimation of time required for trial, the total "net" delay would still be double or triple the "presumptive ceiling" established by the Supreme Court of Canada in **Jordan** for a trial in the Provincial Court.

[12] For his part, the Crown Attorney notes that the large majority of the time for which the "original" and "replacement" Informations have been before the Court, were years before the Supreme Court of Canada released the decision in **Jordan**. The Crown Attorney submits that the Court should attribute some defence delay in the initial time taken to retain counsel after Mr. Longaphy was arrested and charged with the offences before the court as well as the delay waived by Mr. Longaphy to retain new counsel for the April 7, 2017 trial continuation. The Crown Attorney also submits that the first trial adjournment should also be considered primarily as defence delay and most, if not all of the eleven and a half (11.5) months needed to schedule the second date for the start of the trial, should be attributed to the Defence.

[13] Therefore, while the Crown Attorney acknowledges that the total "net" delay would probably remain above the presumptive ceiling established by the Supreme Court of Canada for a trial in the Provincial Court, this trial, while not being particularly complex, has had several discrete and exceptional circumstances which have had a significant impact on the progress of the trial. Moreover, the Crown Attorney submits that those discrete and exceptional circumstances were not ones which could be reasonably foreseen or reasonably remedied by the Crown or the Court in short order and they should also be deducted from the total "net" delay. The Crown Attorney submits that Mr. Howe's first and second suspensions from the practice of law in Nova Scotia during this trial, qualify as discrete and exceptional circumstances.

[14] The Crown Attorney also submitted that there were other "discrete events" which contributed to delay which could not be reasonably foreseen or corrected in short order by the Crown. Moreover, despite the good-faith efforts by both sides in estimating the time required for trial, there is no question that the parties significantly underestimated the time required, which obviously had an impact on the dates scheduled for trial.

[15] In the final analysis, it is the position of the Crown that when the exceptional circumstances and other discrete events are subtracted from the total "net" delay, the amount of time that this matter has been before the Court for trial is below the presumptive ceiling and therefore, the section 11(b) **Charter** application should be dismissed. In the alternative, if the Court does not entirely agree with the position of the Crown respect to the calculation of the total "net" delay, then, the Crown Attorney submits that this is a "transitional case" and when the Court conducts its analysis under the previous framework for section 11(b) **Charter** applications, the charges before the Court are serious, there was a significant period of institutional delay in the Dartmouth Provincial Court while this matter was before the court and Mr. Longaphy has suffered little, if any, prejudice since he was released on a summons to appear in court and has not been under restrictive release conditions. Therefore, the Crown Attorney submits that this application should be dismissed.

FACTUAL BACKGROUND:

[16] On March 9, 2012, Mr. Longaphy was served with a summons dated February 23, 2012 which required him to attend at the Dartmouth Provincial Court on April 18, 2012. The "original" Information which charged Mr. Longaphy with three offences had been sworn before a Justice of the Peace on February 22, 2012.

[17] On April 18, 2012, Mr. Longaphy made his first appearance in court on the "original" Information. On that date, he was assisted by the Legal Aid Duty Counsel and advised the Court that he would be retaining counsel. Mr. Longaphy asked for an adjournment to June 25, 2012 to retain counsel and he added that he thought it would give him sufficient time to hire a lawyer.

[18] Mr. Longaphy appeared in court on June 25, 2012 with Mr. Lyle Howe, but Mr. Howe stated that he was present for "today only" which was an indication to the Court that he had not yet been formally retained by Mr. Longaphy. Mr. Howe advised the Court that he would be contacting the Crown Attorney to obtain disclosure. The confirmation of counsel and plea were adjourned to July 30, 2012.

[19] On July 30, 2012, Mr. Howe did not state that he was representing Mr. Longaphy for that day only, but advised the Court that there may be some outstanding disclosure and that he would have some further discussions with the Crown Attorney regarding "materials." As a result, he asked the presiding Judge to adjourn the matter for plea until September 7, 2012.

[20] On September 7, 2012, the Crown Attorney confirmed that they were proceeding by way of summary conviction and Mr. Howe indicated he was the solicitor of record and entered a not guilty plea for his client. Counsel advised the Court that the estimated time required for trial would be two (2) hours. There was no discussion on the record of possible trial dates, since the practice at that time, was for the counsel to discuss trial dates with the Clerk of the Court off the record and then confirm the one convenient date for both sides on the record. The first trial date was set for June 26, 2013, approximately nine and a half (9.5) months later, and in response to the Court's inquiry as to whether that date was "convenient to both sides," the Crown Attorney indicated that it was and Mr. Howe confirmed that the date was "fine with defence."

[21] On April 10, 2013, the Court received a copy of a letter dated that same date from the Howe Law office signed by another individual for Mr. Howe. The letter advised the Dartmouth Provincial Court that the trial of the three offences alleged against Mr. Longaphy was scheduled to be heard on June 26, 2013 at 1:30 PM and that "we are requesting that the matter be brought forward on the docket for April 16, 2013 in Dartmouth Provincial Court at 1:30 PM for adjournment." The letter went on to note that "This is a very time sensitive issue" and asked the Court to "confirm this adjournment request date by 4:30 PM today."

[22] The fax coversheet also dated April 10, 2013 from Howe Law was addressed to the Dartmouth Provincial Court and the Dartmouth Provincial Crown with the handwritten message on the fax coversheet stating: "Re: Christopher Longaphy Adjournment Request" and underneath that, were written the words "very urgent!!"

[23] As a result of Mr. Howe's request, the Court scheduled and docketed his adjournment request on April 16, 2013 at 1:30 PM in courtroom number three at the Dartmouth Provincial Court. When the matter was called for hearing by the Court shortly after 1:30 PM and again shortly after 4:00 PM, the Crown Attorney, Ms. Janine Kidd was present, but Mr. Howe was not present, nor was there any representative from his office present to speak to the adjournment request. Ms.

Kidd advised the Court that she had not seen Mr. Howe that afternoon. In addition, the Crown Attorney said that she had not heard from Mr. Howe or anyone from his office to explain why Mr. Howe was not able to attend on the date and time that he had specifically requested six days earlier.

[24] Since neither the Court nor the Crown Attorney had received any communications to explain Mr. Howe's absence and there was no one present from his office to speak to the adjournment request, the Court noted that it was Mr. Howe's application and that no one had spoken in support of his application to adjourn the trial date. Therefore, the Court confirmed that the trial date [of June 26, 2013] stands.

[25] On June 20, 2013, just six days before the first scheduled date for this trial Ms. McCarthy appeared for Mr. Howe and made a request to adjourn the trial. Ms. McCarthy advised the Court that this was a defence request to adjourn the trial as both she and Mr. Howe had "conflicts" on the June 26, 2013 trial date.

[26] After Ms. McCarthy made the request to adjourn the trial, the Crown Attorney [Ms. Kidd] informed the Court that they had recently been advised that Mr. Guibault suffered more serious injuries than they originally believed, during the incident on January 20, 2012. Based upon the availability of that medical information, the Crown Attorney said that it was likely that a "replacement" Information would be filed with an additional charge of assault causing bodily harm contrary to section 267(b) of the **Criminal Code**.

[27] Since the Crown Attorney did not have those medical records, she said that disclosure of that information would take some time as releases would have to be signed to obtain the medical records from the hospital and the lead investigator was on paternity leave. For that reason, the Crown Attorney advised the Court that she would consent to the defence request to adjourn the trial.

[28] Once again, no dates were canvassed on the record with counsel to schedule the second date to commence the trial. However, the Crown Attorney now estimated that the time required for trial would be one-half day, with the possibility of medical evidence being called. Since it was not clear to the Court who would be the solicitor of record for the trial, Ms. McCarthy advised the Court that the new date could be set according to her schedule. When the Court asked the parties to advise to whom this adjournment request should be attributed, the Crown Attorney advised the court that it could be "attributed as a joint request."

[29] Shortly thereafter, the Court confirmed a half day for trial on June 9, 2014, with the defence "consent" to that date. At the same time, the Court also scheduled a status date for August 20, 2013 to ascertain whether the medical information had been obtained by the Crown Attorney and disclosed to Defence Counsel.

[30] On August 20, 2013, the Crown Attorney [Ms. Kidd] advised the Court that she was still waiting for the medical records and that she may need to get a consent signed by Mr. Guibault. The Crown Attorney and Ms. McCarthy, who indicated she was appearing for Mr. Howe, agreed to return to court on October 28, 2013 as the next status date.

[31] During the October 28, 2013 status date, Ms. McCarthy, who was appearing for Mr. Howe, advised the Court that she had not yet received the medical documents from the Crown Attorney. The Court noted that the trial date had already been set and that this status date did not have any impact on the trial date, as there was still several months to resolve any outstanding issues before the start of the trial on June 9, 2014. A further status date was established for December 3, 2013.

[32] On December 3, 2013, the Crown Attorney [Ms. Kidd] confirmed that a "replacement" Information had been sworn on November 13, 2013 and that Information added a fourth charge of assault causing bodily harm to Mr. Tristan Guibault contrary to section 267(b) of the **Criminal Code**. Ms. McCarthy was present as Defence Counsel on this status date. The Crown Attorney also confirmed that they had forwarded the medical records of Mr. Guibault to Defence Counsel. The Crown Attorney withdrew the "original" Information, but all of the endorsements and the release conditions were carried over to the "replacement" Information.

[33] Since the "replacement" Information had been sworn on November 13, 2013 and added a fourth charge with the other three charges being the same as the ones contained in the "original" Information sworn on February 22, 2012 in relation to an incident on January 20, 2012, the Crown Attorney advised the Court that they would be proceeding by indictment, given the dates involved, unless they received Defence Counsel's consent to proceed by way of summary conviction.

[34] Ms. McCarthy confirmed that the defence consented to the Crown proceeding by way of summary conviction and she also confirmed that Mr. Howe would be the trial counsel. Both counsel advised the Court that the prior estimate one half day of trial time being required for the trial, was still an accurate

estimation. The Court also confirmed that Defence Counsel was still available for half-day scheduled for trial on June 9, 2014. Ms. McCarthy confirmed: “yes, that’s still fine.”

[35] However, the trial did not proceed on that second scheduled trial date of June 9, 2014. A representative of the Receiver [Mr. Ian McIsaac], who was appointed by the Nova Scotia Barrister’s Society to take over Mr. Howe’s files, appeared on June 9, 2014 and advised the Court that Mr. Lyle Howe had recently been suspended from the practice of law in Nova Scotia. The Receiver advised the Court that they were required to review Mr. Howe’s files, before they could be forwarded to another lawyer. Moreover, the Receiver was not in a position to represent Mr. Longaphy in this trial matter. The Crown Attorney did not oppose the Receiver’s application to adjourn the start of the trial.

[36] Furthermore, on June 9, 2014, the Crown Attorney [Ms. Kidd] confirmed that both complainants were in court, the police officer was in court and she had the emergency room doctor on standby. Although the Court Appearance Record confirmed that Mr. Longaphy was present in court when the Receiver made the request to adjourn the trial date, there was no indication whether any of the other proposed defence witnesses were present.

[37] As a result of Mr. Howe’s suspension from practicing law in Nova Scotia in early-June, 2014, the Court scheduled a hearing to set a trial date on August 6, 2014. In that way, the Court provided Mr. Longaphy with two months to retain a new lawyer and then the third date for the commencement of the trial could be scheduled with that lawyer’s availability being considered.

[38] On August 6, 2014, Ms. McCarthy appeared for Mr. Longaphy and said that she had his file and would be representing him. The Crown Attorney stated that they were still estimating that the trial would take one-half day of court time. Once again, no possible dates for the start of the trial were canvassed with counsel on the record. The third date for the trial was established as September 3, 2015.

[39] After scheduling the trial date, the Court asked counsel whether there was a need to schedule a pre-trial conference. Ms. McCarthy noted that September [2015] was a long way away and that there was a potential that the defence “may need a video conference for a defence witness, but we’ll address that when it gets a little closer to the trial date.” Since neither counsel had indicated that there was a need for a pre-trial conference of this half-day trial, no conference was scheduled.

[40] On September 3, 2015, the Crown Attorney [Ms. Quigley] stated that she had a "little dilemma" because it was brought to her attention, the previous day, that the investigating police officer had not received his subpoena. The Crown Attorney advised the Court that the two youthful complainants were in court, but the police officer was "a very material" witness. The Crown Attorney also noted that she believed "there is now consent that the Medical Doctor would not have to testify." The Crown Attorney was prepared to start the trial, since the two complainants and the doctor were available, but added that it was her "preference" to call the investigating officer as the first witness, since it would likely have an impact on the questions to be addressed with the complainants.

[41] At that point, the Crown Attorney noted that she believed there would be trial time available in the court on September 18 and September 25, 2015, and therefore, she was requesting a short adjournment of the trial. The Court asked Defence Counsel to indicate her position with respect to the Crown Attorney's request. Ms. McCarthy indicated that her client's preference was to have the trial proceed that day and noted that the "file does have a bit of history," but she also said that Mr. Longaphy recognized the reality that it was unlikely that the Crown's evidence would be completed that day.

[42] Ms. McCarthy also advised the Court that Mr. Longaphy was concerned that if the Crown's evidence was not completed on that date due, to the absence of the police officer, another date would have to secured. Since there would be defence evidence, Mr. Longaphy was not sure whether a defence witness who was present that day, would be available on another date.

[43] The Court reminded the parties that the trial had only been scheduled for a half-day and that given the number of witnesses which the parties anticipated calling, "the half day [for trial] was probably an underestimate, based upon what I'm hearing now." Based upon the positions provided by counsel, the Court advised the parties that they could start the trial at noon on September 3, 2015 or, as a result of the recent resolution of another matter, they could have a full day for trial on either September 18 or September 24, 2015. Ms. McCarthy said that she was not available on either of those two alternate dates. Following that, the Court offered a half day for the start of the trial on October 7, 2015 at 1:30 PM. Ms. McCarthy confirmed that she was available at that time.

[44] The Crown Attorney stated that she would speak with Defence Counsel to try and reach an agreement to reduce a number of factual issues as well as the

necessity for evidence as to the extent of the injuries suffered by Mr. Guibault. Defence Counsel noted that there would probably be issues of self-defense and causation, but if the trial started on time, she thought that the half-day of trial time "should be fine." Ms. McCarthy also noted that several admissions could be made and that the defence would not be contesting the jurisdiction or Mr. Longaphy's identity and that the trial would come down to the Court's conclusion with respect to the facts involved in this incident.

[45] Although the Court noted that it was "not ideal" to adjourn the trial on September 3, 2015 due to its "long history," the Court also observed that the new date scheduled for the start of the trial on October 7, 2015 was only a few weeks away and if there were a few agreements to narrow factual issues, that would also focus the legal issues. The Court asked the parties to check with their witnesses to ensure that everyone was available on October 7, 2015 at 1:30 PM and when everyone's availability was confirmed, the trial was adjourned to October 7, 2015. The Crown Attorney asked the Court to direct the two youthful complainants to return to court on that date, but Defence Counsel did not ask Court to direct anyone to return on October 7, 2015.

[46] Once October 7, 2015 was confirmed as the new date to start the trial, the Court asked the parties whether they had reached an agreement with respect to whether the Medical Doctor would be required to testify. The Crown Attorney said that she would write to Defence Counsel, but she believed that there had been an indication that it would not be necessary for the doctor to testify in court. The Court reminded the Crown Attorney that if there was no agreement, then the doctor would be expected to be present in court to testify.

[47] On October 7, 2015, Mr. Eric Taylor appeared for the Crown and Mr. Howe appeared with Mr. Longaphy. Mr. Howe stated that he was "stepping on the record" as solicitor for Mr. Longaphy and he was "ready to proceed." Mr. Howe's suspension from the practice of law in Nova Scotia had recently been lifted by the Nova Scotia Barrister's Society. Mr. Howe indicated that he was now the solicitor of record and not Ms. McCarthy, but agreed that a letter could have been sent to the Court to indicate that she would no longer be the solicitor of record. Mr. Longaphy confirmed that Mr. Howe would be his trial counsel.

[48] Prior to the commencement of the trial, the Court asked the parties if there were any preliminary motions to address. The Crown Attorney stated that, on the previous date, Ms. McCarthy had agreed to issues relating to the medical evidence,

the identification of Mr. Longaphy and the jurisdiction. The Crown Attorney wanted to know whether those agreements made by Ms. McCarthy, on the record, when she was the solicitor of record, transferred over Mr. Howe since he had now confirmed he would be the solicitor of record.

[49] The Court also noted that on September 3, 2015, Ms. McCarthy had agreed to the narrowing of some factual issues, possible video link evidence and some legal issues. The Court questioned Mr. Howe as to whether he had received any instructions from Ms. McCarthy regarding previous agreements or discussions on possible agreements. Mr. Howe advised the Court that Ms. McCarthy "did not leave me any notes related to agreements." Mr. Howe added that he preferred to hear from the two civilian witnesses and then he would talk to the Crown Attorney about the medical evidence and whether the Crown was planning to qualify the doctor as an expert in order to give opinion evidence.

[50] The Crown Attorney confirmed that Ms. Quigley had written a letter to Ms. McCarthy on September 3, 2015 which included the following statement which was read into the record on October 7, 2015: "I confirm we have an agreement on the following facts to expedite the trial process." Following that, Mr. Howe asked the Court to grant a short recess so he could speak with Mr. Longaphy and advise the Court of their position on these matters.

[51] Just before taking that recess, the Crown Attorney advised the Court that Const. Smith was still in Newfoundland and had not been subpoenaed, but the two youthful complainants were in court and he would be able to start the trial with them. Given the remote location where Const. Smith was now stationed with the RCMP, the Crown Attorney mentioned that he would make an application to have the police officer testify by video link, but he did not know if Defence Counsel would oppose that application.

[52] At that point, court recessed for about twenty five minutes to allow Mr. Howe to consult with Mr. Longaphy. When court resumed, Mr. Howe stated that the defence was only prepared to agree on the date and jurisdiction of the alleged offences. He added that there was no agreement on the identity issue or on the medical evidence, the Crown would be calling the emergency room doctor and that there would probably be a need for a *voir dire* to qualify her as an expert to provide opinion evidence.

[53] Given those developments, the Court asked the clerk to check for possible trial continuation dates before the first witness was called and noted that "it sounds

like we need a day" for the trial continuation. The Court asked the Crown Attorney and Mr. Howe whether that was an accurate assessment and Mr. Howe replied: "I was thinking a half day." The Crown Attorney observed that the amount of time required for the trial continuation would depend upon the number of witnesses heard on October 7, 2015.

[54] Since it had taken a significant amount of time to address those preliminary issues, the Court expressed the view that there was not enough time left in the day to call all of the Crown's evidence. The Court also noted that another day would be needed for the evidence of Const. Smith.

[55] In terms of scheduling a trial continuation date, the Court noted that Mr. Howe's availability for a trial continuation had been limited due to other commitments at that time. In response, Mr. Howe stated that: "now I have slightly better availability" but it depended on the dates offered by the Court. The Court asked Mr. Howe to indicate a series of dates when he was not available, since a large block of time had just opened up in the court and several dates would be available between November 2015 and February, 2016. Mr. Howe advised the Court that he was available the week of November 16, 2015 and December 21, 2015, but January is "a tough month for me and the start of February [2016] was also "tough" but the end of February was "available."

[56] Based on Mr. Howe's availability, the Court offered December 2, 2015 at 1:30 PM as a trial continuation date for a half-day. The Crown Attorney and Defence Counsel confirmed their availability on that date and Dr. McVey also confirmed her availability on that date. Since it had already become obvious that there would not be enough time to complete the Crown's case on October 7, 2015, Dr. McVey was excused as a witness for that day.

[57] Once those preliminary matters were clarified by the Court, the Crown Attorney called his first witness, Mr. Tristan Guibault. However, due to the amount of time that it had taken to resolve those preliminary matters, the Crown Attorney was only able to finish his direct examination of the witness before the court adjourned for the day.

[58] During the afternoon of December 2, 2015, which was a half-day scheduled by the Court for the trial continuation, Mr. Howe conducted and completed a lengthy cross examination of Mr. Tristan Guibault. The cross examination of Mr. Guibault utilized almost all of the time for the trial continuation that afternoon.

[59] Once Mr. Guibault was excused as a witness, the Court noted that there were still two witnesses outside the courtroom – the second youthful complainant, Mr. James Beaver and the emergency room doctor, Dr. McVey. The Crown Attorney also advised the Court that he would be calling Const. Smith and that he was planning to do so by video link. The parties indicated that their direct examination and cross examination of Mr. Beaver would be about the same length as that of Mr. Guibault, so the Court estimated that one-half day of trial time would be needed for his evidence. Mr. Howe agreed with that assessment.

[60] The Court asked the Crown Attorney to estimate the length of his direct examination of Const. Smith and he indicated that "it would not be very long." As for Dr. McVey's testimony, the Crown Attorney estimated that it might require between forty-five to sixty minutes of court time. Mr. Howe stated that he did not anticipate "much of a cross examination for the expert." The Court asked counsel whether they could reach an agreement on accepting the qualifications of Dr. McVey as an expert, but if not, the Court would hold a Mohan *voir dire*. Mr. Howe stated that he "did not think the *voir dire* would be contentious" and the Crown Attorney confirmed that he had already given the appropriate notice to the defence with respect to expert evidence.

[61] At the end of the proceedings on December 2, 2015, the Court also scheduled additional half-days for the trial continuation on June 20, 2016 and on June 28, 2016. Dates had been offered for the trial continuation on March 14 and March 29, 2016, however, the Crown Attorney advised the Court that on March 14, 2016, he would be out of the country on a previously planned vacation during the Spring school break. The Crown Attorney also indicated that he was not available on March 29, 2016 due to other court commitments. As a result, the Court confirmed the two trial continuation dates on June 20, and June 28, 2016.

[62] After the Court confirmed the additional trial time in June 2016 to complete the testimony of the Crown's three remaining witnesses, the Court asked Mr. Howe to indicate, on an upcoming status date, whether he was "strongly contemplating defence evidence." If so, the Court stated that additional trial continuation dates could be scheduled during the January 2016 "status date," rather than waiting until the June 2016 to "lock in" some additional trial time for defence evidence and submissions. Mr. Howe replied: "Yes, Your Honour, that's fine."

[63] Before concluding the proceedings on December 2, 2015, the Court also scheduled a status date on January 22, 2016 to determine the issues of whether

Const. Smith was available and would testify by video link, a Mohan *voir dire* would be required for the Medical Doctor's qualifications or whether the doctor would have to be called at all.

[64] During the January 22, 2016 status date, Mr. Howe confirmed that "we're not going to be contesting the qualifications" of Dr. McVey. With respect to the Crown's application for the police officer to testify by video link, Mr. Howe stated that he had "no opposition" and although it was not ideal, he recognized that there was inconvenience and expense involved. In those circumstances, the Court granted an order for Const. Smith to testify by video link. When asked by the Court if there were any issues to address from the defence side, Mr. Howe advised the Court that he did not have any to raise and he did not ask the Court to schedule any additional trial time for defence evidence.

[65] On June 20, 2016, a third half-day which was scheduled for the hearing of evidence, was utilized for the direct examination and the majority of Mr. Beaver's cross examination by Defence Counsel. At the outset of the proceedings that day, the Crown Attorney confirmed that, on June 28, 2016, he planned to call Const. Smith as a witness by a video link and Dr. McVey, as it was anticipated that Mr. Beaver's testimony would take most, if not all, of the time available on June 20, 2016.

[66] On June 20, 2016, the Court also noted that Mr. Howe was involved in a lengthy hearing before a panel convened by the Nova Scotia Barrister's Society and that he had made an application to subpoena the presiding Judge and several other Judges of the Dartmouth Provincial Court as witnesses in that proceeding. Until the hearing panel rendered its decision on issuing subpoenas to the judges, in addition to the obvious impact of that hearing on Mr. Howe's availability for the scheduling of court dates, there was a possibility that the presiding Judge would have to recuse himself for the trial continuation since Mr. Howe was the solicitor of record. However, the Court confirmed that those Judges had been recently advised that the hearing panel dismissed Mr. Howe's request to issue subpoenas, so recusal was no longer an issue, but the impact on Mr. Howe's availability in court remained a live issue as the Bar Society hearing continued for several days.

[67] Prior to calling Mr. Beaver as a witness, the Court also confirmed that, during the status hearing on January 22, 2016, Mr. Howe had indicated that he did not intend to contest Dr. McVey's qualifications to provide expert opinion evidence. Mr. Howe confirmed his position by advising the Court: "that's correct."

[68] During the afternoon of June 20, 2016, the Crown Attorney's direct examination of Mr. Beaver was completed within an one hour and then Mr. Howe commenced his cross examination around 3:40 PM. After noting that it was past 4:30 PM, Mr. Howe advised the Court that he still had an "fair amount of cross examination." The Court reminded him that the Crown Attorney planned to call Const. Smith and Dr. McVey on June 28, 2016, and asked Mr. Howe whether he could complete his cross examination of Mr. Beaver in the next twenty minutes or so. Mr. Howe said that it would be "hard to gauge" the length of the cross examination given the questions that he wished to ask. He also added that he would "really rather not" continue that afternoon due to other previously planned commitments. Since it was unlikely that Mr. Howe's cross examination of Mr. Beaver would be completed that day, the Court confirmed that it would continue on June 28, 2016.

[69] Prior to adjourning for the day, the Court also advised the parties that a trial scheduled for the morning of June 28, 2016 would probably not be proceeding due to the illness of the Defence Counsel who was a member of Mr. Howe's firm. As a result, the Court confirmed that, if the other trial did proceed on June 28, 2016, Mr. Longaphy's trial continuation would start at 12:30 PM. However, the Court suggested and the parties agreed that Mr. Beaver would be available at 9:30 AM, with Dr. McVey on standby for that morning to ensure that her testimony was concluded prior to 1:30 PM, which was the time previously arranged for the video link evidence of Const. Smith.

[70] On June 28, 2016, which was the fourth day scheduled for trial continuation, Mr. Howe continued his cross examination of Mr. Beaver at about 10:30 AM and concluded about forty-five minutes later. Mr. Howe mentioned that a defence witness from Winnipeg was outside the courtroom and since it was unlikely that the Crown would close its case that day, given the expense involved in bringing that person to Halifax, he would need to make a formal application for a court order to hear the evidence by video link.

[71] In addition, Mr. Howe noted that the Crown still had two witnesses to be called and that he had anticipated that the completion of Mr. Beaver's cross examination would take most of the morning and that he would have the lunch break to prepare for Dr. McVey's evidence. The Court observed that it was approximately 11:20 AM, there was time available before the noon hour break and confirmed that the Crown Attorney had previously disclosed the notes of Dr.

McVey, her curriculum vitae and had issued a notice that they intended to introduce expert evidence.

[72] Mr. Howe stated that he believed there were admissions and previous discussions on the record in terms of the injuries sustained by Mr. Guibault. The Crown Attorney added that he believed that Defence Counsel was not objecting Dr. McVey's qualifications or her level of expertise and Mr. Howe confirmed that his "only contention was how the injuries were caused."

[73] The Court had already indicated that time was available and that the direct examination of Dr. McVey should commence in the morning. However, it was not clear whether Defence Counsel was consenting to the areas of expertise for Dr. McVey to provide opinion evidence or whether there was a need for a Mohan *voir dire* to qualify her as an expert. The Crown Attorney believed that there was an agreement with respect to the qualifications of Dr. McVey and Mr. Howe confirmed that there was no contest with respect to her qualifications to speak about the injuries of Mr. Guibault, but opinions relating to the "cause of the injuries was still contentious." In those circumstances, the Court stated that the parties would have to conduct a Mohan *voir dire* to determine if Dr. McVey would be qualified as an expert in order to provide opinion evidence

[74] Mr. Howe advised the court that he had not "recently" seen the list of the areas for which the Crown Attorney was seeking to qualify Dr. McVey as an expert. The Crown Attorney said that there were three areas and the Court reiterated that if there was no agreement, then a *voir dire* would be required. Mr. Howe stated that the defence was only contesting Dr. McVey's qualifications to provide opinion evidence on the third area requested by the Crown.

[75] Since there was no agreement with respect to whether the medical evidence would be admitted without the necessity of calling Dr. McVey or her qualifications to provide expert opinion evidence, the *voir dire* proceeded. Immediately following the *voir dire*, at about 12:25 PM on June 28, 2016, the Court held that she would be allowed to give opinion evidence on the three areas sought by the Crown Attorney. Since she had already been sworn as a witness, the trial was adjourned until 1:30 PM for the trial evidence of Dr. Jennifer McVey.

[76] During the afternoon of June 28, 2016, the parties conducted the direct examination and cross examination of Dr. McVey. Dr. McVey was excused as a witness around 4:15 PM and at that time, Court noted that a hearing to set further trial dates would probably be necessary. It would be important to know Const.

Smith's availability, since it was not possible to conduct his video link evidence at that time. The Crown Attorney confirmed that Const. Smith would be his last witness and he estimated that the direct examination would take between forty-five to sixty minutes and if the cross examination was of equal length, then the Crown required about two hours of trial time.

[77] Thereafter, Mr. Howe advised the Court that there would be defence evidence and that he planned to apply for some of that evidence to be heard by video link. The Court suggested that it could be arranged following Const. Smith's testimony if one day was scheduled for the trial continuation, however, Defence Counsel stated that he wanted to "set that evidence on its own."

[78] Although no other dates were discussed on the record with respect to the parties' availability, the Court confirmed that a full day had been scheduled for the trial continuation of this matter on December 9, 2016. It was anticipated that, on this fifth day scheduled for the trial continuation, the Crown would close its case after Const. Smith's testimony by video link. Thereafter, Defence Counsel would have the balance of the day to call defence evidence, including the possibility of a witness testifying by video link if a timely application was made by the defence.

[79] Following the comments made by Mr. Howe, the Court questioned whether the defence was asking for one or two days to be scheduled for defence evidence. Mr. Howe did not advise the Court as to the amount of time that he would require for defence evidence, but he indicated that he would be back in court on July 11, 2016 to address these points. However, the Court had not scheduled a status date for this trial for July 11, 2016, Mr. Howe did not advise the Court that he required any additional time for defence evidence and he never made an application for video link evidence to be heard from a defence witness.

[80] On November 3, 2016, approximately one month before the fifth day which was scheduled by the Court for the hearing of trial evidence, the Receiver for the law practice Mr. Lyle Howe, who was appointed by the Nova Scotia Barrister's Society, appeared in court to advise that Mr. Howe had been suspended from practicing law in Nova Scotia for the second time during this trial. Once again, the Receiver advised the Court that Mr. Howe's files would have to be reviewed, before they could be turned over to another lawyer.

[81] Mr. Longaphy was present in court when the Receiver for the Barrister's Society advised the Court that they were taking over all of Mr. Howe's files and that it would take time to review them, before they could be released to another

lawyer. In those circumstances, the Receiver waived any delay caused by the suspension of Mr. Howe as it was recognized that it would take some time for Mr. Longaphy to retain another lawyer. Mr. Longaphy confirmed that he did not wish to have Ms. McCarthy assume conduct of his matter, even though she had previously represented him and he advised the Court that he would be looking for another private lawyer to represent him.

[82] Given the information provided by Mr. Longaphy and the Receiver for the Nova Scotia Barrister's Society, the Court scheduled a fifth full day for the hearing of trial evidence on April 7, 2017. It was anticipated that the video link evidence of Const. Smith would be heard first on that date and the balance of the day would be available for the hearing of defence evidence. The Receiver confirmed that Mr. Longaphy waived the delay between the previously scheduled trial continuation date of December 9, 2016 to April 7, 2017.

[83] However, since it was not clear whether Mr. Longaphy would have a new lawyer retained who would be available and able to proceed with the trial continuation on April 7, 2017, the Court scheduled a status date on January 30, 2017. In addition, since the Receiver had indicated that a new lawyer could not rely upon the notes contained in Mr. Howe's file, the Court ordered transcripts of the trial testimony to reduce Mr. Longaphy's financial burden in order to assist him in making the arrangements to retain a new lawyer.

[84] On January 30, 2017, Mr. Longaphy appeared in court on the status date and he advised the Court that he had approached several lawyers, but he had not been able to retain anyone. He also advised the Court that he expected to receive the transcripts that day. As a result, a further status date was set for March 10, 2017.

[85] On March 10, 2017, Mr. Longaphy advised the Court that he had spoken to ten lawyers, but he had still not found anyone to take on his case. The Court confirmed that the transcripts had been distributed to everybody on or about January 17, 2017.

[86] Based on preliminary conversations with lawyers, Mr. Longaphy advised the Court that he was now considering two applications – one for ineffective or incompetent representation by counsel and the other one being an application for an unreasonable delay in the conduct of the trial, since it had been over five years. Mr. Longaphy said that there was still one Crown witness to be called and that the defence evidence would be comprised of himself and two other defence witnesses.

[87] The Crown Attorney stated that, in his opinion, this is not a particularly complex case and that if Mr. Longaphy was not able to secure counsel, he would be able to represent himself. However, Mr. Longaphy stated that he did not think he would be ready to represent himself on April 7, 2017 and that he would like to bring an application for unreasonable delay before introducing defence evidence. In those circumstances, the Court was not prepared to further adjourn the April 7, 2017 trial continuation date, but realized that it may also become a status date if Mr. Longaphy was not able to retain a new lawyer who was available and able to represent him on that date.

[88] On April 7, 2017, Mr. Hughes confirmed that he had recently been retained and would be the new solicitor of record for Mr. Longaphy. Since it already been arranged for Const. Smith to testify by video link and Defence Counsel stated that he was prepared to conduct the cross-examination of the police officer, Const. Smith's trial evidence was heard by video link. The Crown closed its case following the completion of Const. Smith's testimony.

[89] At that point, Defence Counsel advised the Court that he would be making a section 11(b) **Charter** application that Mr. Longaphy's right to a trial within a reasonable time had been breached and that the remedy being requested would be a stay of proceedings pursuant to section 24(1) of the **Charter**.

[90] The Court then established dates for the filing of briefs by Defence Counsel and the Crown Attorney as well as scheduling a date for their oral submissions on the **Charter** issue.

LEGAL FRAMEWORK:

[91] Section 11(b) of the **Charter** reads as follows:

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

[92] Section 24(1) of the **Charter** reads:

> "Anyone whose rights or freedoms, as guaranteed by this **Charter**, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

[93] On July 8, 2016, in **R. v. Jordan,** *supra***,** the Supreme Court of Canada [hereafter the "SCC"] established a "new framework beyond which delay is presumptively unreasonable." This decision changed the framework analysis of the right to trial within a reasonable time which is enshrined in section 11(b) of the **Charter.** The majority of the SCC observed that the section 11(b) litigation based upon **R. v. Morin,** [1992] 1 SCR 771 had become "too unpredictable, too confusing and too complex" and had become a burden on already overburdened trial courts [**Jordan**, at para. 38].

[94] The majority of the SCC in **Jordan** put forward this new framework to generate "real change" which they acknowledged would require the efforts and coordination of all participants in the criminal justice system to take preventative measures to address inefficient practices and resourcing problems. The very clear expectations of the SCC with respect to the efforts and coordination of all participants in the criminal justice system - Crown Attorneys, Defence Counsel, the Courts, Parliament and the provincial legislatures - were summarized succinctly in **Jordan** at paras. 138-141.

[95] The core concepts for the new framework for section 11(b) **Charter** analysis were described in **Jordan**, supra, at paras. 46-48. The new framework establishes a "presumptive ceiling" beyond which "delay is presumptively unreasonable," however, the majority of the SCC also acknowledged in **Jordan**, at para. 51, that "obviously, reasonableness cannot be captured by a number alone, which is why the new framework is not solely a function of time." The majority of the SCC noted that they have simply adopted "a different view of how reasonableness should be assessed."

[96] The new legal framework for a section 11(b) **Charter** analysis was summarized in **Jordan**, *supra*, at para. 105:

> - **There is a ceiling beyond which delay becomes presumptively unreasonable**. The presumptive ceiling is eighteen (18) months for cases tried in the provincial court, and thirty months (30) for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry. Defence delay does not count towards the presumptive ceiling.
>
> - **Once the presumptive ceiling is exceeded**, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably

unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the cases complexity, the delay is reasonable.

- **Below the presumptive ceiling,** in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.

- **For cases currently in the system,** the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

[97] The **Jordan** framework for a section 11(b) **Charter** analysis may be summarized and described by the following procedural steps:

1. Calculate the "Total Delay" which is the time from when the charge was laid to the actual or anticipated end of the trial;

2. Deduct defence Delay from the Total Delay. The SCC notes that defence Delay may arise from two subcategories: (a) where the defence has waived an accused's section 11(b) **Charter** rights - this waiver may be implicit or explicit, but the defence must have full knowledge of the right and the effect of the waiver; the waiver must be clear and unequivocal; the waiver is for discrete periods of time and not the waiver of this right in its entirety and that the Crown may seek a waiver as a *quid pro quo* to providing consent for a procedural step in the litigation, for example, re-election; and (b) where the Defence conduct directly results in the delay, which can arise from deliberate and calculated tactics employed by the defence to delay the trial (for example, frivolous applications) or for time periods where the Crown and the Court were available, but the defence was unavailable. It is left open to trial judges to determine when defence actions or conduct have caused delay, but the majority of the SCC added that "defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay." **Jordan** at paras 60-65;

3. Determine the Total "Net" Delay which remains after deducting the defence-waived delay **and** defence-caused delay from the Total Delay in the matter;

4. If the Total "Net" Delay **exceeds** the "presumptive ceiling" of eighteen (18) months in the Provincial Court or thirty (30) months in the superior court, then the delay is "presumptively unreasonable" and the burden shifts to the Crown to justify the delay as having been due to "exceptional circumstances;"

5. The Crown has the onus to demonstrate that there were "exceptional circumstances" present in the case which were reasonably unforeseen or reasonably unavoidable, but they need not be rare or entirely uncommon [**Jordan** at para. 69]. The SCC notes that there can be two broad categories of "exceptional circumstances": (a) "discrete and exceptional events" such as medical or family emergencies involving someone in the case or exceptional events that may arise at trial or the trial goes longer than reasonably expected, even where the parties have made a good-faith effort to establish realistic time estimates, then, the delay was likely unavoidable and may amount to an exceptional circumstance [**Jordan** at paras 71 to 73] or (b) particularly complex cases which involved voluminous disclosure, a large number of witnesses, significant expert evidence, charges covering a long period of time, large number of charges, pretrial applications, novel or complicated issues or a large number of issues in dispute [**Jordan** at para. 77];

6. If the Crown has established that there were "exceptional circumstances" which the Crown could not reasonably mitigate or prevent, which caused delay, then that delay is to be deducted from the Total Net Delay;

7. If the Total Net Delay remains below the "presumptive ceiling," the onus or burden shifts to the Defence to show that the delay is unreasonable in those clear cases and, if so, a stay of proceedings "must be entered" [**Jordan** at para. 76]. In addition, where the onus is on the defence, it must establish that it took "meaningful and sustained steps to be tried quickly", that it was cooperative with and responsive to the Crown and the court and put them on notice when delay had become a problem and must conduct all applications reasonably and expeditiously [**Jordan** at paras. 84 to 85];

8. If the Total Net Delay remains above the "presumptive ceiling," because the Crown has not established "exceptional circumstances" justifying the delay, then the delay remains "presumptively unreasonable" and the application must be granted and a stay must be entered.

[98] During their submissions, neither the Crown Attorney nor Defence Counsel submitted that this was a particularly "complex case" as defined by the SCC in **Jordan** or as clarified in their **Cody** decision.

Transitional Exceptional Circumstances for Cases Already in the System:

[99] The SCC points out in **Jordan**, at para. 94 that there are a variety of reasons for applying the new framework "contextually and flexibly for cases currently in the system." They recognized, at paras. 92-94, that this new framework is a departure from the law that was applied to section 11(b) applications in the past and they did not want to create such "swift and drastic consequences" which might risk undermining the integrity of the administration of justice. For those reasons, the majority of the SCC held that the new framework, including the presumptive ceilings, applies to cases currently in the criminal justice system, subject to two qualifications:

1.Transitional exceptional circumstances: Reliance on the Previous Law:

[100] In those cases, where the Crown proves that the time which the case has taken is justified, based upon the parties' reasonable reliance on the pre-**Jordan** law, this reliance will constitute "transitional exceptional circumstance" justifying delay over the presumptive ceiling.

[101] As the SCC pointed out in **Jordan** at para. 96, this requires a contextual assessment, sensitive to the way the previous framework was applied, for example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework and the fact that the parties' behavior cannot be judged strictly, against a standard of which they had no notice.

[102] For cases, currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. The trial judge should consider whether enough time has passed for the parties to "correct their behavior and the system has had some time to adapt" before

determining that the transitional exceptional circumstance exists" [**Jordan** at para. 96].

2. Jurisdictions with Significant Institutional Delay:

[103] A second "transitional exceptional circumstance" is the existence of "significant institutional delay problems" in the jurisdiction in question. The SCC notes that trial judges in jurisdictions plagued by "lengthy, persistent and notorious institutional delays" should account for this reality, as the Crown's behavior is constrained by systemic delay issues. Parliament, the legislatures and Crown counsel need time to respond to the decision and "stays of proceedings cannot be granted *en masse* as they were after the **Askov** decision, simply because problems with institutional delay currently exist." The SCC recognized, with this "transitional exceptional circumstance that change takes time and institutional delay – even if it is significant – will not automatically result in a stay of proceedings." [**Jordan** at para. 97]

Stays Entered When Delay Vastly Exceeds the Presumptive Ceiling:

[104] In **Jordan**, at para. 98, the majority of the SCC stated that if the delay in a simple case "vastly exceeds the ceiling" and the Crown caused the delay, section 11(b) breaches may still be found and stays entered for cases currently in the system, if the delays were due to the "repeated mistakes or missteps by the Crown or the delay was unreasonable even though the parties were operating under the previous framework." This analysis must be contextual and the SCC stated that they relied on the "good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case." [**Jordan** at para. 98]

The Jordan Framework Reiterated in R. v. Cody:

[105] More recently, on June 16, 2017, the SCC released its decision in **R. v. Cody,** 2017 SCC 31, which dealt with another application under section 11(b) of the **Charter**. In that decision, the SCC reiterated all of its key comments from **Jordan** but did expand their comments on certain areas.

[106] In **Cody**, supra, at para. 21, the SCC reiterated what had been said in **Jordan** at para. 60, that is, that the first step in the new framework entails "calculating the total delay from the charge to the actual or anticipated end of the trial."

[107] In terms of deducting the defence delay, the unanimous court confirmed in **Cody**, supra, at para. 28 that, in broad terms, this deduction of delay is concerned with defence conduct and is intended to prevent the defence from benefiting from "its own delay-causing action or inaction" (**Jordan** at para. 113). Therefore, the SCC reiterated, in **Cody** at para. 30 what they had said in **Jordan** at para. 66, that the only deductible defence delay from the total delay is that delay "which (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate in so much as it is not taken to respond to the charges."

[108] Furthermore, in **Cody**, supra, at para. 30, the SCC reiterated their comments made in **Jordan** (at para. 63) that the most straightforward example is "deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests." Similarly, where the Court and the Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted (**Jordan** at para. 64). The SCC made it clear that these were some of the possible examples of defence delay, but this was not an exhaustive list and as they stated in **Jordan** at para. 64, it remains "open to trial judges to find that other defence actions or conduct have caused delay" warranting a deduction.

[109] In addition, in **Cody**, supra, at para. 31, the SCC said that the determination of whether defence conduct is legitimate is not an "exact science" and is something that "first instance judges are uniquely positioned to gauge" (**Jordan** at para. 65). 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 the 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 section 11(b) application if it is designed to delay or if it exhibits marked inefficiency or marked indifference towards delay.

[110] The SCC also noted in **Cody**, at para. 33, that inaction may amount to defence conduct that is not legitimate (**Jordan** at paras. 113 and 121). In addition, illegitimacy may extend to omissions as well as acts [referring to **R v. Dickson**, 1998 Canlii 805 (SCC) which dealt with the Crown's duty to disclose relevant information and Defence Counsel's obligation to pursue disclosure with due diligence].

[111] As a result, the SCC stated, in **Cody** at para. 33, that the accused persons must bear in mind that a corollary of the section 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 advance their clients right to a trial within a reasonable time, collaborate with crown counsel when appropriate and use court time efficiently" (**Jordan** at para. 138).

[112] The SCC stressed in **Cody,** at para. 35, that with respect to a Court's potential ruling of "illegitimate defence conduct" for the purpose of a section 11(b) application, "illegitimacy in this context does not necessarily amount to professional or ethical misconduct on the part of Defence counsel." Instead, legitimacy takes its meaning from the culture change demanded in **Jordan**. All justice system participants – Defence counsel included – must now accept that many practices which were formally commonplace or merely tolerated are no longer compatible with the right guaranteed by section 11(b) of the **Charter**.

[113] It is clear from the SCC's comments in **Cody**, at paras 36-39, that they expected a proactive approach to real change to address the root causes of delay in the criminal justice system. This is a shared responsibility and requires the trial judge to play an important role in curtailing unnecessary delay and "changing courtroom culture" (**Jordan**, at para. 114). Trial judges should use their case management powers to minimize delay by, for example, denying an adjournment request even if it was made by the defence if it would result in an "unacceptably long delay."

[114] A further example of a trial judge's screening function would be in a situation where an application was permitted to proceed, but if applications and requests become apparent that they are frivolous, then they should also be summarily dismissed. In **Cody**, the SCC noted that the defence request for the trial judge to recuse himself was a clear example of a frivolous and illegitimate defence conduct that directly caused delay. It ought to have been summarily dismissed [**Cody** at paras. 41-42].

[115] With respect to the comments of the SCC in **Cody** regarding "exceptional circumstances" and "discrete events," the Supreme Court of Canada reiterated the comments that they had previously made in **Jordan** (at paras 68-71 and 94-98).

[116] In relation to "Discrete Events," the SCC stated, in **Cody** at para. 48, that this is where the exceptional circumstances analysis begins. Discrete events, like deductions for defence delay, result in "quantitative deductions of particular

periods of time." The delay **caused** by discrete exceptional events or circumstances that are reasonably unforeseeable or unavoidable are deducted to the extent they could not reasonably mitigated by the Crown and the justice system (**Jordan** at paras. 73 and 75). An example of a "discrete event" which was appropriately conceded by Mr. Cody was the delay caused by the appointment of his former counsel to the bench.

[117] In dealing with other specific examples of disputed periods of delay in **Cody**, at para. 51-61, the SCC noted that there was a dispute with respect to Defence Counsel's refusal to sign a disclosure undertaking, which took several months to resolve. The SCC noted in **Cody** at para. 52 that, even if this event had been reasonably unforeseeable, it was incumbent upon the Crown to take immediate steps to resolve the dispute. Instead, it took three further court appearances and three and half months of accrued delay which the trial judge had attributed to the Crown. The SCC deferred to the trial judge's finding and the conclusion that the Crown had not met the second prong in establishing an exceptional circumstance, since they did not remedy the delays emanating from those circumstances once they arose.

[118] In terms of a new **McNeil** disclosure obligation which arose on the eve of the defence **Charter** application to exclude evidence, the SCC in **Cody**, at para. 54, agreed with the Crown that the emergence of the new disclosure obligation qualified as a discrete event and that they would deduct a portion of the delay that followed. It was reasonably unavoidable and unforeseeable and the Crown acted responsibly in making prompt disclosure, following up as the matter proceeded and seeking the next earliest available dates. While the SCC stated that the Crown may have been able to take additional steps rather than relying on the officer's evidence or tendering it through an agreed statement of facts, the requirement is that of reasonableness, not that the Crown exhaust every conceivable option of addressing the event in question to satisfy the reasonable diligence requirement.

[119] However, the SCC concluded that they would not deduct the entire five months for the event, since it took two months for the Crown and defence to determine how to proceed, but the court was unable to accommodate them until three months later. Therefore, that portion of delay was a product of systemic limitations in the court system and not of the discrete event (**Cody** at para. 55 and **Jordan** at para. 81). However, one month of delay was caused by Defence counsel's unavailability (**Jordan** at para. 64) and not by the preparation time

necessary to respond to the charges, and therefore that delay should also be deducted (**Jordan** at para. 65).

[120] Finally, in **Cody** there was a dispute with respect to an error in the Agreed Statement of Facts which essentially resulted in a delay of slightly over eight months. The SCC stated in **Cody**, at para. 58 that, in principle, an inadvertent oversight may well qualify as a discrete event. "The first prong of the test for exceptional circumstances requires only that event at issue be **reasonably** unforeseeable or **reasonably** unavoidable" [emphasis in original text]. It does not impose a standard of perfection upon the Crown. As the SCC noted in **Jordan**, at para. 73, "trials are not well oiled machines" and mistakes happen. They are "an inevitable reality" of a human criminal justice system and can lead to exceptional and reasonably unavoidable delay that should be deducted for the purpose of section 11(b).

[121] The question then focused on the second prong of the test of exceptional circumstances, that is, whether the Crown took reasonable steps to remediate the error and minimize delay. The Crown "is not required to show that the steps it took were ultimately successful – just that it took reasonable steps in an attempt to avoid the delay" (**Jordan** at para. 70). In **Cody**, the Crown acted promptly after the error was discovered, notified defence counsel and the Court and argued that the error was immaterial. The SCC expected that an issue of this nature should have been resolved in short order and if necessary brought to the attention of the trial judge on an application for summary dismissal. Based upon the record, the SCC, was unable to conclude that the exceptional circumstances criteria were met in this case.

[122] In **Cody**, supra, at para. 63-66 the SCC provided some further comments to clarify what might be considered to be a "particularly complex case." They note that case complexity requires a qualitative, not quantitative assessment and that complexity is an exceptional circumstance only where the case as a whole is particularly complex. Complexity cannot be used to deduct specific periods of delay, however, if the net delay still exceeds the presumptive ceiling, the case's complexity as a whole may be relied upon to justify the time that the case has taken and rebut the presumption that the delay was unreasonable. A particularly complex case is one that because of the nature of the evidence or the nature of the issues requires an inordinate amount of trial or preparation time. This is a determination that falls within the expertise of a trial judge (**Cody** at para. 64 and **Jordan** at paras. 79-80).

[123] Finally, with respect to the "Transitional Exceptional Circumstance" for cases that were already in the system when the **Jordan** decision was released, the SCC reiterated that this exceptional circumstance involves a "qualitative" analysis. In terms of the "reasonable reliance on the law as presently existed" stated in **Jordan** at para. 96, the SCC stated that the Crown may show that it cannot be faulted for failing to take further steps, because it would have understood the delay to be reasonable given its exceptions prior to **Jordan** and the way delay and other factors such as the seriousness of the offence and prejudice would have been assessed under **Morin** (**Cody** at para. 68).

[124] The SCC stated that "it is presumed" that the Crown and defence relied on the previous law until **Jordan** was released and that the evaluation must be undertaken contextually with a sensitivity to the manner in which the previous framework was applied – prejudice and seriousness of the offence often played a decisive role in whether delay was unreasonable and some jurisdictions were plagued with significant and notorious institutional delays (**Cody** at para. 69 and **Jordan** at paras. 96 and 98).

[125] When considering the transitional exceptional circumstance, trial judges should be mindful of what portion of the proceedings took place before or after **Jordan** was released. For aspects of the case that pre-dated **Jordan**, the focus should be on reliance on factors that were relevant under the **Morin** framework. For delay that accrues after **Jordan** was released, the focus should instead be on the extent to which the parties and the courts had sufficient time to adapt (**Cody** at para. 71 and **Jordan** at para. 96).

ANALYSIS

[126] The first step in the **Jordan** framework for a section 11(b) **Charter** analysis is to establish the total delay. In **Jordan**, at para. 47, the majority of the SCC stated that the calculation of the "total delay" is from the date of the charge to the actual or anticipated end of the trial, minus defence delay. During their oral submissions, the Crown Attorney and Defence Counsel agreed that the information was sworn on February 22, 2012 and that the actual or anticipated end of the trial would have been April 7, 2017. Therefore, as a starting point for the **Jordan** framework analysis, I find that the "total delay" is approximately sixty-one and a half (61 ½) months.

Deduction of Defence Delay from the Total Delay:

February 22, 2012 to April 18, 2012:

[127] In this case, the incident which resulted in charges being laid against Mr. Longaphy occurred on January 20, 2012, however, the Information was not sworn until February 22, 2012. On February 23, 2012, Mr. Longaphy was served with a summons to appear in Dartmouth Provincial Court on April 18, 2012 for arraignment on the three charges contained in the "original" Information. I find that this period of time, for the purposes of the **Jordan** calculation of total delay, gave Mr. Longaphy, at a minimum, two months and possibly as much as three months to retain counsel, since the incident which brought him before the court is alleged to have occurred on January 20, 2012.

[128] I find that there is no defence delay during this period of time, as it provided Mr. Longaphy with a reasonable amount of time to retain counsel, meet with counsel to obtain advice and provide instructions to counsel.

April 18, 2012 to June 25, 2012:

[129] Mr. Longaphy made his first appearance in court on April 18, 2012 with the assistance of the Legal Aid Duty Counsel. The Duty Counsel advised the Court that Mr. Longaphy was planning to retain private counsel and asked for an adjournment of 2 "rotations" of the Court's intake weeks to do so. Mr. Longaphy indicated that he thought that would provide sufficient time to hire a lawyer.

[130] When the Duty Counsel referred to "rotations" of the court, it should be noted here that each of the five courtrooms located at Dartmouth Provincial Court dedicate one week in turn for "Intake" matters. During that "Intake" week, numerous new matters are before the court for first appearance and arraignment, the scheduling of trials or sentencing hearings for cases which first appeared in that courtroom, applications to vary conditions of court orders and dealing with consent interim releases or contested bail applications of accused persons who are in custody and sentencing hearings or decisions. In the Dartmouth Provincial Court, each courtroom will have a minimum of ten intake weeks during the year, during which all court time is dedicated to those intake matters. Obviously, the volume of intake matters in the Dartmouth Provincial Court affects the amount of trial time available during the calendar year.

[131] Mr. Longaphy could have been provided with an appearance during the next intake rotation which would have been during the third week of May, 2012, but at his request, that was extended to the last week of June, 2012. I find that this period

of ten weeks or two and a half months was accorded at the request of Mr. Longaphy by the Duty Counsel to provide more time to retain counsel. In those circumstances, I find this to be an implicit waiver by the defence of that two and a half (2.5) month period of time.

June 25, 2012 to July 30, 2012:

[132] On June 25, 2012, Mr. Lyle Howe appeared with Mr. Longaphy for the first time, when this matter was scheduled for plea, as the Crown had previously indicated that they were proceeding summarily on the charges. Mr. Howe advised the Court that he was appearing with Mr. Longaphy for "today only" and he stated that he had not been formally retained, so he requested an adjournment of the plea to confirm the retainer and review the disclosure information. Mr. Howe advised the court that he had written a letter to the Crown to obtain disclosure.

[133] I find that this further adjournment of a month and a quarter (1.5) to the next intake period at the end of July, 2012, was primarily an implied waiver by the defence to confirm Mr. Howe's retainer that he would be the solicitor of record. Given the fact that that it has been agreed by all counsel involved in this case that it is not one that is particularly complex, I find that it would not be very complicated to review the disclosure in short order. For those reasons, I find that this a month and a quarter (1.25) is to be considered as an implied waiver of delay which was occasioned by the defence.

July 30, 2012 to September 7, 2012:

[134] On July 30, 2012, Mr. Howe appeared with Mr. Longaphy, but he did not confirm that he had been retained to be the solicitor of record, nor did he indicate that he was present for "today only." Mr. Howe advised the Court that there "may be outstanding disclosure" and that he wanted to discuss that issue with the Crown Attorney. Mr. Howe therefore requested that the plea in this matter be adjourned to the next rotation on September 7, 2012.

[135] In considering this adjournment request, I find that it is appropriate to take into account that none of the Crown Attorneys involved in this file nor any of the Defence counsel who have represented Mr. Longaphy have considered this to be a "particularly complex" case. Mr. Longaphy had obviously met with Mr. Howe some time before late June 2012 and one would reasonably assume that Mr. Howe would have had additional opportunities to meet with Mr. Longaphy after that and

provide an opinion and enter a plea, based upon those meetings and the disclosure in his possession.

[136] In those circumstances, I find that the defence request to adjourn Mr. Longaphy's plea from July 30, 2012 to September 7, 2012 was an implied waiver of the one and a quarter (1.25) months of delay occasioned by that defence request.

September 7, 2012 to June 26, 2013:

[137] On September 7, 2012, Mr. Howe confirmed that he was solicitor of record and entered a not guilty plea on behalf of Mr. Longaphy. Counsel estimated that the time required for the trial would be two hours and the Court confirmed that the trial would be held on June 26, 2013. There was no request made by Mr. Howe that he wished to have the earliest possible trial date set for this matter and, of course, Mr. Longaphy was not held in custody, nor was he subject to any restrictive bail conditions. The Crown Attorney indicated that that the date was acceptable and Mr. Howe stated that the date was "fine with defence." As a result, there was simply no discussion of any earlier or alternate dates being offered to the parties, on the record.

[138] It should be noted that, at the time when this trial date was confirmed, which was just slightly under four years before the **Jordan** decision was released by the SCC, there was generally no discussion on the record of any other dates which were offered to the parties by the clerks of the court. Certainly, the Court was well aware of the fact that many of the Crown Attorneys and Defence Counsel who regularly appeared in the Dartmouth Provincial Court had many other trial commitments and that it would be reasonable to conclude that they would be aware of their schedule and not double book themselves so that they would be required to be in two different places at the same time. For both of those reasons, I have no doubt that other dates were discussed with counsel off the record. However, the only date confirmed, on the record, was that the trial would be held on June 26, 2013 and that counsel had estimated the time required for the trial was two hours.

[139] It should also be noted that, at the time this matter was set down for trial, it was quite commonplace in the Dartmouth Provincial Court to have trials of a half-day or a day scheduled like this one – being nine and half to approximately twelve months later, due to the volume of cases in the court and the fact that two and half months of the year were taken up dealing with the intake matters referred to previously in this decision. Those institutional delays in scheduling in the

Dartmouth Provincial Court were noted in **R. v. McCully**, 2016 NSPC 70 at paras 90-92.

[140] Since in the **Jordan** decision, the Court has adjusted its practice and now, all of the dates offered before a trial date are confirmed by both sides and any waivers of delay are clearly expressed on the record. While the defence is not assumed to be perpetually available, I also find that there is a practical reality that Defence Counsel have other clients and trials, need time for trial preparation, writing legal briefs and facta, office and personal commitments. Given that reality and the fact that, at the time that this matter was set down for trial, this was a jurisdiction in which there were "lengthy, persistent and notorious institutional delays," it was not uncommon to have a trial date scheduled for several months later. However, since the **Jordan** decision was released in July 2016, this Court and the parties have taken other significant steps through numerous initiatives to reduce that delay.

[141] On April 10, 2013, Mr. Howe forwarded a fax to the Dartmouth Provincial Court administration which noted that the **R. v. Christopher Longaphy** adjournment request was "very urgent." In his attached letter dated April 10, 2013, Mr. Howe stated that this is "very time sensitive issue" to adjourn the trial. In his letter, Mr. Howe asked the court to docket his request to adjourn the trial on April 16, 2013 at 1:30 PM. The court scheduled Mr. Howe's application to adjourn the trial on the date and time which were specifically requested by Mr. Howe.

[142] On April 16, 2013, when the matter was called by the Court on two occasions [shortly after 1:30 PM and again shortly after 4 PM] that afternoon, neither Mr. Howe or anyone from his office had attended to speak to his motion, nor was there any communication from his office that he would be unable to attend. Since there was no one present to address the reason for the adjournment request, the Court concluded that no action would be taken on Mr. Howe's motion and that the trial date stood as previously scheduled.

[143] I find that it is apparent from Mr. Howe's fax coversheet and letter dated April 10, 2013 that, at least two months before the date for the trial, Mr. Howe had some unspecified conflict in his schedule which meant he would not available to conduct the trial on June 26, 2013. Therefore, although Mr. Howe had confirmed on September 7, 2012 that the June 26, 2013 trial date was "fine with defence," it is apparent something had changed in the interim, since Mr. Howe was stating that this was an "urgent" request to adjourn the trial.

[144] Moreover, despite the fact that Mr. Howe had noted that this was a "very urgent" matter on the fax coversheet and that it was "a very time sensitive issue" in his letter to the court, neither Mr. Howe nor anyone from his office attended court to speak to the motion on April 16, 2013. Since the application had been scheduled at Mr. Howe's request an no one had attended to speak to the motion, the Court confirmed that the trial date stood.

[145] I find this "discrete event" of Mr. Howe's failure to appear on April 16, 2013 to request an adjournment of the trial for some unspecified reason and the fact that a request to adjourn the Longaphy trial was only made by Ms. McCarthy of the Howe Law office on June 20, 2013, had a significant impact on the subsequent timelines for this trial. First, if the adjournment had been granted on April 16, 2013, a new trial date would have been obtained at that time and, in all likelihood, that trial date would have been well before Mr. Howe was suspended by the Nova Scotia Barrister's Society on a personal matter [which was ultimately overturned]. Secondly, if that personal matter had dates scheduled around the same time as the Longaphy trial date, the file could have been transferred to another lawyer who would have had ample time to prepare for a trial that neither side had considered to be "complex." It is important to remember that the total estimated time for this trial was two hours!

[146] Since Mr. Howe's application to adjourn the trial was not pursued by him on April 16, 2013 or for the next two months, the defence request to adjourn the trial was made by Ms. McCarthy on June 20, 2013, which was only six days before the scheduled trial date. During the application to adjourn the Longaphy trial on June 20, 2013, Ms. McCarthy advised the Court that Mr. Howe had a conflict in his schedule for the trial date and that she was not available to take over the trial on that date. In other words, for some unknown reason, Mr. Howe was no longer available to conduct the trial and Ms. McCarthy could not assume conduct because she had other commitments.

[147] The Crown Attorney did not object to the defence request to adjourn the trial and added that she had just been made aware of some medical information with respect to the severity of the injuries sustained by one of the complainants. The Crown Attorney stated that, in all likelihood, there would be an additional charge laid of assault causing bodily harm and added that it may take some time to get this medical information, since she required the consent of the complainant to release the medical records from the hospital. For that reason, the Crown Attorney said that she "joined" Ms. McCarthy in making the request to adjourn the trial.

[148] With respect to the estimated length of the trial, the parties recognized that there may be an additional witness required for trial after the medical information was disclosed to the defence, and, for that reason, they advised the Court that they were now seeking a half day for trial. The new trial date of June 9, 2014 was confirmed according to Ms. McCarthy's schedule and although the Court stated that the adjournment was "attributed as a joint request," Ms. McCarthy said that the defence "consented" to that new date.

[149] Once again, when the Court granted the adjournment request, no dates were discussed on the record to indicate when the court had available time and the Crown was available with its witnesses, but Defence Counsel was not available. It bears repeating here that this adjournment of the trial and the scheduling of a second date for the commencement of the trial occurred over three years before the SCC's **Jordan** decision.

[150] Notwithstanding the Court's indication for the purposes of the **Morin** framework analysis for section 11(b) **Charter** applications that this was a "joint" request, I find that, in reality, the predominant reason for adjourning the first scheduled date for trial on June 20, 2013, was due to the fact that Mr. Howe had known since mid-April, 2013 that he had a conflict and he would not be able to conduct the **Longaphy** trial on June 26, 2013. Furthermore, I find that it is also clear from the record that when Ms. McCarthy made this adjournment request only 6 days before the scheduled trial date, she would not be able to assume conduct of the trial on short notice due to a pre-existing commitment in her schedule.

[151] Since it was clear that neither Mr. Howe nor Ms. McCarthy were available to conduct this trial on June 26, 2013, I find that it would be speculative to consider what position the Crown Attorney might have advanced on the trial date if a defence counsel was present, without the evidence of the doctor and the medical records, assuming of course, that all of the other witnesses would have been present on June 26, 2013.

[152] After having carefully considered the facts and circumstances surrounding the adjournment of the first scheduled date of June 26, 2013, in particular, the fact that Mr. Howe did not attend on his own application to adjourn the trial on April 16, 2013 and Ms. McCarthy requested an adjournment on his behalf on June 20, 2013, six days before the trial because no Defence Counsel was available, there was simply no way for the Court or the Crown to react and make any productive use of that previously scheduled trial date. Since Ms. McCarthy confirmed that

neither she nor Mr. Howe were available to act as the trial counsel on June 26, 2013, I find that the entire period of delay occasioned when the first trial date was adjourned was lost as a direct result of the defence conduct.

[153] Moreover, I have made that finding, notwithstanding the fact that the Crown Attorney had "joined" in the adjournment request, based upon the recent discovery of medical evidence, which eventually lead to an additional charge of assault causing bodily harm. However, that additional disclosure could have been provided as the trial proceeded given the point in time when the Crown Attorney was informed that the medical information existed. In addition, if that medical information was disclosed to the Defence Counsel well before a trial continuation date or the second date for the start of the trial, I doubt that the medical information would have had any significant impact on the defence theory of the case. If anything, while adding a serious charge, I find that the real impact of the recent discovery of medical evidence, was the slight lengthening of the estimated time required for trial.

[154] I find that the first scheduled trial date of June 26, 2013 was totally lost due to Mr. Howe originally confirming that he was available on that date, not proceeding on his application to adjourn the trial which was scheduled on April 16, 2013 and then Ms. McCarthy's request to adjourn the trial only six days before the scheduled trial date due to the unavailability of Mr. Howe and the fact that she could not pick up the file on short notice due to other commitments. I find the entire period was lost due to the defence conduct and I am not prepared to apportion a part of that delay to the Crown for the reasons outlined above.

[155] In those circumstances, I find that the entire period of time between September 7, 2012 and June 26, 2013, which is approximately nine and three quarter (9.75) months, is to be deducted from the total delay.

June 26, 2013 to June 9, 2014:

[156] When the trial was adjourned on June 20, 2013, given the medical information to be disclosed and the likelihood of an additional charge, the Crown Attorney and Defence Counsel estimated that the trial would require one half day of court time. The second date for the start of the trial space was scheduled for June 9, 2014.

[157] The Court scheduled status dates on August 20, 2013 and October 28, 2013 to receive updates on the medical disclosure issue and the "replacement"

Information. Since neither of those events had occurred by October 28, 2013, the Court scheduled a further status date on December 3, 2013 to ensure that the disclosure would not have any impact on the upcoming trial date.

[158] During the third status date on December 3, 2013, the Crown Attorney confirmed that the medical information had been obtained and disclosed to Defence Counsel. The Crown Attorney also said that a "replacement" Information had been laid on November 13, 2013, which added a fourth charge which alleged Mr. Longaphy had assaulted Tristan Guibault and had caused bodily harm contrary to section 267(b) of the **Criminal Code**.

[159] The Crown Attorney advised the Court that she would be proceeding by Indictment on this "replacement" Information, since the new charge was added over 18 months after the date of the incident in question. She did, however, indicate that she would be prepared to proceed summarily with Defence Counsel's consent. Ms. McCarthy who appeared for Mr. Longaphy, consented to the Crown proceeding summarily and confirmed that Mr. Howe would be the trial counsel.

[160] After the Crown Attorney advised the Court that the medical information was disclosed and the "replacement" Information contained an additional charge, the Court questioned whether those developments changed the time estimate for trial. Counsel advised the Court that the new developments did not change their estimate of the time required for trial. The Crown Attorney confirmed that the trial would proceed on the "replacement" Information and Ms. McCarthy confirmed that Mr. Howe was available to conduct the trial on June 9, 2014.

[161] However, on the second date scheduled for the start of the trial [June 9, 2014], Mr. Howe was not present. Instead, a lawyer representing the Receiver for the Nova Scotia Barrister's Society informed the Court that Mr. Howe had recently been suspended from the practice of law in Nova Scotia. Mr. Longaphy was in court when the lawyer for the Receiver requested an adjournment of the trial to allow Mr. Longaphy some time to retain legal counsel for this matter. The Receiver confirmed that he was not able to represent Mr. Longaphy.

[162] The Crown Attorney advised the Court that she was not opposed to the Receiver's application on behalf of Mr. Longaphy to adjourn the trial, which would provide reasonable time for him to retain another lawyer. In addition, the Crown Attorney confirmed that the two youthful complainants and the police officer were present in court and the Medical Doctor was on standby waiting for a call from the Crown Attorney to attend court.

[163] Since the second date for the start of the trial had to be adjourned due to the recent suspension of Lyle Howe from the practice of law in Nova Scotia, I find that the Receiver's request to adjourn the trial was made on behalf of Mr. Longaphy and as such, it was a specific and explicit waiver of the delay. There can be no doubt that this second half day scheduled for trial had been completely lost due to Mr. Howe's recent suspension. As a result, I find that the Receiver's request to adjourn the trial amounts to an explicit waiver of delay on behalf of Mr. Longaphy, since it was apparent to the Court that Mr. Longaphy wished to be represented by counsel and because of Mr. Howe's suspension, he was not available or able to conduct the trial.

[164] In addition, I find that there can be no doubt that Mr. Howe's suspension just days before the trial date could also be regarded as a "discrete and exceptional event" under the **Jordan** framework analysis. As such, I find that it is important to consider the impact of his suspension at this point in the **Jordan** framework analysis, given the fact that the Receiver had to collect and review Mr. Howe's file material and that it would take some time for Mr. Longaphy to make arrangements to retain another lawyer to represent him.

[165] In those circumstances, I find that this entire eleven and a half (11.5) month period between June 26, 2013 and June 9, 2014, which was time between the first and second dates scheduled for the start of the trial was completely lost and not able to be utilized to conduct this trial, due to Mr. Howe's suspension from the practice of law, just days before the June 9, 2014 trial date.

[166] On June 9, 2014, the Crown Attorney confirmed that all Crown witnesses were present and were available to testify that day if the trial had proceeded. There was no indication on the record whether the proposed defence witnesses were present on that second scheduled trial date.

[167] Therefore, I find that this eleven and a half month (11.5) period of time should be deducted from the "total delay" in order to calculate the "total net delay" in this matter.

June 9, 2014 to August 6, 2014:

[168] Given the fact that Mr. Howe had been suspended from the practice of law in Nova Scotia, the limited nature of the Receiver's role in temporarily assuming conduct of his files to reassign them and the fact that Mr. Longaphy wished to be

represented by counsel, the Court scheduled August 6, 2014 as a hearing to set a trial date.

[169] The primary reason, of course, for this two-month delay was the suspension of Mr. Howe and Mr. Longaphy's request to retain another lawyer. In those circumstances, although there was no specific waiver of this period of time by either the lawyer representing the Receiver or Mr. Longaphy, I find that this two-month delay was requested by Mr. Longaphy and as such, I find that it was an implied waiver of any delay to locate a new counsel.

[170] Therefore, I find that this two (2) month period of time should be deducted from the "total delay" in order to calculate the "total net delay" in this matter.

August 6, 2014 to September 3, 2015:

[171] On the August 6, 2014 hearing to set a trial date, Ms. McCarthy appeared for Mr. Longaphy and indicated that she had taken over the Mr. Longaphy's file. The parties confirmed that the half-day estimate for the trial was still accurate. Bearing in mind that this hearing to set a trial date was about eleven (11) months before the **Jordan** decision, it is noted that Defence Counsel did not ask for the earliest dates available for trial on the record and no earlier dates for the trial were discussed on the record between the Court and counsel. However, given the fact that only one date was mentioned on the record, I find that the Crown Attorney and Defence Counsel had obviously met with the clerks of the court and both counsel agreed upon the one-half day trial date. As a result, September 3, 2015 was the only date mentioned and confirmed as the third scheduled date for the start of the trial.

[172] On August 6, 2014, the Court asked whether a pretrial conference would be of assistance, however, the parties advised the Court that there did not appear to be a need at that time. Ms. McCarthy indicated that there might be a potential need to make an application for a defence witness to testify by video link, but added the trial date was "a long ways away" and she would address that issue when it got a little closer the trial. I find that these comments were another indication by the Crown and Defence Counsel, now Ms. McCarthy, that they did not believe that this was a "complex" file which required the Court to discuss the key issues in the trial with counsel, whether there was a possibility of narrowing issues or whether more time would be required for trial. The parties had, once again, confirmed that only one-half day of trial time was required to hear the evidence of the two

complainants, the investigating police officer, a Medical Doctor and as many as three defence witnesses.

[173] In setting the September 3, 2015 trial date, the Court was well aware of the fact that, prior to his suspension from the practice of law in Nova Scotia, Mr. Howe had a very busy criminal defence practice, regularly representing people in the Halifax Regional Municipality and elsewhere around the province. While the Court is not aware of the number of Mr. Howe's files which were assumed by Ms. McCarthy of the Howe Law office when she assumed conduct of Mr. Longaphy's file, I find that it is reasonable to infer that this sudden assumption of an unspecified number of files on top of her already busy schedule, presented very significant scheduling difficulties in the short and medium term. The SCC in **Jordan** as stated that Defence Counsel are not expected to be perpetually available, but by the same token, the Court could not expect Ms. McCarthy to double book herself on the dates when she had other matters previously scheduled in order to accommodate the earliest possible dates for Mr. Longaphy's trial.

[174] At the same time, I find that it is unusual that the only date that the court clerks would have offered a one-half day trial would have been thirteen months away. As indicated previously, dates for half-day or one-day trials were being set during this time period on a fairly regular basis in the nine to twelve month time frame. In addition, as was the practice at that time, I find that there was no discussion of dates offered for trial on the record, nor any indication that Defence Counsel sought the earliest available date for trial. In those circumstances, I find that it is reasonable to conclude that Defence Counsel impliedly waived at least a portion of this delay due to her busy schedule in representing her own clients and then attempting to schedule her assumption of Mr. Longaphy's trial into the Court's availability for half day trials.

[175] Therefore, I am prepared to apportion most of the delay to the institutional delays which were present when the third date was scheduled for the start of this trial. However, I find that given all of the factors which have been outlined in the preceding paragraphs, I find that four months of this total delay should be apportioned to the defence and that period of time was implicitly waived by Defence Counsel in order to secure a trial date when Ms. McCarthy, the Court and the Crown Attorney were all available to conduct the trial.

[176] As a result, I find that a four (4) month period of time should be apportioned to the defence and deducted from the total delay of thirteen months to reflect the

fact that I find that it was highly unlikely that Ms. McCarthy had available dates in the short and medium term. In addition, I find that this new trial date was secured outside the normal range that was regularly offered in the Dartmouth Provincial Court at that time and that it is reasonable to infer that a portion of that time was attributable to delay caused by the Defence Counsel not being available when the Court and the Crown were available. Therefore, I am prepared to deduct those four (4) months from the "total delay" in order to calculate the "total net delay" in this matter.

September 3, 2015 to October 7, 2015:

[177] On September 3, 2015, which was the third date scheduled to start the trial, the Crown Attorney, Ms. Quigley, advised the Court that the Crown had "little dilemma" as she only learned the previous day that an out of province subpoena had not been served on the investigating police officer. The Crown Attorney indicated that the police officer was a "very material" witness, but added that the two complainants were present in court.

[178] The Crown Attorney also stated that, with respect to the evidence of the Doctor McVey, she believed that Defence Counsel [Ms. Laura McCarthy] had consented to the fact that the medical doctor would not have to testify. The Crown Attorney advised the Court that it was her "preference" to call Const. Smith, first as she believed that his evidence would have an impact on the questions that would probably be asked of the two complainants. However, the Crown Attorney also said that she was prepared to proceed that day with the witnesses who were present in court.

[179] Defence Counsel stated that she had spoken with Mr. Longaphy and he wished to have the matter dealt with that day, but he was also concerned that it would probably not finish that day. Ms. McCarthy added that the defence had one witness present, but would likely not be able to call that person because the Crown would not be completing its case that day, due to the absence of Const. Smith.

[180] The Court reminded counsel that their estimated time required for the trial was one-half day. The Court added that, given the number of witnesses, it would appear that "the half-day [scheduled for trial] probably was an underestimate" based upon the information now being related to the Court.

[181] Since the Crown Attorney had stated that it was not her preference to start the trial by first calling one of the civilian witnesses, the Court offered the parties

the alternative of starting early that afternoon or grant a short adjournment and to start the trial on September 18th or September 24, 2015. Ms. McCarthy said that she was not available on either of those half days offered by the Court, but was available on the third half-day offered by the Court, on October 7, 2015. Ms. McCarthy indicated that she had another matter in court on the morning of October 7, 2015, but added that she was "not sure that a full day is necessary" for this trial.

[182] In addition, the Crown Attorney said that she would talk to the Defence Counsel in order to try and reach an agreement to reduce some of the trial issues as well as the necessity of medical evidence relating to the extent of the injuries suffered by Mr. Guibault. Ms. McCarthy noted that if the trial started on time, she believed that the time estimate would be "fine." She also indicated that a number of admissions could be made and that the defence would not be contesting the jurisdiction or Mr. Longaphy's identity, and that the trial issues come down to the Court's evaluation of the events.

[183] The Court noted that the request for a short adjournment was "not ideal" given the "long history" of this matter, but there was now the possibility of a few agreements to narrow the factual issues to focus on the legal issues. In the final analysis, the Court granted the Crown's request to adjourn the trial for a short period of time and the fourth date to commence this trial was set for October 7, 2015 at 1:30 PM. The Crown Attorney asked the Court to direct the two civilian witnesses to return to court on October 7, 2015. No defence witnesses were directed to come back on the new date scheduled for trial.

[184] In addition, the Court asked the parties about the possible agreement relating to the evidence of the medical doctor. The Crown Attorney advised the Court that she would write to Defence Counsel, but she believed that Defence Counsel had already indicated an agreement. Prior to concluding for the day, the Court advised the Crown Attorney that if there was no agreement with respect to the medical evidence, then the expectation of the Court was that the Doctor would be present.

[185] As a result of this short adjournment request, the Court and the Crown were available and ready to proceed on September 18, 2015 or also on September 24, 2015. Defence Counsel advised the Court that she was not available on those two dates, but was available on October 7, 2015, which was the fourth scheduled date for the commencement of this trial. In those circumstances, I find that there is no defence delay for the first two weeks of this adjournment, but I find that there was

defence delay for the next three weeks to be scheduled trial date of October 7, 2015.

[186] In these circumstances, I find that three weeks of delay or 0.75 month should be deducted as defence delay from the "total delay" in order to calculate the "total net delay" in this matter.

October 7, 2015 to December 2, 2015:

[187] In early September, 2015, the Nova Scotia Barrister's Society lifted the suspension of Mr. Howe from practicing law in Nova Scotia. Although Ms. McCarthy had appeared as solicitor of record, on the September 3, 2015 trial date, when the trial actually commenced on October 7, 2015, Ms. McCarthy was not present. Mr. Howe was present and stated that he now had Mr. Longaphy's file and would "be stepping on the record" at the request of Mr. Longaphy. Mr. Howe confirmed that he was "ready to go" and would be the solicitor of record.

[188] When the Court raised the issue of whether the Crown Attorney or Defence Counsel had any preliminary motions to make, the Crown Attorney stated that, on the previous trial date, Ms. McCarthy had agreed to the medical evidence being entered, that the defence was not contesting the issue of identification or the jurisdiction and he asked whether those agreements transferred over to Mr. Howe.

[189] The Court also stated that on September 3, 2015, the Crown Attorney and Ms. McCarthy had talked about issues that could be agreed and the possibility that Const. Smith would testify by video link. The Court asked Mr. Howe whether he had any instructions from Ms. McCarthy regarding any agreements with the Crown Attorney. Mr. Howe told the court: "no, Ms. McCarthy did not leave me any notes related to agreements." He added that he preferred to hear the two civilian witnesses and then he would talk to the Crown regarding the necessity of calling Doctor McVey for medical evidence or expert opinion evidence.

[190] At that point, the Crown Attorney confirmed that his colleague, Ms. Quigley, had sent a letter to Defence Counsel dated September 3, 2015 in which she indicated "I confirm we have an agreement on the following facts to expedite the trial process." Following that statement by the Crown Attorney, Mr. Howe asked the Court to grant a short recess so he could consult with Mr. Longaphy.

[191] In addition, the Crown Attorney stated that given the brief adjournment between the scheduled trial dates, Const. Smith was still in Newfoundland and the

out of province subpoena had still not been served on him. However, the Crown Attorney raised the possibility of Const. Smith would testify by video link and he wanted to know whether that request would be opposed by Defence Counsel. The court then recessed at 2:20 PM on October 7, 2015.

[192] When court resumed at 2:44 PM, Mr. Howe advised the Court that the defence agreed that there was no issue with respect to establishing the date or the jurisdiction of the offences alleged in the Information. However, the defence was not agreeing on the issue of identity and they expected the Crown to call the emergency room medical doctor. Mr. Howe added that he would be requesting a *voir dire* to determine whether the Dr. McVey would be qualified to provide expert opinion evidence.

[193] Based upon the position adopted by Mr. Howe on October 7, 2015, prior to the Crown Attorney calling his first witness, the Court stated that it "sounds like we need a day" to continue the trial and asked the Crown Attorney and Mr. Howe whether that was an accurate assessment. Mr. Howe stated that he "was thinking a half a day" was all that was necessary and the Crown Attorney stated that the time required to continue the trial depended on the number of people who were heard that day. Crown Attorney added that he had the two complainants in court as well as Dr. McVey. There was no indication as to whether any of the proposed defence witnesses were available in court on that date

[194] The Court observed that Mr. Howe's availability for trial continuations was now limited due to other commitments, which was a reference to both his representation of other clients in court as well as a Barrister's Society hearing. Mr. Howe stated that he now had "slightly better availability" but added that it depended on the dates being offered by the Court. The Court noted that a significant block of time had just opened up during the months of November, 2015 through to February, 2016. Mr. Howe advised the Court that he had time available during the week of November 16, 2015, the week of December 21, 2015, but January, 2016 and the beginning of February, 2016 were "tough" for him.

[195] I should note here, parenthetically, that the reference to the Nova Scotia Barrister's Society hearing was based upon information known to the Court, which was in the public domain at that time and has been subsequently confirmed by indisputable information contained in a Resolution signed by the Hearing Panel Chair on October 20, 2017, which is attached to its "Sanction Decision" of that same date and officially released to the public on the Nova Scotia Barrister's

Society website. In that Resolution which contained the sanctions imposed by the Hearing Panel on Mr. Howe, it was noted that the hearing in relation to the charges brought against Mr. Howe by the Barrister's Society commenced on December 10, 2015. The Sanction Decision itself notes in the first paragraph that "the Panel issued its decision on the merits of the Society's charges against Mr. Howe (Decision)" on July 17, 2016.

[196] When the Court offered December 2, 2015 at 1:30 PM for a half-day, the Crown Attorney confirmed that he was available, Dr. McVey confirmed that she was available and Mr. Howe confirmed his availability on that date. As a result, prior to calling Tristan Guibault as the first witness in the trial, the Court had already confirmed a half day trial continuation on December 2, 2015.

[197] Given the length of time it took to sort out those preliminary matters, the Crown Attorney was only able to complete his direct examination of Mr. Guibault on October 7, 2015. Mr. Howe was only able to begin his cross examination.

[198] I find that there was no explicit or implicit waiver of any defence delay between these dates and that the trial continuation date of one half day, which was scheduled on December 2, 2015, was the earliest date when the Court, the Crown Attorney and Defence Counsel were all available. Therefore, no defence delay shall be deducted from the total delay for that reason.

[199] However, as Supreme Court of Canada pointed out in **Jordan** at para. 113 and **Cody** at para. 28, that in broad terms, deducting for defence delay is concerned with defence conduct and is intended to prevent the defence from benefiting from "its own delay causing action or inaction." In order to resolve the preliminary issue of whether or not Mr. Howe was aware of or bound by the concessions apparently made by Ms. McCarthy who was the solicitor of record on September 3, 2015, the Court lost approximately half of the trial time of the one-half day trial time which had been scheduled for the hearing of <u>all</u> of the evidence in this trial.

[200] In addition, although Mr. Howe stated that Ms. McCarthy had not left him any notes with respect to those agreements, the Crown Attorney referred to a letter sent to Ms. McCarthy on September 3, 2015 which was designed to confirm those agreements. In those circumstances, I find that, regardless of whether or not Ms. McCarthy left any notes on the file, I find that Mr. Howe ought to have been aware of the Crown's position for several weeks through the correspondence that ought to have been placed on that file.

[201] It is not clear from the record when it was decided that Mr. Howe would take over as the solicitor of record from Ms. McCarthy, however, whenever that transition occurred, I find that it would be reasonable to infer that Ms. McCarthy would have discussed the issue of agreements made by her with him or he would have seen the Crown Attorney's letter or both, and that these critical issues ought to have been sorted out before the trial started. Since those critical issues with respect to the apparent agreements relating to identity and the necessity of calling Dr. McVey were not addressed by Mr. Howe with the Crown Attorney before the trial date, the Court had to utilize precious trial time to address those issues, which depending on the outcome, would have a significant impact on the timely progress of the trial.

[202] In those circumstances, since only half of the first date for trial was able to be utilized for the hearing of the direct examination of Mr. Tristan Guibault, one of the youthful complainants, I find that the defence action or, in this case, inaction prior to trial impacted the presentation of evidence on October 7, 2015 in a very significant way. As a result, I am prepared to apportion one half of the two-month delay between the October 7, 2015 trial date and the trial continuation date on December 2, 2015 as defence delay.

[203] Therefore, I find that one (1) month should be deducted as defence delay from the "total delay" in order to calculate the total "net" delay.

December 2, 2015 to June 20, 2016:

[204] On December 2, 2015, Mr. Howe completed his cross examination of Mr. Tristan Guibault and the Crown Attorney completed a short re-examination of the witness. The Crown Attorney advised the Court that the other complainant, Mr. James Beaver and Dr. McVey were outside the courtroom. The Crown Attorney also advised the Court that his plan was to arrange for Const. Smith, who was stationed in Newfoundland, to testify by video link.

[205] For the purpose of scheduling trial continuation dates, the Crown Attorney estimated that Mr. Beaver's testimony would be about the same length as Mr. Guibault's evidence and he estimated that Dr. McVey's evidence might be forty-five to sixty minutes. Mr. Howe stated that he did not anticipate much of a cross examination for the expert, but his cross examination of Mr. Beaver would be longer. The Court estimated that Mr. Beaver's testimony would probably take a half day to complete and Mr. Howe agreed with that assessment. Mr. Howe added

that he did not think that the *voir dire* for Dr. McVey would be "contentious" and the Crown Attorney confirmed that they had served an expert notice on Defence Counsel.

[206] The court suggested that an additional day should be secured for the trial continuation of the Crown's case and then there would be defence evidence. The Court offered trial time on March 14 and March 29, 2016 for which Defence Counsel stated that he was available, but the Crown Attorney advised the Court that he was not available on either of those dates. The Crown Attorney explained that he had previously booked a trip out of the country during the school break week which included March 14, 2016 and that he was not available on March 29, 2016 due to other Court commitments.

[207] After that, the Court offered what was essentially a day and a half of trial time on June 20, 2016 and June 28, 2016, and both the Crown Attorney and Defence Counsel confirmed that they were available. The Court also set a status date for January 22, 2016 to get an update on whether the Crown intended to call Const. Smith by video link and, if so, whether the defence would oppose that application. The Court also mentioned that the status date would provide an opportunity to update the Court on the other evidentiary issues and whether any agreements had been reached.

[208] In addition, just before concluding for the day on December 2, 2015, the Court asked Mr. Howe to indicate if he was "strongly" contemplating calling defence evidence and if so, to advise the Court on the January 22, 2016 status date if additional time was required for defence evidence or submissions. The Court stated that, if additional trial time was required, that could be scheduled during the January 22, 2016 status date rather than waiting to late June, 2016 to schedule additional court time. Mr. Howe agreed and stated: "that's fine."

[209] I find that there was no defence delay during this period of time and in fact, Defence Counsel stated that he was available on March 29, 2016 when the Court was also available, but the Crown Attorney was not available due to other Court commitments. Since the Crown Attorney had planned to be out of the office for some time prior to the possible trial continuation date of March 14, 2016, I find that it would not be reasonable to expect the Crown Attorney to cancel previously scheduled vacation time with his family.

[210] In those circumstances, I find that there was no defence delay between December 2, 2015 and June 20, 2016.

June 20, 2016 to June 28, 2016:

[211] During the January 22, 2016 status date hearing, Mr. Howe confirmed that the defence would not be contesting the qualifications of Dr. McVey to be qualified as an expert in the areas outlined by the Crown Attorney. Defence Counsel also advised the Court that he did not have any objection to Const. Smith testifying by video link.

[212] Based upon Mr. Howe's position with respect to those matters, the Crown Attorney advised the Court that he expected Mr. Beaver's evidence would be as long as Mr. Guibault's evidence, so he would be calling Mr. Beaver on the half-day scheduled for June 20, 2016 and that he planned to call Dr. McVey and Const. Smith on June 28, 2016.

[213] At the outset of the proceedings on June 20, 2016, the Court confirmed with Mr. Howe that he had previously stated, on January 22, 2016, that he would not contest Dr. McVey's qualifications to provide expert testimony. Then, Mr. James Beaver was called as a witness and the Crown Attorney completed his direct examination and Mr. Howe began his cross examination. The Court suggested that Mr. Howe continue past 4:30 PM to complete his cross-examination, however, Mr. Howe stated that he still had an "fair amount" of cross examination to conduct and it was difficult to predict how long it would take. In those circumstances, the Court adjourned for the day and confirmed that the cross-examination Mr. Beaver would be completed on June 28, 2016.

[214] Although the June 28, 2016 trial continuation had been set for a half-day in the afternoon, the Court asked the parties to attend in the morning. The Court had recently learned that another member of Mr. Howe's office was quite ill and had a half-day trial scheduled on the morning of June 28, 2016. Based upon a prior adjournment request due to that lawyer's illness, the Court indicated that it was highly unlikely that the other trial would proceed on that date.

[215] There was no defence delay which was waived or caused by defence conduct during this period of time.

June 28, 2016 to December 9, 2016:

[216] On June 28, 2016, the continuation of the cross examination of Mr. Beaver began around 10:30 AM and was completed at about 11:15 A.M. Mr. Howe said that he had a witness from Winnipeg outside the court at great expense, but noted

that there were still two Crown witnesses to be called. Mr. Howe stated that he was planning to have that defence witness testify by video link, but he also acknowledged that he would have make a formal application to the Court.

[217] At about 11:20 AM, Mr. Howe asked the Court to adjourn until the afternoon since he had prepared for the continuation of Mr. Beaver's cross examination and he thought that he would have noon hour to prepare for Dr. McVey's testimony. The Court confirmed that the Crown had disclosed the Doctor's notes, her CV and an expert notice, to which Mr. Howe replied that he believed that there were admissions on the record in terms of the injuries. Since Mr. Howe was not prepared to agree to all the areas for which the Crown was seeking to qualify Dr. McVey as an expert, the Court directed the parties to enter into a *voir dire*. The *voir dire* took approximately one hour and immediately after the evidence and submissions of counsel, the Court qualified Dr. McVey as an expert to provide opinion evidence in the three areas sought by the Crown Attorney. The Court recessed at 12:24 PM and was scheduled to resume at 1:30 PM.

[218] Although no reason was indicated on the record, the trial did not resume until 1:59 PM, when the Crown Attorney commenced his direct examination of Dr. McVey in the trial proper. Dr. McVey was excused as a witness around 4:15 PM. Since the police officer was the last Crown witness, the Crown Attorney estimated that his direct examination would be about an hour and that the cross examination would probably be of equal length. Therefore, the Crown Attorney estimated that he would need about two hours to complete his case.

[219] After receiving the Crown Attorney's estimate for the trial continuation to complete his evidence, the Court asked Mr. Howe whether the defence would require one or two days for the defence evidence. Mr. Howe stated that he planned to call a witness by video link, but he wanted to "set that evidence on its own." Since Mr. Howe did not provide an answer as to whether the defence required one or two days for its evidence, the Court offered a full day on December 9, 2016 for the Crown to conclude its case in the morning and then the defence would have the balance of the day. The Crown Attorney and Defence Counsel confirmed that the full day offered on December 9, 2016 was "fine" for both sides.

[220] In setting the full day for the trial continuation on December 9, 2016, the Court noted that an order had already been issued for Const. Smith's evidence to be heard by video link and that the defence would have the balance of the day for

their witnesses. The Court reminded Mr. Howe that, if he wanted to make an application with supporting material for a defence witness to testify by video link, there was ample time to do so before the trial continuation date of December 9, 2016. In fact, no application for a defence witness to testify by video link evidence was ever made by Mr. Howe.

[221] It would appear that the December 9, 2016 trial continuation date, which was offered on the record, was the only date offered by the Court on the record. Both counsel confirmed that the date was "fine" for them, which indicated that they and their witnesses were available on that date. In those circumstances, for the period between June 28, 2016 and December 9, 2016, I find that there was no explicit or implied waiver of delay by Defence Counsel.

[222] While no alternate dates were discussed on the record, I note that when the full day for trial continuation was scheduled for December 9, 2016, it was anticipated that all the trial evidence would be concluded on that date. This trial continuation date for the anticipated end of the trial date was established, about three weeks before the SCC released its **Jordan** decision. Although no alternate dates were discussed on the record, it is also important to note that Mr. Howe did not mention any concern about delay nor did he ask for the earliest possible trial dates on the record. Having said that, I find that securing a full day for the trial continuation in about five months reflects on the efforts made by the Dartmouth Provincial Court to address what had been a significant institutional delay, which had been apparent in setting the half-days for the start of the trial and thereafter the half-day trial continuations on earlier dates in this matter.

[223] However, I find that in analyzing the period of time between June 28, 2016 and December 9, 2016, I have to take into account the fact that June 20 and 28, 2016 had been scheduled, at the very least, and to complete the Crown's evidence in this trial. However, there were preliminary issues relating whether a *voir dire* would be required to qualify Dr. McVey as an expert as well as earlier indications that Dr. McVey's evidence would either be brief or not required at all. Instead, Dr. McVey's evidence essentially took up the entire day on June 28, 2016 and the Court was required to schedule another full day to complete the Crown's evidence and presumably to hear most, if not all, of the defence evidence.

[224] It bears repeating here that Ms. McCarthy had apparently consented to the medical evidence being introduced on consent without the necessity of calling Dr. McVey. However, at the start of the trial, on October 7, 2015, when Mr. Howe

stated that he was now the solicitor of record, he also said that he was not aware of any agreements having been made by Ms. McCarthy. In subsequent appearances, either on trial continuation dates or status dates, Mr. Howe advised the Court that his cross examination of Dr. McVey would not be "contentious", probably "not be very long" and that he would not be contesting Dr. McVey's qualifications to be called as an expert witness. In addition, on of June 28, 2016, just prior to Dr. McVey being called as a witness, Mr. Howe also stated that he believed there were admissions on the record in terms of the injuries.

[225] Furthermore, on June 28, 2016, when Mr. Howe stated that he could not agree with the Crown Attorney on one of the areas for which the Crown was seeking to have Dr. McVey qualified as an expert, the Court directed that the parties proceed on a contested **Mohan** *voir dire*. In the final analysis, the medical evidence in this trial which might have been tendered by agreement, perhaps without the necessity of Dr. McVey even being called as a witness ended up taking most of the trial time available on June 28, 2016. Since Dr. McVey was already on the witness stand, it was not a logical to split her evidence and direct her to return to court in order to hear Const. Smith's testimony, which had previously been scheduled to be heard by video link at 1:30 PM on June 28, 2016. As a result, instead of the Crown's case being completed on June 28, 2016, Const. Smith's video link evidence was rescheduled for the morning of December 9, 2016.

[226] As indicated previously, the Court had advised counsel that it was highly likely that a block of trial time would become available on the morning of June 28, 2016, due to a medical issue involving one of the lawyers in Mr. Howe's office. As a result, the Court had asked the parties to attend in the morning, in order to fully utilize any additional court time that might become available before the time which had already scheduled for the afternoon of June 28, 2016. Since it had already been arranged for Const. Smith to testify via a video link at 1:30 PM that day, the Crown Attorney called Dr. McVey who was on standby and immediately came to the court. It was in that context that Mr. Howe stated that he anticipated Mr. Beaver's cross examination would take the morning and that he thought that he would have the noon hour to prepare for Dr. McVey's testimony.

[227] However, notwithstanding the relatively short notice of Dr. McVey's actual availability on the morning of June 28, 2016, the Court and counsel were well aware of the fact that Dr. McVey had been in court or on standby on earlier trial dates when it was anticipated that she would testify. Moreover, Dr. McVey's triage notes, her curriculum vitae and the notice of the intention of the Crown to qualify

her as an expert in certain areas was information in the possession of Defence Counsel, well before the trial actually commenced in October, 2015. In those circumstances, I find that Mr. Howe's opposition to Dr. McVey being qualified as an expert to give opinion evidence may have been based on the fact that he needed some time to prepare for his cross examination of her trial evidence.

[228] It is also noted that, on a prior occasion, Mr. Howe had said that he would not be contesting Dr. McVey's qualifications to provide expert opinion evidence and that indication was certainly consistent with the position which was apparently conceded by Ms. McCarthy, when she was the solicitor of record on this file and had apparently agreed that it would not be necessary for the Crown to even call Dr. McVey as a witness.

[229] In the final analysis, a witness whose evidence Mr. Howe did not necessarily consider to be very "contentious," and that he did not anticipate "much of a cross examination" of Dr. McVey, ended up taking up most of the trial time on June 28, 2016. This had a significant impact on the effective and efficient use of court time as well as the timely progress of the trial. Since Dr. McVey's evidence and the balance of Mr. Beaver's cross examination had taken all of the time available on June 28, 2016, the Court was required to schedule another trial continuation date for the video link evidence of Const. Smith and the proposed defence evidence.

[230] Looking at the circumstances which unfolded on June 28, 2016, I find that this is a situation which was considered by the SCC in **Jordan** at para. 113 and in **Cody** at para. 28 where they stated that there should be a deduction of delay caused by defence conduct or inaction in order to prevent the defence from benefiting from "its own delay causing action or inaction."

[231] As a result, I am prepared to apportion one half of the five and a half (5.5) month delay or two and three quarter (2.75) months of delay, between the June 28, 2016 and December 9, 2016, to be considered as defence delay which I find to have been caused by either defence actions or conduct in relation to the evidence of Dr. McVey which had a very significant impact on the timely progress of the trial. I find that it may not have been necessary to conduct a *voir dire* prior to Dr. McVey being qualified as an expert to give opinion evidence, since there appeared to be an agreement that a *voir dire* was not necessary based on the apparent agreement between Ms. McCarthy and the Crown, Mr. Howe's own statements prior to June 28, 2016 as well as the fact that it had apparently been previously

agreed by Ms. McCarthy that the medical information would be tendered as an exhibit without calling Dr. McVey as a witness.

[232] Taking all of those things into account, it would not have been reasonable for the Court or the Crown to foresee that Dr. McVey's evidence would take up the large majority of the time available for trial on June 28, 2016. Moreover, when Defence Counsel stated his position with respect to Dr. McVey's evidence on June 28, 2016, there was no way for either the Court or the Crown to mitigate its impact on the timely progress of the trial.

[233] In those circumstances, I find that the actions and conduct of the defence necessitated the scheduling of a further full day for trial continuation on December 9, 2016. I find that it demonstrated on the part of the defence a marked indifference towards delay and that delay also impacted the plans for the evidence of the out of province witness who the defence proposed to call on a future date. Therefore, I find that one half of the five and one half (5.5) months of total delay during this period of time or two and three quarters (2.75) months should apportioned as defence delay which shall be deducted from the "total delay" to reach the total "net" delay in this matter.

December 9, 2016 to April 7, 2017:

[234] On November 3, 2016, the Court was advised by the Receiver appointed by the Nova Scotia Barrister's Society for Mr. Howe's law practice that Mr. Howe had been suspended from the practice of law by the Barrister's Society. This was the second time that Mr. Howe had been suspended from practicing law in Nova Scotia during the progress of this trial. The Receiver stated that he had only been able to recently contact Mr. Longaphy and Mr. Longaphy had informed him that he wished to retain a new lawyer. The Receiver added that he had sent a letter to Mr. Longaphy on September 15, 2016 regarding Mr. Howe's suspension, but the letter was returned because the Receiver had an outdated address for Mr. Longaphy. The Receiver also added that Mr. Longaphy's circumstances were complicated by the fact he had already paid Mr. Howe for his defence and it would take some time for him to retain another lawyer.

[235] During the Receiver's application to adjourn the trial, which was made on November 3, 2016, the Receiver mentioned that he had sent a letter regarding Mr. Howe's suspension to Mr. Longaphy on September 15, 2016, but he did not indicate to the Court when Mr. Howe was suspended from the practice of law by

the Nova Scotia Barrister's Society. According to the indisputable information posted in the public domain on the website of the Nova Scotia Barrister's Society, the Complaints Investigation Committee of the Barrister's Society gave notice that Lyle Howe's practicing certificate had been suspended, effective September 1, 2016 until further notice. In addition, in that Notice of Suspension, the Barrister's Society advised clients of Mr. Howe or persons affected by the suspension to direct inquiries to the Receiver and the Notice provided the name, address and telephone number of the Receiver.

[236] Mr. Longaphy was present in court on November 3, 2016 when the Receiver made an application on his behalf to adjourn the upcoming December 9, 2016 trial continuation date. The Receiver also indicated that Mr. Longaphy would not have a new lawyer retained who could conduct the trial on that trial continuation date. The Court also noted that, if another lawyer was to be retained, he or she would probably require transcripts to prepare for the trial continuation and the defence evidence.

[237] The Crown Attorney questioned whether Mr. Longaphy had considered the possibility of Ms. McCarthy taking over the file on "quick notice" as the solicitor of record, since on earlier dates, she had been the solicitor of record or appeared on behalf of Mr. Howe. The Receiver confirmed that Mr. Longaphy wished to retain a different law firm and that he also recognized this would result in further delay, since he did not wish to stay with Howe Law.

[238] In view of that decision, the Court confirmed that the Receiver did not have any transcripts on the file and the Receiver added that "I don't think, in particular, a lawyer could rely on the notes" in Mr. Howe's file. Based upon that information, the Court confirmed that it would order the transcripts, for the days during which trial evidence was called, to defray Mr. Longaphy's costs and to facilitate his efforts to retain a new lawyer. In those circumstances, on behalf of Mr. Longaphy, the Receiver waived any delay between December 9, 2016 and the new date to be scheduled for the conclusion of the trial [April 7, 2017].

[239] In order to provide Mr. Longaphy with a reasonable amount of time to retain another counsel and to complete the trial evidence, the Court scheduled a full day for the trial continuation, which would include Const. Smith's video link evidence and the defence evidence. A full day was offered by the court clerk on March 14, 2017, but the Crown Attorney advised that he had made arrangements to be out of the country during that week as it was the school March Break. In any event, the

Court mentioned that while it was important to note his unavailability for the **Jordan** framework, there was no Defence Counsel in court to confirm that he or she would have been available on that date. Furthermore, it was far from certain that Mr. Longaphy would have retained a lawyer who was ready to proceed with the trial on that date. As a result, the Court scheduled a full day for trial the trial continuation on April 7, 2017, which gave Mr. Longaphy several months to make arrangements to retain a new lawyer.

[240] In addition, since the Receiver had informed the Court that Mr. Longaphy was a seasonal worker and had recently been laid off from work, the Court scheduled a status date on January 30, 2017 to get an update on whether he had retained counsel who would be ready to proceed on April 7, 2017.

[241] On the January 30, 2017 status date, Mr. Longaphy advised the Court that he had spoken with several lawyers, but he had not yet retained anyone. As a result, a further status date was scheduled for March 10, 2017 and on that date, Mr. Longaphy said that he had received the transcripts ordered by the Court, but he had not yet retained another lawyer.

[242] On the April 7, 2017 trial continuation date, Mr. Hughes appeared as Defence Counsel for Mr. Longaphy. While Defence Counsel had previously indicated that he would be filing a section 11(b) **Charter** application, he advised the Court that he was prepared to conduct the cross examination of the police officer. Since Const. Smith was available to testify by video link, the Crown Attorney conducted his direct examination and Defence Counsel completed his cross examination of the police officer. After Const. Smith's evidence, the Crown Attorney closed his case. However, Defence Counsel requested an adjournment of the defence case, given the time and expense involved in making an application under section 11(b) of the **Charter** and asked the Court to render its **Charter** ruling before being put to the time and expense of calling defence evidence. In those circumstances, the Court agreed to first provide the section 11(b) **Charter** decision on the understanding that April 7, 2017 would be considered as the date upon which the trial would have concluded.

[243] In view of the circumstances outlined by the Receiver for the Nova Scotia Barrister's Society that Mr. Howe had been indefinitely suspended from the practice of law in Nova Scotia and that Mr. Longaphy wished to retain another lawyer, the Receiver confirmed that Mr. Longaphy waived the delay in the conduct

of the trial which was caused by Mr. Howe's suspension from December 9, 2016 to the April 7, 2017 trial continuation date.

[244] In those circumstances, I find that this entire four (4) month period of time is clearly delay which was caused by the defence, as a result of the sudden and unforeseen unavailability of Defence Counsel due to the suspension of Mr. Howe prior to a trial continuation date, which necessitated a further full day of trial to be scheduled. As a result, there is no doubt that Mr. Longaphy's waiver of delay was clearly and unequivocally expressed by the Receiver for the Barrister's Society and therefore, the entire four (4) month period of time should be deducted from the "total delay" in order to calculate the "total net delay" in this matter.

Determination of Overall Net Delay:

[245] As I previously indicated I have found that total delay from the date of the charge [February 22, 2012] to the agreed-upon end or anticipated end of the trial [April 7, 2017] is approximately sixty-one and a half (61.5) months.

[246] In the preceding paragraphs, I have set out the timeline of this trial for the dates prior to plea and the dates upon which evidence was heard or scheduled to be heard. In addition, I have analyzed those appearances in accordance with the **Jordan** framework to first determine whether there was any defence delay which was explicitly or implicitly waived by the defence or there was any delay caused by defence conduct, action or inaction which directly resulted in delay or other delay for periods of time where the defence was not ready to proceed or were not available, when the Crown and the Court were available,.

[247] In my analysis of the deductions of defence delay from the total delay, I have concluded that:

(a) For the period between February 22, 2012 to April 18, 2012, there is no defence delay as this was a reasonable amount of time to retain counsel prior to plea;

(b) For the period between April 18, 2012 to June 25, 2012, I have found that there was an implicit waiver by the defence of two and half (2.5) months of delay;

(c) For the period between June 25, 2012 to July 30, 2012, I have found that there was one and a quarter (1.25) months of delay which was an implied waiver by the defence;

(d) For the period between July 30, 2012 to September 7, 2012, I have found that there was one and a quarter (1.25) months which was an implied waiver by the defence;

(e) For the period between September 7, 2012 to June 26, 2013, I find the entire period was lost due to the defence conduct and inaction related to the trial and that the date could not be utilized due to the fact that, as early as April 10, 2013, Mr. Howe knew that he was not available to conduct the trial on June 26, 2013 but failed to attend at his own "very urgent" application to adjourn the trial. As a result, Ms. McCarthy made a request to adjourn the trial only six days before the scheduled date for the trial and nothing could be accomplished on that trial date. In those circumstances, I found entire period of nine and three quarter (3.25) months was lost due to the inaction and conduct of the defence when it was known for some time that Mr. Howe, who had apparently been available on the trial date when it was set, suddenly became unavailable months later and did not follow up on his application to adjourn the trial in a timely manner;

(f) For the period between June 26, 2013 to June 9, 2014, which was the second date scheduled for trial, I find that this entire eleven and half (11.5) month period which was the second date scheduled for the start of the trial was completely lost and not able to be utilized to conduct this trial, due to Mr. Howe's suspension from the practice of law, on or about June 1, 2014, just days before the trial date. There can be no doubt that Mr. Howe's suspension was the direct cause for the adjournment of the trial. As a result, I find that the loss of this period of time should be considered as defence delay and deducted at this point since there is no question that the Court and the Crown were available, but the defence was unavailable to proceed on the trial date. However, I recognize that this development could also be regarded as a very discrete and exceptional event which would be deducted as defence delay in any event;

(g) For the period between June 9, 2014 to August 6, 2014, I find that it was an implied waiver of this two (2) month period of delay to locate a new counsel;

(h) For the period between August 6, 2014 to September 3, 2015, which was the third date scheduled for the start of this trial, I find that four (4) months of this total delay should be apportioned to the defence as

being implicitly waived by Defence Counsel in order to secure a trial date when the Court and the Crown Attorney were available and Ms. McCarthy was also available, for the reasons previously outlined in this decision;

(i) For the period between September 3, 2015 to October 7, 2015, I find that three weeks of delay or three quarters (1.75) of a month should be deducted from the "total delay" in order to calculate the "total net delay" in this matter, due to the Defence Counsel (Ms. McCarthy) not being available on earlier dates when the Court and Crown Attorney were available to conduct the trial;

(j) For the period between October 7, 2015 to December 2, 2015, I find that the defence action or, in this case, inaction prior to trial impacted the presentation of evidence on October 7, 2015 in a very significant way. As a result, I have apportioned one (1) month of that two-month delay as defence actions which have caused delay;

(k) For the period between December 2, 2015 to June 20, 2016, I find that there was no defence delay during this period of time and, in fact, the defence was available on a date offered by the Court, but the Crown was not available;

(l) For the period between June 20, 2016 to June 28, 2016, I find that there was no defence delay which was waived or caused by defence conduct during this period of time;

(m) For the period between June 28, 2016 to December 9, 2016, I find that I am prepared to apportion one half of the five and half month delay during that time period, which amounts to two months and three quarter (2.75) months of defence delay which I find to have been caused by the defence actions or conduct;

(n) Finally, for the period between December 9, 2016 to April 7, 2017, I find that the Receiver for the Nova Scotia Barrister's Society advised the Court that Mr. Howe was suspended for the second time during this trial and requested an adjournment on behalf of Mr. Longaphy. Since Mr. Longaphy wished to retain another lawyer, the Receiver waived the delay, which was caused by Mr. Howe's unavailability to conduct the trial due to his suspension for the entire four (4) month period until the anticipated or actual end of the trial on April 7, 2017.

[248] Having carefully reviewed and analyzed the transcripts of each and every one of the days that this matter was before the court, I have found that the total delay which was waived by the defence, either explicitly or implicitly or where the defence actions, inactions or conduct caused the delay, amounts to a total of forty and three-quarter (40.75) months.

[249] Therefore, after deducting defence delay of forty and three-quarter (40.75) months from the total delay of sixty-one and a half (61.5) months, I find that the total "net" delay is twenty and three-quarter (20.75) months, which slightly exceeds the "presumptive ceiling" of 18 months in the Provincial Court. Therefore, I find that the delay is "presumptively unreasonable" as defined by the SCC in the **Jordan** decision and that the onus is on the Crown to justify that the total "net" delay was either due to "exceptional circumstances" or "transitional exceptional circumstances" since this case began several years before the **Jordan** decision.

Has the Crown Established Exceptional Circumstances Justifying the Delay?

[250] In **Jordan**, supra at para. 69-77, the SCC discussed situations that may be regarded as "exceptional circumstances" which generally lie outside the Crown's control in the sense that they are (1) reasonably unforeseen or reasonably unavoidable and (2) Crown Counsel cannot reasonably remedy the delays emanating from those circumstances once they arrive. The circumstances which may be considered "exceptional" need not be rare or entirely uncommon for the purpose of adjudicating a section 11(b) **Charter** application. The SCC also noted, in **Jordan**, at para. 71 that it would be "impossible" to identify, in advance, all of the circumstances that may qualify as "exceptional." Ultimately, the determination of whether the circumstances were "exceptional" would depend on the trial judge's good sense and experience since the list is "not closed."

[251] In my view, the progress of this trial has been affected by almost every one of the non-exhaustive list of "exceptional circumstances" which were contemplated by the SCC in the **Jordan** decision. As the SCC noted in **Jordan** at para. 69, the Crown has the onus to demonstrate that there were "exceptional circumstances" present in the case which were reasonably unforeseen or reasonably unavoidable, but they need not be rare or entirely uncommon. The SCC described "exceptional circumstances" as either being "discrete and exceptional events" which would include medical or family emergencies or exceptional events that may arise at trial.

[252] Given the length of this decision, I do not intend to go into extensive detail with respect to each and every one of the several circumstances which I find to be "discrete and/or exceptional events" which impacted, in a very significant way, the timely and efficient progress of this trial. With respect to those circumstances which arose during this trial, I find that the following circumstances or events meet the criteria established in **Jordan** order to be considered as "discrete and exceptional circumstances" which have occurred during this trial:

Mr. Howe's Failure to Appear and Adjourn the Trial in April, 2013:

[253] I find that Mr. Howe's unexplained failure to appear on his own "very urgent" request and "time sensitive" motion to adjourn the trial on April 16, 2013 completely changed the timeline of this trial, which, in hindsight, put into play his first suspension as well as probably his second suspension from the practice of law.

[254] As I indicated previously, it appears that as early as April 10, 2013, if not sooner, Mr. Howe realized that he had made some alternate arrangements which caused him to conclude that he would not be available to conduct the trial on June 26, 2013. When that first date for the start of the trial was set on September 7, 2012, Mr. Howe had confirmed that the trial date was "fine with defence," which could only have indicated that he was available on that trial date.

[255] If Mr. Howe had been diligent and actually appeared on his motion to adjourn the trial on April 16, 2013 or had someone else appear on his behalf to adjourn the trial at that time, it is highly likely, given the institutional delay that the court was experiencing at that time, that a new trial date for the original two-hour estimate or a half day would have been secured eight to ten months later. Without canvassing other dates on the record, the first trial date was secured nine and three-quarter months later, and in those circumstances, I find it reasonable to infer that a second trial date would have been offered in or about February, 2014. If the trial had commenced at that time and the good-faith estimates of time for trial were accurate, this trial would have concluded four months before Mr. Howe was suspended for the first time.

[256] If, on the other hand, the trial had required an additional half day or day to complete the trial evidence, that trial continuation date would have likely been scheduled well after Mr. Howe's first suspension in June, 2014. In that event, there would have been ample time for Mr. Longaphy to retain another lawyer, presumably Ms. McCarthy, to take over the file and conduct the balance of the

trial, as she was prepared to do in September, 2015. Moreover, if a further trial continuation date was required in 2014, it would have been arranged according to the new lawyer's schedule and in my opinion, this trial would have been completed in late 2014 or early 2015.

[257] In my opinion, Mr. Howe's failure to diligently act on his own "very urgent" and "time sensitive" motion to adjourn the trial in April, 2013, unfortunately, changed the timelines of this trial and had downstream consequences that neither the Court, nor the Crown or for that matter, Mr. Longaphy, could have foreseen or avoided at that time. In those circumstances, I find that Mr. Howe's unexplained failure to appear on his own motion can certainly be characterized as defence inaction which directly resulted in significant, unforeseen and unavoidable delay down the road, for which at least two and a half months of delay [April 16 to June 26, 2013] ought to be deducted from the total delay, which would of course, reduce the total net delay of this trial. However, I have already deducted the entire nine and three-quarter (9.75) months of delay for the period of time between September 7, 2012 to June 26, 2013 as having been lost due to Mr. Howe not being available on the first trial date.

[258] Notwithstanding the obvious specific impact of Mr. Howe's unexplained failure to act on his own "very urgent" motion to adjourn had downstream consequences, in a sense similar to a witness failing to attend on the scheduled trial date, I also find that this event should also be regarded as a "discrete and exceptional event" because it completely changed the timeline of this trial which put into play other very significant, unforeseen and unavoidable events which caused further delay. As I indicated above, in my opinion, if the trial had been adjourned and rescheduled on April 16, 2013, this trial would have been completed long ago.

Mr. Howe's First Suspension from the Practice of Law:

[259] I find that Mr. Howe's first suspension on or about May 31, 2014 from the practice of law in Nova Scotia following a personal matter would clearly be an "exceptional circumstance" which would have been reasonably unforeseen and completely unavoidable on the part of the Crown and the Court. Mr. Howe's first suspension from practicing law in Nova Scotia occurred about seven days before the second date scheduled for the start of this trial. Since the Receiver for the Nova Scotia Barrister's Society had to temporarily take charge of Mr. Howe's files before they could be forwarded to another lawyer, it was not reasonably possible

for Mr. Longaphy to retain another lawyer to take over his file and conduct a trial within that short timeframe.

[260] After the Receiver temporarily assumed control of Mr. Howe's files, it took a couple of months to review Mr. Howe's files and then forward them to another lawyer, who Mr. Longaphy wished to retain. As it turned out, this file and perhaps many others that were handled by Mr. Howe were eventually transferred to Ms. McCarthy, who was also a member of Howe law office. However, I have no doubt that Ms. McCarthy's assumption of this file and probably several other files of Mr. Howe placed a significant burden on her to fit this file and any other files assumed from Mr. Howe, into her own already busy litigation schedule.

[261] In those circumstances, given the fact that only one trial date was confirmed on the record, on August 6, 2014, when the third date for the commencement of the trial was scheduled for September 3, 2015, I find that it is highly likely that earlier dates were offered by the clerk of the court to the parties, but Ms. McCarthy was not available to conduct this trial on those other dates. Moreover, having her own busy caseload and assuming this file and perhaps others from the Receiver with little notice, the Court could not expect Ms. McCarthy to double book trials if she already had her own files scheduled well into the future. I find that it is reasonable to infer that some delay, perhaps even significant delay, was caused by her sudden assumption of this file and probably many other files and that had previously been handled by Mr. Howe.

[262] I find that the first suspension of Mr. Howe had the obvious and direct impact of causing the second date for the commencement of this trial on June 9, 2014 to be completely lost. Moreover, I find that the impact of Mr. Howe's first suspension and the Bar Society Receiver having to review this file, contact clients and then forward the file to a lawyer retained by Mr. Longaphy, were all "discrete and exceptional events" which created additional delays in this trial, which could not have been reasonably foreseen or avoided on the part of the Crown and the Court. Furthermore, Mr. Howe's suspension also had a long-term consequence, since the start of the trial had to be adjourned for a second time without hearing any evidence. As a result of that delay, which I find to have been solely and directly caused by Defence Counsel not being available on the trial date, there was simply no way for the Court to determine whether the half day which was the total estimated time for trial was accurate or not. In those circumstances, there was no opportunity for either the Crown or the Court to take proactive steps to minimize future delays, by scheduling additional trial continuation dates.

Mr. Howe's Second Suspension from the Practice of Law:

[263] I find that Mr. Howe's second suspension from the practice of law in Nova Scotia can certainly be considered as "defence delay" where a date was lost due to the fact that the Crown and the Court were available, but Defence Counsel suddenly, and with little prior notice, became unavailable on the trial date. I also find that it is another example of a "discrete and exceptional event" which had an impact on the timely progress of the file in addition to causing the December 9, 2016 trial continuation date to be entirely lost for any useful purpose in the trial.

[264] As I indicated previously, the Receiver for the Barrister's Society applied to adjourn the trial on November 3, 2016. On that date, the Receiver advised the Court that he had sent a letter to Mr. Longaphy on September 15, 2016, but that letter had gone to an outdated address and was not able to be delivered to Mr. Longaphy. The Receiver also advised the Court that he was only able to get good contact information for Mr. Longaphy in the preceding couple of days and once he did, he made the application to adjourn the December 9, 2016 trial continuation date. The Official Notice of Suspension of Lyle Howe issued by the Nova Scotia Barrister's Society had stated that his suspension from practicing law in Nova Scotia was effective September 1, 2016.

[265] While the full day for trial continuation scheduled for December 9, 2016 was officially adjourned on November 3, 2016, there can be no doubt that effective September 1, 2016, Mr. Howe was no longer available for the trial continuation. It was expected, based upon the reasonable estimates of counsel on June 28, 2016, that the trial continuation date on December 9, 2016 would be the end or anticipated end of the trial.

[266] Based upon the information related to the Court by the Receiver on November 3, 2016, it would also appear that Mr. Howe's second suspension from practicing law in Nova Scotia was a culminating incident for Mr. Longaphy as he advised the Receiver and the Court that he did not wish to be represented, going forward, by Mr. Howe if the suspension was lifted. In addition, Mr. Longaphy had apparently advised the Receiver that he did not want to be represented by Ms. McCarthy of Howe Law, even though she had prior familiarity with his file and had appeared on behalf of Mr. Howe on several dates, including the third date scheduled for the start of the trial on September 3, 2015.

[267] In those circumstances, I find that, notwithstanding the fact that the Receiver made an application to adjourn the trial approximately one month before the

December 9, 2016 trial continuation date, there is no doubt that the orderly and efficient progress of the trial had been completely derailed, effective September 1, 2016, by Mr. Howe's second suspension from the practice of law in Nova Scotia. As of September 1, 2016, Mr. Howe became immediately unavailable from handling any ongoing aspects of Mr. Longaphy's file, which obviously included meetings with Mr. Longaphy, potential witnesses and preparation for closing submissions or making any agreements with the Crown Attorney to narrow the factual or legal issues in the trial.

[268] Therefore, there can be no doubt that Mr. Howe's second suspension from the practice of law in Nova Scotia must be considered as defence delay since he was no longer available to conduct the trial. However, in addition to the loss of the scheduled full day for trial on December 9, 2016, there were the consequential impacts from this "discrete and exceptional event" which were reasonably unforeseen by the Court and the Crown and certainly and completely unavoidable on the part of the Court and the Crown.

[269] I find that Mr. Howe's second suspension from the practice of law in Nova Scotia had downstream impacts on the efficient and effective utilization of court time, completely negating the Court's earlier efforts to proactively schedule dates for this trial, so that it could be completed as soon as reasonably possible, despite having to deal with all of the unforeseen and unavoidable events. In those circumstances, I find that the second suspension must also be considered as a "discrete and exceptional event" which completely disrupted the efficient and effective scheduling of trial continuation dates and obviously created delays. Further delays were occasioned in order to provide Mr. Longaphy with a reasonable opportunity to retain new counsel and to allow the new counsel a reasonable amount of time to prepare for the trial.

[270] If the Receiver had been able to obtain Mr. Longaphy's instructions in early September as opposed to early November, there is the possibility that the December 9th, 2016 trial continuation date could have been utilized by the parties or in the alternative, the end or anticipated end of the trial could have been scheduled at an earlier date. However, since the Receiver did not have accurate contact information for Mr. Longaphy or Mr. Longaphy reacting to the Bar Society's official notice of suspension, the result was that the Receiver's request to adjourn the trial was made when the full day scheduled for the trial continuation could not reasonably be utilized by the Court, Mr. Longaphy or the Crown.

The Consequential Impact of the Switches of Solicitor of Record:

[271] I find that the SCC's comments in **Jordan** at para.73 that "trials are not oiled machines, unforeseeable or unavoidable developments can cause cases to quickly go awry," aptly described the impact of the switches of solicitor of record during this trial. Mr. Howe was the original solicitor of record, but Ms. McCarthy appeared on his behalf on several occasions for different purposes, then took over as solicitor of record after Mr. Howe's first suspension. Ms. McCarthy appeared as solicitor of record on the third date scheduled for the start of the trial, which was ultimately adjourned for short period of time, but she apparently made agreements which would have narrowed the factual and legal issues in the trial. However, when Mr. Howe's suspension was lifted in early September, 2015, he appeared as solicitor of record on October 7, 2015 and continued as solicitor of record until the time of his second suspension in September, 2016.

[272] First, I find that, as a result of the switches in solicitor of record between the third scheduled start of the trial on September 3, 2015 trial date and the fourth date for the start of the trial on October 7, 2015, when Mr. Howe appeared as the solicitor of record, the Court lost a significant amount of trial time in order to sort out "preliminary issues." Those "preliminary issues" became important to address at the outset of the trial, since those issues related to whether Ms. McCarthy had made agreements to narrow some of the legal or evidentiary issues and whether Mr. Howe and Mr. Longaphy were bound by them.

[273] In particular, the best example of this "discrete and exceptional event" is the fact that the Crown Attorney was of the view that Ms. McCarthy had confirmed, when she was solicitor of record on September 3, 2015, that Dr. McVey would not be required to testify, the medical evidence would be tendered by agreement and that the identification of Mr. Longaphy was not in issue. On October 7, 2015 when Mr. Howe advised the Court that he was now the solicitor of record, he also advised the Court that he did not have instructions from Mr. Longaphy to accept some of the agreements made by Ms. McCarthy. I find that sorting out those preliminary issues amounted to a "discrete and exceptional circumstance" which had a detrimental impact on the effective and efficient progress of the trial.

[274] Secondly, I find that there were very significant downstream impacts on the scheduling of trial continuation dates, which arose from that switch in solicitor of record which necessitated the rescheduling of one day for additional evidence in order to accommodate the *voir dire* relating to Dr. McVey's qualifications and then

her trial evidence. I find that this delay and consequential impact could not have reasonably been foreseen or avoided by the Crown once Mr. Howe confirmed that he was "ready to go" as the solicitor of record on October 7, 2015, but he was, for all intents and purposes, unaware of the position apparently adopted by Ms. McCarthy a few weeks earlier.

[275] Moreover, despite the fact that the Crown Attorney read into the record a portion of a colleague's letter apparently confirming those agreements, which was sent to Ms. McCarthy shortly after the trial was adjourned on September 3, 2015, it ultimately meant that Dr. McVey, who might not have been called as a witness at all, turned into a witness who took most of the time scheduled on the June 28, 2016 trial continuation date.

[276] The combination of the police officer being the last witness to testify and Mr. Howe stating that identity was in issue, despite Ms. McCarthy's apparent agreement that it was not, certainly had the impact of prolonging the direct and cross examination of the two complainants which necessitated the scheduling of additional trial continuation days. Ultimately, I find that the downstream impact of the solicitor of record changing from Mr. Howe to Ms. McCarthy and then back to Mr. Howe resulted in prolonging the length of the trial which could not reasonably be foreseen or avoided by the Crown or the Court.

[277] I find that the consequential impact of the switches in counsel and, in particular, not maintaining or even being aware of the agreements confirmed by Ms. McCarthy, could also be considered as defence actions which directly resulted in the delay and the necessity of scheduling additional trial dates. Clearly, it would appear that Ms. McCarthy and the Crown Attorney had made a serious effort to reach agreements which might have narrowed the factual and legal issues in the case. With the switch in solicitor of record, Mr. Howe maintained that that he was not aware of any agreements having been made by Ms. McCarthy to narrow the factual or legal issues and therefore, he did not consider himself or Mr. Longaphy to be bound by them.

[278] At this stage, with only the Crown's evidence before the Court, it is difficult to assess whether Mr. Howe's position was one that was legitimately taken to respond to the charges or was a deliberate and calculated tactic to delay the trial. In either event, I find that the switches in counsel created a "discrete and exceptional circumstance" which was not reasonably foreseen or could reasonably be avoided by the Crown. I find that the impact of the switches in solicitor of record had the

effect of undoing what had been a serious effort to narrow the factual and legal issues in the trial in order to use the scheduled court time efficiently and effectively on triable issues. As with many "discrete and exceptional events," I find it is not a matter of simply deducting a quantifiable amount of time due to a discrete event or exceptional circumstance which had an overall impact on the presentation of evidence during the trial. The real impact was not in a specific quantifiable period of time being deducted as defence delay, but rather, the direct impact was the necessity of several additional trial continuation dates.

Non-Service of Police Officer's Out of Province Subpoena:

[279] The investigating officer, Const. Kyle Smith of the RCMP was scheduled to be the Crown's first witness. He had been stationed in the Halifax area when the first two dates for the start of the trial were adjourned in June 2013 and June 2014. However, some time before the third date to start the trial on September 3, 2015, he transferred to a remote detachment of the RCMP in Newfoundland. The Crown Attorney indicated that an out of province subpoena issued by the Court was to have been served on him by a police agency in Newfoundland, but was apparently never received by that agency. In those circumstances, the Crown Attorney asked the Court to grant a short adjournment of the start of the trial, despite its previous history, as she "preferred" to call the police officer as the first witness in the trial.

[280] However, the Crown Attorney also indicated that she was prepared to start the trial on September 3, 2015 with the other witnesses who were present, but described Const. Smith's absence as a little "dilemma" since she believed that him being the first witness would focus the questioning of the two complainants by both sides. The Crown Attorney advised the Court that time for the trial had become available on September 18, September 24, 2015 and October 7, 2015, which could accommodate what was estimated to be a half-day trial. Defence Counsel did not consent to the Crown's request for a short adjournment, but did express her client's "preference" to have all of the evidence be heard at one time.

[281] Given the absence of Const. Smith, on September 3, 2015, Defence Counsel acknowledged the reality that the Crown's case would continue on another day, even if the evidence of the other Crown witnesses could be completed on that date. As a result, the Court granted a short third adjournment of the trial and rescheduled the start of the estimated half-day trial for October 7, 2015, since Ms. McCarthy was not available on the two alternate dates offered in September, 2015.

[282] In the interim, the Crown Attorney who assumed conduct of the trial on the October 7, 2015 trial date issued a subpoena for Const. Smith to attend by video-link. However, that subpoena was only served on him a short time before the trial date, due to the relatively brief adjournment granted on September 3, 2015 and the extra time required to serve him at his remote location in Newfoundland. As a result, by the time of the subpoena was served, there was insufficient time to coordinate the technical details to appear by video link or in the alternative, to make the arrangements to appear in person in Dartmouth on October 7, 2015.

[283] I find that Const. Smith's absence on both September 3, 2015 and October 7, 2015 were "discrete and exceptional events" which resulted in a key witness being unable to attend court. Despite reasonable efforts to secure his attendance, without any prior notice, a key witness was not able to attend court on the scheduled dates. I find that this was an example of what the SCC had described in **Jordan** at para. 73 where "unforeseeable and unavoidable developments can cause cases to quickly go awry." The Crown had made the necessary arrangements for Const. Smith's attendance on both occasions, but I find that their efforts were thwarted due to unforeseeable developments. As the SCC noted, the Crown is expected to be reasonably diligent in taking steps to avoid delay and in this situation, I find that the Crown had taken reasonable steps to secure Const. Smith's attendance and avoid the delay [see **Jordan** at para. 70 and **Cody** at para. 54].

[284] As it turned out, Ms. McCarthy was not available on other earlier dates which had been offered by the Court before the both sides confirmed their availability for the start of the trial on October 7, 2015. Since Ms. McCarthy had indicated she was not available on September 18 and September 24, 2015, that delay when the defence was not available, has already been considered in my analysis of the calculation of the total "net" delay in this trial.

[285] In addition to the relatively brief delay caused by the non-service of the subpoena to attend in person on September 3, 2015 and the fact there was insufficient time to arrange for video link evidence on October 7, 2015, I find that the absence of the police officer on the first day the trial evidence was heard, obviously altered the Crown Attorney's "preferred" order of calling witnesses. The Crown Attorney maintained that calling the police officer as the first witness would have narrowed the scope of the questions addressed by both counsel with the two complainants, if they were called after the police officer.

[286] As it turned out, since Const. Smith was the last Crown witness to be called, the combination of his absence at the start of the trial and the switch of Defence Counsel, appears to have left the issue of identification in play. The Crown Attorney had believed there was an agreement with respect to the issue of identification with Ms. McCarthy, but Mr. Howe maintained that identification was a contested issue. Given the absence of Const. Smith and the position maintained by Mr. Howe, I find that those two discrete events certainly lengthened the direct and cross-examination of the two complainants, which ultimately had an impact on the actual time required for trial and the scheduling of trial continuation dates.

The Parties Significant Underestimation of Trial Time Required:

[287] In my opinion, there can be no doubt, whatsoever, that this trial has gone significantly longer than anyone reasonably expected, even where the parties have made good-faith efforts to establish realistic time estimates [see **Jordan** at paragraph 73]. Based upon the "original" Information, the parties advised the Court that only two hours would be required for this trial. When the first trial date was adjourned and the Crown Attorney stated that they would probably be filing a "replacement" Information with an additional charge and providing medical evidence. Therefore, the parties estimated that the Crown and defence evidence could be completed by scheduling one half day for the trial.

[288] As I have indicated previously, on each adjournment request and subsequent trial continuation date, both counsel indicated that the only additional time required was another half day. Instead, the trial to date has taken almost three full days of court time to hear the evidence of the four Crown witnesses. At this point, no defence witnesses have been called and presumably the proposed defence witnesses would probably require a minimum of an additional day of court time.

[289] In fact, on September 3, 2015, when the start of the trial was adjourned for the third time, the Court observed that parties' estimate of a half-day of court time to complete all trial evidence was "probably an underestimate" given the indication that there would also be defence evidence. However, since neither side had identified this as a "complex case" and the first witness was not called until October 7, 2015, I find that there was simply no basis upon which the Court could conclude that the parties had made anything other than "good-faith efforts to establish realistic time estimates" [see **Jordan** at para. 73].

[290] When I consider that, in addition to taking about three days to hear the Crown's evidence to date, the Court has also lost almost three full days of court time due to unforeseen adjournment requests at the last moment, I find that this trial has gone way longer than anyone could have reasonably expected. In addition, since those unforeseen events occurred on or just before a scheduled trial date and there was also an underestimation of the trial time required, those circumstances left little or no opportunity for the Court or the Crown to reasonably react to events in a proactive manner. I find that the unforeseen and unavoidable delays which have occurred in this case are the type of situations contemplated by the SCC in **Jordan** at para. 73 where the majority said that "if the trial goes longer than reasonably expected," then "it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance." [Emphasis is mine]

[291] It bears repeating here that, in coming to the conclusion that the trial has gone longer than reasonably expected due to "exceptional circumstances," the "original" Information was laid on February 22, 2012, but a period of forty three and a half (43.5) months had passed before the first witness was called in the trial on October 7, 2015. The large majority of the total delay (almost fifty-two (52) months) in this file occurred before July, 2016 when the SCC issued its decisions in **Jordan** and **Williamson**.

[292] Furthermore, given the procedural history of this case, I find that the comments of the SCC in **Jordan** at para. 74 are particularly instructive. In that paragraph, the SCC notes that trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In those cases, the focus should be on whether the Crown has made reasonable efforts to respond and to conclude the trial under the ceiling. The SCC recognized that when an issue arises in a trial close to the ceiling, it will be "more difficult for the Crown and the Court to respond with a timely solution." For that reason, the SCC noted that "it is likely that unforeseeable and unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances."

[293] Once this trial actually got underway, I find that the record reflects the fact that, notwithstanding the circumstances in which the Court was attempting to move the trial forward and schedule dates in a proactive manner, the Court did respond, within reason, to prioritizing this case which had, utilizing the words of the SCC in **Jordan** at para. 75, "faltered due to unforeseen events." As I have indicated above,

I have found that the delay caused by those unforeseen events could not have been reasonably mitigated by the Crown or by the Court.

[294] However, after the trial heard its first witness on October 7, 2015, additional half days of court time were confirmed for December 2, 2015, two dates were offered in March, 2016 but not available for the Crown, a half day was confirmed for June 20 and three quarters of a day was used on June 28, 2016, a further day was confirmed but not utilized on December 9, 2016 due to the second suspension of Mr. Howe and finally a full day of trial time was scheduled on April 7, 2017. The anticipated end of the trial was scheduled on April 7, 2017, approximately five months after the Receiver for Mr. Howe's law practice asked the Court to adjourn the December 9, 2016 trial date and provide a reasonable amount of time for Mr. Longaphy to retain a new lawyer.

[295] While I have previously found that the total "net" delay in this trial was around twenty and three quarters (20.75) months, that analysis did not factor the consequential impacts and quantitative delays due to the numerous "discrete and exceptional events and circumstances" which have continuously plagued this trial. I have found that those "discrete and exceptional events" impeded and impacted the conduct of this case in a very significant way. While not all of what I have found to be "discrete and exceptional events" are listed by the SCC in the **Jordan, Williamson** or **Cody**, the SCC noted in **Jordan** at para. 71, the list of those "discrete and exceptional events" was "not closed." Ultimately, the SCC concluded that the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience [see **Jordan** at para. 71].

[296] In the final analysis, I conclude that the trial time required for this case was significantly underestimated which, in my opinion, caused inevitable and unavoidable delay in the trial in addition to other delays which could not have been reasonably foreseen or reasonably avoided by the Court or the Crown. As a result, I find that the very significant underestimation of the trial time required for this matter is exactly what the SCC had described in **Jordan**, para. 73 and I conclude that it amounts to an "exceptional circumstance."

[297] For all of the reasons outlined above, I find that, in coming to the conclusion with respect to the total "net" delay and then taking into account what I have found to be several "discrete and exceptional events," some of which had a direct quantitative impact on the trial and others which had an overall impact on the progress of the trial, I find that the trial as gone much longer than anyone could

reasonably have expected. In those circumstances, I also find that the delay was unforeseen and unavoidable on the part of the Court and the Crown. Furthermore, given the fact that almost four and a half years of delay in this trial occurred before the SCC released their decisions in **Jordan** and **Williamson** in July, 2016, it would not be fair to judge the parties' behaviour strictly against a standard of which they had no notice and had little opportunity to take corrective action. As a result, I find that the Crown has justified that the delay based upon the "exceptional circumstances" even if I was to conclude that the total "net" delay was slightly above the "presumptive ceiling."

[298] Furthermore, I find that it is evident from all of my previous findings with respect to the delays occasioned during the course of this trial and based upon the comments of the SCC in **Cody** at para. 33 that the Defence Counsel did not actively advance their client's right to a trial within a reasonable time, collaborate with Crown Counsel when appropriate or use court time efficiently [see also **Jordan** at para. 138]. Notwithstanding the length of time or "delay" that this matter has been before the Court, I find that this is not one of those "clear cases" where the defence has taken "meaningful and sustained steps to be tried quickly" [See **Jordan** at paras. 84-85].

[299] If someone had a crystal ball and could have reasonably foreseen that this trial, which neither side has considered to be complex or would have needed two or three days for trial, those dates could have been scheduled by the fall of 2013 and this trial could have concluded long ago. Since this trial has gone way longer than reasonably expected, I find that the delay was unavoidable and amounts to an "exceptional circumstance."

Transitional Exceptional Circumstances:

[300] Since the large majority of the delay in the conduct of this trial occurred years before the SCC released its **Jordan** decision, there is no question that the Crown may also rely on transitional exceptional circumstances to what otherwise might be considered to be presumptively unreasonable delay where the charges were brought before the release of the **Jordan** decision. Those transitional exceptional circumstances recognize, in **Jordan** at paras. 96-97, that the parties' behavior cannot be judged strictly, against a standard of which they had no notice and the fact that the change promoted by the **Jordan** decision realistically takes time to implement.

[301] I find that the brief analysis of the "transitional exceptional circumstance" conducted by our Court of Appeal in **R. v. Mouchayleh,** 2017 NSCA 51 which involved an appeal of an unreported section 11(b) **Charter** decision by my colleague Judge Buchan is most helpful in determining this issue.

[302] The **Mouchayleh** case was a drug prosecution with the accused being initially represented by Mr. Howe. The information had been laid on April 10, 2012 and the accused entered a not guilty plea on October 3, 2012. The trial was estimated for one day and was scheduled for one year later, on October 3, 2013. The trial was adjourned due to late Crown disclosure. Mr. Howe stated that the trial would only require a half day of trial time when the trial was rescheduled for eleven months later, on September 25, 2014. As we know from this case, Mr. Howe was suspended from the practice of law in Nova Scotia in June, 2014. However, unlike the instant case, there was sufficient time for Mr. Mouchayleh to retain another lawyer and Ms. McCarthy took over the file. Unfortunately, she was not available on the September 25, 2014 trial date, so the trial was adjourned to November 5, 2014. Instead of proceeding with the trial on that date, Ms. McCarthy brought a section 11(b) **Charter** motion since the total delay had been, at that point, about thirty-two (32) months.

[303] In an unreported decision of the Provincial Court, Judge Buchan conducted her analysis under the **Morin** framework and rendered her decision in December 2014, over eighteen (18) months before the **Jordan** decision. However, by the time the appeal in **Mouchayleh** reached the Nova Scotia Court of Appeal, the **Jordan** decision had been released by the SCC and therefore, our Court of Appeal conducted its section 11(b) **Charter** analysis under both frameworks.

[304] Given some of the similarities between the cases, I find that the Nova Scotia Court of Appeal's brief analysis of the transitional exceptional circumstances mentioned in **Jordan** is particularly illuminating in the evaluation of the circumstances present in this case. Of course, as the Nova Scotia Court of Appeal pointed out, the "transitional exceptional circumstances" only come into play if the overall "net" delay remains over the **Jordan** "presumptive ceiling" and may render that delay reasonable.

[305] In **Mouchayleh**, supra, at paras. 37-58, the Nova Scotia Court of Appeal discussed the contextual framework and criteria to be considered in determining whether the Crown has established the "transitional exceptional circumstance". In

reviewing those criteria in this case, I have made the following findings under those headings in this case:

1. **Seriousness of the offence** – I find that the charges of assault causing bodily harm and assault using or threatening to use a weapon, to wit, a baseball bat, are certainly serious charges. Moreover, I find that the allegations of this offence being committed by an adult much older than the two youthful complainants in the context in which the Crown has alleged the assaults occurred, also heightens the seriousness of this offence.

2. **Institutional delay** – I find that the record does indicate that the Dartmouth Provincial Court was experiencing significant institutional delay problems, given the nine to twelve month delay to find a half-day or more for trial for this matter. Those institutional delay problems were noted in the **McCully**, supra, and for that matter, but for one early trial date, the half-day trial and the one-day trials in **Mouchayleh** were established on a similar timeline to the instant case, that is, about nine to twelve (12) months down the road.

3. **Complexity of the case –** The Crown concedes and the defence agrees that this is not a particularly complex case. But, as the Nova Scotia Court of Appeal noted under this heading in **Mouchayleh**: "That works both ways."

4. **Delay in excess of the Morin guidelines** – Our Court of Appeal notes that the **Morin** case fixed the guidelines in Provincial Court at eight to ten months, but that was twenty-five years ago and the extent of disclosure and the number and complexity of trial motions has increased. The SCC implicitly recognized this by increasing the "presumptive ceiling" well beyond the **Morin** guidelines. However, prejudice and seriousness of the offence were significant factors in resulting in a "generous application" of those guidelines. Because this application was made after the **Jordan** decision, unlike Judge Buchan's decision in **Mouchayleh** which was rendered well before the **Jordan** decision, I have not conducted a separate delay analysis under the **Morin** framework.

5. **The Crown response to institutional delay** - After the trial had been adjourned on a couple of occasions due to the unavailability of defence counsel, when the trial was adjourned for the 3rd time for a

few weeks, the Crown Attorney immediately attempted to reach agreements to narrow the evidentiary and legal issues to be resolved. The Crown Attorney believed that some agreements had been confirmed by Ms. McCarthy, but Mr. Howe indicated that he had not seen any notes from Ms. McCarthy and evidently must not have seen the letter written by the Crown Attorney to Ms. McCarthy apparently confirming those agreements. However, once Mr. Howe was informed of the Crown's understanding of what issues would not be contested, after a consultation with his client, Mr. Howe took the position in court that he only was agreeing that the Crown did not have to establish the date or jurisdiction in which the offences were alleged.

In considering this criteria, however, the Nova Scotia Court of Appeal also noted the comments in **Jordan** that it would be unfair to the Court and the parties to apply the new criteria without regard to the law as it was. The test must be applied contextually in light of the new criteria and had the Court and the parties been aware of the presumptive ceilings, they could have acted differently.

As I have previously indicated, given the number and timing of the "discrete and exceptional events" which have arisen during this trial, I find that they were completely unforeseen and unavoidable on the part of the Crown. Therefore, I find that there was very little, if anything, the Crown they could do to respond to institutional delays, the unforeseen unavailability of Defence Counsel at the last moment and the other "discrete and exceptional circumstances."

6. **Defence efforts to move the case along** – In this case, like the **Mouchayleh** case, I find that the defence did absolutely nothing to move this case along. As the Nova Scotia Court of Appeal noted there and the same applies in the instant case, at no point did Defence Counsel object to proposed dates for trial, Mr. Howe did not at any time make any agreements that might have shortened the length of the trial, but apart from that, actually lengthened the proceedings by conducting a *voir dire* that he had stated on a couple of occasions would not be necessary and conducting a much longer cross examination than he originally contemplated of a witness that Ms. McCarthy had apparently confirmed was not necessary for the purpose of the trial given the presence of the medical documentation.

In addition, in this case as in the **Mouchayleh** case, Mr. Howe continually stated on each adjournment that the balance of the Crown witnesses and the defence evidence could be accomplished in one half day. Judge Buchan found in that case and I have found in this case that there was either explicit or implied waiver by the defence that created a significant amount of delay or that large amounts of delay were caused by the actions or inaction of Defence Counsel, most significantly, the two suspensions of Mr. Howe from practicing law in Nova Scotia during this trial. In addition, even when the Court offered to schedule an additional day or two of court time to complete the case, Mr. Howe was of the view that only one half day was required.

Moreover, given the fact that Mr. Howe had stated that there would be defence evidence, I find it is significant to note that Defence Counsel never asked the court to direct any defence witnesses to return, on some occasions indicated that defence witnesses were not present and Defence Counsel never made any application to have a defence witness testify by video link.

As the Court of Appeal pointed out in **Mouchayleh** at para. 35 in describing the actions of Mr. Howe which were very similar, if not identical to the actions or inactions taken by him in this case, that "all of these events are indicative of a casual attitude, even indifference, that obviously gave the judge the impression that Mr. Mouchayleh was in no hurry to proceed." Likewise, in this case, I find that the defence did not do anything to reduce the time required for trial or enter into any agreements with the Crown that would expedite matters.

7. **Prejudice to the accused** – As the Nova Scotia Court of Appeal pointed out in **Mouchayleh** at para. 54, under the **Jordan** analysis, prejudice disappears into the presumptive periods [**Jordan** at para. 54 and 109]. But it is still a relevant factor consider in transitional cases, where appropriate.

The 2 interests which prejudice captures are Mr. Longaphy's liberty/security interest and trial fairness. With respect to the former, unlike the **Mouchayleh** case where the Crown agreed to increasingly relaxed bail conditions as the case moved forward, the only conditions to which Mr. Longaphy was subject, was a summons which required him to attend court as and when directed. In those circumstances, I

> cannot find that there was any actual prejudice of his liberty/security interests and I am not prepared to infer that there was any prejudice in those circumstances.
>
> As for the evidence, given the very brief and relatively unusual circumstances in which the charges before the Court are alleged to have occurred, there was no indication in the evidence that any of the Crown's witness's ability to recall and relate details of events was compromised. By the same token, I find that it is unlikely, given the very specific time, nature and short duration of the allegations before the Court, that any of the potential defence witness's ability to recall and relate events will be hampered by the passage of time. In those circumstances, I am not prepared to find that there is any actual or inferred prejudice in trial fairness, that is, having to recall and relate details of events from years earlier to the court.

[306] Therefore, in addition to finding that the total "net delay" is at worst slightly above the "presumptive ceiling," I find that the Crown has established that there were several "discrete and exceptional circumstances" as outlined above, which have justified the delay. In those circumstances, I hereby dismiss Mr. Longaphy's section 11(b) **Charter** application for a stay of proceedings based on that conclusion. Furthermore, I also find that the Crown has also established that this trial involves a "transitional exceptional circumstance" and therefore, I would also dismiss Mr. Longaphy's section 11(b) **Charter** application on that basis.

[307] For all of the foregoing reasons, and notwithstanding the fact that the total delay from the start of this trial to the anticipated end of the trial was sixty-one and a half (61.5) months, after deducting the defence delay and taking into account the several "exceptional circumstances" which I find to have been established by the Crown, I find that Mr. Longaphy's section 11(b) **Charter** right to be tried within a reasonable time has not been infringed or denied. After having come to that conclusion, I find that Mr. Longaphy's application for a stay of proceedings under section 24(1) of the **Charter** is hereby dismissed.

Theodore Tax, JPC