PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Nagy Willis*, 2022 NSPC 29

Date: 20220729
Docket: 8459117
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Zackery Stephen Nagy Willis

Judge:	The Honourable Judge Theodore Tax,
Heard:	May 10, 2022, in Dartmouth, Nova Scotia
Decision	July 29, 2022
Charge:	Section 266 of the **Criminal Code of Canada**
Counsel:	Tiffany Thorne, for the Public Prosecution of Nova Scotia Bruce Muir, for the Counsel for the Defence

By the Court:

[1] Mr. Nagy-Willis has brought an application requesting a stay of proceedings on the ground that there has been a violation of his right to a trial within a reasonable time pursuant to section 11(b) of the **Canadian Charter of Rights and Freedoms ["the Charter"].**

Introduction

[2] The applicant was charged with the unlawful assault of Sharon Higgins contrary to section 266 of the **Criminal Code**, in an Information sworn on August 6, 2020, which alleged that an offence had occurred on or about July 15, 2020.

[3] Mr. Nagy-Willis entered a not guilty plea to the charge before the court on December 18, 2020, and the original date for the estimated one-half day trial was set for October 6, 2021. In addition, on another date, Mr. Nagy-Willis also had entered a not guilty plea to a charge of failing to attend court on November 3, 2020, and the trial in relation to that charge was scheduled to be heard at the same time as the half-day assault trial, which had been scheduled for October 6, 2021.

[4] On the morning of October 6, 2021, the Court was advised that the Crown Attorney and Defence Counsel were discussing possible resolution of the trial matters for Mr. Nagy-Willis. As a result, the Court recessed for a short time to allow the parties to discuss possible resolution. During the short recess, the parties were able to resolve the trial matter in relation to the failure of Mr. Nagy-Willis to attend court on November 3, 2020. After Mr. Nagy-Willis entered a change of plea to guilty which was accepted by the Court, the parties made sentencing submissions and the Court ordered a $350 fine plus a reduced victim surcharge in the amount of $50.

[5] Since the parties were not able to reach a resolution with respect to the assault trial, the Court concluded that there would not be enough time to conduct all the trials which had been previously scheduled for October 6, 2021. The Court stated that one or more of the trials scheduled for October 6, 2021, would have to be adjourned, while one or more other trials were prioritized to proceed on that date. The parties confirmed that the Nagy-Willis trial would still likely take one half day and then the Court scheduled what the Court referred to as a "relatively early date," for his Nagy-Willis's one half-day assault trial on March 25, 2022.

[6] Prior to the March 25, 2022 trial date, Defence Counsel advised the court that he would be filing a section 11(b) **Charter** Application based upon the Supreme Court of Canada framework for analysis as stated in **R. v. Jordan** and **R. v. Cody.** Notice of this **Charter** application was filed on or about March 2, 2022.

[7] Based upon the receipt of the Applicant's Section 11(b) **Charter** Notice, a "status date" was scheduled for March 9, 2022, to discuss the implications of that notice and whether the **Jordan** application should be heard in advance of any evidence being presented in the trial on the substantive issues. The parties returned to the court on March 15, 2022, to determine the status of this matter and whether the defence would proceed with the **Charter** Application or, in the alternative, not proceed with the **Charter** Application and conduct the trial on March 25, 2022.

[8] On March 15, 2022, after having the opportunity to consider their options, Defence Counsel advised the court that the trial on the substantive issues would be adjourned to another date, to first address the section 11(b) **Charter** application. The March 25, 2022 trial date was released on March 15, 2022. The next day, on March 16, 2022, dates were set for the filing of the Defence **Charter** brief by April 8, 2022, and the Crown Reply by April 29, 2022. The Court also scheduled May 10, 2022, for the parties to present their oral submissions on the **Charter** Application.

[9] The oral submissions by the Crown Attorney and Defence Counsel were made on May 10, 2022. The Court scheduled its decision to be delivered on this section 11(b) **Charter** Application on July 29, 2022.

[10] For the purposes of the **Jordan** section 11(b) **Charter** application, the parties have agreed that March 25, 2022, when this matter was scheduled for a ½ day trial would have been the "Anticipated Trial Completion" date.

The Positions of the Parties

[11] It is the position of the Defence that the "delay" in bringing this case before the court prior to the "anticipated trial completion date" of 18 months as outlined in the **Jordan** decision was based upon systemic problems and a lack of judicial resources, rather than discrete or exceptional events.

[12] While the originally scheduled trial date of October 6, 2021 would have been within a reasonable time based upon the **Jordan** guidelines, that trial date was adjourned due to "double booking" of trials by the Court and not any delay

attributed to the defence as they were ready to proceed with the trial on that date. Defence Counsel submits that the rescheduled half-day trial on March 25, 2022, would be either a minimum of one day to 46 days over the **Jordan** guidelines where a delay would be presumptively unreasonable, even if the attributed a couple of delays to the Defence. The remedy sought by the Defence on this section 11(b) **Charter** application is the entry of a judicial stay of proceedings.

[13] For her part, the Crown Attorney agrees with the applicant's calculation of the time between the date that the information was laid and that the anticipated conclusion of the trial, representing the "total delay" was 19.6 months. However, she does take issue with the Defence position that no delay during that period of time is attributable to the defence. She submits that there was some defence delay which should be deducted from the total delay to get to the "net delay."

[14] She agrees with Defence Counsel that the lost trial date of October 6, 2021, due to the court being "double-booked" is not attributable to defence delay and is not necessarily an exceptional circumstance. However, it is the position of the Crown that the "exceptional circumstances" brought about by the Covid 19 pandemic rebuts the presumption of unreasonable delay.

[15] The Crown Attorney submits that the record clearly states that there were at least two lengthy periods where the impact of the Covid 19 pandemic and public health restrictions created delays and created a significant backlog in the trial matters scheduled in Dartmouth, which had a significant impact on the setting of trial dates. In addition, it is the position of the Crown that there is well over a month of "exceptional circumstances" which, when deducted from the "total delay" and in the final analysis, this case could have been heard below the 18 Month Presumptive Ceiling on March 25, 2022.

Factual Background

[16] Based upon the affidavit evidence submitted by the Crown Attorney in response to this application, Sgt. Sandra Johnston, who is the supervisor/manager of the Integrated Court Section for the Halifax Regional Police, stated that her Section acts as Informants on matters laid before the Provincial Court by the Halifax Regional Police or the RCMP, compiles and delivers relevant disclosure to the Crown and arranges for subpoenas. One of the other roles of her Section, a short time after an accused is arrested, usually within a week, is to lay an Information. Prior to the Covid 19 pandemic, accused persons were usually given a

date to appear for Arraignment within 6 to 8 weeks from the date that they were arrested. This allowed sufficient time for the Court Section to prepare a disclosure package and forward it to the Crown so that disclosure could be provided to the defence on or before the first appearance, if requested.

[17] Sgt. Johnston stated that she was aware that the Provincial Court was closed to in-person proceedings between about March 16, 2020 to July 2, 2020, and she was aware that this had created a significant backlog in scheduling matters, particularly for accused who were not in custody. Sgt. Johnston was aware of the public notices issued by the Nova Scotia Courts and, as of March 16, 2020, the direction by the Chief Judge to all law enforcement agencies to schedule first appearances after May 31, 2020, whenever possible.

[18] As a result of the implications of the Covid 19 pandemic and the Direction from the court, Sgt. Johnston stated that instead of their normal date for arraignment being 6 to 8 weeks from the date of arrest, by June and July 2020, the backlog created by the closure of the courts, meant that first appearances were then being scheduled between 3 to 4 months after the accused was arrested on the charge.

[19] In this case, Sgt. Johnston confirmed that she had received information that Mr. Nagy-Willis was arrested on the assault charge on August 1, 2020 and released on a police officer undertaking at that time to attend court on November 3, 2020. She stated that the delay between August 1, 2020, and November 3, 2020, was consistent with the backlog created by the closure of the courts and the public announcements with respect to continued restrictions on court operations caused by the Covid 19 pandemic.

[20] In her affidavit, Sgt. Johnston concluded by stating “In normal times and but for Covid 19, the accused in this case would have received a first appearance date in mid-to-late September.”

[21] As part of the record on this application, the Crown Attorney submitted copies of the Covid 19 Measures Applicable to the Provincial Court publicly issued on the Nova Scotia Courts website. The notices of special measures closing or restricting court operations which were filed by the Crown were dated March 16, 2020, June 16, 2020, April 23, 2021, June 7, 2021, December 31, 2021, January 13, 2022, February 9, 2022, and updated on February 18, 2022. Those measures provided regular updates to the public about restrictions or easing of

public health directives in relation to in-person hearings and proceedings before the court.

[22] As mentioned in the affidavit of Sgt. Johnston, Mr. Nagy-Willis was arrested on the assault charge on August 1, 2020, and he was directed to attend court for arraignment on that charge on November 3, 2020. The parties have filed transcripts of all Mr. Nagy-Willis's appearances in the Provincial Court, however, the brief transcript for November 3, 2020, simply confirmed that Judge Hoskins issued a warrant for his arrest for failing to attend court as required.

[23] According to the endorsements on the assault Information, which was sworn on August 6, 2020, Mr. Nagy-Willis was arrested on that warrant on November 5, 2020, and directed by a Appearance Notice to attend court on November 17, 2020.

[24] The transcript of proceedings before Judge Murphy on November 17, 2020 confirmed, once again, that Mr. Nagy-Willis was not in court as required by the appearance notice, however, the Duty Counsel indicated that although she did not have instructions from him, she was aware that he had a courtdate scheduled the next day [November 18, 2020] at 1:30 PM in courtroom no. 5 in Dartmouth. Judge Murphy issued a warrant but held it until November 18, 2020.

[25] The transcript of proceedings on November 18, 2020, confirms that Mr. Nagy-Willis appeared in court with Defence Counsel, Ms. Giancarla Francis. On that day, the court dealt with the formalities of the failure to attend court on November 3, 2020, contrary to section 145(4)(b) of the **Criminal Code**, vacated the warrant issued but held by Judge Murphy the previous day, and also dealt with the formalities of the arraignment on the assault charge which Information was sworn on August 6, 2020.

[26] At the same time, Mr. Nagy-Willis was in court that day with Ms. Francis in relation to charges of obstruction of a peace officer contrary to section 129 of the **Criminal Code** and a breach of an undertaking charge in relation to a condition to not consume alcohol or intoxicating substances contrary to section 145 (5.1) of the **Code**. He entered guilty pleas to those two charges and the sentencing hearing was adjourned until December 18, 2020, as Ms. Francis was already scheduled to be in courtroom no. 5 on that date. Plea on the assault Information was also adjourned to December 18, 2020.

[27] On the December 18, 2020 appearance before the Court, Mr. Nagy-Willis was also assisted by Ms. Francis, who called into the court on a telephone and

indicated that she had received instructions from her client to enter not guilty pleas to the assault charge of Ms. Higgins and the failure to attend court charge on November 3, 2020. The Crown Attorney indicated that those two cases might take 2 to 3 hours for trial and the Court had already confirmed with Ms. Francis that she did not anticipate any **Charter** issues.

[28] Given the fact that Mr. Nagy-Willis might be a witness on one or both of those trials, the Court asked the clerk to look for the "earliest possible half day" for this trial and the clerk indicated that the date would be October 6, 2021, at 9:30 AM.

[29] On the trial date of October 6, 2021, Mr. Nagy-Willis appeared with his new Defence Counsel, Mr. Muir and the Crown Attorney was Ms. Sarah Lane. Shortly after court commenced, at 9:41 AM, the Crown Attorney indicated that she and Mr. Muir were having discussions with respect to his client's matters and if they could be stood down for about 10 to 15 minutes. The Court then recessed for a short period to allow the parties to discuss possible resolution. Just prior to doing so, the Court stated at page 27, lines 1 and 2 "that would make a lot of sense. We have got probably a minimum of two, perhaps three, days worth of cases here today."

[30] Court recessed at 9:44 AM to allow the parties to discuss resolution and when court resumed at 10:17 AM, the Crown Attorney indicated that there would be a change of plea with respect to the failure to attend court trial, but in relation to the July 15, 2020 assault allegation, Defence Counsel advised the court that they were ready to proceed to trial on the that charge.

[31] Prior to setting any new trial date, the Court then proceeded with the sentencing hearing on the failure to attend court charge of November 3, 2020. Brief submissions were made by the parties and the court ordered Mr. Nagy-Willis to pay a fine of $350 as well as a $50 surcharge for victims.

[32] Following the completion of the sentencing hearing, the Court confirmed that the assault trial could not go ahead on October 6 2021 and, at that point, court recessed at 10:26 AM to check for a date to reschedule the assault trial.

[33] When proceedings resumed at 10:43 AM on October 21, 2021, the Court confirmed on the record, in speaking to the Crown and Defence Counsel, Mr. Nagy-Willis and the two witnesses who had come into the room to be directed to

attend the rescheduled trial date, at page 39 of the transcript of proceedings as follows:

> "This is the trial matter… As we had mentioned in the previous appearances this morning, that there's just simply not enough time to proceed today. We actually had probably the equivalent of, minimum, two days of trials set into the one day that, realistically, we're trying to clear up the backlog."

[34] The comments of the Court in relation to this adjournment continued on page 40 as follows:

> "It's unfortunate. We don't know necessarily that things are proceeding or not proceeding. It turns out that today, it looks like everything is proceeding, as that… I think we do have to double book in a time when were trying to catch up with the backlog and, plus, one judge short. So that's sort of the Coles notes version, the short-form version, of what's sort of transpired in more detail than I have explained to the parties elsewhere.
>
> So given the fact that the parties wish to proceed with the trial, I had to make a decision that the trial has to be adjourned. The other file, just so that you know sort of the balance that I have done, has a witness that came from New Brunswick and the accused person came from New Brunswick. They have cleared public health protocols. My view is they're here too… We have to proceed with that one.
>
> So, I did canvas with the counsel… The Crown Attorney and Defence Counsel if this really still remains a half-day matter. There indicating that it probably does."

[35] Then, the clerk confirmed that both parties were available on March 25, 2022, at 1:30 PM and that date was confirmed as the rescheduled trial date. The witnesses in court were directed to return on that date and thereafter, the Court stated as follows at page 41 at lines 13 to 19 of the transcript:

> "March 25 is a Friday. That's actually not too bad to find dates. I know one day matters are probably going down into September/October 2022, so I think the court found a relatively early date."

[36] Shortly before concluding the appearance on October 6, 2021, at page 44 of the transcript, Defence Counsel stated:

> "Just before the record is turned off, I would just state for the record… And I know this is pretty much well understood. Defence would have been available earlier. And when I was canvassing the dates with madam clerk, she did advise that was the first half day available that would not involve double booking."

[37] In response, at page 44 of the transcript, the Court responded:

> "Right. And quite frankly, I have… You have heard me say I am a little bit surprised it was even that early. So, I think that… Hopefully. we'll have the other Judge appointed and things will get back into a normal flow. But for the moment, it is a bit of a scramble. Okay? Thanks to both witnesses and Mr. Nagy-Willis."

LEGAL FRAMEWORK:

[38] 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."

[39] 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."

[40] On July 8, 2016, in **R. v. Jordan,** *supra***,** the Supreme Court of Canada ("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 Court observed that the section 11(b) litigation based upon **R. v. Morin,** [1992] 1 SCR 771 had become "too unpredictable, too confusing and to complex" and had become a burden on already overburdened trial courts [**Jordan**, at para. 38].

[41] 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 Court 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 paragraphs 138-141.

[42] The core concepts for the new framework for section 11(b) **Charter** analysis were described in **Jordan**, *supra*, at paragraphs 46 to 48. The new framework established a "presumptive ceiling" beyond which "delay is presumptively unreasonable," however, the majority of the Court 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 court noted that they have simply adopted "a different view of how reasonableness should be assessed."

[43] 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 18 months for cases tried in the provincial court, and 30 months 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.

[44] 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 Delay which remains after deducting the Defence- waived delay **and** Defence-caused delay to arrive at the Total Net Delay in the matter;

4. If the Total Net Delay **exceeds** the "presumptive ceiling" of 18 months in the Provincial Court [or 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 this case which were reasonably unforeseen or reasonably unavoidable, but they need not be rare or entirely uncommon [**Jordan** at para. 69]. The Court 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 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 and 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.

[45] 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:

[46] 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:

[47] 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.

[48] 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.

[49] 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:

[50] 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]

3. Stays Entered When Delay Vastly Exceeds the Presumptive Ceiling:

[51] 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:

[52] 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.

[53] 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."

[54] 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."

[55] 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.

[56] 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.

[57] 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.

[58] 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).

[59] 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**.

[60] 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."

[61] A further example of a trial judges 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].

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

[63] 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.

[64] 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 Supreme Court of Canada stated 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 3 further court appearances and 3 ½ months of accrued delay which the trial judge had attributed to the Crown. The Supreme Court of Canada deferred to the trial judge's finding and the conclusion that the Crown had not met the 2nd prong in establishing an exceptional circumstance, since they did not remedy the delays emanating from those circumstances once they arose.

[65] 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.

[66] However, the SCC concluded that they would not deduct the entire 5 months for the event, since it took 2 months for the Crown and defence to determine how to proceed, but the court was unable to accommodate them until 3 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).

[67] 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 8 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).

[68] The question then focused on the 2nd 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 was met in that case.

[69] In **Cody**, *supra*, at para. 63 to 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).

[70] The recent case **R. v. J.F.** 2022 SCC 17 at para. 27 confirms that the presumptive ceilings set out in **Jordan** do not apply to the entire period when an accused is a person charged with an offence. The framework established in that case is limited in scope, since it provides a solution to a specific problem. **Jordan** deals with the "culture of complacency" that allows for excessive delay in bringing an accused to trial [see also **R. v. K.J.K**., 2020 SCC 7 at para. 34]. The new framework applies to the delay from the charge to the actual or anticipated end of the trial, that is, "when the parties' involvement in the merits of the trial is complete, and the case is turned over to the trier of fact." [See also **KJK** at para. 31]. Deliberation time is excluded from this framework [see also **KJK** at para. 50]. Sentencing proceedings are also excluded from the framework. Although the SCC recognized in **Jordan** that section 11(b) continues to apply between conviction and sentencing, it made no comment on how such delay should be treated [see **Jordan** at para. 49, footnote 2].

ANALYSIS

[71] The first step in the **Jordan** framework for a section 11(b) **Charter** analysis is to establish the total delay. In the **Jordan** decision, *supra,* at paragraph 47, the majority of the SCC stated that "if the total delay from the charge to the actual or anticipated end of the trial (minus defence delay) *exceeds* the ceiling then the delay is presumptively unreasonable."

[72] In this case, the parties agree with the comments of the majority in **Jordan**, *supra*, at para. 47 and again at para. 60, that the calculation of total delay starts from the date that the Information was sworn [August 6, 2020]. They have also

agreed that the "Anticipated Trial Completion" date would have been March 25, 2022.

Calculation of the "Total Delay"

[73] Based upon my review of the relevant authorities and interpretation of the opening words of section 11 of the **Charter**, I find that for the purposes of calculating the total delay involved in this case, the starting point is the day upon which the Information was sworn, and Mr. Nagy-Willis was formally "charged" with the assault charge now before the court on August 6, 2020.

[74] In those circumstances, I find that the "total delay" from the date of the charge [August 6, 2020] to the end or anticipated end of the trial [March 25, 2022] is a total of 596 days or 19.6 months.

Deduction of Defence Delay from the Total Delay:

August 6, 2020 to November 3, 2020:

[75] As I indicated previously, the charge was laid on August 6, 2020 and Mr. Nagy-Willis was scheduled to make his first appearance in court on November 3, 2020. He failed to attend court on that date and warrant was issued for his arrest.

[76] With respect to this period of time, **there is no defence delay**. The Police Undertaking when he was released after being arrested had directed him to attend court on November 3, 2020. The fact that he did not attend court on that date, does not change the fact that he was initially accorded that amount of time to make his first appearance in court on the charge.

November 3, 2020 to November 17, 2020:

[77] Mr. Nagy-Willis was arrested on November 5, 2020 on the bench warrant for failing to attend court on November 3, 2020. Mr. Nagy-Willis was released on November 5, 2020 and was directed by the issuance of a Appearance Notice to attend court on November 17, 2020. Mr. Nagy-Willis failed to attend court on November 17, 2020. However, the Legal Aid Duty Counsel in Dartmouth Court on that date, although not having any instructions from him, advised the court that he had a scheduled appearance on November 18, 2020 in Courtroom #5 in Dartmouth. The presiding judge issued a warrant but held that warrant until the next day.

[78] I find that the failure of Mr. Nagy-Willis to attend court on November 3, 2020, as directed by the police undertaking issued and his subsequent arrest and direction to appear in court on November 17, 2020 represents **14 days of defence delay** in moving this trial forward. Mr. Nagy-Willis' failure to attend court as directed meant that the formalities of arraignment were delayed as well as the provision of disclosure and the possible engagement of counsel to represent him.

November 17, 2020 to November 18, 2020

[79] As a result of the failure of Mr**.** Nagy-Willis to appear in court for his first appearance and arraignment on the assault charge, the formalities of the arraignment, disclosure and possible retention of counsel were delayed. He was then directed to attend court on November 17, 2020 for his first appearance and as mentioned, Mr. Nagy-Willis did not attend court on November 17, 2020. However, the Legal Aid Duty Counsel who was in the Dartmouth Court on November 17, 2020 and happened to be familiar with Mr. Nagy-Willis provided information to the Court. She advised the court, without having any instructions from Mr. Nagy-Willis, that he was required to be in another Dartmouth court the next day. As a result, the Court issued a warrant, but based upon the information provided by the Duty Counsel, the warrant was held until November 18, 2020.

[80] I find that the failure of Mr. Nagy-Willis to attend court on November 17, 2020 further delayed his first appearance in court and the formalities around his arraignment on the assault charge. I find that this represents a **defence delay of one day**.

November 18, 2020 to December 18, 2020

[81] Mr. Nagy-Willis appeared in court on November 18, 2020 and the warrant for his arrest which had been held was vacated. The formalities of arraignment on the charge were addressed, the Crown indicated they were proceeding summarily, and Mr. Nagy-Willis was assisted on that day by his Defence Counsel, Ms. Francis. The matter was adjourned in the normal Dartmouth Provincial Court Intake cycle for five weeks to return to court for plea on December 18, 2020.

[82] For this period of 30 days or one month, **Jordan** anticipates that this is reasonable for procedural requirements to be addressed and/or defence preparation time. There is **no defence delay** during this 30 day/one month period of time.

December 18, 2020 to October 6, 2021

[83] As this was a summary conviction matter, Defence Counsel, Ms. Giancarla Francis appeared for Mr. Nagy-Willis by telephone. Given that it was a summary matter, and that she also had the instructions from her client to enter a not guilty plea on this second occasion in court. Based upon the representations of the Crown Attorney and Ms. Francis, the court scheduled the matter for half-day trial on October 6, 2021. Both sides indicated that they would be ready to proceed on October 6, 2021.

[84] It should also be noted that Ms. Francis had entered a not guilty plea to both the August 6, 2020 assault Information as well as an Information in relation to the failure to attend court on November 3, 2020. Given the fact that Ms. Francis had indicated that Mr. Nagy-Willis might testify in the trial, the court scheduled the half-day trial for October 6, 2021.

[85] There is **no defence delay** between December 18, 2020 and October 6, 2021, which is a period of 292 days or 9.6 months. Given the nature of the charges on those two Informations, they were scheduled for trial on October 6, 2021. The clerk had confirmed, at the request of the Court, that it was the "earliest possible half-day." Defence Counsel had confirmed that there were no **Charter** issues and but there may be some defence evidence. There is no indication, given the two Informations before the court, of any special complexity to either trial matter.

October 6, 2021 to March 25, 2022

[86] Although the Crown Attorney and Defence Counsel were able to resolve the trial in relation to the failure to attend court on November 3, 2020, despite being provided with some time on October 6, 2021 at the court, they were not able to reach a resolution on assault trial. Due to the fact the Court had indicated that there was a backlog due to Covid 19 and recent appointment of a colleague to a different court, the court had scheduled about 2 to 3 days worth of trials on October 6, 2021 on the likelihood that one or more of those trials would be resolved at the last moment without advance notice to the court.

[87] Unfortunately, as indicated in the transcript of proceedings and for the rationale explained at that time, the Court determined that there was insufficient time to conduct Mr. Nagy-Willis' assault trial. Mr. Nagy-Willis was ready to proceed to trial and, for that matter, so was the Crown as they had their two witnesses present in the court. However, the Court determined that the trial matter with the out of province accused and out of province witness, who were also in

attendance for a trial, had to be prioritized on that day once it was determined that there was insufficient time to complete all trial matters.

[88] Based upon the information related to the parties when this trial was rescheduled for March 25, 2022, the Court did secure the "earliest date possible" for rescheduling the trial, which resulted in an additional delay of approximately five months to the anticipated trial completion date. The Court had commented that one day trials would have been scheduled approximately 6 to 7 months later than that in the year.

[89] For this period of time between October 6, 2021 and March 25, 2022, there is **no defence delay for the period of 170 days or 5.6 months**.

[90] Therefore, in calculating whether the total delay exceeds the 18 month "presumptive ceiling" established in **Jordan** for a trial in the Provincial Court, as I have previously indicated the total delay from the time when the charge was laid [August 6, 2020] to the "Anticipated Trial Completion" date [March 25, 2022] is 596 days or 19.6 months.

[91] At this point, according to **Jordan**, the Court is required to total any defence delay being any actions or conduct which the Court considers has caused or contributed to delay. I have previously concluded that there was defence delay of a total of 15 days or one-half month. As a result, at this stage of the analysis, I find that the **net delay is 19.1 months or 581 days.**

[92] As such, net delay is over the presumptive ceiling of 18 months and as a result, the onus shifts to the Crown to prove the delay is justifiable on a discrete event or exceptional circumstance: see **Jordan** at paras 47 and 105.

Did Crown establish Discrete Event or Exceptional Circumstances?

[93] In the Crowns written submissions, which included copies of publicly available Provincial Court updates as to the measures put in place by the Provincial Court in relation to the Covid 19 global pandemic, she has noted that the Provincial Court cancelled normal court operations on March 17, 2020 due to the first wave of Covid 19 pandemic through to July 2, 2020. All in-person trials during that period of time were adjourned to later dates. On May14th 2020, the Provincial Court announced that some in-person trials or preliminary inquiries would resume for in custody accused persons, but otherwise, in-person trials for other accused persons did not resume until July 2, 2020. This obviously created a huge backlog

in cases that had already been before the court for some period of time and had their trial date adjourned due to the suspension of all in-person trials to address the public health state of emergency measures in the court.

[94] Between April 26, 2021 and June 14, 2021, once again the Provincial Court issued public notices and cancelled normal court operations for a second time in response to rising numbers of Covid 19 cases and new public health restrictions. As a result, in-person proceedings were adjourned to a later date and did not resume until June 14, 2021. It is obvious and I am certainly prepared to take judicial notice of the fact that when approximately two months of previously scheduled trials, that have already been in the system for some time, were cancelled and expected to be rescheduled, it created a tremendous backlog which had to be addressed. This created a situation where postponed trials were being rescheduled at the same time as new cases and trials were being scheduled before the Court.

[95] Between January 4, 2022 and February 14, 2022, the Provincial Court, once again, issued public notices cancelling normal court operations for the third time in relation to the Covid 19 pandemic, on this occasion, to address public health restrictions and measures to limit the "spread" of the highly transmissible Omicron variant. In-person proceedings did not resume until February 14, 2022. Once again, this created a tremendous backlog of cases which had been previously scheduled for trials in the Provincial Court, but were adjourned and had to be rescheduled at the same time as new cases and trials were being scheduled before the court.

[96] In addition to this tremendous backlog of cases which had to be rescheduled, the situation in the Dartmouth Court, which is one of the busiest courts in the province conducting exclusively criminal prosecutions, the backlog and new cases presented a unique and totally unforeseen and unavoidable scheduling problem. In my opinion, the measures taken by the Provincial Court in the face of a reasonably unforeseeable and certainly unavoidable "perfect storm" of circumstances undoubtedly and inevitably created delays in the hearing of trial matters in the Provincial Court, which neither the Crown nor the Court could **reasonably** mitigate or remedy in the short term.

[97] In **R. v. Cody,** *supra*, at para. 48 the Supreme Court of Canada recognized that, like defence delay, "exceptional circumstances" can result in quantitative deductions of particular periods of time. The Court stated:

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

[98] In **Jordan,** the SCC explained that there is no closed list of circumstances that qualify as exceptional, but that they generally fall into two categories: discrete events and particularly complex cases: see **Jordan** at para. 71. Exceptional circumstances lie outside the Crown's control in that they are one, reasonably unforeseen and reasonably unavoidable and two, they cannot reasonably be remedied: see **Jordan** at para. 105.

[99] In **R. v. Ali,** 2021 0NSC 1230, Justice Somji noted that the Covid 19 pandemic has been found to constitute a "discrete event" by multiple courts across the country: **R. v. Simmons**, 2020 ONSC 7209 at para. 60; **R. v. Drummond** [2020] O.J. no. 3908; **R. v. Gharibi**, 2020 ONSC 63 at para. 59; **R. v. Cathcart**, [2020] S.J. no. 415; **R. v. Truong**, 2020 ONCJ 613 at para. 71; **R. v. Loblaw's Inc**., 2020 ABPC 250 at para. 66 and **R. v. Folster** [2020] M.J. no. 187 (MBPC).

[100] In the **Ali** case, Justice Somji concluded that the Covid 19 pandemic resulting in the suspension of court services constituted a discrete event. I agree with those courts that have already determined that there was a "discreet event" created by the Covid 19 pandemic and the public health measures to control the "spread" of Covid resulted in a global pandemic of a magnitude not really seen for almost 100 years!

[101] In my opinion, there can be no doubt that the Covid 19 pandemic and the public health measures to control the "spread" have to be viewed as a discrete and exceptional event or circumstance, which resulted in court closures. In addition, as courts gradually re-opened to in-person trials while continuing to implement the public health measures to ensure that people coming into the court were safe and secure, the court limited numbers of people coming into the courtrooms as well as the courthouses or, in the alternative, conducted those matters, such as a sentencing hearing, that could be reasonably conducted on a virtual basis, without parties actually being physically present in court.

[102] The reality is that we have been in the midst of this Covid 19 pandemic at this point for over two years and addressing and implementing the mandated public health requirements has created a tremendous backlog of trials, which has necessitated, in Dartmouth, and likely in many other locations with a steady number of new cases coming into the system what amounts to a scheduling

nightmare for the court. In this particular case, one of the strategies for trying to address the issues of backlog and steady volume of new cases was to double and even triple book trial days.

[103] In my opinion, dealing with the backlog of trials postponed due to the closures of courts to address mandated public health requirements, while at the same time having a steady flow of new cases also requiring trials to be held within a reasonable time, has created a situation similar to what the Supreme Court of Canada described in **Jordan**, *supra*, at para. 94 as a "transitional exceptional circumstance." In that case, the Supreme Court of Canada stated that the **Jordan** framework should be applied "contextually and flexibly for cases in the system so as not to create swift and drastic consequences which might undermine the integrity of the administration of justice."

[104] As I have already indicated, I find that the Covid 19 pandemic created a discrete event as well as an exceptional circumstance that could not reasonably be foreseen or mitigated by the court nor the Crown. During those periods of time where the court was closed to in person trials, there can be no doubt that a backlog was created, which needed to be addressed in a timely matter.

[105] In this court, I find that, dealing with that backlog has had an obvious and very significant impact on any trials being scheduled during or shortly after the points in time when in person trials were not conducted or only went forward on a limited basis for persons in custody. In addition, in my opinion, dealing with the backlog and rescheduling trials at the same time as new matters were set for trial, has to be regarded as a discrete, unforeseen and exceptional event or circumstance and not the consequence of any complacency or insufficient response by either the Crown or the court or any other actors in the criminal justice system.

[106] As I have previously concluded, I find that those periods of time where court sittings and trials were cancelled or restricted to persons in custody, must be considered as exceptional circumstances which could also be considered based on the **Jordan** framework as a discrete event. During her submissions, the Crown Attorney stated that prior to the declaration of the global pandemic, half day trials in the Dartmouth court could have been scheduled within 4 to 6 months of the date of plea. In this case, there was a 9.6-month delay between December 18, 2020 and October 6, 2021. Anecdotally, it is clear from her analysis of the impact of the Covid 19 pandemic in this Dartmouth courtroom, had at a minimum, affected a trial hearing dates by between 3.6 to 5.6 months.

[107] In some reported decisions, as previously mentioned, other courts have determined that the entire period of the restricted court operations and trials should be considered as an exceptional circumstance or a discrete event which created a backlog that had to be addressed with the incoming cases/trials and therefore deducted from the net delay. As the Supreme Court of Canada stated in **Jordan**, *supra*, at para. 75 discrete exceptional events can be deducted from delay if the Crown and the justice system could not reasonably foresee and mitigate the delay.

[108] At a minimum, with regard to the amount of time that can be attributed to exceptional circumstances of backlog created by the Covid 19 pandemic in the Dartmouth court, the Crown Attorney has indicated that prior to the pandemic half day trials in that court could usually be accommodated within 4 to 6 months. Given the fact that there was a 9.6-month delay between December 18, 2020 and October 6, 2021, I am prepared to deduct, **at a minimum**, 3.6 months of delay due to the Covid 19 Pandemic discrete exceptional event or circumstance from the net delay of 19.1 months.

[109] In those circumstances, **deducting the 3.6 months of exceptional circumstances** from the previous net delay results in an **adjusted net delay of 15.5** months, which is well below the presumptive unreasonable ceiling 18 months.

[110] In addition to that aspect of the impact of the public health measures to address Covid 19 on in-person court trials and then restricting trials to persons in custody, I also want to address the total delay period based upon the affidavit information provided in the affidavit sworn by Sgt. Sandra Johnston.

[111] The affidavit of Sgt. Sandra Johnston, who is the Supervisor/manager of the Halifax Regional Police Integrated Court Section indicated that Mr. Nagy-Willis was arrested on August 1, 2020 and released on a police undertaking to appear in the Dartmouth Provincial Court for the first time on November 3, 2020. She stated in her affidavit that, as a result of the public health measures in relation to Covid 19 and the closure of the courts to in-person matters, this three-month delay between arrest and first appearance was typical during this time. However, she indicated that, in normal times, without the Covid 19 implications on first appearances, Mr. Nagy-Willis would have made his first appearance in court in mid-to-late September.

[112] As I mentioned previously, there is no defence delay during this period of time, however, I find that the discrete exceptional event of a global Covid 19 pandemic and a public health state of emergency being declared in this province

and in Canada, very obviously affected the normal time for an individual to make his or her or their first appearance in court. Based upon the information provided by Sgt. Sandra Johnston, at the very least, the implications from the global Covid 19 pandemic and the court closure to in-person trials, impacted the timing of this first appearance by almost 6 weeks.

[113] In those circumstances, I find that the difference between mid-to-late September and November 3, 2020, should be considered as a discrete exceptional circumstance that could not be remedied by the Crown or the court. Based on Sgt. Johnston's estimation of when a first appearance would typically be directed in the circumstances, I will assume that the period of this discrete exceptional circumstance caused by the Covid 19 pandemic and public health restrictions would involve a period from about September 23, 2020 to November 3, 2020, which equates to a total of 41 days or about 1.3 months of delay created by the Covid 19 implications on first appearances as another exceptional circumstance.

[114] In those circumstances, I find that the extra 41 days or 1.3 months of delay in the timing of the first appearance of an accused person after the Information was laid, in this case on August 6, 2020, should be deducted from the total delay as a "discrete event or exceptional circumstance", directly the result of the pandemic and the closure of or limited court operations over extended periods of time.

[115] Therefore, I find that the adjusted delay after taking into account this unavoidable and unforeseeable discrete event or **other exceptional circumstance should be further reduced by 1.3 months,** which was the additional time extended to people making their first appearance in the court as a result of the pandemic. Having previously concluded that the net delay had been adjusted to 15.5 months, when I deduct this additional 1.3 months of discrete event/exceptional circumstance delay from that total the **final adjusted net delay total is 14.2 months of delay.**

[116] Having come to those conclusions and having determined that the adjusted net delay is now, in my opinion, well under the 18 month "presumptive ceiling" I have to consider whether the defence discharged the onus of establishing that the delay was nevertheless unconstitutional. As the Supreme Court of Canada stated in **Jordan** at paras. 84 and 85, when delay falls below the ceiling, the defence must demonstrate that it took "meaningful, sustained steps to expedite proceedings." Here, the trial judge should consider what the defence could have done, and what it actually did, to get the case heard as quickly as possible.

[117] In this case, I certainly know that the record reflects that the Defence Counsel asked for the earliest possible hearing dates and was cooperative with and responsive to both the Crown and the court. Given the fact that the trial may have only been one or two key witnesses and perhaps the third witness being a police officer providing brief testimony, this did not seem like one of those cases where there could be significant agreements of facts to really streamline the issues.

[118] In addition, the record reflects that there were meaningful discussions to resolve the file, but they only occurred at the last moment, while the parties were in court. Those discussions led to a resolution of one of the trial matters, but Defence Counsel indicated that the assault charge would still be going to trial as was his right to do so.

[119] However, as the Court outlined in the comments reflected in the transcript, after dealing with the brief sentencing hearing on the failure to attend court charge, there was simply not enough time to address all of the trial matters that day. Then, as indicated by the Court at that time, and given the double and triple booking of files to attempt to address the backlog in a reasonable fashion, the Court prioritized the other case to proceed to trial, where the accused and the witness had come from out of province and had cleared public health measures.

[120] In the final analysis, I have concluded that the adjusted net delay is well below the 18 month "presumptive ceiling" of unreasonableness, being in my opinion, 14.2 months of net delay. In addition, having concluded that the adjusted delay is below the relevant presumptive ceiling, I cannot conclude that the defence has established unreasonable delay by taking meaningful and sustained steps to expedite the proceedings.

[121] In conclusion, I hereby dismiss Mr. Nagy-Willis' section 11(b) **Charter** application.

Theodore Tax, JPC