PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Tolbert*, 2020 NSPC 51

Date: 20201218
Docket: 8115908
Registry: Kentville

Between:

Her Majesty the Queen

v.

Regan Brant Tolbert

RESTRICTION ON PUBLICATION: By court order made under subsection 486.4(1) of the *Criminal Code*, information that may identify the person described in this decision as the complainant may not be published, broadcasted or transmitted in any manner.

Judge:	The Honourable Judge Ronda M. van der Hoek
Heard:	October 28, 2020, in Kentville, Nova Scotia
Decision	December 18, 2020
Counsel:	Dan Rideout, for the Crown Zeb Brown, for the Defendant

By the Court:

Introduction:

[1] Mr. Tolbert asks the Court to grant a judicial stay of proceedings due to a breach of his section 11(b) *Charter* right to a trial in a reasonable time. The matter is not complete and has exceeded the presumptive ceiling set by the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27. The parties have focused the inquiry to specific timeframes between the date of charge on June 14, 2017 and December 12, 2019 when prior counsel waived delay on a go forward basis to the next trial date. (29.9 months.)[1]

[2] The Crown says Mr. Tolbert is responsible for 28 days delay and the remaining delay, not attributable to actions of the Crown, amounting to 378 days arises from exceptional circumstances. After deducting exceptional circumstances delay there remains a net delay of 16.67 months, below the eighteen-month presumptive ceiling.

[3] Mr. Tolbert disputes the Crown's characterization of exceptional circumstances instead asserting he is responsible for some portion of the overall

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[1] This decision does not consider Covid-19 pandemic related delay.

delay- 4.5 months occasioned by his actions. However, he argues the exceptional delay component cannot all be deducted as some is best characterized as institutional delay, amounting to the net delay exceeding the presumptive ceiling.

[4] As a result, the Court will focus the inquiry on three discrete events- (1) two fourteen day pre-plea periods when, on one occasion, Mr. Tolbert was not present in court; (2) Mr. Tolbert's hospitalization that led to the adjournment of the second trial date, and; (3) the discovery, during Crown redirect, of information that required investigation resulting in a joint request to adjourn for same and the Crown's consideration of reopening the case to recall the complainant.

Decision:

[5] After carefully considering the chronology of events and the arguments of both Crown and defence counsel, I find the presumptive ceiling has been breached, the net delay exceeds eighteen months, and grant the defence application for a stay of proceedings.

Facts:

The Chronology:

[6] A helpful chronology was provided by defence counsel. I have summarized it and supplemented it with input from the Crown brief and my own review of portions of the court recordings.

June 14, 2017	The Information was sworn.
June 20, 2017	First appearance: The Crown makes an indictable election and defence counsel, Mr. Vardigans, indicates disclosure, including videos, was received that day. He required time to review same, and declined an offered return date of July 11, 2017, in favour of July 18, 2017.
July 18, 2017	Defence counsel seeks adjournment saying, "information has come to light". (The Crown on this application argues the 14 days constitutes defence delay.)
August 1, 2017	Defence counsel seeks an adjournment noting he had expected Mr. Tolbert to be present. Mr. Vardigans says he may not have told his client to be there on that date, but in any event had planned to meet with him that morning. Despite a designation on file with the court, he sought a two-week adjournment. He determined to adjourn to have his client present for election. (For the purpose of this application, both the Crown and defence counsel invite the Court to characterize the 14-day period as defence delay.)
August 15, 2017	Defence counsel attends with Mr. Tolbert who elected to be tried in the Provincial Court, enters a not guilty plea, and the trial is scheduled for a full day on April 4, 2018.

March 29, 2018	The Crown brings the matter forward to seek an adjournment of the April 4, 2018 trial date to await investigation following the findings in a DNA report. A new trial date of August 9, 2018 was offered and accepted by both counsel. There was no suggestion of the trial proceeding with witnesses whose testimony would not be impacted by the results of the DNA clothing results.
August 9, 2018	Trial begins. Evidence is heard from two Crown witnesses. Testimony concluded at approximately 6:30 pm that evening and the Crown advised there were three more crown witnesses to call. It was suggested the matter be set over to September 6, 2018 to find the full day sought by defence counsel.
September 6, 2018	Trial was scheduled to resume on November 28, 2018.
November 28, 2018	Defence counsel appears with advance notice to Crown and Court to seek an adjournment due to Mr. Tolbert's sudden illness. There was no indication witness been brought to court this day. Defence counsel advised his client had suffered a collapsed lung and was in the hospital. When rescheduling was addressed, he suggested maybe a date “in the new year”. The Court asked if scheduling should await an indication of Mr. Tolbert’s health outcome, but defence counsel instead sought to set the next date. There was discussion about how much time would be needed- the Crown indicated it would lead evidence from two more witness over three hours. Defence counsel sought the better part of a day to complete the trial. The Court asked the clerk to provide the best part of a day in the new year. Offered was February 13, 2019, but defence counsel declined the date saying he was hoping “not that week because he is away”. He advised that he was otherwise available until mid May 2019. The clerk offered April 15, 2019, noting defence counsel also has a three-hour trial that day in the same

	courtroom, and defence counsel suggested the Tolbert matter could take precedence. The clerk quickly offered the next day, April 16, 2019 which was accepted by both counsel. The Court noted the Information sworn date.
April 16, 2019	Trial continues. Evidence is heard from one Crown witness. The trial was adjourned by agreement due to an issue arising from a Crown witness' testimony on redirect. The trial, as I recall, continued with a second witness. Defence counsel and the Crown advised the Court that they wanted to return on a new date to confirm instructions, ensure newly sought material had been gathered, and to set a new trial date. They suggested May 16, 2019, but defence counsel was away so he offered the week of his return on May 30, 2019.
May 30, 2019	Defence counsel advised the Court that while he had spoken to the Crown yesterday, he had yet to review with his client the newly received material. The Crown advised a decision would be taken about recalling the complainant after assessing the remaining redirect testimony from his last witness. As a result, the Crown determined he needed an hour on one day, and both counsel agreed an additional day would see the matter conclude. The Crown wanted the first date as soon as the Court could accommodate one hour. The court clerk offered June 17, 2019, but Mr. Vardigans said he was unlikely to have time to meet with his client and review the materials, noting that date was "too rushed". The clerk offered July 17, 2019, but the Crown was unavailable. July 31, 2019 was offered but defence counsel was scheduled to be in another courtroom. The Court asked if there were any earlier dates, acknowledging a judicial conference that month and other days when I would not be sitting.

August 1, 2019 was offered. The Crown was available, however Mr. Vardigans had two other matters scheduled that day and would not fit in the Tolbert matter.

August 25, 2019 was offered, but defence counsel was scheduled for two trials. The clerk commented on August vacations, noting the first available date was August 28, 2019. Defence counsel was scheduled for a full day trial.

August 29, 2019 at 1:30 pm was offered and accepted by both counsel.

The Court suggested a full day could be scheduled for September or October and took a recess to allow counsel opportunity to review their schedules to find a date that could accommodate both schedules. After a recess, the Court was told Mr. Vardigans had not been available for some offered dates and ultimately October 31, 2019 for one hour followed by December 12, 2019 were acceptable to the parties. There were no stated reasons why August 29, 2019 had been given up. I note the delay is concerning, but defence notes early September dates are not available as he needs a break. September 11, 2019 was not available for the Crown. The Court acknowledged the extremely busy dockets and case loads of NSLA defence counsel, and offered both counsel the option to consider moving other files.

October 31, 2019 The crown witness did not attend to complete her testimony on redirect. The Crown advised the police were aware of the return date on October 10, 2019. The matter moves ahead to the previously set full day- December 12, 2019.

December 6, 2019	Defence counsel files notice of s. 11(b) Charter application and waives delay from December 12, 2019 forward.
December 12, 2019	Adjournment. It was contemplated that December 12, 2019 would be a very busy trial continuation date with continued testimony form the last witness, and the Crown potentially recalling the complainant, and calling his final witnesses. Defence counsel also intended to call evidence.

Legal Principles

[7] Section 11(b) of the *Charter* provides that

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

[8] In *Jordan*, the Supreme Court established a framework for evaluating trial delay. The Court established a presumptive ceiling of 18 months at the Provincial Court level from the date a charge is laid to the end of the trial.

[9] The *Jordan* analysis of delay begins by calculating the total delay from the charge date to the end of trial. Any delay attributable to the defence is subtracted from that number along with delay attributable to exceptional circumstances, including discrete events: *Jordan* at paras. 48 and 60; *R. v. Coulter*, 2016 ONCA 704 at paras. 34-40.

[10] In a recent decision of the Ontario Court of Appeal, *R. v. Villanti*, 2020 ONCA 755, the Court considered some arguments similar to those arising in this case, namely delay caused by scarce judicial resources, what constitutes exceptional circumstances and the requirement of the Crown to show steps taken to mitigate delay. While somewhat lengthy, it is worth citing paragraphs 10-12, 15,16, 41-45:

> [10] In *Jordan*, the Supreme Court replaced the formula in *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771 for determining whether the delay in the trial of an accused breached s. 11(b) of the *Charter*. The court set ceilings at 18 months from the date of the charge to the likely date of the verdict for cases tried in provincial courts and 30 months for cases tried in superior court, or cases tried in the provincial court after a preliminary inquiry: *Jordan*, at para. 46.[2]
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> [11] Net delay that exceeds the ceilings, being total delay less defence delay, is presumptively unreasonable, but the Crown can rebut the presumption by showing the excessive delay was caused by "exceptional circumstances": *Jordan*, at para. 68. These are circumstances that "lie outside the Crown's control" in that they are "reasonably unforeseen or reasonably unavoidable" and the Crown cannot "reasonably remedy the delays emanating from those circumstances" (emphasis in original): *Jordan*, at para. 69.
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> [12] The categories of exceptional circumstances are not closed but, "in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases": *Jordan*, at para. 71. Discrete events include "medical or family emergencies (whether on the part of the accused, important witnesses, counsel or the trial judge)": *Jordan*, at para. 72. The period of delay caused by such a discrete event is subtracted from the net period of delay to determine whether a ceiling has been exceeded: *Jordan*, at para. 75.
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> …
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> [15] When the possibility of a breach of the *Jordan* ceiling looms, then the Crown is required to take action to mitigate the problem. In order to justify a delay in excess of a *Jordan* ceiling, the Crown must "show that it took reasonable available steps to avoid and address the problem before the delay exceeded the ceiling" (emphasis in original): *Jordan*, at para. 70. The court added that: "The Crown, we emphasize, is not required to show that the steps it took were

ultimately successful – rather, just that it took reasonable steps in an attempt to avoid the delay": *Jordan*, at para. 70.

[16] The Supreme Court affirmed its resolve that the *Jordan* ceilings be applied rigorously in *Cody* and most recently in *R. v. Thanabalasingham*, 2020 SCC 18.

…

[41] The Crown's third argument is that the application judge did not deduct a single day on account of exceptional circumstances in her *Jordan* calculation. The Crown says that some deduction is mandatory and that the application judge's failure to do so is fatal.

[42] I would not give effect to this argument. The application judge said, at paras. 36 and 39, that she would be prepared to deduct up to three months to the discrete circumstance of two judges falling ill. This was nowhere near the 11 months that any exceptional circumstances deduction would need to overtake.

[43] However, there is no evidence on this issue on which the application judge could base an estimate that the delay caused by two judicial illnesses should be no more than 3 months. Her estimate cannot serve as a norm. But I would agree with the application judge, on the basis of common sense and the Superior Court's decision to set the priority for this trial behind numerous others, that the delay caused by scarce judicial resources could not tolerably be permitted to consume all of, or even most of, the actual 11-month delay.

[44] The Crown's fourth argument is that prosecutions are a provincial responsibility, as is the operation of the superior courts in the province. The fault, if any, in this case, counsel asserts, lies with the federal government not the provincial government, and the provincial Crown is not answerable for the federal government's delay in increasing the judicial complement and filling vacancies.

[45] I would not give effect to this argument because it ignores the appellants, who are the right-holders under the *Charter*. It matters not at all to the respondents or to the *Charter* which level of government is at fault. The only question from the *Charter's* perspective is whether the delay is unacceptable in accordance with the Jordan principles. The court's focus in the analysis must be on the right-holder, not on the Crown: *Jordan*, para. 19.

Defence delay:

[11] *Jordan* also speaks to what will constitute defence delay at paragraph 65:

[65] To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In

> addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence.

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

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

[13] The Crown concedes, and I agree, there were no frivolous or obstructive applications made by the defence in this proceeding. The Crown submits however that 28 days pre-plea should be deducted as defence delay. I will consider all these timeframes in turn, after I have outlined what constitutes exceptional circumstance.

[14] Once again referencing *Jordan* at paragraph 75, exceptional circumstances were described by the Court as follows:

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

Issue 1: Pre-plea adjournments (two fourteen-day periods)

[15] This timeframe can be dealt with rather expeditiously. It was clear to the Court from a review of the record that early on defence counsel was much further ahead in the proceedings than most matters that appear before the Provincial Court. While Mr. Tolbert was charged on June 7, 2017, he appeared a short few weeks later, on June 20, 2017 already represented by Nova Scotia Legal Aid counsel, virtually unheard of in this jurisdiction. Mr. Vardigans sought an adjournment because he had received disclosure that morning. He asked to put the matter over to meet with his client and to take instructions. The matter returned on July 18, 2017 and Mr. Vardigans said he needed more time because “information had come to light”. The Court does not require counsel to delve into the reasons for requesting a short delay before election when the matter has been before the Court for such a short period of time. I cannot agree that Mr. Vardigans’ request for time

to look into something constitutes defence delay, rather I consider this to be inherent delay built into the system.

[16] When the matter returned two weeks later Mr. Vardigans expected his client to be present so they could meet. He feared he may not have told Mr. Tolbert to come to court. While Mr. Vardigans had a designation on file with the Court, he sought a two-week adjournment.

[17] I find that the statement from Mr. Vardigans that he had planned to meet his client and his decision not to elect without him present, indicates that he needed to confirm instructions, and clearly the intended meeting involved a meaningful step in the process.

[18] When Mr. Tolbert attended court two weeks later, he elected provincial court, entered a not guilty plea, and the matter was set for a full day trial- well within eighteen months. Such is indicative of a workable process that sees defence counsel permitted to spend appropriate time with a client prior to making the important election decision and scheduling a trial.

[19] As such, I am not prepared to deduct any of the foregoing time as defence delay, instead I consider it to be inherent time required for a busy NSLA lawyer to properly represent a client in a busy provincial court.

[20] I would also note, at the time of plea the Crown was not in receipt of a forensic analysis conducted on clothing seized from the complainant. It goes without saying that information would have been disclosed and Mr. Vardigans had to consider same in his preparation.

[21] While Mr. Brown was prepared to concede 14 days of the delay as occasioned by actions of defence counsel, I am not prepared to do so.

[22] In the result, to the Crown's calculation of 16.67 months net delay must be added 28 days, bringing the net delay to 17.67 months should I accept his argument regarding exceptional circumstances. I will now address the first of those circumstances.

Issue 2: The illness of Mr. Tolbert:

[23] Both counsel agree the illness of Mr. Tolbert constituted a discrete event and an exceptional circumstance. The issue for the Court is determining whether the entirety of the delay from that adjournment until the next trial date should be characterized as such and therefore deducted from overall delay.

[24] The context to this point saw the first trial date, April 14, 2018, adjourned at the Crown's request to investigate the DNA issue, resulting in the trial commencing on August 9, 2018. That day was very busy with several sentencings,

people in custody, etc. and so the trial started late and continued into the evening until 6:30 pm. All participants should be commended for their ability to be flexible when court should end at 4:30 pm. After reviewing the transcript, it appears just under three hours was devoted to the trial.

[25] Rather than set the next date that evening, the matter was adjourned to September 6, 2018 to obtain the trial continuation date- November 28, 2018. I will say that it is not uncommon in this jurisdiction to set a date to come back to seek a date as it allows counsel and the Court time to consider any delay and try to find a best date. I encourage this practice as it accords with *Jordan*. In fact, the court clerk can be heard on the record suggesting she could work behind the scenes to find a date.

[26] Presumably during the brief hiatus, the next date was arrived at, and it must have been apparent that the matter was approaching the *Jordan* threshold. In fact, on November 28, 2018 the matter would be only 15 days shy of that ceiling.

[27] November 28, 2018 was scheduled for trial continuation over the better part of the day. (Less than three and a half months after day one of trial.)

[28] A few days prior to the trial continuation date, Mr. Vardigans was advised his client was hospitalized with a collapsed lung. On November 28, 2018 he attended court to seek an adjournment with notice to Crown and the Court.

[29] Mr. Vardigans suggested a new date "maybe would have to go into the new year" to allow for recovery time.

[30] The court offered February 13, 2019 but Mr. Vardigans indicated he was scheduled for holiday that week and could not accept. This, I find was eminently reasonable in the circumstances as Mr. Vardigans, as I continue to emphasize, is a busy NSLA counsel who appears before this Court almost daily and, at least in the opinion of this judge, often appears to put his client's interests ahead of his own, but had recently advised the Court that he needed to start taking his earned leave.

[31] The Crown did not indicate whether the declined date would have been acceptable.

[32] Other than the week in February, Mr. Vardigans stated open availability until May 2019. The next date offered was April 16, 2019 and both counsel accepted it.

[33] It is also important to consider what did not occur on November 28, 2018. There was no discussion of 11(b) *Charter* waiver, no discussion of working court

dockets to find an earlier date, nor consideration of matters that might not be proceeding thus freeing up court time. By this I refer to trial dates, and the like, which counsel might know were not likely to proceed. There was likewise no indication that the defence counsel had a certain firm date moving forward when Mr. Tolbert would be recovered, only in the new year which one presumes means January 2019. There was no discussion about how this illness related delay should be characterized.

[34] Mr. Brown argues it is important to note, unlike many delay cases, defence only rejected one date and for good reason.

[35] As Justice Muise said in *R. v. R. A.*, 2019 NSSC 404, at para. 52, it is "preferable for defence counsel to put on the record that he had earlier availability", as post-*Jordan* cases have clearly indicated "that can be a material issue" rendering "the practice of doing so more common."

[36] In these circumstances, it is reasonable to conclude that Mr. Tolbert's illness cannot be taken to have delayed the matter as long as April 16, 2019. Rather, defence counsel rejected only the February date which strongly suggests defence would be, but for a vacation, open to continuing at least from that point forward.

[37] As such, the time from February 13 to April 16, 2019 was time when the Court could not accommodate the need to set an earlier date in consideration of the section 11(b) *Charter* right that was not acknowledged or waived. As an aside, I will also note there appeared to be no consideration of January dates, although nothing really turns on such.

[38] It is appropriate to note that there comes a time during all criminal proceedings when participants must adeptly move to respond to matters at imminent risk of breaching a *Charter* protected right. When fast action must occur will of course be case specific and depend on the area in which the proceedings are heard. At a minimum this requires counsel, as part of preparation for any court appearance, to remain live to issues that could impact delay.

[39] I note the JEIN system in this province had by 2017, added a *Jordan* counter ticker to the right hand side of the dockets allowing readers to readily see the number of months each docketed matter has been before the Court. That daily docket is available, often posted on the courtroom door, and searchable by both Crown counsel and lawyers at NSLA.

[40] Reviewing JEIN generated dockets facilitates consideration of delay to date and should lead to background work aimed at reducing the overall delay and

safeguarding the *Charter* protected right. For example, consideration of bringing other matters forward to adjourn to find time to support the *Charter*-right-at-risk matter. By other matters, to be clear, I refer to matters such as summary offence tickets that were set for a few days a month at the time, or sentencings hearings that could be moved, etc.

[41] In this case that was not done. Even if the defence counsel considered the pre-plea 15-30 days as defence delay, doing so placed the matter at 16.5 months and not 17.5 months. But there was no mention of this reality and no waiver of the full delay to April 2019. A waiver would have been a clear recognition from Mr. Tolbert that he was giving up his *Charter* right. Presumably one can assume for *Charter* purposes that he thought his trial would complete in 17.5 months but for his sudden hospitalization.

[42] So, the Court must determine if the time occasioned by same is exceptional such that it is deducted entirely from the total delay.

[43] Mr. Brown argues it should not. He argues for a deduction of just two months. He says the Court lacked the capacity to accommodate an earlier date, the matter should have taken precedence over other set matters, and the Crown was in a position to assess such things. The Crown knew before the trial date that the

matter was not going ahead and should have obtained a waiver or clarified if one was needed or looked to see what other matters could be resolved in the event the next date offered was too far out considering the nature of any waiver, the timelines and the seriousness of the offence.

[44] The Crown says the entire period should be waived.

[45] I cannot find that the totality of 4.6 months be either characterized as solely defence delay or exceptional delay. Once defence rejected the first date it was incumbent upon the parties to recognize the delay issue and work toward obtaining an early date. It cannot be inferred that Mr. Tolbert needed as much time as February 13, 2019 to recover, but it can be inferred by defence counsel rejecting that date, only due to vacation, that he was otherwise ready to resume the trial. An April date without effort to obtain an earlier date is not a result of exceptional circumstances, but instead represents a failure to consider Mr. Tolbert's *Charter* protected right. There is blame to go around.

[46] I find that *Jordan* required accommodation of earlier dates through creative means that were not engaged. For example, even summary offence trial dates under the *Motor Vehicle Act* could have been adjourned, the Court has done so on many, many occasions in order to complete a sexual assault trial, but that issue was

not raised. Mr. Brown is correct, in accordance with the decision of Justice Muise in *R. v. R.A., supra,* at paragraph 39 wherein the court addressed defence counsel unavailability for an offered trial date:

> [39] The principles emanating from these cases expand upon the general rule that "if the court and the Crown are ready to proceed, but the defence is not, … [t]he period of delay resulting from that unavailability will be attributed to the defence". Those principles can be summarized as follows:
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> 1. Whether defence unavailability will count as defence delay will depend on the context of the case.
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> 2. Jordan requires scheduling flexibility.
>
> 3. Refused dates which do not provide reasonable preparation time do not count as defence delay.
>
> 4. Where defence counsel is available on dates earlier than those scheduled, but the court is unable to accommodate them, the resulting delay is to be considered institutional delay.
>
> 5. If defence counsel does not provide reasonable availability and reasonable cooperation in selecting dates the resulting delay is to be considered defence delay.
>
> 6. Circumstances relevant to determining what is reasonable, and whether delay should be attributed to the defence, include whether:
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> (a) the defence did anything to seek earlier dates, such as offering earlier dates on which it was available, or remained silent;
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> (b) the Crown expressed Jordan concerns, or remained silent;
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> (c) the Crown was available on numerous dates that were offered by the court, and the defence counsel was repeatedly unavailable for any dates over a reasonable period, or the defence merely refused a single date;
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> (d) the defence only refused a single date following an adjournment for which the Crown was responsible; and,
>
> (e) the defence has made efforts to expedite the proceedings.

[47] On this basis I find only two months of this delay was attributable to Mr. Tolbert, the remainder is institutional delay and cannot be deducted from the overall delay.

[48] A word is also necessary about complexity. This matter was not complex. It involved two people alone at the time of the alleged assault and a few witnesses who were with them in the hours before that time. As such, the trial should have moved along expeditiously and I would even go so far as to suggest that the witnesses who had nothing to offer regarding the DNA analysis could have been called first therefore not delaying the overall trial. I do however concede that the Crown is surely entitled to one adjournment.

[49] My finding on the delay now increases the overall delay from the previous 17.67 months, after the 28 days for pre-trial matters is added back, to 19.67 months net delay.

[50] While unnecessary to do so, I go on to consider the remaining period of time- delay occasioned by the unexpected testimony of a Crown witness.

Issue 3: Adjournment arising from unexpected testimony of a Crown witness:

[51] On April 16, 2019, one year after evidence was first called, the matter continued with one Crown witness. On cross-examination defence counsel asked

her generally about conversations she may have had with the complainant after nights of drinking. This led to testimony suggesting the complainant may not recall anything about the night of the offence and the possible existence of text messages about this topic. The Crown explored the issues more thoroughly on redirect and the parties agreed to adjourn to further an investigation, possibly obtain any relevant text messages, and to allow the Crown time to consider recalling the complainant who had already given evidence.

[52] The matter was adjourned by consent to May 30, 2019 to set the next date.

[53] On May 30, 2019, the court offered June 19, 2019 but Mr. Vardigans declined because he did not believe he would have enough time to properly consult with his client and review the newly provided material. July 17, 2019 was not available to the Crown; the Court was concerned about offering earlier dates but acknowledged attendance at a conference in July. July 31, 2019 saw the defence in a different courtroom. On August 1, 2019, the Crown was unavailable. August 29, 2019 was accepted as the first date to continue the testimony of the witness still under oath and a second date would be needed for trial continuation. After a recess to allow counsel to work with the clerk to find a date for the final portion, the matter returned and for some reason August 29, 2019 was given up in favour of October 31 and December 12, 2019.

[54] On October 31, 2019, the matter did not proceed when it was learned the returning witness was not advised of the date until October 10, 2019. She was not available. I do not find she was directed back as was suggested, there is no record of same.

[55] Mr. Vardigans filed a section 11(b) *Charter* notice on December 6, 2019.

[56] Mr. Brown points out that it was reasonable for Mr. Vardigans to refuse the June 19, 2019 date to prepare and review the new material. I agree and characterize this as inherent delay. He also points out that the next date offered July 17, 2019 was not available to the Crown and that it is not reasonable to continue to assess the ongoing delay as exceptional past this point.

[57] I recognize that both July 17 and August 29, 2019 could have been available to defence counsel to continue this matter, but the Crown was not available on July 17, 2019. As such I am not prepared to stop the clock on July 17 but would instead move it ahead to August 29 at the earliest, but certainly October 10 at the latest. As such, either 3.5 months or two additional months must be characterized as institutional delay.

[58] As repeatedly mentioned, it was by this point surely obvious that the case was in serious jeopardy. There was no section 11(b) *Charter* waiver, there was no

discussion of accessing existing dockets, no request to consider placing the matter on a summary offence ticket date, as is regularly done in the jurisdiction.

[59] Eight months is an excessively long period of time to accommodate an hour and the better part of a day to complete a serious trial matter. I accept defence counsel's arguments that this full timeframe cannot be solely attributed to exceptional circumstances. The matter was already past the eighteen-month ceiling and without a clear indication why August 2019 was rejected in favour of October and December dates, it is a mystery why the matter was set so far out. Likewise, I cannot ignore Mr. Vardigans' available dates when the Crown was not. Surely when the Court and the defence are available and the Crown is not, that time forward cannot be excluded as exceptional circumstances and therefore constitute deductible delay. That delay cannot remain in the mix (See: *Jordan* at para 75)

[60] I find that adding the minimum of two months submitted by defence, or indeed 3.5 months in my consideration, back to the net delay of 19.67 months, results in a delay of between 21.67 or over 23 months.

Conclusion:

[61] It must be said that *Jordan* ceilings are not a suggested approach, rather as Judge Tufts put it in *R. v. Ellis*,[2] they are bright lines. All parties in the justice system bear the responsibility to ensure matters progress through the system within what must surely be a reasonable eighteen-month window. Surely the Supreme Court of Canada has not suggested an unattainable objective; this Court does not conclude so as that would be contrary to *Charter* objectives and therefore unfathomable.

[62] I will add, trials such as this are unfortunately commonplace, not unduly complicated, and should easily be completed within eighteen months. They must take priority over such mundane matters as *MVA* trials, minor offences such as shoplifting or even animal protection, matters that consume vast amounts of court resources. It is necessary for all justice participants to prioritize cases at risk of breaching a *Charter* protected right.

[63] Finally, I will offer that perhaps charges where the investigation is incomplete should not be laid until such time as they can proceed expeditiously; there are many historic sexual assault cases wherein charges are not laid until the investigation is complete and no stone is left unturned. Alleged victims can be

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[2] Unreported, upheld on appeal in *R. v. Ellis*, 2020 NSCA 78

protected by peace bonds until charges are laid. There is no reason to lay charges immediately after discovery of an offence. *Jordan* requires parties to think outside of the box, conducting matters in the manner herein suggested must certainly align with *Jordan* expectations.

[64] The Crown has not satisfied its burden to rebut the presumption by showing excessive delay was caused by exceptional circumstances, and the resulting net delay, after deducting delay caused by defence and the properly characterized exceptional circumstances, exceeds the eighteen-month ceiling. In accordance with our Court of Appeal's decision in *R. v. Ellis*, 2020 NSCA 78, the only remedy is a stay of the proceeding which is granted.

[65] Judgment accordingly.

van der Hoek, J.