# PROVINCIAL COURT OF NOVA SCOTIA

**Citation:** *R v Clarke*, 2022 NSPC 2

**Date:** 20220218
**Docket:** 8431109-1114
**Registry:** Kentville

**Between:**

R

v.

Bradley Clarke

**Restriction on Publication: 486.4(2)(B)**

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| **Judge:** | The Honourable Judge Ronda van der Hoek, JPC |
| **Heard:** | February 11 and 16, 2022, in Kentville, Nova Scotia |
| **Decision** | February 18, 2022 |
| **Charge:** | 286.1(2); 172.1(1); 151; 271 *Criminal Code*; 5(1) x 2 *Controlled Drugs and Substances Act* |
| **Counsel:** | Peter Dostal, for the Crown<br>Kyle Williams, for the Defendant |

- **486.4 (1)** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
    - **(a)** any of the following offences:
        - **(i)** an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
        - **(ii)** any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
    - **(b)** two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
- **Marginal note: Mandatory order on application**

  **(2)** In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
    - **(a)** at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
    - **(b)** on application made by the victim, the prosecutor or any such witness, make the order.

**By the Court:**

*Introduction:*

[1] Mr. Clarke seeks a judicial stay of proceedings arising from a breach of his section 11(b) *Charter* right to a trial in a reasonable time. A six count Information was sworn on February 12, 2020, and the parties agree the trial will conclude just over two years later on February 22, 2022.

[2] When seeking an adjournment of the first trial dates, defence counsel explicitly waived 2½ months of delay. That waiver did little to ameliorate the net delay that still exceeds by six months, the eighteen-month presumptive ceiling set by the Supreme Court of Canada in *R. v. Jordan,* 2016 SCC 27.

[3] The Crown seeks to rebut the presumption of unreasonable delay asking the Court to deduct defence delay for, what he described as, "defence fishing expeditions". There are also two pre-arraignment events to be classed as extraordinary delay- the impact of the provincial state of emergency arising from the global pandemic and two investigating officers' deployment to the Bible Hill detachment following the mass casualty event. As well, the Crown argues Covid related delay impacted scheduling trial dates and some deduction should be permitted to account for same. Should the Court deduct some or all of these events, the delay would fall below the presumptive ceiling and the application can be dismissed.

*Issues*:

[4] Did any additional delay result from the actions of defence counsel.

[5] Did the provincial state of emergency due to the global pandemic and/or officer unavailability prior to the Crown receiving the fruits of the investigation, result in extraordinary delay.

[6] Did provincial court closures during the early days of the pandemic result in exceptional delay in setting trial dates.

*Decision*:

[7] The Court considered Cst. Blanche's evidence, the helpful written and oral submissions of counsel, and applied the legal framework for assessing delay. Despite deductions for 2 ½ months defence waived delay, extraordinary pre-arraignment delay arising from the provincial Covid state of emergency and the investigators' deployment to address the mass casualty event (22 days), and the addition of two months when the defence counsel could have been in a position to elect, the Court concludes the delay in this case exceeds the 18-month presumptive ceiling and is therefore unreasonable. Having found a breach, the only available remedy is a stay of proceedings.

*The Legal Framework*:

[8] Section 11(b) of the *Charter* provides:

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

[9] In *Jordan*, the Supreme Court established a framework for evaluating trial delay, setting an 18-month presumptive ceiling after which delay is unreasonable. That time frame spans from the date the Information is sworn to the conclusion of the trial. The analysis begins by first calculating the total delay and deducting delay attributable to the defence and delay attributable to exceptional circumstances, including discrete events: *Jordan* at paras. 48 and 60; *R. v. Coulter*, 2016 ONCA 704 at paras. 34-40.

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

[11] Exceptional circumstances fall into two categories, "discrete events and particularly complex cases" (*Jordan*, at para. 71). Discrete events include such

things as “medical or family emergencies (*Jordan*, at para. 72). The period of delay caused by a discrete event is subtracted from the net delay to determine whether the ceiling has been exceeded (J*ordan*, at para. 75). Particularly complex cases include those with numerous co-accused and those involving complex legal issues.

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

*Defence delay**:***

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

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

[14] In *R. v. Cody*, 2017 SCC 31, at paragraphs 32 and 33 the Court expanded 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' … ."

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

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

*Chronology*:

[16] Counsel provided a helpful chronology and the Court listened to the audio recordings of each appearance, adding any necessary comments from that and the materials filed by counsel on the application.

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| February 12, 2020 | Information sworn. (six counts) |
| February 19, 2020 | Defence writes Crown seeking disclosure. |
| April 19, 2020 | Mass casualty event. |
| April 20, 2020 | Cst. Blanche and the lead investigator deploy to Bible Hill until May 5, 2020. |
| May 6 - 23, 2020 | Both officers return to the investigation and review the results of a Production Order obtained during their deployment. They complete 12 remaining steps in the investigation. |

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| March 17, 2020 | **Mr. Clarke Arraigned**. Crown elects to proceed by indictment. Defence not in receipt of disclosure and election and plea adjourned to June 23, 2021. (one month since Information sworn) |
| June 23, 2020 | **Second Court Appearance**: Crown advises Court disclosure was vetted today. Defence counsel elects Provincial Court, but Court does not accept election pending defence receipt and review of disclosure. Crown concurs advising a considerable amount of material will also not be provided pursuant to section 278.2 CC. Court offers return date- July 21, 2020. (four months since Information sworn) |
| June 23, 2020 | Initial disclosure package provided to defence counsel containing video and audio interviews, police reports, business records, bank records, warrants, court documents, investigative emails, photographs, and segments of extraction report from complainants phone. [approximately 600 pages]. |
| July 21, 2020 | **Third Court Appearance**: Defence counsel seeks date for s. 278 CC disclosure application. Court offers July 23, 2020, and election and plea adjourned. |
| July 23, 2020 | **Fourth Court Appearance**: Section 278 application granted by consent. Court orders disclosure including 27 pages of unredacted extraction from complainant's phone, the applicant's cell phone extraction, text messages between the complainant and the applicant from the applicant's phone, photographs from complainant's phone. Court raises issue of time needed for Crown to comply with Order and for defence to review materials and consult client. Defence says unredacted disclosure materials may uncover the existence of other materials and the need for a future application. Matter adjourned to September 22, 2020. |

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| August 10, 2020 | Defence counsel receives ordered disclosure containing the two cell phone extraction reports: a package containing 4,241 separate files totalling 9,036 pages. |
| August 11, 2020 | Defence counsel receives another disclosure package containing a partially redacted copy of a 606-page PDF document also ordered disclosed pursuant to the 278 application. |
| September 22, 2020 | **Fifth Court Appearance**: Assigned Crown not in attendance. Defence counsel requests adjournment of election and plea until end of December to allow Mr. Clarke opportunity to review with counsel the recently obtained disclosure and provide instructions. Court provides earlier date December 2, 2020. (2 months 10 days) |
| September 22, 2020 | Crown writes to defence counsel, apologizes for missing the court appearance, agrees an adjournment to review disclosure not unreasonable, but states 2½ months seems along. Defence counsel replies on September 29 that disclosure seems to match the last one but is larger and he is struggling to determine the difference between the two large documents. He also mentions that he is particularly busy this time of year and seeks help from the Crown to sort through the material. |
| October 11, 2020 | Crown responds offering assistance to figure out the difference between the two files and defence asks for an itemized list. |
| October 29, 2020 | The Crown writes that he does not have such a list but will ask the police if they can point out the differences. |
| December 2, 2020 | **Sixth Court Appearance**: Mr. Clarke elects Provincial Court, pleads not guilty, and the Crown estimates the trial will take four days. Trial is scheduled for October 5, 13, 14 and 21, 2021. (20 months and 9 days since |

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| | Information was sworn) Defence advises Court he has sent a proposal to the Crown with a "slight possibility of resolution" and Crown will be in position to consider by end of January. PTC: January 26, 2021. (Neither the Court, nor counsel raise the issue of delay despite trial dates set outside the eighteen-month presumptive ceiling.) |
| January 26, 2021 | **Seventh Court Appearance**: Crown advises there is no resolution, trial proceeding. Court advises a Judicial Education Conference is scheduled for October 13 and 14, 2021, parties require two new trial dates. October 4, 2021 is offered and accepted to replace October 13, and December 2, 2021 is accepted to replace October 14, 2021. The delay from October 21 to December 2 (12 days) occurred at the behest of the Court and constitutes institutional delay. PTC scheduled for August 3, 2022. |
| March 9, 2021 | Defence counsel writes to Crown, accepting ten proposed concessions to streamline required trial time. |
| June 9, 2021 | **Eighth Court Appearance**: Defence counsel brings application to adjourn trial in favour of multi accused Supreme Court trial. Crown consents to adjournment request.<br><br>December 14, 2021 is offered, the Crown is reluctant to accept and split up trial dates. Crown unavailable in January 2022. Defence does not comment on availability.<br><br>Court offers February 15, 16, 17 and 18, 2022 and expresses concern about delay as matter stands today at 15.9 months. Defence counsel waives delay from December 2, 2021 to February 18, 2022 (two and a half months). Matter adjourned to June 14 to determine whether a *per diem* judge can hear the trial on the set dates. |

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| | Defence has not heard from the Crown about concessions in his March correspondence in aid of reducing trial time. |
| June 14, 2021 | **Ninth Court Appearance**: Court offers earlier trial dates: February 7, 8, 10, 11, 2022. Accepted by the parties. |
| June 16, 2021 | **Tenth Court Appearance**: Court brings the matter forward to advise that February 10 actually not available and provides February 22, 2022. Final trial dates- February 7, 8, 11 and 22, 2022. (Four days from February 18-22, 2022 are institutional delay not waived by defence.) |

In light of concessions, parties agree one day, February 22, 2022 is required for the trial.

*The Evidence of Sgt. Blanche*:

[17] Sgt. Blanche, RCM Police file coordinator, testified that he was in charge of preparing disclosure packages, which the Court will refer to as "the fruits of the investigation", to send to the Crown. The investigation started on January 7, 2020, and by February 10, 2020, Mr. Clarke had been arrested, the lead investigator had sworn an Information, a statement had been taken from the complainant, and initial steps were underway to gather material from her cellular phone.

[18] On March 13, 2020, the initial disclosure package was sent to the Crown including a nine-page summary of the investigation with witness interviews, Mr. Clarke's statement, and a summary of the conversation between the complainant and Mr. Clarke contained on her cell phone.

[19] On March 22, 2020, the Covid-19 state of emergency was declared in Nova Scotia. The team had to work remotely, which was a change from the norm, so it took a week to schedule communications and actions. While Sgt. Blanche did not have anything concrete to say about how the emergency declaration impacted the investigation, he concluded the RCM Police were dealing with adjustments fluidly for approximately a week.

[20] On March 22, 2020, the investigation was not complete. A warrant had been executed, items were seized, and a Production Order was obtained for Mr. Clarke's bank records. A search warrant was also obtained to review the contents of his seized phone.

[21] Sgt. Blanche testified that on April 20, 2020, the day after the Nova Scotia mass casualty event, he and the lead investigator were seconded away from the investigation, for fifteen days, to lend assistance at the Bible Hill RCMP detachment.

[22] Returning to regular duties on May 6, 2020, steps were taken to complete the investigation. The items sought in the Production Order had been received in April and additional/follow up steps were taken in May.

[23] By June 15, 2020, the team had provided the Crown an Adobe package including records, multimedia files, links, and bookmarks to aid viewing. Together with the Crown Attorney, they vetted the material to reflect the section 278 CC regime cautions regarding the complainant's cell phone and other specified concerns.

[24] There was some confusion over when those last fruits of the investigation were sent to the Crown on June 13 or June 15, 2020. In any event, the officer reviewed the materials filed by the Crown on the application and confirmed items located at Tabs A and B were part of those materials.

[25] Sgt. Blanche testified that in July the complainant waived section 278 concerns, and the original materials were amended, provided to Crown counsel, and forwarded to defence counsel. By August the package of material containing 606 and 22 pages, and Mr. Clarke's cell phone records were provided to defence counsel. Disclosure packages were provided in March, June, and August.

[26] The Court sought clarity on delays occasioned by the mass casualty event and the officer testified that the Production Order results came in on April 18, 2020, but he was not able to deal with them until he returned from deployment on May 6, 2021, at which time he followed up on tasks and generated more work including completing witness statements and attending a location for investigation. Overall, he says there were 12 tasks assigned or generated based on the results of the Production Order, all were completed within fifteen days between May 6 and May 25, 2020.

[27] On cross-examination defence counsel pointed out that the Production Order results were actually received six days prior to the mass casualty event deployment and there were two members left on the team who were not deployed.

[28] Asked if he raised with Crown counsel concerns about delay involving Covid, the officer said he did not. He also agreed the August 10, 2020 disclosure package included 9,000 pages of cell phone extractions.

*Analysis*:

[29] Section 11(b) applications are not meant to lay blame but to characterize delay. *Jordan* made clear that all justice system participants have a responsibility to ensure the *Charter* protected right of an accused to a trial in a reasonable time is respected. That is why the *Jordan* ticker was added to our provincial court dockets, allowing participants to see at a glance where a matter falls and take appropriate action to reduce delay.

[30] The parties agree the delay in the case is just over 24 months and 10 days. Defence counsel explicitly waived 2.5 months and the delay drops to 21.5 months. As he should, the Crown sought to rebut the presumption of unreasonable delay. The Court was asked to consider three specific timeframes.

*(1) Information sworn until delivery of initial disclosure*:

[31] Sgt. Blanche testified about delays in providing the fruits of the investigation to the Crown and the resulting delay in making disclosure to defence counsel. While the evidence did not come out as anticipated in the Crown's brief, the Court is asked to deduct, as extraordinary circumstances, a week for the police to react to the provincial state of emergency arising from Covid-19, and fifteen days for the mass casualty event deployment.

[32] Defence counsel argues there will always be situations where officers are unexpectedly taken away from their duties, and the mass casualty event is such a situation. He says the fifteen-day deployment left two other members of the team to move their investigation along and the fifteen days should not be deducted.

[33] Laying an Information triggers the *Jordan* clock, and it continues to baffle the Court just how often this is done before the investigation is complete and disclosure can be provided. The Court recognizes Nova Scotia is a not pre-charge

screening province and the police maintain the right to the lay an Information when they choose, however such a decision taken prematurely affects delay and impacts the Crown as a matter proceeds through the Court. With twelve steps remaining in the investigation in May, it was not made clear to the Court why the Information was laid so soon.

[34] The Court does observe that the completion of twelve investigative steps in 15 days and only a week to adapt to the provincial state of emergency was quite impressive on the part of the RCMP. Perhaps there is a built-in expectation they will use some portion of the eighteen months to complete their investigation. The Court will accept that conclusion because it certainly appears to be the rule rather than the exception.

[35] The Court accepts the Crown argument that 22 days be characterized as exceptional circumstances, given the police more than made up for that delay demonstrated in the prompt investigative actions taken after each event. That said, leaving defence counsel without initial disclosure for four months should not be the gold standard.

This deduction of 22 days reduces 21.5 months to approximately 21 months.

*(2) June 23, 2020 to December 2020*:

[36] With the defence now in receipt of disclosure on June 23, 2020, the Crown says election should have occurred a month later. The Court notes the disclosure was fairly large consisting of over 600 pages of material that led defence counsel to make a prompt and successful s. 278 application within a month.

[37] The Crown argues the following four months of delay arose because defence counsel was seeking all possible documents, the law does not support doing so, and the time should therefore be deducted as defence caused delay. The Crown asks what was so pivotal in the cell phone information that precluded a timely election and asks the Court to find delay was essentially a fishing expedition.

[38] In support of this argument the Crown referenced a number of cases including *R. v. Regan* 2018 ABCA 55. The issue in that case was how to characterize adjournments sought by the defence to review disclosure. The Court said, “just as the Crown cannot be expected to provide full disclosure the same day the accused sends in his disclosure request, defence counsel cannot be expected to

drop everything and pour over the witness interviews and police reports the moment they arrive. Lawyers require a reasonable amount of time to prepare, and this preparation time does not count as defence delay" (*Regan* at para. 62). The Court also acknowledged whether defence delay was reasonable or legitimate is an inexact science and trial judges are uniquely positioned to determine if delay was legitimate. (*Jordan* at para 65)

[39] The Court in *Regan* recognized that "reviewing disclosure at an early stage helps counsel identify arguable defences or potential avenues of independent investigation, and helps uncover legal, procedural, and evidentiary issues that must be addressed early in the proceedings". Doing so can prevent unnecessary delay down the road. (*Regan* at paragraph 64)

[40] The Crown asked the Court to focus on paragraph 65 of *Regan* as standing for the proposition defence counsel is not entitled to all possible material. In that paragraph, the Court said while without the choice of election, Mr. Regan was "entitled to his lawyers' considered professional opinion about the strength of the Crown's case before making other important decisions, such as considering a guilty plea or pursuing resolution discussions". After referencing the Alberta requirement to complete a detailed form before proceeding to a preliminary inquiry, it concluded those requirements necessitated a probing review of the Crown's case. The Court then said, "the accused cannot hold out for every last shred of disclosure before setting hearing dates" referencing decisions of the Ontario Court of Appeal including *R. v. Kovacs- Tartar* 2004 CanLII 42923 (ON CA). The Court added, "in some cases it is reasonable to expect defence counsel to book a trial or preliminary inquiry before they have had an opportunity to review all of the Crown's disclosure… but defence counsel should not be expected to set a hearing date before they have a reasonable opportunity to review the essential aspects of the Crown's case". Ultimately the appellate court concluded the trial judge's conclusion that two months was a reasonable amount of time to review voluminous disclosure should not be second-guessed. (*Regan* at paragraph 66)

[41] *R. v. Gandhi*, 2016 ONSC 5612 addressed defence delay in the context of a Crown Attorney who was regularly and consistently advocating for a JPT to address disclosure and insisting on setting a preliminary inquiry because defence counsel had sufficient disclosure in an identity focused case.

[42] *R. v. Toor*, 2022 ONCJ 8 involved a matter at 16.5 months with an applicant arguing the charges should have been laid earlier who sought to add pre-charge

delay due to Covid to the s. 11(b) analysis. The Court declined to consider same but acknowledged the effect of the pandemic considered in other Ontario provincial court decisions: *R. v. Truong,* 2020 ONCJ 613 at para. 71 and *R. v. Greenridge,* 2021 ONCJ 57.

[43] Defence counsel says he did not actively create delay. Instead, all his actions were directed at moving the matter along. At arraignment he was without disclosure and sought to elect but the Court cautioned against that until he had received disclosure.

[44] As for the Crown's question about relevance of the phone records, he reminds the Court two of the six charges related to communications presumably contained in the cell phone communications between his client and the complainant. As is often the case in these matters, his client's cell phone had been seized by the police and neither client nor counsel had access to its contents. While the Crown says Mr. Clarke should have been aware of what was on his own phone, defence says the question is not what his client understood to be on his phone, but what the Crown could prove was on his phone. The hallmark of competency, he argued, required a review of the contents of that phone, consideration of its value, and provision of legal advice to his client.

[45] In any event, he says none of those things could occur until after the matter returned to court on July 21, 2020, and defence counsel quickly made a section 278 application. In line with his efforts to move the matter along expeditiously, counsel accepted a date two days hence to make that application. The Crown consented to the application and undertook to provide the materials. Defence counsel says the application was necessary, timely, and not a deliberate or calculated tactic to delay, rather it put him in a position to consider the election and take instructions from his client.

[46] The matter was set over to September 22, 2020 to allow time for the Crown to comply with the disclosure order and he did so on August 10 and 11 2020. The Court is told the amount of material was large and as a result, counsel was not in a position to elect on September 22, 2020 and needed more time to review and meet with his client. While defence counsel sought a date late in December, he accepted, at the urging of the Court, December 2, 2020 suggestive the Court was live to managing potential delay, an effort accepted by defence counsel. The assigned Crown was not in court that day to comment on or consider delay.

[47] The assigned Crown argues, while he was not personally attending to the matter on September 22, 2020, in email correspondence, at Appendix C, he told the defence that it was reasonable to take time review disclosure, but 2½ months seemed long. Defence counsel responded that his practice was very busy and sought assistance to determine the difference between two somewhat similar parts of the disclosed material, suggesting there may be an index. That dialogue ended on October 29, 2020, with an indication the Crown would ask the police if they had an itemized list.

[48] Counsel appeared a month later on December 2, 2020, elected provincial court, plead, and set trial dates.

[49] Based on the record before the Court, neither the Crown nor the defence mentioned delay concerns. The Court accepts that the defence made one timely s. 278 application that he deemed necessary. It was impressive how quickly the matter was heard, and the resulting materials provided to counsel. It is almost unheard of that such a matter is heard so quickly.

[50] While the Court asked that the matter come back at the beginning of December rather than the end as requested by defence counsel, it is unfortunate the Crown was not present to raise the concerns expressed in his email. That said, given the defence conveyed to the Crown problems navigating the voluminous material, the Court cannot say that all the time up to and including the October 29, 2020, email was delay attributable to the defence. At best, the Court is prepared to deduct two months when defence counsel probably could have been in a position to review that material and elect.

[51] The Court must add, it seems somewhat it disingenuous to suggest that four months delay in providing initial disclosure should be built into the process and not deducted, yet four months when the defence received disclosure, brought a s. 278 application, and took time to review the material is defence caused delay. It was, after all, incumbent on the Crown, any Crown, to raise concerns about delay. That the first trial dates were set without comment, 20 months after the Information was sworn, suggests an ongoing lack of concern for delay by all parties.

[52] I find two (of the four months) taken by defence counsel to ready himself for election was the time inherently required to deal with the six-count Information involving a s. 278 application and voluminous disclosure. The Court is prepared to deduct two months.

[53] Deducting two months reduces delay from 21 to 19 months.

*Between October 5, 2021 and December 2, 2021*:

[54] The Crown abandoned a request to deduct this timeframe.

*The Overall Effect of Covid-19*:

[55] Finally, the Crown asks the Court to consider waiving some delay due to Covid-19 arguing Courts have addressed the Covid 19 pandemic as an exceptional circumstance where it can be proven on a balance of probabilities that the delay was caused by the pandemic (*R. v. Toor* 2022 ONCJ 8 at para. 8).

[56] There was no evidence led that Covid-19 caused the Court to offer four days in October 2021 and not earlier. Based on my own understanding of how matters are addressed in this jurisdiction, four trial days close together are always difficult to schedule. Having regard to my experience in this jurisdiction it is not unusual for multiple day matters to be scheduled eleven months out. Court Services and the Court have consistently engaged in reducing delay by offering earliest dates available, moving other matters, and scheduling trials during judicial writing days. While I note the parties were not asked, and did not offer, to consider accepting four days spread out over time, that was certainly done the second time trial dates were scheduled. While neither occasion saw the parties suggest separating the dates, likewise there was no expression of concern about delay or any acknowledgement of exceeding the ceiling.

[57] On the second setting of dates, the Crown did not accept a date offered in December 2021 because he did not want to split the trial. That is a reasonable concern because complainants may be required to remain under oath for extended periods. The Crown was also not available for trial dates in January. However, by this time the defence had already written to the Crown three months earlier accepting ten concessions aimed at reducing trial time. That was not addressed in Court.

[58] All of the foregoing leads to my conclusion there was little regard to delay until the Court raised it and defence counsel waived delay. There are very few s.

11(b) applications in this jurisdiction and without an evidentiary basis, the Court cannot accept on a balance of probabilities that Covid-19 had any impact when scheduling this four-day trial. Despite the argument that there was a cascading effect caused by adjourning three months worth of trials due to Covid, I simply cannot agree that was the case. Rather, there was no attention brought to delay and Covid was not mentioned in any of the appearances in this matter.

[59] No Court relishes a finding of unreasonable delay, but the right to a trial in a reasonable time represents "discipline for the justice system". While achieving same may be uncomfortable in the short term, it will bring achievement in the long term (*Jordan* at para. 134). The delay in this case is 19 months and the remedy for the breach of Mr. Clarke's *Charter* protected right is a stay of proceedings.

Judgement accordingly.

van der Hoek, J.