PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Yeo*, 2023 NSPC 11

Date: 20230201
Docket: 8245364, 8245365, 8245366, 8245367, 8245368
Registry: Dartmouth

Between:

His Majesty the King

v.

Arnold Bruce Yeo

Judge:	The Honourable Judge Theodore Tax,
Heard:	December 15, 2022, in Dartmouth, Nova Scotia
Decision	February 1, 2023
Charge:	Section 255(2)x 4 & 255.(2.1) of the **Criminal Code of Canada**
Counsel:	Tiffany Thorne, for the Public Prosecution of Nova Scotia Victor Goldberg, K.C., for the Counsel for the Defence

By the Court:

[1] Mr. Arnold Yeo has filed a **Charter** application to have his criminal charges stayed. Mr. Yeo's **Charter** application has been filed pursuant to section 11(b) of the **Canadian Charter of Rights and Freedoms** [hereafter "the **Charter**"] that the trial of the criminal charges which he faces has taken too long. In his application, Mr. Yeo states that he has a right to a trial within a reasonable time as guaranteed by section 11(b) of the **Charter** and that right has been violated.

[2] Mr. Yeo was charged with having committed five offences on or about June 10, 2018, at or near Goffs, Nova Scotia. There are four allegations of having care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug and thereby causing bodily harm to four individuals, contrary to section 255(2) of the **Criminal Code.** The fifth charge of having care or control of a motor vehicle, after having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 mg of alcohol hundred millilitres of blood, causing an accident resulting in bodily harm, contrary to section 255(2.1) of the **Criminal Code**.

[3] The Information alleging the five offences which are presently before the court was sworn on July 19, 2018. Based on the schedule of trial proceedings, the "anticipated end of the trial" is June 15, 2023, which is the date that has been scheduled for the parties to make their closing arguments, if this **Jordan** application was dismissed by the Court. The Crown Attorney and Defence Counsel agree that, for the purposes of the **R. v. Jordan**, 2016 SCC 27 analysis as to whether there was an unreasonable delay in the trial, the "total delay" between those two dates is 1792 days or 58.9 months.

[4] While the parties agree on some of the periods of "delay" which should be "deducted" from that "total delay" using the **Jordan** framework for the analysis of a section 11(b) **Charter** application, their submissions with respect to the assessment of several periods of "delay" is vastly different.

Positions of the Parties:

[5] Defence Counsel submits that when the defence waived or caused delay as well as "exceptional circumstances" are "deducted" from the "total delay" as per the **Jordan** framework for the analysis of the section 11(b) **Charter** applications,

the “total delay” is 36.7 months, being more than double the Supreme Court of Canada’s unreasonable delay “presumptive” ceiling of 18 months for a trial in the Provincial Court. He submits that the Crown has not established the presence of sufficient exceptional circumstances to rebut that presumption through either discrete events or this being a particularly complex case to bring the “total delay” below that “presumptive ceiling.”

[6] In the alternative, Defence Counsel submits that, if the Court was to conclude that the “net delay” was below that 18 month “presumptive ceiling,” then, he points to the fact that the defence has taken significant steps to expedite the trial along the way through agreements and admissions. Those “meaningful and substantial” steps expedited the trial and alleviated the need for the Crown to call several witnesses to relate the nature of their injuries, some statements by other individuals, presenting accident scene photographs and not seeking an adjournment when some photographs were disclosed at the last moment. In addition, Defence Counsel submits that this is not an overly complex case, but it has taken markedly longer than it should have.

[7] For her part, the Crown Attorney submits that the “total net delay” is 13.7 months, being well below the 18 month “presumptive ceiling,” after subtracting defence delay and delay attributed to “exceptional circumstances” from “discrete events.” She submits that there were three very significant sets of “exceptional circumstances” which were totally unforeseeable and totally unavoidable by any reasonable efforts by the Crown to mitigate or avoid their impact before the total delay exceeded the ceiling.

[8] It is the position of the Crown that there was far more defence waived or caused delay then what has been acknowledged by Defence Counsel. However, the main difference between their two positions is that the Crown Attorney submits that there were three very “exceptional circumstances” as “discrete events” which rebut the presumption of unreasonable delay.

[9] In particular, the Crown Attorney submits that those “exceptional circumstances” arose from the unforeseen and unavoidable suspension of court operations as a result of the Covid 19 pandemic in both 2020 and 2021 which actually cancelled previously scheduled court dates for trial evidence, and then having to reschedule court dates with the backlog of other postponed cases. She also points to the unforeseeable medical issues of the defence expert witness [Mr. Johnstone] who, on a couple of occasions, was unavailable to testify on scheduled

trial continuation dates. Finally, she also submits that the trial took significantly longer to conclude than anyone had anticipated and coupled with those exceptional circumstances, as the trial progressed, the estimates of the additional time required to complete the trial were also underestimated, which resulted in several additional dates having to be scheduled.

[10] In the alternative, the Crown Attorney submits that if the "net delay" as calculated by the Court exceeds the 18 month "presumptive ceiling", then, this case was one that was sufficiently complex, with one expert witness being called by the Crown and two expert witnesses being called by Defence Counsel to provide opinion evidence to assist the Court. As a result, the Crown elected to recall their expert witness to present rebuttal evidence.

[11] It is the position of the Crown that the application for a stay of proceedings pursuant to section 11(b)of the **Charter** should be dismissed.

Brief overview of Background Facts and Procedural History:

[12] On June 10, 2018, at about 12:18 p.m., Mr. Yeo was operating a motor vehicle on Highway 102 after passing the exit to the Halifax International Airport inbound toward Halifax. Shortly thereafter, Mr. Yeo's vehicle went off the passing lane of the inbound portion of the highway, through a center grass median, which sloped up to the outbound portion of the highway, became airborne and rolled several times on the outbound lanes of Highway 102. Mr. Yeo's car came to rest near Exit 5A on Highway 102, on its driver's side, after colliding with several vehicles on the outbound portion of the highway.

[13] As a result of the accident, the outbound portion of Highway 102 was closed, police officers and paramedics arrived to attend to the people in the cars involved in the accident. Firefighters were also on scene and the jaws of life were used to cut the roof off the Mr. Yeo's car to extract him from the vehicle. He was assessed by paramedics at the scene. Const. Thomas spoke with Mr. Yeo at the scene, making his own observations and obtaining information from other police officers and after that, he made an Approved Screening Device demand for Mr. Yeo to provide a sample of his breath at about 12:59 PM on June 18, 2018. Shortly thereafter, Mr. Yeo provided a suitable sample of his breath for analysis which registered as a "Fail." Thereafter, Const. Thomas made a demand for Mr. Yeo to provide suitable samples of his breath for analysis in an "Approved Instrument" at the detachment.

[14] At the Lower Sackville RCMP Detachment, prior to providing suitable samples of his breath into an Approved Instrument, paramedics were again called to examine Mr. Yeo. After being assessed by the paramedics, Mr. Yeo provided two (2) suitable samples of his breath for analysis into the Approved Instrument, with the first one being at 2:54 PM on June 18, 2018, with the result of 170 mg of alcohol in 100 mL of blood. After waiting a minimum of 15 minutes before providing a second suitable sample of breath for analysis, the second suitable sample for analysis was obtained at 3:29 PM with the result of 160 mg of alcohol in 100 mL of blood.

[15] I note, parenthetically, that the sections of the **Criminal Code** under which Mr. Yeo was charged have since been repealed by Parliament and were replaced by section 320.14(2) of the **Criminal Code** when those amendments came into force on December 18, 2018. The case has proceeded on the basis of the legislation and law in effect with respect to that legislation as of June 10, 2018.

[16] Mr. Yeo was charged with the Indictable offences before the Court, in an Information which was sworn on July 19, 2018. He made his first appearance in court through his counsel on July 25, 2018. The matter was adjourned to October 1, 2018, when Defence Counsel received additional disclosure. The election and plea were then scheduled for December 14, 2018. On that date, Defence Counsel indicated that he "**waived delay**" pursuant to section 11(b) of the **Charter** as he was planning to obtain medical reports. Based upon that information, the election and plea were adjourned to February 25, 2019.

[17] On February 25, 2019, Mr. Yeo, through his counsel, elected trial in the Provincial Court and after a discussion with Judge Brinton, this matter was set down for a four-day trial in Dartmouth Provincial Court #5 on December 3, 4, 10 and 17, 2019. The Crown Attorney had advised Judge Brinton that the estimated length of their evidence would be at least 2½ days and after hearing that, Defence Counsel stated that he was contemplating a three-day trial. However, after hearing from the Crown Attorney, Defence Counsel stated that he planned to call at least two and possibly three experts, so the trial was "going to be somewhat complicated" and suggested that four (4) days should be scheduled for the trial.

[18] During the discussion to set the trial dates, the clerk initially offered the first date being June 10, 2019, but Defence Counsel indicated that he was not available on that date. He added: "I was thinking perhaps December or January… Four days straight." Defence Counsel also requested a status date be set well before the trial

dates as it "may well be" that they would bring a **Charter** application but were waiting for information from experts. Based upon those remarks by Defence Counsel, the Crown Attorney asked Defence Counsel to waive the delay of about six (6) months between the first date offered for trial on June 10, 2019, and the scheduled start of the trial on December 3, 2019. Defence Counsel "agreed to waive that delay," but indicated that "scattered dates, in my experience don't help the efficiency of trial."

Pre-Trial Conference & Status Dates for the Trial -

[19] After scheduling the four days for trial, the Court also scheduled a pre-trial conference for July 3, 2019. The pre-trial conference was held in chambers on July 3, 2019. During the pre-trial conference, as confirmed by a summary prepared by the Court and forwarded to counsel, the Crown Attorney mentioned that there may be as many as 22 witnesses if all were required to attend. She also indicated that the Crown would be calling expert "extrapolation" evidence. Defence Counsel indicated that they may be calling two (2) experts as well. Although four (4) days had been set for the trial, there was discussion as to whether additional or different days might be required, but the indication at that point was that the defence would probably not be raising **Charter** issues. The parties agreed with the Court to set a further status date on October 8, 2019.

[20] Immediately following the pre-trial conference, the parties came into court and, on the record, released the December 3, 2019 date, based upon a possible conflict for Defence Counsel. However, the Court was able to advise that December 18th had become available, so the four-day trial was then confirmed for December 4, 10, 17 and 18, 2019. It was also stated that, during the upcoming status date on October 8, 2019, the parties would "see" if more or less time was required, depending upon whether there were any agreements in relation to the Crown calling up to 22 witnesses during the trial. Defence Counsel expressed a preference that the trial dates be kept as close as possible to one another, and the Court agreed that it would be preferable to do so, rather than being months apart.

[21] During the status update on October 8, 2019, Defence Counsel advised that his potential conflict for a couple of the December trial dates had been resolved, so he was available for all four days which had been confirmed on July 3, 2019. In addition, Defence Counsel asked that the Court schedule another status date as he planned to speak with the Crown Attorney to determine if it was possible to "streamline" the witness list for the trial. Defence Counsel indicated that, even

with streamlining the witness list, given the fact that it was likely that three experts would be involved, he could foresee lengthy cross-examination by both sides.

[22] The Court scheduled November 12, 2019, as a further status date to check with counsel as to whether there had been some "fine-tuning" of the issues that had been mentioned. The Court had also advised the parties that there was a two-hour matter on the morning of December 18, 2019 and asked counsel whether another day or half-day should be scheduled. The decision on whether extra time would be required was postponed to the next status update as the parties would be speaking about streamlining the witness list. At that time, the Court advised counsel that a continuation date would likely be, at a minimum, 2 to 3 months after the December trial dates.

[23] At the outset of the November 12, 2019 status update, Defence Counsel advised the Court that he had received instructions to file a **Charter** application and that he had sent notice of the application to the Crown the previous week. As a result, the focus of the discussion on this status update related to the handling of Mr. Yeo's **Charter** application relating to his rights under section 7, 8, 9 and 10(b) of the **Charter**. Defence Counsel also indicated that he was continuing his discussions with the Crown Attorney with respect to disclosure issues and that they would be meeting the following week to discuss agreed facts or admissions to narrow the witness list and some trial issues.

[24] Given that the trial dates were less than a month away, the issue of how the **Charter** *voir dire* would proceed was discussed. Defence Counsel advised the Court that the Section 8 **Charter** issue related to whether the officer had the required "reasonable grounds to suspect" pursuant to section 254(2) of the **Code** [as in force on June 10, 2018] to make a valid Approved Screening Device demand that Mr. Yeo provide a sample of his breath for analysis. The Court suggested that, if agreed, there could be a blended "*voir dire*" but after some discussion, Defence Counsel stated that they preferred a standalone *voir dire* with the possibility of later using the *voir dire* evidence in the trial.

[25] Since the first day for the trial was only 3 weeks away, it was agreed that there was insufficient time to have a defence **Charter** brief and a Crown response, based upon the anticipated evidence of the *voir dire*, prior to the four days scheduled for the trial. Defence Counsel suggested that the **Charter** *voir dire* evidence be heard on December 4, 2019, with briefs to be filed after the evidence was heard. Defence Counsel suggested keeping the December 10, 2019 date in

case it was needed for further *voir dire* evidence, releasing the December 17th date and scheduling the December 18, 2019 date for closing oral submissions on the **Charter** application. The Court stated that December 17th should also be retained "for now" in case it was needed as determined by the next status date which was then scheduled for November 26, 2019.

[26] Once those dates were established, the Crown Attorney questioned whether the one expert to be called by the Crown and the two experts to be called by the defence would be available on the December dates. Both counsel indicated that it would be advisable for the Court to set additional trial time, so that the expert witnesses could be contacted to determine their availability on those dates.

[27] In setting those additional dates, the Court advised the parties that, given the "reality" of the schedule, the parties were now looking at dates in March 2020. In terms of how many days for trial should be scheduled, Defence Counsel responded that "probably two full days" would be needed for his experts and the Crown Attorney stated that that might not suffice given the evidence that they planned to call. The Court offered four (4) full days for trial on March 17, 18, 24 and 25, 2020, but Defence Counsel was unavailable on those dates. Following that, the Court offered and held March 31 and April 7, 2020, for the parties to confirm the availability of their witnesses on those dates.

Schedule Dates for Charter *Voir Dire*/Release and Schedule New Trial Dates -

[28] During the November 26, 2019, status date, the Court confirmed that the purpose of this status date was to reschedule trial dates and to confirm the plan for the **Charter** application. Counsel confirmed that it was their intention to proceed with the evidence for the **Charter** *voir dire* on December 4, 2019, filing the **Charter** briefs after that hearing and then returning on December 18th to make oral submissions. The Court indicated that the date for the decision on the **Charter** *voir dire* would be determined after the oral submissions on December 18, 2019.

[29] As a result of proceeding in that manner, and the fact that the parties believed that all the **Charter** *voir dire* evidence could be heard on December 4, 2019, the previously scheduled trial dates of December 10 and 17, 2019 were released. Since there was not enough time for the Defence to file their brief and the Crown reply before December 18, 2019, the Court confirmed with the parties that they would file their briefs, *at the same time*, on or before December 16, 2019, and would have the opportunity to make oral submissions on December 18, 2019.

[30] In terms of the trial dates, the parties confirmed that March 31, 2020 remained a good date for both sides, however, Defence Counsel advised that his expert was not available on April 7, 2020. After hearing that April 7th was no longer a convenient date to both sides, the Crown Attorney indicated that they would need 2 to 3 additional days for the trial. Defence Counsel indicated that was "correct" and added that the Court should schedule a fourth additional day after the date when the **Charter** *voir dire* decision was delivered. In essence, the parties' estimate of the time required for the trial, **after** the **Charter** *voir dire* decision was the same [4 days] as had been originally scheduled for trial in December 2019.

[31] The parties had already confirmed that March 31, 2020, remained a good date for both sides and having released the April 7th date because the defence witness was not available, the Court then scheduled three (3) more days for a total of four (4) days for the trial on April 22 and 29, 2020 as well as May 5, 2020. The parties also indicated that it would be ideal for the **Charter** *voir dire* decision to be provided prior to the trial continuation date on March 31, 2020, as that decision would likely impact whether the four additional days which had just been scheduled would all be needed.

[32] During this status date, the Crown Attorney also made an application for their toxicology expert to testify by video, which was not opposed by the defence. However, given the scheduling of the **Charter** *voir dire*, it was confirmed that the expert would not be called on December 18th as had been planned, as her evidence was not relevant to the issues on the **Charter** *voir dire.*

Charter *Voir Dire* – Day 1 - December 4, 2019 -

[33] On December 4, 2019, Const. Grant Thomas of the RCMP was the only witness called on the **Charter** *voir dire*. Once Const. Thomas's evidence was concluded, the parties indicated to the Court that no other evidence would be called. Court was adjourned at 2:45 PM. The date for the oral submissions of counsel on the section 8 **Charter** *voir dire* had previously been scheduled for December 18, 2019.

Charter *Voir Dire* – Day 2 - December 18, 2019 -

[34] On December 18, 2019, the parties made their oral submissions on the section 8 **Charter** *voir dire*, and the court reserved its decision. After canvassing dates when the Court and counsel would be available for the delivery of the

decision, it was determined that the March 31, 2020 trial date would be converted to the decision date for the **Charter** *voir dire*. Since that previously scheduled date for trial would be taken up by the **Charter** decision, the Court was able to add another half-day for the trial continuation on May 13, 2020, at 1:30 PM. As a result, the four (4) days then rescheduled for the trial then became April 22 and 29, 2020 as well as May 5 and May 13, 2020, in Dartmouth Provincial Courtroom #5.

Covid 19 Measures by Provincial Court Vacating dates for Charter *Voir Dire* Decision and the First 4 Days Scheduled for Trial which had been scheduled for March 31, 2020, April 22 and 29, 2020 and May 5 and May 13, 2020 -

[35] On March 16, 2020, the Provincial Court of Nova Scotia issued a public notice that certain measures were being put in place by the Court as a result of Covid 19. The Chief Judge indicated in that notice that "Starting Tuesday, March 17, access to Provincial Courts will be restricted to only those persons who are necessary to the proceedings before the Court." Chief Judge Williams also indicated that "For many matters presently before the Provincial Court, efforts are being made to adjourn the next appearance until after May 31, 2020."

[36] On March 30, 2020, Chief Judge Williams stated on the record, based upon the previous notice and public health measures which had been put in place to address the Covid 19 pandemic that all matters scheduled for Courtroom #5 in Dartmouth Provincial Court will be adjourned until the end of May. As a result, the previously scheduled trial dates of March 31, 2020, April 22 and 29, 2020, May 5 and May 13, 2020, were vacated by the Court. Chief Judge Williams also stated that matters scheduled for March 31, 2020, which included the Yeo trial, would be adjourned to June 23, 2020, at 9:30 AM to re-schedule new trial dates.

June 23, 2020 - Rescheduling the Covid Cancellations of Charter *Voir Dire* Decision and the first 4 Days for Trial –

[37] During the June 23, 2020, telephone appearance by counsel with the Court, the Court advised that this was a hearing to set the date for the release of the **Charter** *voir dire* decision and to reschedule trial continuation dates. The Court indicated that, working from home, it was difficult to have access to files at the court and completion of the decision might take another 3 to 4 weeks.

[38] In terms of scheduling, the Crown Attorney advised the Court that it would be helpful to have the Court's **Charter** *voir dire* decision first as it would likely

impact whether the Crown would need to call their expert and a number of other witnesses. Defence Counsel indicated that if the Crown called their expert witness, then, the defence would likely have two experts to be called and trial time would be needed for those witnesses. The Court asked if two or three days should be scheduled for the trial itself, the Crown Attorney suggested four days and Defence Counsel indicated that they would need three or four days for the trial.

[39] The Crown Attorney advised the Court that they were initially planning to call over 20 witnesses, but she was working on agreements and admissions with Defence Counsel to narrow the witness list. They were also considering filing a booklet of photographs without certain witnesses being called, but even with those agreements, the Crown would still have 8 to 10 witnesses and Defence Counsel indicated that there would be defence evidence. As a result, the Crown Attorney asked that a few days be set for trial continuation and depending on the **Charter** *voir dire* decision there may be a need to set some more dates after the decision.

[40] The court clerk asked whether the **Charter** *voir dire* decision could be delivered on July 15, 2020, but the Court answered that might be "a little too soon" to complete the decision and added that only "a little extra time" was needed. The Court stated that the **Charter** *voir dire* decision would be delivered well before the trial continuation dates. The Court suggested scheduling two days for trial and holding another two days for the purpose of the trial continuation if they were needed.

[41] In terms of a possible **Charter** *voir dire* decision date, the clerk then offered August 13, 2020, but moments later, it was determined that there was no courtroom available on that date. As a result, the clerk canvassed several other dates in August, September, and early October, but there were either no vacant courtrooms or other matters had been scheduled for the entire day. Finally, it was determined that the Court, the parties and a courtroom were all available, on October 22, 2020, and that date was scheduled for the **Charter** *voir dire* decision.

[42] Following those efforts to schedule the **Charter** *voir dire* decision, the Court and the parties scheduled four (4) full days for the trial continuation on December 2, 2020, January 5 and 6, 2021 and January 12, 2021. The Court noted that it would be difficult to find four days in a row and that those dates provided a block of time relatively close together.

[43] In addition, the Court stated that it was unlikely any earlier trial dates would open up due to the court having to deal with the matters where trials had not been

affected by Covid 19 measures, rescheduling trials which had been vacated by the Covid 19 measures at the same time as new matters before the court required trial dates. Furthermore, the Court stated that a priority was being given to trials or new matters involving people who were in custody. Finally, the Court noted that the ongoing Covid protocols may lengthen the time required for trial and encouraged the parties to reach agreements on "peripheral" issues which might shorten the amount of court time required for the trial.

[44] The **Charter** *voir dire* decision was delivered on October 22, 2020. The Court held that Const. Thomas had sufficient grounds to make an ASD demand and that the search and seizure was carried out in a reasonable manner. The Court concluded that there was no violation or infringement of Mr. Yeo's section 8 **Charter** right to be secure against unreasonable search or seizure and dismissed the application.

[45] **Trial – Day 1 - December 2, 2020** - The evidence in the trial proper commenced on December 2, 2020. Prior to calling the first witness, the Crown Attorney indicated that she had reached an agreement with Defence Counsel to file Exhibit 1 in the trial which was a series of admissions that the parties had concluded, which greatly reduced the potential number of witnesses to be called by the Crown. In addition, many of the photographs that had been filed during the **Charter** *voir dire* which had not been a blended *voir dire*, were filed as Exhibit 1.

[46] The Crown Attorney called and completed the evidence of its first three witnesses – Sgt. Lyndon Morrison, Const. Robert Kellock and Const. Kayla Jeffrey. The Crown Attorney had also planned to call Const. Deidre MacIntyre but there was not enough time at the end of the day to do so and her testimony was postponed to the next trial date.

[47] Prior to concluding for the day, the Crown Attorney indicated that she had just received 4 photographs taken by Const. MacIntyre and that they had just been disclosed to Defence Counsel. At that point, Defence Counsel stated that the Crown still had three witnesses before their expert witness, and that the trial would not finish on the three remaining days already scheduled for the trial. Defence Counsel asked the Court to schedule three additional days for the trial as soon as possible as he was concerned with delay and the amount of time that the trial had taken to date.

[48] With respect to the issue of the late disclosure of the four photographs, the Crown Attorney stated that she would be prepared to forgo filing those photos if

Defence Counsel needed an adjournment to review them. She also stated that the Crown was cognizant of **Jordan** issues and the Crown was attempting to mitigate delay by working with her court partner to see if other cases could be resolved to create trial time for this matter. The Crown Attorney agreed that more trial time would be needed.

[49] In addition, the Court asked the clerk to see if additional court time could be secured. The Court noted that trials were taking longer with the Covid protocols in place. The court clerk stated that finding other court dates would require a conversation with the Chief's office, as there was no available time for a half-day or full-day trial in this courtroom until August or September 2020.

[50] The Court also advised counsel that, as part of the conversation with the Chief Judge's office, the Court would be looking at the possibility of using any vacant courtroom in the Halifax Regional Municipality to schedule this matter. However, the Court reiterated that it was difficult to find additional trial time on short notice, given the Provincial Court's stated priority of dealing with trials of people in custody, which had been postponed due to the Covid 19 public health restrictions and the cancellation of other previously scheduled trials.

[51] The Crown Attorney indicated that she would probably need at least a further 1.5 days to complete her case as she has three more witnesses and then planned to call her expert witness. At that point, the Court asked the parties to discuss whether it would be a contested **Mohan** *voir dire* with respect to the expert qualifications of the witness, as a contested *voir dire* would require an additional time commitment.

[52] **Trial – Day 2 - January 5, 2021** - At the outset, prior to calling the witnesses who were at the court, the Crown Attorney sought guidance from the Court with respect to the recent receipt of an amended notice of the defence expert report on December 14, 2020. She had anticipated having the Crown expert [Ms. Hackett] prepare a rebuttal report but indicated that would take time and she had hoped to call her expert that day or the next day.

[53] The Crown Attorney indicated that a short adjournment of Ms. Hackett's evidence might "streamline" proceedings, but there was a concern that in doing so it may create a delay. Defence Counsel was concerned from a "trial fairness" position that it might provide the Crown with two opportunities to rebut the opinion of the defence expert.

[54] Following fulsome discussions on the issue with the parties, the Court concluded, and Defence Counsel agreed that Ms. Hackett should provide her opinion evidence based upon her original report and be subject to cross-examination in the "natural flow of evidence" rather than also commenting on the "anticipated opinion evidence" of the defence expert. The Crown Attorney also agreed with that approach, but added that she would likely be calling Ms. Hackett to provide further expert opinion evidence on rebuttal.

[55] During the discussions with respect to the opinion evidence of Ms. Hackett, Defence Counsel raised his concern with respect to the amount of time that it was taking to proceed with this trial. The Crown Attorney advised the Court that the issue with respect to Ms. Hackett's evidence arose because she only had 11 "clear days" notice of the amended defence expert report. She indicated that it was late notice and that the defence had known for almost a year that they would be calling expert opinion evidence in this area. As a result, Ms. Hackett did not have a reasonable amount of time to prepare an amended or supplemental report in advance of this trial date.

[56] With respect to the potential **Jordan** issue of the unreasonable delay, the Court indicated that, ultimately, it was open to the defence to advance that **Charter** application if they were of the view that there had already been an unreasonable delay in the trial proceedings. However, the Court also indicated that this was a "very complex trial" and that it was anticipated that at least three experts would be called. The Court also stated that, the fulsome discussion with counsel around the expert report and evidence of Ms. Hackett, to ensure that there was a "fair trial" to both sides, was an example of the complex nature of the trial.

[57] In addition, the Court noted that significant efforts had been made to secure additional trial time on relatively short notice through the Chief Judge's office. As a result, the court clerk had previously forwarded an e-mail to advise the parties that the Court had secured 3 additional days for trial on January 8, 15 and 28, 2021. The Court advised the parties that it was very difficult to schedule any court dates on short notice as there were many "moving parts" to coordinate. The court clerk had also advised the parties that, in this courtroom, there was no available time for half-day or full-day trials until August or September 2021.

[58] In response to those proposed dates, the Crown Attorney indicated that neither she nor Ms. Hackett were available on January 8 or January 15, 2021, but she could re-arrange her schedule to make herself available on January 28, 2021.

Defence Counsel stated that he was available to continue with the trial on all three of those dates. After hearing that, the Court also stated that, prior to continuing with the trial, earlier that morning, other parties had indicated that it was likely trial time would be available on June 29, 2021. As a result, counsel confirmed that they were available on that date and the Court agreed to hold that date, based upon what the Court referred to as the proposed "trajectory" of the trial evidence, for the Court's trial decision.

[59] On this second full day of the trial [January 5, 2021], due to the fact that the Court had to deal with some other matters during the day, the Crown was only able to complete the evidence of Const. McIntyre and Const. Michael Collins. Prior to concluding for the day, the Court discussed the setting of future dates for trial evidence with the parties. The Court asked the parties if they would need two more days past the currently scheduled January 28, 2021 date. The Crown Attorney said that she had only completed three of the six witnesses planned for that day and would need another 1.5 days for their remaining witnesses. Defence Counsel noted that, in addition to the dates already scheduled by the Court, he would need three more days scheduled for the defence evidence.

[60] **Trial – Day 3 - January 6, 2021** - The Crown called their next three witnesses, Constables Grant Thomas, Shealynn Wellwood and Traci Boswell. After the evidence of Const. Thomas was completed by mid-afternoon, the Crown Attorney indicated that they would be calling two civilian witnesses. Prior to a short break at that point, Defence Counsel asked if the Court had obtained any additional dates for the trial. The Court stated that, arrangements were being made with the Chief Judge's office and it was likely that three days in mid-March could be obtained for the trial continuation. The Court stated that the parties would be advised of those of days shortly to be able to confirm the availability of their witnesses.

[61] After the evidence of Const. Traci Boswell was concluded, the Crown Attorney said that her final witness in the trial, would be their expert witness, Ms. Hackett. It was anticipated that Ms. Hackett would testify on January 12, 2021, and counsel estimated that her direct examination and cross-examination would likely take most of the day. The Crown Attorney candidly indicated that this was her time estimate for the evidence, but her estimates had been "off" in the past in terms of the length of the trial.

[62] Defence Counsel indicated that he expected that there would be a significant cross-examination of Ms. Hackett and it was unlikely that her evidence would be completed before 3:30 PM the next day. Defence Counsel added that he would prefer not to put his client on the stand at that time, but essentially start with his client's evidence that next full day for trial.

[63] **Trial – Day 4 - January 12, 2021** - The Crown Attorney called their expert witness, Josette Hackett who testified by videoconference. There were some technical problems with the video connection to Ms. Hackett in Ottawa which briefly interrupted the proceedings, and following that, the Crown Attorney stated that she and the Defence Counsel had agreed that there would not be a contested **Mohan** *voir dire.* They had agreed on the areas where she could be qualified to express expert opinions.

[64] However, the Crown Attorney said that she may go into some depth on Ms. Hackett's qualifications as Defence Counsel had indicated that he would also be posing some questions with respect to her qualifications, while not being contested, which might affect the weight of her opinion evidence. The questioning in relation to Ms. Hackett's qualifications by both counsel took up most of the morning.

[65] In addition, prior to concluding the morning session, the Court asked counsel to confirm their availability for the three additional days for trial that had been proposed in March 2021 by the Court. Both sides wished to speak to their witnesses about their availability. In addition, the Crown Attorney confirmed that she and Ms. Hackett had made changes to their schedules, and they were available on the proposed trial continuation date of January 28, 2021.

[66] After Ms. Hackett was qualified to express expert opinion evidence, the Crown Attorney commenced her direct examination and advised the Court that her direct examination would probably take most of the afternoon. Defence Counsel had indicated that, if there was only a short amount of time left in the day, rather than commence his cross-examination of Ms. Hackett, he had a defence witness on standby and that time could be used for his evidence.

[67] The direct examination of Ms. Josette Hackett was conducted in the afternoon of January 12, 2021and concluded shortly before 4 PM. Defence Counsel indicated that he would start the cross-examination of Ms. Hackett as he did not wish to incur any delay. Defence Counsel commenced his cross-examination of Ms. Hackett and proceeded to an appropriate point to stop for the day with the cross-examination to be continued on January 28, 2021.

[68] **Trial – Day 5 - January 28, 2021 -** At the outset of the proceedings, Defence Counsel informed the Court that his expert witness in pharmacology, Mr. Greg Johnstone had recently undergone an emergency bypass surgery, was recovering and would not be in court to hear the cross-examination of Ms. Hackett. However, Defence Counsel stated that he was prepared to proceed with the cross-examination of Ms. Hackett in the absence of his defence expert as he was told that Mr. Johnstone required a minimum 90 days of recuperation.

[69] In addition, Defence Counsel indicated that he would likely complete his cross-examination of Ms. Hackett in the morning. Since Ms. Hackett was the final Crown witness, Defence Counsel said that he would call a third-party witness in the afternoon and call Mr. Yeo on the next court date of March 15, 2021. He estimated that the direct and cross-examination of Mr. Yeo might take all day on March 15, 2021. Defence Counsel planned to call his respirology expert on March 16, 2021, at 1 PM as the doctor had Covid ICU commitments that morning and he was not available on March 17, 2021. The other defence expert witness, Mr. Greg Johnstone, was scheduled to be the last defence witness and Defence Counsel suggested that two days should be scheduled for his evidence.

[70] Prior to continuing with Ms. Hackett's opinion evidence on a January 28, 2021, after hearing the plans for the defence case, the Court confirmed that everyone was available except for Mr. Johnstone during the three upcoming trial dates which had been recently secured for March 15, 16 and 17, 2021.

[71] Defence Counsel indicated that, given Mr. Johnstone's recuperation period, a date after May 15, 2021, would probably be a convenient for him. The Court noted that, on a previous day, *June 29, 2021 had been held as a tentative date for the completion of the evidence or closing submissions*. The Crown Attorney and Ms. Hackett confirmed their availability on that date.

[72] In terms of scheduling other additional days for the trial, the Court and the Crown Attorney had noted that trials in Dartmouth Courtroom #5 were recently being scheduled in November 2021. The Court reiterated that, finding additional earlier trial dates required assistance from the Chief Judge's office to switch the Court's schedule and find a vacant courtroom, when everybody was available or be advised by the Crown Attorney in a timely manner that some upcoming trials in this court would not be proceeding.

[73] **Crown Closes on Trial Day 5 [January 28, 2021] - Defence Case Commences -** Ms. Hackett's cross-examination and the Crown Attorney's re-

direct examination were completed at about 3 PM on January 28, 2021. Following the conclusion of Ms. Hackett's evidence, the Crown Attorney tendered the exhibits which had been filed by the Crown and closed her case.

[74] After a brief break, Defence Counsel called his first witness, Mr. Peter Morrison. The direct examination, cross-examination and redirect examination of Mr. Morrison was completed within about one hour around 4:15 PM.

[75] **Trial – Day 6 – March 15, 2021 -** At the outset of the proceedings, Defence Counsel confirmed that Mr. Yeo would be testifying that day, with the respirology expert, Dr. Leblanc being scheduled for Tuesday, March 16th , but due to his Covid ICU commitments at the hospital, he would only be available at 1:30 PM that day. If needed, Dr. Leblanc would only be available for the morning on Wednesday, March 17th due to his hospital Covid ICU commitments.

[76] Defence Counsel advised the Court that he did not believe his direct examination of Dr. Leblanc would be that long and although he could not predict how long the cross-examination by the Crown Attorney would be, he hoped that Dr. Leblanc's evidence could be completed within that timeframe, as he had those firm hospital commitments. The Crown Attorney stated that given Dr. Leblanc's expert report, she estimated that the cross-examination would likely continue on March 17, 2021, in the morning.

[77] Defence Counsel confirmed that the additional day scheduled on June 29, 2021, would be for the expert evidence of Mr. Johnstone. As for other dates for the trial continuation, the Crown Attorney indicated that she had corresponded with the clerk for courtroom #5 that there was a possibility of trial time being available on October 19, 2021. The Court stated that the parties would soon be advised if that was an available trial continuation date.

[78] After the upcoming schedule issues had been addressed, Defence Counsel called Mr. Yeo to the witness stand. Mr. Yeo's direct examination continued until the lunch break and concluded about a half hour after Court recommenced for the afternoon. After a brief recess, the Crown Attorney commenced her cross-examination, which continued for the balance of the afternoon. The Crown Attorney advised that she believed that her cross-examination Mr. Yeo would be completed the next morning, prior to Dr. Leblanc's evidence, who was only available on the afternoon of March 16, 2021.

[79] Following the adjournment of the trial to the following morning, the Crown Attorney also advised the Court that a relatively brief, but urgent matter, had been scheduled for 9:30 AM on March 16, 2021, and as a result, Mr. Yeo's cross-examination was scheduled to continue at 10 AM on March 16, 2021.

[80] **Trial – Day 7 – March 16, 2021 –** The cross-examination of Mr. Yeo continued shortly after 10 AM and the Crown Attorney believed that she would finish her cross-examination before 11:30 AM. The cross-examination of Mr. Yeo concluded at about 11:15 AM. Then, after a short break to allow Defence Counsel to review his notes, he advised that he did not have any re-examination questions.

[81] Since the urgent custody matter had not proceeded in the morning as scheduled, it was heard immediately after the completion of Mr. Yeo's evidence. The urgent custody matter concluded at about 1:15 PM, taking about 45 minutes more than those parties had estimated. Given the length of that urgent matter, the Court requested that the parties in the Yeo trial be advised that the trial would resume at 2 PM instead of 1:30 PM in order to provide the court staff with a short break for lunch.

[82] Dr. Aaron Leblanc was then called as an expert witness with Ms. Hackett being connected by the court's video conferencing to hear his evidence. At the outset, the Court asked parties whether Dr. Leblanc's qualifications to provide expert opinion evidence were being contested and whether it would be necessary to conduct a contested **Mohan** *voir dire.*

[83] The parties advised the Court that Dr. Leblanc's expertise for providing opinion evidence was not, for the most part, being contested, however the Crown Attorney stated that she had only been provided with general areas to be covered by him and that there may be issues of his expertise in certain specific areas. For those reasons, she stated that there would likely be several preliminary questions around his expertise to provide opinion evidence in those areas.

[84] After those comments by Defence Counsel and the Crown Attorney around the preliminary questioning of Dr. Leblanc, once again, the videoconference technical difficulties occurred and interrupted Ms. Hackett's virtual presence from Ottawa, in the trial. Similar technical problems had impacted her virtual presence in the proceedings on January 28, 2021. The Court requested the assistance of the technical people to sort out the issue with the videoconferencing.

[85] As a result, the Court adjourned at about 2:25 PM. When the trial resumed about 30 minutes later, prior to questioning Dr. Leblanc, the parties advised the Court that they had been able to draft wording of the areas in which Dr. Leblanc could provide opinion evidence. However, counsel also indicated that they would still be asking preliminary questions, but they would not be conducting a contested **Mohan** *voir dire*.

[86] After the preliminary questions were asked by both sides, the Crown Attorney stated that she was not opposed to most of the areas for which Defence Counsel sought to qualify Dr. Leblanc as an expert to provide opinion evidence. However, after considerable discussion around the question of whether he had the necessary expertise relating to the absorption, distribution and elimination, especially of things like drugs, including alcohol, the qualifications which were approved by the Court were slightly modified from what had been proposed by Defence Counsel.

[87] The preliminary questions by both counsel in relation to Dr. Leblanc's qualifications to provide expert opinion evidence continued to the end of the day, and was determined that his direct examination would start the next morning. Defence Counsel reminded the Court that Dr. Leblanc would only be available for the morning of Wednesday, March 17, 2021, starting at 10 AM until about 12 noon, when he had prior medical commitments. Defence Counsel estimated that he could condense his direct examination of Dr. Leblanc to 30 or 40 minutes and that would leave time in the morning for cross-examination.

[88] Given the fact that Dr. Leblanc was only available for a couple of hours on the morning of March 17, 2021, the Court asked him whether he could also be available on the morning of the March 18, 2021. Dr. Leblanc said that he could be available at that time and as a result that confirmation, the Court undertook to see whether a courtroom would be available to continue with his testimony, if needed, on Thursday, March 18, 2021. Both counsel confirmed their availability on March 18, 2021, prior to concluding for the day.

[89] **Trial – Day 8 – March 17, 2021 (Full Day Scheduled/Half Day Utilized) -** Court commenced on this day, shortly after 10 AM, as had been requested by Defence Counsel to accommodate Dr. Leblanc's schedule, with Ms. Hackett being virtually present by videoconference. The direct examination of Dr. Leblanc by Defence Counsel went a little longer than he had estimated, finishing at about 11:55 AM. Dr. LeBlanc advised the Court that he had professional responsibilities

at 1 PM, however, the Crown Attorney stated that she could not complete her cross-examination before that time. In addition, she wanted to review her notes and speak with Ms. Hackett before commencing her cross-examination. She suggested that the Court to obtain another date for the cross-examination of Dr. Leblanc.

[90] At that point and further to the discussion from the previous day, the Court asked whether everyone would be available the next morning on March 18, 2021, for the Crown Attorney to conclude her cross-examination of Dr. Leblanc and any re-examination by Defence Counsel. A few minutes later, everyone confirmed that they were available on the morning of March 18, 2021 and court was adjourned for the day.

[91] Although March 17, 2021 had been scheduled for a full day of evidence, given Dr. LeBlanc's availability for only the morning, the Court noted that the Crown Attorney would have the afternoon to review her notes and consult with Ms. Hackett and prepare her cross-examination of Dr. Leblanc for the next day.

[92] **Trial – Day 9 – March 18, 2021 (Half-Day) -** At the outset, the Court, once again, dealt with preliminary matters around the scheduling of upcoming dates. In addition, the Court confirmed that Ms. Hackett was now attending virtually by telephone as the video connection with her location Ottawa remained problematic. Defence Counsel confirmed that he had spoken with Mr. Johnstone about testifying on June 29, 2021, and indicated that the date would work, because it was outside the three-month period for his recuperation from the heart procedure. It was also noted that the tentative date of June 29, 2021 date had been *confirmed on a prior occasion as possibly being the date for closing submissions or the Court's decision.*

[93] As a further preliminary matter, the Crown Attorney mentioned that a full day for the trial continuation had recently come available on October 19th, 2021, and there was also half-day available on the afternoon of December 15, 2021. The parties indicated that they were available on both of those dates and the Court confirmed those dates for the trial continuation.

[94] Having confirmed that additional 1.5 days of court time for this trial, the Court noted that, based upon earlier estimates of time, Mr. Johnstone's direct examination and cross-examination would likely take a full day if not more. As a result, the October 19th date could be utilized for the completion of Mr. Johnstone's evidence and the half-day on December 15, 2021, could be utilized for any other

defence evidence or for the Rebuttal evidence that the Crown Attorney had previously indicated, would likely be called.

[95] After dealing with those preliminary matters, the Crown Attorney commenced her cross-examination of Dr. Leblanc. The cross-examination continued until taking a brief mid-morning break around 10:50 AM. The Crown Attorney indicated that she still had many questions to pose on cross-examination. Dr. Leblanc said he could remain in court to answer questions until about 1 PM, but repeated that he had other professional commitments that afternoon.

[96] The Crown Attorney indicated that she was probably halfway through her questions on cross-examination and with everyone indicating that they were prepared to stay until 1:00 PM, the cross-examination continued. After a short health break, the Crown Attorney completed her cross-examination of Dr. Leblanc and he responded to some questions posed by the Court until shortly after 1:00 PM. However, Dr. LeBlanc volunteered that he could stay a little bit longer, answered a few more questions posed by the Court and re-examination by Defence Counsel. He was excused as a witness at about 1:20 PM.

[97] Once Dr. Leblanc's testimony was completed, there was a short discussion about obtaining transcripts on the dates when trial evidence was heard. Defence Counsel expressed his concern with respect to the length of time that the case had taken to date as the Crown Attorney had indicated that, including the **Charter** *voir dire*, this was the 11th day where evidence was heard. The Court noted that several factors had come into play and that if anyone had a "crystal ball" and had predicted that this would be a 10-day trial, it could have been scheduled after the **Charter** *voir dire* in June 2020 or even earlier for that length of time.

[98] **Trial – Day 10 – June 29, 2021 -** On this trial date, Defence Counsel called Mr. Gregory Johnstone to be qualified as an expert and provide opinion evidence. At the outset, the Court questioned whether the Crown was contesting the qualification of Mr. Johnstone as an expert in certain areas to provide opinion evidence to the court and whether it would be necessary to enter into a contested **Mohan** *voir dire*.

[99] The Crown Attorney advised the Court that she had reviewed the proposed areas for which Defence Counsel sought to qualify Mr. Johnstone as an expert to provide opinion evidence. She did not have any issue with most of the proposed areas, but did with respect to the second area dealing with the "absorption, distribution and elimination of the effects of drugs, including asthma drugs and

inhalers on the human body." The Crown Attorney indicated that, for the moment, she was contesting his qualification in that area.

[100] As a result, Defence Counsel posed general qualification questions on direct examination and focused questions in relation to the area contested by the Crown. The Crown Attorney cross-examined Mr. Johnstone in relation to those contested areas and the Court posed questions on the qualifications *voir dire*. The direct examination, cross-examination, and questions by the Court in relation to the qualifications *voir dire* took the entire morning and concluded at about 12:40 PM.

[101] The submissions and discussions around the contested area of Mr. Johnstone's qualifications to provide expert opinion evidence commenced when court resumed at about 1:50 PM. There was an extensive discussion with respect to the contested second area for which the defence sought to qualify Mr. Johnstone as expert to provide opinion evidence. In the final analysis, the Court agreed with Defence Counsel, but noted that there may be objections by the Crown and that the Court also had a "gatekeeper" role to ensure that Mr. Johnstone remained within his "lane" of expertise in providing opinion evidence.

[102] Although it was mid-afternoon at this point and the courtroom was becoming quite warm, the Court asked whether Mr. Johnstone wished to take a short break. Mr. Johnstone said that he was "good to go", so Defence Counsel commenced his direct examination, which continued until an afternoon break.

[103] When court recommenced after the short break, the Court informed the parties that inquiries would be made with the Chief Judge's office to see if some early trial continuation dates could be secured in this courtroom or a vacant courtroom. The Crown Attorney also undertook to do a review of her schedule for the courtroom to see if cases would be resolved and make additional trial time available. The Court noted that, it would be preferable to continue with the direct examination of Mr. Johnstone and if possible dates were found, counsel would be notified by e-mail.

[104] Defence Counsel continued with the direct examination Mr. Johnstone until a point in time where he indicated that he was now going to explore the specific details of his expert report. Since it was close to the end of the day, everyone agreed that it was an appropriate place to stop for the day as Defence Counsel indicated that he would be moving to those key questions in relation to Mr. Johnstone's opinion evidence.

[105] Prior to concluding for the day, the Court and the parties returned to the issue of scheduling the timing and number of days needed to complete the trial. The Crown Attorney estimated that the direct examination and cross-examination of Mr. Johnstone could be completed on the already scheduled date of October 19, 2021, and then the half-day for trial already scheduled for December 15, 2021 would probably be sufficient for the rebuttal evidence of Ms. Hackett. *She also indicated that another half-day to one full day be scheduled for the closing submissions of counsel, as there would likely be lengthy submissions given the number of issues raised during the hearing of the evidence.*

[106] For his part, Defence Counsel also estimated that two more days would be needed to complete the trial evidence and then schedule a date for the submissions of counsel. He indicated that he was considering a **Jordan** unreasonable delay **Charter** application, but also recognized that there had been Covid adjournments. He estimated that by scheduling three additional days, the parties would complete the cross-examination and re-examination of Mr. Johnstone, the submissions of counsel as well as some time for "other applications."

[107] **Scheduled Trial – Day 11 – October 19, 2021 -** Unfortunately, this full day for trial continuation and the completion of Mr. Johnstone's direct examination and cross-examination had to be cancelled at the last moment. Defence Counsel informed the Crown and the Court that Mr. Johnstone had undergone additional surgery on October 18, 2021. It was not a planned surgery. Since Mr. Johnstone was scheduled to be the last of the defence witnesses, no other evidence could be called that day, with the result that this full day of trial time was lost due to the unforeseen medical issues of the defence expert witness.

[108] **Trial – Day 11 – December 15, 2021 –** This date had originally been scheduled for a half-day trial continuation in the afternoon, on March 18, 2021, *when it was being considered as a possible date for the closing submissions*. Although, the date had been set as a half-day trial continuation in the afternoon, it is evident from the transcripts of proceedings on December 15, 2021, that another case had been resolved and the parties were notified that the Court now had almost a full day, as this trial recommenced at about 10:35 AM.

[109] However, due to the unexpected loss of the full day for trial on October 19, 2021, due to Mr. Johnstone's medical issues arising at the last moment, the projected plan for December 15, 2021 to be used for rebuttal evidence by the Crown was not possible. As a result, the trial continuation for December 15, 2021

was now projected to be for Mr. Johnstone's direct examination and cross-examination by the Crown Attorney.

[110] Based upon the previous estimations of time requirements by counsel which were made on June 29, 2021, when Mr. Johnstone was last in court, it was anticipated that his direct examination and cross-examination would be completed on December 15, 2021. On December 15, 2021, Defence Counsel commenced his direct examination of Mr. Johnstone and with a short mid-morning break, it continued for the balance of the morning.

[111] After the noon break, Defence Counsel resumed his direct examination of Mr. Johnstone and after several questions, the Crown Attorney raised an objection with respect to him providing expert opinion evidence in an area which had been contested by the Crown. After the Court dealt with the Crown Attorney's objection, the direct examination of Mr. Johnstone continued until about 3:00 PM, when Defence Counsel indicated that he had almost completed his direct examination, but since it was "quite warm" in the room, court recessed for a 15-minute break.

[112] Upon returning from the short recess, Defence Counsel indicated that he and the Crown Attorney had met during the break to discuss how they would proceed for the balance of the day. Defence Counsel stated that he would like to finish his direct examination of Mr. Johnstone and was not far from doing so. However, he said that Mr. Johnstone had mentioned during the short break that he was "getting tired" and, as a result, the parties had discussed adjourning after the direct examination was completed.

[113] In addition, just after returning from the short recess, the Court noted that some proposed dates had been sent out to counsel for the trial continuation. The Crown Attorney indicated that a full day would be available on January 14, 2022, as the accused person was deceased. She added that January 31, 2022, had also opened up for the same reason. The Crown Attorney also indicated that she was working very closely with her colleagues to determine if other cases were not proceeding or were likely to be resolved as possible trial continuation dates for this matter.

[114] After hearing that there were a couple of available days for the trial continuation, the Court suggested that, rather than taking additional time at that point to confirm dates, Defence Counsel should complete his direct examination of

Mr. Johnstone. The direct examination of Mr. Johnstone was completed at about 3:35 PM.

[115] After Mr. Johnstone's direct examination was completed, there was some discussion as to whether the Crown Attorney should commence her cross-examination of Mr. Johnstone with the balance of time available that day. The Crown Attorney stated that she could start her cross-examination but preferred to speak to Ms. Hackett before doing so.

[116] After hearing from both counsel, and given Mr. Johnstone's early remark of "being tired," Defence Counsel also noting that it was "extremely warm" in the courtroom when court resumed after the break and Mr. Johnstone's recent heart operation, the Court concluded that it would be appropriate to adjourn at that point. The Crown Attorney agreed that it would probably assist in streamlining her cross-examination of Mr. Johnstone on the next date. Mr. Johnstone stepped down from the witness stand at about 3:35 PM.

[117] Although some court time could have been used for the initial questions of the Mr. Johnstone's cross-examination, the Court stated that it was a priority to schedule trial continuation dates at the earliest opportunity. The Court noted that possible half-day continuation dates on January 14th and January 31, 2022, had been sent out to the parties. The Crown Attorney also noted that there was likely time available on March 9, 2022, but Defence Counsel indicated he would likely be out of the country at that time.

[118] Based upon the two January 2022 dates being available, the Crown Attorney estimated that she could complete her cross-examination of Mr. Johnstone on January 14, 2022. As for the January 31, 2022 date, the Crown Attorney said that it would likely be used for the rebuttal evidence with Ms. Hackett, which she had previously indicated that she would be calling. *Thereafter, she estimated that only one more day would need to be scheduled for the closing submissions of counsel.*

[119] The Court also advised the parties that there were ongoing efforts by the scheduling clerk in the Chief Judge's office to find additional trial dates for this matter and any possible dates would be forwarded to the parties. The Court informed the parties that scheduling of trial continuation times for new cases and dealing with a backlog of cases already adjourned by Covid had impacted scheduling with new trials of a day or more and other trials were now being scheduled in this courtroom in January 2023.

[120] **Scheduled Trial – Day 12 – January 14, 2022 -** On Thursday, January 13, 2022, the Provincial Court of Nova Scotia issued a statement on the Court's website that due to the high Covid-19 case numbers in Nova Scotia and the ongoing situation with the Omicron variant, the Court had extended the suspension of in-person proceedings until Friday, January 28, 2022. The suspension applied to all in-person proceedings in the Provincial Court with the exception of trials for individuals in custody or any matter deemed urgent or exceptional by the presiding judge and as operational requirements allowed.

[121] The parties appeared virtually by telephone on January 14, 2022, in accordance with the Court's statement suspending in-person proceedings. During the virtual appearance, the Court reiterated the rationale for the cancellation of the trial date and confirmed that the suspension of in-person proceedings would be until January 28, 2022. The suspension of in person proceedings was expected to be re-evaluated by the Court on January 25, 2022.

[122] Following the cancellation of the January 14, 2022, the Court confirmed that everyone was still available for the half-day continuation on January 31, 2022. Since that trial continuation date was only for half-day, the Court asked whether the Crown Attorney believed that her cross-examination of Mr. Johnstone could be completed on that date or additional trial time would be required. The Crown Attorney was "hopeful" that her cross-examination of Mr. Johnstone could be completed on January 31, 2022, but also reminded the Court that she had previously stated that she would seek to call rebuttal evidence.

[123] She suggested that two more days be scheduled – one to complete the evidence and *the other for closing submissions*. The Court noted that February 8 and 9, 2022 were intake days for the courtroom, but if the Court's schedule could be switched with another judge and a vacant courtroom and a clerk were available, it might be possible to continue on those dates. The Court undertook to check with the Chief Judge's office to see whether all those "moving parts" on the Court's side could be accommodated.

[124] Defence Counsel indicated that he was not available on February 8, 2022, but he and his witness were available on February 9, 2022. The Crown Attorney indicated that she was available on both dates and would check with Ms. Hackett. Defence Counsel also noted that, given the earlier statements by the Court that a further suspension of in-person court proceedings on January 31, 2022, would likely impact the possibility of a trial continuation on February 9, 2022. The Crown

Attorney stated that she had been carefully looking at upcoming dockets for the court and believed that trial time had also opened on March 8, 2022, but Defence Counsel had previously indicated that he would be out of town on that date.

[125] **Scheduled Trial – Day 12 – January 31, 2022 -** On January 25, 2022, the Provincial Court of Nova Scotia issued a statement on the Court's website that due to the ongoing situation with Covid 19 and the Omicron variant, the Court was extending the suspension of most in-person proceedings until Friday, February 11, 2022. The Court indicated that the situation would be reassessed prior to February 11th to determine whether it was safe to resume hearing more matters in-person.

[126] As a result of the notice of the suspension of in-person proceedings, the parties appeared virtually by phone on January 31, 2022. Since the trial was not able to continue on this date, the Court confirmed that the Crown Attorney had recently advised the Court that a full day would be available on May 3, 2022. On that date, she advised that the afternoon was already clear and a colleague at indicated that this matter could be "overbooked" in the morning as the other matter scheduled for that day was unlikely to proceed.

[127] After hearing from counsel that Mr. Johnstone and Ms. Hackett were available for the cross-examination of Mr. Johnstone on May 3, 2022, the Court confirmed that full day for the trial continuation. After doing so, the Court noted that, *based upon what the Crown Attorney had previously stated, it appeared that two additional days would be required – one being for the completion of evidence and the other for the closing submissions.* The Court also stated that the clerks would be looking at upcoming dockets, possible switches with another judge to go to a vacant courtroom to locate two additional days for the trial.

[128] **Trial – Day 12 – May 3, 2022 -** The Court noted that the trial continuation was beginning at about 10:20 AM due to having dealt with some other previously scheduled matters at the outset. However, the rest of the day and been cleared up for Mr. Johnstone's cross-examination by the Crown Attorney and any re-examination by Defence Counsel. The Crown Attorney commenced her cross-examination and proceeded with her questions, after short break, for the rest of the morning and indicated that she had several more questions for Mr. Johnstone.

[129] Prior to the noon hour break, the Crown Attorney indicated that she still had several additional questions for Mr. Johnstone, but there was a sentencing scheduled for 1 PM that day. The Court had indicated that the sentencing should be adjourned but the Court also informed the parties that we would likely have to

adjourn for the day around 2:15 PM for the Court to travel to Ottawa for a previously scheduled national commitment.

[130] When court resumed at about 1 PM, the Crown Attorney continued her cross-examination of Mr. Johnstone. Shortly thereafter, she indicated that she would be asking him to perform a series of calculations to estimate Mr. Yeo's Blood Alcohol Concentrations (BAC) at different points of time on June 10, 2018 using different rates of elimination of alcohol based upon the evidence provided by Mr. Yeo's alcohol consumption on the day before the accident, taking into account the starting point of the first drink to his last drink, the amount of alcohol consumed and the percentage of alcohol by volume in those drinks.

[131] The Crown Attorney had indicated that there may have been some differences between the trial evidence and the information previously utilized by Mr. Johnstone in preparing his report. For those reasons, the Crown Attorney asked Mr. Johnstone to do those calculations in court. Mr. Johnstone replied that it might take time and added: "I'd rather do that on another day, have time to do it ... you give me all the information. I'll go away and do it, and the next time we come back I'll give you the numbers. You're asking me to start from scratch."

[132] Following Mr. Johnstone's remark with respect to the work involved in providing those blood-alcohol concentration (BAC) calculations at certain points of time with different rates of elimination, the Court had a discussion with counsel with respect to Mr. Johnstone's proposed manner of proceeding. It was agreed that the Crown Attorney would send information which stated a series of assumptions, based upon the trial evidence and also forward other relevant information to be able to perform the requested calculations. It was agreed that the Crown Attorney's "homework" would be forwarded to Mr. Johnstone through Defence Counsel. Mr. Johnstone was to perform his own analysis and estimates prior to the next court date and bring his calculations to court the next day for further cross-examination by the Crown Attorney.

[133] The Court noted that this approach made sense as Mr. Johnstone had said that each of the specific calculations would take time to calculate "longhand" and he preferred to do them at home and return on another day. In addition, the Crown Attorney stated that most of the remaining cross-examination related to those calculations of the various scenarios. The parties agreed that it would be helpful for Mr. Johnstone to provide those calculations to counsel prior to the next court date.

[134] Once Mr. Johnstone stepped down as a witness, at about 1:40 PM, there was a discussion with respect to scheduling the continuation of his cross-examination, any re-examination, and the rebuttal evidence of Ms. Hackett. The court clerk offered a half day that was available on July 26th or a full day on July 27, 2022, as possible dates for the trial continuation. The Crown Attorney and Defence Counsel, as well as Ms. Hackett were available on both days. Defence Counsel's preference was to book the full day on July 27, 2022, if Mr. Johnstone was available. Mr. Johnstone stated that he would advise Defence Counsel.

[135] The Crown Attorney indicated that her cross-examination of Mr. Johnstone would be completed the next day. Then, she indicated that it would be preferable to have a minimum of a month before the date of the rebuttal evidence planned by the Crown as Ms. Hackett would be asked to perform a series of calculations and prepare a report for presentation at that time.

[136] A status date was scheduled for May 10, 2022, and Mr. Johnstone confirmed his availability to continue his cross-examination on the next full day confirmed for the trial continuation on July 27, 2022.

[137] **Trial – Day 13 – July 27, 2022 – Defence Case Closed -** At the outset of the proceedings, there was a brief discussion of trial continuation dates and the fact that Ms. Hackett could appear in person on the date scheduled for rebuttal evidence. Defence Counsel also indicated that the parties were hoping to have transcripts of all dates when evidence was heard, as the Court had indicated that we were now getting close to what the Supreme Court of Canada had referred to as the "*anticipated end of the trial*" where the closing submissions would be made.

[138] Defence Counsel also indicated that they were entertaining a **Jordan** application. In response, the Crown Attorney asked when formal notice would be provided to the Crown and the Court and when Defence Counsel anticipated that his brief would be filed to provide the Crown with adequate time to reply.

[139] At that point, the Court and the parties discussed scheduling dates for the Crown's rebuttal evidence and a potential date for the **Jordan** application. The dates of October 21, 2022 and November 25, 2022 were mentioned. *The Crown Attorney added that the cases scheduled for December 13, 2022 and February 1, 2023 would likely not be proceeding, so they could be considered for trial continuation, the **Jordan** application or closing submissions in the trial.*

[140] After a short break, the Court confirmed that the possible date on October 21, 2022, was not available due to a previously scheduled French trial matter in Antigonish on that date. Then, the Court scheduled the status date on September 12, 2022 to verify whether the proposed dates of November 25, 2022, December 13, 2022 and February 1, 2023 would be confirmed as trial continuation dates.

[141] Following the discussion regarding upcoming dates, the cross-examination of Mr. Johnstone continued. The Court advised the parties that a scheduled afternoon matter would be adjourned, so they now had almost a full day to complete Mr. Johnstone's evidence.

[142] In the afternoon, the Crown Attorney continued and completed her cross-examination of Mr. Johnstone. Then, Defence Counsel asked questions on re-examination and the Court asked a few questions of Mr. Johnstone, completing his evidence at about 3:10 PM on July 27, 2022. Immediately thereafter, Defence Counsel closed his case, and he tendered his exhibits.

[143] Prior to adjourning for the day, the Crown Attorney confirmed that she would be calling Ms. Hackett in rebuttal and that she would ask her to prepare a report, based upon the evidence called during the trial. She indicated that she wanted to have the report forwarded to Defence Counsel at least one month before the next trial continuation date. The Court noted that November 21, 2022 could be a date for the rebuttal evidence, if everyone was available. A status update was scheduled for that purpose on September 12, 2022 and court adjourned for the day.

[144] On the September 12, 2022 status update before Chief Judge Williams, it was confirmed that November 21, 2022 would be the continuation date for the rebuttal evidence of the Crown. The oral submissions on the proposed **Jordan** application would be made on December 13, 2022, and February 1, 2023 was confirmed for the trial continuation, possibly for the **Jordan** application decision.

[145] **Trial – Day 14 – November 21, 2022 – Crown Rebuttal -** On this date, the Crown Attorney who had been handling this trial from the outset was not available to conduct the Crown's rebuttal evidence of Ms. Josette Hackett. However, a Crown colleague was able to take over the conduct of the direct examination of Ms. Hackett on short notice and this trial continuation date was not lost.

[146] Prior to her testimony in court, as outlined on the previous day, Ms. Hackett had provided a supplementary report to the Crown Attorney which was forwarded to Defence Counsel and filed as an Exhibit. The Crown Attorney completed her

direct examination of Ms. Hackett and Defence Counsel completed his cross-examination of Ms. Hackett on November 21, 2022.

[147] In addition, on November 21, 2022, the Court confirmed that the oral submissions on the **Jordan** application which was to be filed by Defence Counsel would be heard on December 13, 2022. The Court also noted that the February 1, 2023, which could be a full day for the trial continuation, was also confirmed as the anticipated date for the decision on the **Jordan** application.

[148] At the same time, the Court confirmed that the formal notice of the **Jordan** Application and Defence Counsel's brief were to be filed and served on the Crown by November 30, 2022. The Crown Reply was to be filed and served by December 12, 2022. *In addition, the Court was holding June 1, 2023 and June 15, 2023, as the possible dates for the closing arguments in the trial proper, in the event that the **Jordan** application was dismissed by the Court.*

[149] **Trial – Day 15– December 13, 2022 -** On this date**,** Defence Counsel and the Crown Attorney made their oral submissions on the **Jordan** section 11(b) **Charter** application that alleged Mr. Yeo's right to a trial within a reasonable time had been infringed. The parties had filed their written briefs on the dates as specified by the Court. The detailed oral submissions by Defence Counsel and the Crown Attorney referred to transcripts, Provincial Court notices, notes of the Pre-Trial Conference and notes made by the court clerks on the Information, and other documents attached to their written briefs.

[150] Following the oral submissions by the parties, the Court reserved its decision on the **Jordan** application until the anticipated date for that decision on February 1, 2023.

The Applicable Analytical Legal Framework

[151] In **R. V. Jordan**, 2016, SCC 27, the Supreme Court of Canada set out the framework for analysis in determining a whether there had been a violation of an individual's right to a trial within a reasonable time pursuant to section 11(b) of the **Canadian Charter of Rights and Freedoms** (hereafter the "**Charter**"). In summary form, the analytical framework is as follows:

1. Calculate the total delay which is the period from the date that the charge was laid to the actual or anticipated end of the trial;

2. Subtract defence delay from the total delay to determine the "net delay." The Supreme Court of Canada noted that defence delay is comprised of waiver or delay caused solely by the conduct of the defence;
3. Compare the net delay to the "presumptive ceiling", which in the case of a trial in the Provincial Court is 18 months;
4. If the net delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of exceptional circumstances to justify the delay. If it cannot rebut the presumption, a stay will follow. In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases. In addition, the Crown may establish that there was an unavoidable/unforeseeable "discrete event" as an exceptional circumstance.
5. Subtract delay caused by any discrete events or exceptional circumstances from the Net Delay, leaving the "remaining delay" or "net adjusted delay" for the purpose of determining whether the presumptive ceiling has been reached.
6. If the "remaining delay" exceeds the presumptive ceiling, the Court must consider whether the case was particularly complex such that the time that the case has taken is justified and the delay is reasonable.
7. If the "remaining delay" is below the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable by establishing that they took (1) "meaningful and sustained steps" to expedite the proceedings **and** (2) that the case took markedly longer than it should have.

ANALYSIS

1. Calculation of the "Total Delay" – How Long did the Trial Take?

[152] In **Jordan**, *supra*, at paras. 47, 48 and 60, the Supreme Court of Canada stated the starting point for the analytical framework is to calculate the "total delay" in the trial which was defined as "from the charge to the actual or anticipated end of the trial." More recently, in **R. V. K.G.K**., 2020 SCC 7(CanLII) at para. 31, Moldaver J. clarified what the "total delay" encompassed in terms of the **Jordan** ceilings:

> "[31] Properly construed, the **Jordan** ceilings apply from the date of the charge until the actual or anticipated end of the evidence and argument. 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. As I will explain, this date permits the straightforward application of the **Jordan** framework in a manner consistent with its design and goals."

[153] In this case, the parties initially agreed that, with respect to the first step in the **Jordan** Analytical Framework, the "total delay" is 1792 days or 58.9 months. They base that calculation on the Information before the Court having been sworn on July 19, 2018. There is no dispute between the parties and the Court certainly agrees that based upon the **Jordan** Analytical Framework, the starting point for this analysis is, in fact, July 19, 2018.

[154] With respect to the "actual or anticipated end of the trial," in their written and oral submissions, the parties initially referred to that "actual or anticipated end of the trial" as being June 15, 2023, which has been tentatively scheduled by the Court for closing submissions of counsel, if this application is dismissed. In those circumstances, the parties agree that the "total delay" between July 19, 2018 and June 15, 2023 would be 1792 days or 58.9 months.

[155] However, the Crown Attorney, in her written brief, has questioned whether June 15, 2023 should be considered as the "actual or anticipated end of the trial." She submits that the trial evidence was actually concluded on November 21, 2022 after the Crown's rebuttal evidence. She adds, that but for the **Jordan** application and the submissions on that application having been made on December 13, 2022, that court date could have been used for the closing submissions in the trial.

[156] In those circumstances, the Crown Attorney submits that the **Jordan** application argument on December 13, 2022, the February 1, 2023 date for the **Charter** decision and the scheduling of June 15, 2023, for closing submissions should all be deducted as "defence delay" or as a "discrete exceptional circumstance" brought on by the **Jordan** application and the cascading delay in the scheduling of the closing arguments. In the further alternative, she submitted that the parties should proceed with closing submissions on February 1, 2023 or agree to submit written submissions to bring the trial to a conclusion "more quickly."

[157] In his brief, Defence Counsel acknowledged that the 50 days between the hearing of the **Jordan** application (December 13, 2022) and the anticipated decision of the **Jordan** application (February 1, 2023) would reasonably be considered as Defence delay and as such, be deducted from the period of the "total

delay." He submits that the period between February 1, 2023 and June 15, 2023 which has tentatively been scheduled for the closing submissions should be considered as "institutional delay" which had to be scheduled to reach the "actual or anticipated end of the trial."

[158] With respect to the Crown Attorney's position that December 13, 2022 should be considered as the "anticipated end of the trial" where closing submissions could have been made, Defence Counsel pointed out during his oral submissions that after the conclusion of the rebuttal evidence on November 21, 2022, the defence focus was on preparing the written brief and oral remarks for the **Jordan** application. In those circumstances, he submits that there was insufficient time to also prepare a written brief and oral remarks for the closing argument and submissions on December 13, 2022.

[159] During his oral submissions, Defence Counsel submitted that both sides would likely have been ready for closing submissions and argument on February 1, 2023, if that date had been fixed for that purpose instead of the decision on the **Jordan** application. For those reasons, Defence Counsel acknowledged in his written brief and oral remarks that the period between December 13, 2022 and February 1, 2023 should be deducted from the "total delay" as that entire period related to the **Jordan** argument and the Court's decision on that application.

[160] Therefore, there is an issue between the parties as to whether the periods of time between December 13, 2022 and February 1, 2023 as well as between February 1, 2023 and June 15, 2023 should be considered as "defence delay," "institutional delay," a "discrete exceptional circumstance" brought on by the **Jordan** application and deducted from the "total delay" or not part of the "total delay" at all, if the actual or anticipated end of the trial, when closing argument and submissions could have been made was either on December 13, 2022 or in the alternative, February 1, 2023.

[161] A similar issue arose in **K.G.K.**, *supra*, where the issue before the Supreme Court of Canada was whether the reasonable time enshrined in section 11(b) extends beyond the end of the evidence and argument at trial and encompasses verdict deliberation time as well. In **K.G.K**., *supra*, at para. 33, Justice Moldaver stated as follows:

> "[33] While **Jordan** states that the presumptive ceilings apply "from the charge to the actual or anticipated end of the trial", the Court did not explicitly define the phrase "end of trial." It has been suggested that this phrase permits of four

> possible interpretations: (1) the end of the evidence and argument; (2) the date the verdict is delivered, excluding post-trial motions; (3) the conclusion of post-trial motions; or (4) the date of sentencing (see **A.F**. at para 131). On close analysis, it is the first interpretation that accurately reflects the reasoning underlying **Jordan** and the mischief it sought to address. *To be precise, the **Jordan** ceilings apply from the charge to the end of the evidence and argument, and no further."*
> [Emphasis is Mine]

[162] If there was any doubt whatsoever as to what the Supreme Court of Canada in **KGK**, *supra*, considered as the period to which the **Jordan** ceilings applied, in that case, Moldaver J. reiterated at, paras. 3, 23, 31, 33 and 50 that "the presumptive ceilings set out in **Jordan** only apply until the actual or anticipated end of the evidence and argument at trial, **and no further**." [Emphasis is mine]

[163] Given the fact that the actual conclusion of the trial evidence occurred on November 21, 2022 with the rebuttal evidence proffered by the Crown, but for the **Jordan** application brought by the defence, the next court date where the parties were available, would have been scheduled for the closing submissions of counsel. In fact, the parties had been informed on July 27, 2022 that additional dates for this trial would be available on December 13, 2022 and February 1, 2023. Those possible trial dates were being considered for trial evidence, if any was left outstanding, the closing submissions or as a potential date for the **Jordan** application that the defence was considering. Those additional trial dates were confirmed by the Court and the parties during a status date on September 12, 2022.

[164] Defence Counsel submits that, at a minimum, the period from December 13, 2022 to February 1, 2023 should be deducted from the "total delay" as "defence delay" as a result of the filing of the **Jordan Charter** application, the submissions on that application having been made on December 13, 2022 and the date of this **Charter** decision being scheduled for February 1, 2023.

[165] Given the fact that trial evidence in this case has been heard on 14 days between December 2, 2020 and November 21, 2022, after the standalone **Charter** *voir dire* evidence, submissions and decision, I agree with Defence Counsel that it is highly unlikely that the parties could have made their closing submissions three weeks later on next previously scheduled court date of December 13, 2022. However, the parties indicated that they were available on February 1, 2023, and in my opinion, that would have provided, as Defence Counsel submitted, a reasonable amount of time for both sides to prepare for their closing submissions in the trial.

[166] Therefore, in my opinion, taking into account the comments of the Supreme Court of Canada in **KGK** that the "end of the trial" does not include post-trial motions, the acknowledged "defence delay" as a result of the **Jordan** application to February 1, 2023. the parties would likely have been able, but for the **Jordan** application, to make their closing arguments and submissions on the trial on February 1, 2023. The **Jordan** delay application, itself, created additional delay and additional dates to be scheduled or utilizing previously scheduled dates for other purposes. As a result, for the purposes of the **Jordan** framework analysis, as clarified by the Court in **KGK, I conclude that the actual or anticipated end of the trial with closing submissions an argument on the trial proper by the parties, could have been made on February 1, 2023.**

[167] In the final analysis, in determining the period of "total delay" in this trial for the **Jordan** analytical framework analysis, I am in substantial agreement with the position of the Crown that the period of time from December 13, 2022 to June 15, 2023 was precipitated by the **Jordan** delay application, rather than proceeding with the closing submissions on either December 13, 2022 or February 1, 2023.

[168] In coming to the conclusion that the "actual or anticipated end of the trial" will be considered as February 1, 2023, the trial time taken up by the **Jordan** application from December 13, 2022 to February 1, 2023 shall be deducted from the "total delay" as a period of "defence delay" as a result of the **Jordan** application having been made on December 13, 2022.

[169] Therefore, I find that the **Jordan** ceilings which will apply to this trial "from the date of the charge until the actual or anticipated end of the evidence and argument" will cover the period of time from July 19, 2018 to February 1, 2023. In those circumstances, **I find that the "total delay" in this case is 1659 days or about 54.4 months.**

[170] Having determined the "total delay" as the first step in the **Jordan** Analytical Framework, the next step is to calculate any "defence delay" to determine the "net delay" of this trial. Since the parties do not necessarily agree on certain periods of time which might be attributed to "defence delay," prior to the Court's determination of "defence delay" it would be important to outline the considerations as determined by the Supreme Court of Canada in **R. v. Jordan**, 2016 SCC 631 and as clarified in **R. v. Cody**, 2017 SCC 31.

[171] In **R. v. Potter**, 2020 NSCA 9 at paras. 270 - 272, the Court reviewed the **Jordan** and **Cody** decisions of the Supreme Court of Canada with respect to the

applicable legal principles. Our Court of Appeal made the following comments in relation to the calculation of defence delay, *supra*, at para. 271:

- A defence waiver can be either explicit or implicit, as long as it is "informed, clear and unequivocal."
- Deducting delay caused by the defence is aimed at preventing an accused from benefiting from their "own delay causing action or inaction."
- Courts must carefully consider delay caused by the defence. **Jordan** made clear that "defence actions legitimately taken to respond to the charges" are not deductible.
- Deductible defence delay is described in **Cody** as:

> [30] The only deductible defence delay under this component is, therefore, that 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. As we said in **Jordan**, the most straightforward example is "deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests." (**Jordan** at para 63). 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). These examples were, however, just that – examples. They were not stated in **Jordan**, nor should they be taken now, as exhaustively defining deductible defence delay. Again, as was made clear in **Jordan**, it remains "open to trial judges to find that other defence actions or conduct have caused delay" warranting a deduction (para. 64).

> [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 click 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. [Emphasis in original]

- Not only can defence actions justify deduction, but delay due to inaction can also be attributed to the defence.

- Defence counsel have a responsibility to assist in the preservation of their client's section 11(b) rights by actively advancing their right to a trial within a reasonable time, collaborating with the Crown when appropriate, and using court time efficiently.

- The deduction for illegitimate defence conduct does not serve to diminish a defendant's right to make full answer and defence, as the Court in **Cody** explained:

> [34] This understanding of illegitimate defence conduct should not be taken as diminishing an accused person's right to make full answer and defence. Defence counsel may still pursue all available substantive and procedural means to defend their clients. What defence counsel are not permitted to do is to engage in illegitimate conduct and then have it count towards the **Jordan** ceilings. In this regard, while we recognize the potential tension between the right to make full answer and defence and the right to be tried within a reasonable time – and the need to balance both – in our view, neither right is diminished by the deduction of delay caused by illegitimate defence conduct.

2. Calculation of Defence Waived or Caused Delay

[172] Having reviewed those comments with respect to the calculation of "defence delay" and after having outlined the procedural history of this matter from the laying of the Information to the "anticipated end of the trial," I will now determine what, if any, periods of time are attributable to delay waived by the defence or delay solely caused by the conduct of the defence.

A) July 19, 2018 to December 14, 2018 (148 days or about 4.9 months)

[173] The Information was sworn on July 19, 2018 and Mr. Yeo made his first appearance in court through his counsel on July 25, 2018. The case was adjourned until October 1, 2018, for the defence to obtain and review disclosure. On October 1, 2018 the matter was further adjourned to December 14, 2018 for defence to obtain and review further disclosure. The Parties agree that there was **no defence delay during this period of 148 days** (**about 4.9 months**).

B) December 14, 2018 to February 25, 2019 (73 days or about 2.4 months)

[174] During the appearance on **December 14, 2018**, as acknowledged by Defence Counsel in his brief, Defence Counsel requested an adjournment of the election and plea until **February 25, 2019** in order for Mr. Yeo to undergo medical testing.

Defence Counsel explicitly waived the delay for this time. The Parties agree that this was ***Defence Delay from December 14, 2018 to February 25, 2019 which was 73 days (about 2.4 months).***

C) February 25, 2019 to June 10, 2019 (105 days or about 3.5 months)

[175] Defence Counsel elected Provincial Court and entered a not guilty plea on behalf of Mr. Yeo on **February 25, 2019**. The Crown Attorney estimated that the trial length would be at least two and half days, Defence Counsel stated that he was planning to call at least two experts and added that the trial "was going to be somewhat complicated" and suggested scheduling a four-day trial. The first day offered by the Court was **June 10, 2019** and Defence Counsel indicated he was not available on that date. The parties agree that there is **no defence delay during this period of 105 days** (**about 3.5 months**) **from February 25, 2019 to June 10, 2019** which was the first possible day for trial where both the Court and the Crown were available.

D) June 10, 2019 to December 3, 2019 (177 days or about 5.9 months)

[176] During the hearing to set trial dates on February 25, 2019, after Defence Counsel indicated that he was not available on June 10, 2019, he also indicated that he would prefer to have consecutive dates for the trial, preferably in December 2019 or January 2020. As a result, the Court scheduled four days for trial on December 3, 4, 10 and 17, 2019**. Defence Counsel waived delay for the 177 days (about 5.9 months) between June 10, 2019 and the first scheduled date for trial of December 3, 2019.** *Based upon those good-faith estimates for the length of the trial made by the Crown Attorney and Defence Counsel when the Court set this matter down for a four (4) day trial, the "*anticipated end of the trial*" would have been on December 17, 2019.*

E) December 4, 2019 to March 31, 2020 (118 days or about 3.9 months)

[177] Once those trial dates had been set on February 25, 2019, the Court scheduled and held a Pre-Trial Conference pursuant to section 625.1 of the **Criminal Code** on July 3, 2019.

[178] During the Pre-Trial Conference on July 3, 2019, there was a discussion whether additional or different days might be required given the number of witnesses that the Crown anticipated calling, including expert extrapolation

evidence. Defence Counsel had indicated that he may be calling two experts and there was a brief discussion as to whether there would be a **Charter** application. An issue was raised with respect to Defence Counsel's availability on December 3, 2019, and as a result, the Court then substituted December 18, 2019, as the fourth day for trial.

[179] After the Pre-Trial Conference in chambers, the parties came into the court, the December 3rd date was released due to the possible unavailability of Defence Counsel, and the Court was able to replace that date with December 18, 2019, when everyone was available. The summary of that Pre-Trial Conference was sent to the parties by the Court, who had indicated that they still believed that the four days set for trial were sufficient.

[180] After the Pre-Trial Conference, the Court scheduled a trial status date for October 8, 2019. During that status update, there was no request for additional trial time, however, Defence Counsel had indicated that he could foresee lengthy cross examination of the three experts and would talk to the Crown Attorney about "streamlining" the witness list. Defence Counsel asked the Court to schedule another status date and one was set for November 12, 2019.

[181] At the November 12, 2019 status date, Defence Counsel advised that he had received instructions to file a Section 8 **Charter** application and that notice of that application had just been sent to the Crown Attorney. Since the first day for trial was only three weeks away, the parties discussed how the **Charter** *voir dire* would be handled. Defence Counsel stated that he preferred a standalone *voir dire* with the decision on the **Charter** issue before continuing with trial evidence, as it would undoubtedly have an impact on the trial issues and length of the trial.

[182] Counsel agreed that the evidence on the **Charter** *voir dire* would likely take one day and as a result, December 4, 2019 was re-scheduled from the being the first day for trial, and instead being the first day of the **Charter** *voir dire*. The date of December 10, 2019 was kept as a possible continuation date for the **Charter** *voir dire* in the event that the evidence was not completed on that first day. The parties agreed that their oral submissions on the **Charter** issue would be made on December 18, 2019.

[183] As a result of those decisions, it was evident that the first four days which had been scheduled for the trial, would not be utilized for trial evidence. Defence Counsel suggested two full days should be added and the Crown Attorney thought that additional time might be required. The Court tentatively held March 31, 2020

and April 7, 2020 and the Court scheduled another trial status date for November 26, 2019 when final decisions relating to the **Charter** *voir dire* would be made as well as the rescheduling the trial dates.

[184] At the November 26, 2019 status update, the parties decided that the December 10 and 17, 2019 trial dates could be released. They agreed that December 4, 2019 would be sufficient to hear the evidence on the **Charter** application and December 18, 2019 would be utilized for the oral submissions on the **Charter** application. The parties also agreed that, given the fact there was not enough time for both sides to file **Charter** briefs based upon the anticipated evidence of the **Charter** *voir dire*, they agreed to *simultaneously file* their written **Charter** briefs, after the evidence was heard and then make oral submissions on the **Charter** issue on December 18, 2019. The Court stated that the date for the **Charter** decision would be determined after counsel's oral submissions on December 18, 2019.

[185] In addition, on November 26, 2019, given the fact that two trial dates had been released and the other two previously scheduled trial dates had been scheduled to hear the **Charter** *voir dire*, the Court asked the parties to indicate their view with respect to how many days should be scheduled for the trial after the **Charter** *voir dire* decision. The Crown Attorney stated that they would need two or three additional days and Defence Counsel stated that he would probably need "two full days" for his experts. After hearing both sides, the Court indicated that 4 additional days would be scheduled and then offered dates of March 17, 18, 24 and 25, 2020. Defence Counsel was not available on those dates.

[186] After hearing that the defence was not available for those 4 Days, the Court confirmed that March 31 was still good date for everybody and also offered April 22 and 29, 2020 as well as May 5, 2020, for the trial. Everyone was available on those dates and based upon the good-faith estimations of counsel, the "*anticipated end of the trial*" would be May 5, 2020.

[187] The **Charter** *voir dire* evidence was completed on December 4, 2019, the parties made their closing submissions on December 18, 2019. The Court determined that the next day when everybody was available, being March 31, 2020 would be utilized for the **Charter** *voir dire* decision.

[188] In the interim, a Covid 19 global pandemic was declared, federal and provincial health measures were instituted to control the spread of Covid 19, Provincial Court notices were issued that, starting Tuesday, March 17, 2020,

personal appearances in the Court would be extremely limited and almost all matters would be adjourned for a next appearance after May 31, 2020. The impact of the Covid 19 pandemic measures which were put in place in mid-March 2020 had the obvious effect of cancelling all of the scheduled trial continuation dates of March 31, April 22 and 29 and May 5, 2020.

[189] Interestingly, there is a substantial disagreement between the Crown Attorney and Defence Counsel as to how the Court should attribute the issue of "delay" for the period of time between December 4, 2019 and March 31, 2020.

[190] The Crown Attorney submits that the **Charter** application was a perfectly valid aspect of Mr. Yeo's right to make full answer and defence. However, the timing of the application was problematic and by making the application so close to the scheduled trial dates, the Court was required to delay the start of the trial and use two of the four trial days previously scheduled, to hear the **Charter** application. She submits that this period of time should be deducted as defence delay based upon the impact of the timeliness of the defence application as stated in **Cody,** *supra*, at para. 32.

[191] In the alternative, the Crown Attorney submits that the defence **Charter** application should constitute a "discrete exceptional circumstance" and be deducted from the "total delay" and not be considered as "institutional delay." Based upon the decision in **R. v. Tsega**, 2019 ONCA 111, the timing of the filing of the **Charter** application was outside the control of the Crown and in that sense, the delay was reasonably unavoidable by the Crown. Once filed, given its timing close to the trial date, the Crown could not reasonably remedy the delays emanating from those circumstances.

[192] For his part, Defence Counsel has submitted that the entire period between December 3, 2019 and March 31, 2020, which was supposed to be the date of the **Charter** decision, should be considered as "institutional delay."

[193] I find that the filing notice of the **Charter** application approximately three weeks before the first scheduled date for trial, despite having had the trial date set since February 2019, left the Court with little choice on that short notice, but to convert and utilize two of the previously scheduled 4 days for trial to hear the evidence and submissions on the **Charter** *voir dire* application.

[194] In addition, the decision to proceed with a standalone **Charter** *voir dire*, instead of a blended *voir dire*, which was certainly another perfectly valid aspect of

Mr. Yeo's right to make full answer and defence, meant that two days which had been scheduled for trial evidence could not be utilized until the **Charter** *voir dire* decision was made.

[195] With respect to that **Charter** application, I find that it was certainly one that was legitimately taken by the defence to respond to the charges. However, given the timing of the **Charter** notice and the upcoming trial dates, there was insufficient time to file briefs and schedule any dates to hear evidence and submissions on the **Charter** *voir dire* before the previously scheduled trial dates.

[196] With respect to this period of time, I agree with the Crown Attorney's assessment that the period of **118 days (or about 3.9 months) from December 4, 2019 to March 31, 2020 should be deducted from the "total delay" as "defence delay**." In coming to that conclusion with respect to that period of time, I repeat, once again, that the **Charter** application and proceeding as a standalone *voir dire* were both valid aspects of Mr. Yeo's right to make full answer and defence. However, the filing of the **Charter** application within three weeks of the first day scheduled for the trial directly resulted in the requirement for the Court to convert two days of the trial for the **Charter** *voir dire* and release the other two days scheduled for the trial, as it was not anticipated that any other evidence would be called until the Court rendered its decision on the **Charter** *voir dire*.

F) March 31, 2020 to December 2, 2020 (247 days or about 8.2 months)

[197] The parties have vastly different positions with respect to whether this period of time is attributed partially or entirely to "exceptional circumstances" as a result of the Covid 19 pandemic and the suspension of court operations.

[198] The first suspension of Provincial Court operations as a result of the impact of the Covid 19 pandemic and public health measures to control the spread occurred between March 17, 2020 and July 2, 2020. The suspension of court operations during this time, had a direct impact and resulted in the cancellation of the additional four days for trial which had been scheduled in December 2019 for March 31, April 22, April 29 and May 5, 2020. The rescheduled trial dates in March, April and May 2020, were based on a replacement of the first four days originally scheduled for the trial, which had been scheduled in December, 2019, when two of those four days were utilized for the evidence and submissions on the **Charter** *voir dire*, and the other two days in December 2019 were released altogether.

[199] During the period between **March 31, 2020 to December 2, 2020, there was no defence delay**.

[200] However, the issue between the parties is whether all of that period of time constitutes, as the Crown Attorney has submitted, a "discrete exceptional circumstance" caused by the Covid 19 pandemic or whether, as Defence Counsel has submitted, that only a portion of that time can be attributed to the exceptional circumstance with the balance being attributed to "institutional delay."

G) December 2, 2020 to January 28, 2021 (56 days or about 1.9 months) - Crown Closes case on January 28, 2021 (Trial Day #5)

[201] On June 23, 2020, the parties appeared by telephone on a status date to reschedule a date for the **Charter** *voir dire* decision and to reschedule the four days for trial lost due to the Covid 19 closures. Several dates were canvassed for the delivery of the Court's **Charter** *voir dire* decision, but since court proceedings had just reopened with other matters scheduled in that timeframe, on August 13, 2020, the parties were available but no courtroom was available. Ultimately, a brief amount of time was found on October 22, 2020 for the **Charter** *voir dire* decision. The Court indicated, and the parties had agreed, that the **Charter** *voir dire* decision would be delivered well in advance of the upcoming rescheduled trial dates.

[202] In addition, on June 23, 2020, the parties had indicated that the trial would continue, however, they noted that the Court's **Charter** decision would likely impact the number of issues and witnesses in the trial. As a result, the Court rescheduled 4 days for trial as the parties had originally scheduled, based upon their good-faith estimates of the time required to complete the trial. The earliest block of four days for the trial proper to start were scheduled for December 2, 2020, January 5 and 6, 2021 and January 12, 2021.

[203] During those trial dates, given the progress of the evidence, on very short notice, the Court was also able to secure an additional day, being Day 5 of the trial on January 28, 2021. On January 28, 2021, which was Day #5 of the Crown's evidence called during the trial, the Crown Attorney closed her case. In the time remaining on that date, Defence Counsel called his first witness.

[204] In terms of the scheduling, the Crown Attorney had indicated when the original trial dates were set that she estimated that the Crown's case would take about 2.5 days. As it turned out, her estimate was somewhat "off" and the Crown's case had taken longer than she anticipated. However, on this application, the

Crown Attorney is not arguing that the extra time for Crown's evidence amounts to an exceptional circumstance.

[205] During the period from **December 2, 2020 to January 28, 2021,** there was **no Defence delay.**

H) January 28, 2021 to March 18, 2021 (49 days or about 1.6 months) –

[206] As previously mentioned, on January 28, 2021, Defence Counsel completed his cross-examination of the Crown expert, Ms. Hackett and following that, the Crown Attorney closed her case. Since there was still some time left in the day and Defence Counsel had one relatively brief witness available, he commenced the defence case at the end of Day #5 of the trial proper.

[207] Prior to concluding for the day on January 28,2021, the Court confirmed that working with the Chief Judge's office, switching the Court's schedule, and finding a vacant courtroom, the parties had been advised that three days would be available to continue the trial in mid-March 2021. The Court had noted that, as a result of those significant efforts to find early trial dates, this matter had not been scheduled into dates in November 2021, when trials of a day or more were being set due to the cascading effect of the Covid backlog of rescheduling trials, where trials had already been scheduled in that timeframe and with recent matters also having to be scheduled for trial.

[208] With respect to the issue of assessing delay, and in particular, "defence delay," on January 28, 2021, the parties were able to confirm their availability on March 15, 16, and 17, 2021. However, Defence Counsel indicated that his pharmacology expert had recently undergone an emergency heart bypass surgery, was recovering and required a minimum of 90 days of recuperation. He had earlier stated that he was prepared to go ahead with the cross-examination of the Crown's toxicology expert in the absence of his pharmacology expert, Mr. Greg Johnstone.

[209] At that point, Defence Counsel indicated that calling his client and their Respirology expert would probably take about three days and thereafter, about two more days should be scheduled for Mr. Johnstone's opinion evidence. The Court was able to confirm that March 15, 16 and 17, 2021 would be utilized for the defence case, except for Mr. Johnstone, whose evidence would have to be scheduled after his three-month recuperation.

[210] While Defence Counsel was able to confirm that his Respirology expert was available in that timeframe, the expert witness also had Covid ICU commitments at the hospital. As a result, Defence Counsel indicated that Dr. LeBlanc would only be available on March 16, 2021 for the afternoon and that Dr. LeBlanc would only be available for the morning of March 17, 2021. Those three days represented Days, #6, #7 and #8 of the trial, which had been originally estimated to be a four-day trial.

[211] When Dr. LeBlanc's evidence was not completed on the afternoon of March 17, 2021, the Court questioned the parties and Dr. LeBlanc if he could make himself available the following day, and if so, the Court would verify whether there was a vacant courtroom available. Dr. LeBlanc indicated that he could change his schedule and be available in the morning and the parties confirmed their availability. On very short notice, the Court was able to add the morning of the next day, on March 18, 2021 [Day #9 of the trial], to complete Dr. LeBlanc's evidence.

[212] It was also noted, on *June 29, 2021, that this date had been previously confirmed as an available date*, and based upon counsel's good-faith estimates, *as a possible date for closing submissions*. Since Mr. Johnstone's evidence could not be scheduled before his three-month recuperation period, Defence Counsel asked for a continuation date for his evidence after May 15, 2021. It was then agreed that June 29, 2021 would be used for Mr. Johnstone's evidence. Defence Counsel agreed that the date would "work" for him and the expert witness.

[213] During the period between **January 28, 2021 to March 18, 2021 (49 days or about 1.7 months),** there was **no Defence Delay.**

I) March 18, 2021 to June 29, 2021 (103 days or about 3.4 months)

[214] On June 29, 2021, the defence pharmacology expert Mr. Greg Johnstone testified. Although it was agreed that there would not be a contested **Mohan** *voir dire* with respect to his qualifications, there was a "contested" area and the questioning with respect to his qualifications took about half the day. Defence Counsel was then able to complete the general areas of his direct examination . However, given the hour of the day, and the fact that Defence Counsel was moving into the key area of his report, it was agreed to adjourn and continue Mr. Johnstone's direct examination on the next court date. The next court date which

had been previously scheduled for October 19, 2021, during the proceedings on March 18, 2021.

[215] The Crown Attorney believed that the direct examination and her cross-examination of Mr. Johnstone could be completed on October 19, 2021 and that the other half day which had been scheduled on March 18, 2021 for December 15, 2021, could be utilised for in the completion of any outstanding defence evidence or for the Crown Attorney's rebuttal evidence which she had indicated that she would be calling during the hearing on January 5, 2021.

[216] In terms of assessing the issue of "delay" between March 18, 2021 and June 29, 2021, due to the emergency operation of Mr. Johnstone, there is no doubt that he would not have been available to testify during 3 days scheduled for defence evidence from March 15-17, 2021. As it turned out, even with the last-minute addition of extra one-half day on March 18, 2021, those 3.5 days of trial time were utilized to complete the evidence of Mr. Yeo and Dr. LeBlanc.

[217] However, I find that, as a result of Mr. Johnstone's health issue which is essentially an "exceptional circumstance," given the three-month recuperation period, Mr. Johnstone would not have been available to testify during any of the mid-March 2021 dates. Defence Counsel had advised the Court in January 2021, that Mr. Johnstone's recuperation period was a minimum of three months and, As a result, Defence Counsel requested a continuation date for his evidence after May 15, 2021. The next trial date, which the Court could offer the parties, where everyone was available, including Mr. Johnstone, was June 29, 2021.

[218] In determining whether the period of time between March 18, 2021 and June 29, 2021 is attributable to "institutional delay," "defence delay" or an "exceptional circumstance" as a result of Mr. Johnstone's medical situation, I find that a need for extra court time could certainly be regarded as either an "exceptional circumstance" or equally be regarded as an "implicit" waiver of delay by Defence Counsel due to the health situation of the expert witness. There is no doubt that the emergency operation was an "exceptional circumstance" during the days when the Crown case was being completed, which impacted and delayed the presentation of the defence case. Either way, this period of time should be deducted from the "total delay" in determining the "net delay."

[219] Given the fact that the three-month recuperation period of time essentially impacted the scheduling of the trial, as opposed to the loss of a trial date previously scheduled, for the period between March 18, 2021 and June 29, 2021, I will make

that deduction at this point as an "implicit" waiver of delay by Defence Counsel, as contemplated by **Jordan**, *supra*, at para 61. While it might have been initially considered that Mr. Johnstone could provide his evidence during the March 2021 dates, those dates were taken up by other defence evidence and given that fact as well as Mr. Johnstone's emergency operation which required a a minimum three-month recuperation period, Defence counsel requested a further trial date be scheduled for his evidence after May 15, 2021.

[220] I should also mention that during this period of time that, on April 26, 2021 the Provincial Court suspended normal court operations for the second time in response to the Covid 19 rising case numbers Nova Scotia and public health restrictions. In this case, the trial continuation date which had been set in March 2021 for June 29, 2021, was fortuitously scheduled for two weeks after the Provincial Court lifted its suspension of in-person proceedings. In this case, the Covid 19 cancellations had no direct effect on the next scheduled date for this trial. However, it illustrates the "cascading effect" of rescheduling trials cancelled due to Covid 19 suspension up in person proceedings, around previously scheduled trials and at the same time, scheduling new matters for trial at the earliest possible trial date(s).

[221] In those circumstances, for the period between March 18, 2021 and June 29, 2021, I will **deduct t**he time from **March 18, 2021 to June 29, 2021 (103 days or about 3.4 months)** as an **"implicit waiver of delay,"** which as mentioned, could equally be categorized as a "discrete and exceptional circumstance" which would also have been deducted from the "total delay" during that analysis.

J) June 29, 2021 to October 19, 2021 (112 days or about 3.7 months)

[222] Unfortunately, the October 19, 2021 trial date (Day #11) had to be cancelled at the last moment due to the fact that Mr. Johnstone had undergone an unplanned, additional surgery on October 18, 2021. Since Mr. Johnstone was the last defence witness, no other evidence was called, and a full day was lost due to the unforeseen medical issue of the defence expert witness.

[223] During the period between **June 29, 2021 and October 19, 2021,** there was **no Defence Delay.**

[224] However, the Crown Attorney submits that this period of time should be categorized as a discrete and exceptional circumstance based upon the fact that the trial had gone much longer than reasonably expected, even where the parties had

made good-faith efforts to establish realistic timelines based upon the comments of the Supreme Court of Canada in **Jordan**, *supra*, at para. 73.

K) October 19, 2021 to December 15, 2021 (57 days or about 1.9 months)

[225] The December 15, 2021 trial date, which had been reserved on March 18, 2021 had been, at the time when it was scheduled, considered to be a *possible date for rebuttal evidence of the Crown or possibly even closing submissions of counsel*.

[226] However, due to Mr. Johnstone's last-minute medical emergency, he was not available to testify on October 19, 2021. As a result of the full day for trial being lost on October 19, 2021, instead of utilizing December 15, 2021 for the purposes which the parties had estimated when the date was set in March, 2021, it was utilized to complete Mr. Johnstone's evidence. As it turned out, it was only Mr. Johnstone's direct examination which was completed on December 15, 2021.

[227] Since the Crown Attorney had not started her cross-examination of Mr. Johnstone, the immediate issue became scheduling a date for his cross-examination. The Crown Attorney advised the Court that two full days had just opened up and could be used for the trial continuation on January 14, 2022 and January 31, 2022. The parties confirmed their availability on those dates and the *Crown Attorney estimated they could be used for the cross-examination of Mr. Johnstone and the Crown's rebuttal evidence of Ms. Hackett. Thereafter, she estimated that only one more day would be required to be scheduled for the closing submissions.*

[228] Given the fact that December 15, 2021 had been planned in March, 2021, as a trial continuation date when the parties would be available, and actually were available to continue with the trial, I find that, for the period from **October 19, 2021 to December 15, 2021 (57 days or about 1.9 months),** there is **no defence delay.**

[229] However, for the attribution of this period of time, there is no dispute between the parties. The Crown Attorney and Defence Counsel have submitted that this additional time of 57 days to utilize December 15, 2021, for the evidence of Mr. Johnstone was the result of the defence expert witness's health emergency and not being available to testify on October 19, 2021. The **parties agree that this time "delay" constitutes an "exceptional circumstance" and should be deducted from the "total delay.**"

L) December 15, 2021 to January 14, 2022 (30 days or about one month)

[230] As a result of the discussions on December 15, 2021, the parties had confirmed trial continuation dates on January 14 and January 31, 2022. It was anticipated, as mentioned, that these dates would likely be sufficient to complete the cross-examination and any re-examination of Mr. Johnstone as well as Ms. Hackett's rebuttal evidence that the Crown intended to call. For those reasons, the Crown Attorney had estimated that only one additional day would be required after those scheduled dates for the closing submissions of counsel.

[231] Unfortunately, on January 13, 2022, the Provincial Court issued a statement that due to the high Covid 19 case numbers and the spread of the Omicron variant, the Court was extending the suspension of in-person proceedings until Friday, January 28, 2022. The parties appeared virtually by telephone on January 14, 2022, and on scheduled Day #12 of the trial, due to the suspension of in-person proceedings, no evidence was able to be called, and the trial continuation was adjourned to January 31, 2022.

[232] For the period from **December 15, 2021 to January 14, 2022 (30 days or about one month),** there was **no defence delay.**

[233] However, the issue between the parties is whether this period of time constitutes a "discrete" and "exceptional circumstance" caused by the fact that the fact that the trial was unexpectedly taking much longer than either the Crown Attorney or Defence Counsel had estimated, despite their good faith estimates of the trial time required at various points in time to complete the trial. In this particular case, relating to the cross-examination of the defence expert, Mr. Johnstone, Defence Counsel submits that this should be considered as "institutional delay" since the Crown Attorney required additional trial time to be scheduled for that purpose.

M) January 14, 2022 to May 3, 2022 [109 days or about 3.6 months)

[234] As a result of the notice issued by the Provincial Court on January 13, 2022 with respect to the impact of Covid 19 and the cancellation of in-person proceedings for two weeks, the January 14, 2022 trial date was lost. During the telephone appearance on January 14, 2022, the Court confirmed the cancellation of the trial evidence for that day and also confirmed that everyone was still available for the previously scheduled trial date on January 31, 2022.

[235] Unfortunately, the Provincial Court renewed the two-week cancellation of in person proceedings due to Covid 19 for a further period of time of two weeks as of January 28, 2022. The result of that renewal of the two-week Covid 19 cancellation of in-person proceedings in the Provincial Court resulted in the cancellation of what had been scheduled Day #12 of the trial on January 31, 2022.

[236] In addition, on January 14, 2022, the Court had offered to work with the Chief Judge's office to see if arrangements could be made to schedule trial time in a vacant courtroom on February 8 and 9, 2022. Defence Counsel and the witness were available on February 9, 2022, but unfortunately the Covid 19 cancellation of in-person court proceedings in the Provincial Court was extended to February 14, 2022 so neither one of those dates could be used for the trial continuation.

[237] The Crown Attorney also mentioned, on January 14, 2022, that trial time may be opening up on March 8, 2022, but Defence Counsel indicated he would not be available at that time, so that date was not confirmed as a trial continuation date.

[238] In addition, during the virtual appearance on January 31, 2022, after the trial evidence was cancelled on the record due to the Covid 19 measures implemented by the Provincial Court relating to in person proceedings, the Crown Attorney advised the Court that a full day in the courtroom had become available on May 3, 2022. Once everyone stated that they were available on that a full day for the trial continuation [Day #12], the Court confirmed that May 3, 2022 would be the next date for the trial continuation.

[239] First, with respect to this period from **January 14, 2022 to May 3, 2022 (109 days or about 3.6 months),** there **is no defence delay.**

[240] However, the Crown Attorney submits that the entire period between January 14, 2022, until the new trial continuation date of May 3, 2022 should be deducted from the "total delay" as a discrete and exceptional circumstance. Defence Counsel acknowledges that **Covid 19 did impact the scheduling** of trial dates during this time. This **period of about 3.6 months will be deducted during the assessment of the impact of discrete and exceptional circumstances** that the Crown Attorney submits should be taken into account.

N) May 3, 2022 to July 27, 2022 (85 days or about 2.8 months)

[241] On May 3, 2022, the Crown Attorney commenced her cross-examination of the Defence expert, Mr. Johnstone. Early in the afternoon, as the cross examination

continued, she began asking Mr. Johnstone to perform a series of calculations of Blood Alcohol Concentration at different points in time and assuming different elimination rates. Mr. Johnstone stated that he would have to do those calculations "longhand", that it would take time and he preferred to get the questions in a written form and come back to the court with his opinions. The parties agreed with that approach, and the Court reserved July 27, 2022 for the continuation/completion of Mr. Johnstone's expert evidence.

[242] For the period from **May 3, 2022 to July 27, 2022 (85 days or about 2.8 months)**, there was **no defence delay**.

[243] However, the issue between the parties is that the Crown Attorney submits that this period of time should constitute a "discrete" and "exceptional circumstance" caused by the fact that the trial was unexpectedly taking much longer than either experienced counsel had estimated, despite their good faith estimates made at various times during the trial. Defence Counsel submits that this period should be attributed to "institutional delay" as the Crown Attorney required additional trial time for her cross-examination of the witness.

O) July 27, 2022 to November 21, 2022 (121 days or about 4 months) – Defence Case closed on July 27, 2022 (Trial Day #13)

[244] On July 27, 2022, Mr. Johnstone returned to the witness stand to complete his cross-examination, with the "homework" calculations that he had done that at the request of the Crown Attorney. As previously agreed, Mr. Johnstone had received the information with respect to those questions with various scenarios from the Crown Attorney through Defence Counsel. The Crown Attorney completed her cross-examination of Mr. Johnstone in the afternoon.

[245] Defence Counsel posed a few questions on re-examination and, thereafter, he closed the defence case on Day #13 of the evidence in the trial

[246] After Defence Counsel closed his case, the Court was advised that the defence was entertaining a **Jordan** application. The Crown Attorney reminded the court, once again, that the Crown intended to call Ms. Hackett on rebuttal and a date should be scheduled for her evidence. In addition, for a **Jordan** application, a date would have to be scheduled after the formal **Charter** notice had been served upon the Crown with each side having a reasonable amount of time to prepare briefs in advance of the hearing date.

[247] The parties subsequently appeared in court before Chief Judge Williams on September 12, 2022 and confirmed that the Crown's rebuttal evidence by Ms. Hackett would be heard on November 21, 2022 and that the oral submissions on the proposed **Jordan** application would be made on December 13, 2022. The scheduled date for a trial continuation if it was needed or for the Court's **Jordan** decision was confirmed for February 1, 2023.

[248] For the period from **July 27, 2022 to November 21, 2022 (121 days or about 4 months),** there was **no defence delay.**

[249] However, the issue between the parties is whether this period of time constitutes a "discrete" and "exceptional circumstance" caused by the fact that the fact that the trial was unexpectedly taking much longer than either the Crown Attorney or Defence Counsel had estimated, despite their good faith estimates of the trial time required at various points during the trial. In this particular case, relating to the cross-examination of the defence expert, Mr. Johnstone, Defence Counsel submits that this should be attributed to "institutional delay" as the Crown Attorney required additional trial time for that purpose.

P) November 21, 2022 to December 13, 2022 (18 days or about 0.6 months)

[250] On November 21, 2022 being Day #14 of the evidence in the trial proper, the Crown Attorney recalled Ms. Josette Hackett to present rebuttal evidence. Following the direct and cross-examination of Ms. Hackett, the parties indicated that all of the evidence in the trial had now been presented.

[251] In addition, the Court confirmed that the oral submissions on the **Jordan** application would be heard on December 13, 2022 and that February 1, 2023 would be the anticipated date for the decision on the **Jordan** application. Dates were set for the filing of briefs on the **Jordan** application and the Court was holding June 1 and June 15, 2023 as the possible dates for the closing submissions of counsel on the trial proper, in the event that the **Jordan** application was dismissed. For the purposes of the **Jordan** application, the parties had considered the June 15, 2023 date as the "anticipated and of the trial."

[252] For the period from **November 21, 2022 to December 13, 2022 (18 days or about 0.6 months),** there is **no defence delay.**

[253] However, the issue between the parties is whether this period of time constitutes a "discrete" and "exceptional circumstance" caused by the fact that the

fact that the trial was unexpectedly taking much longer than either the Crown Attorney or Defence Counsel had estimated, despite their good faith estimates of the trial time required at various points to complete the trial. In this particular case, relating to the rebuttal evidence of the Crown expert, Ms. Hackett. Defence Counsel submits that this period of time should be attributed to "institutional delay" as he submits that the rebuttal evidence was not necessary and since the Crown Attorney required that additional trial time to be scheduled for that purpose, it should be attributed as "institutional delay."

Q) December 13, 2022 to February 1, 2023 (50 days or about 1.6 months)

[254] The notice of the **Charter** application, the filing of briefs by Defence Counsel and a reply by the Crown Attorney were all filed in accordance with the dates prescribed by the Court. The parties made their oral submissions on the **Jordan Charter** application on December 13, 2022. The Court had previously scheduled February 1, 2023 as a possible date for the **Jordan** decision and reserved its decision to that date.

[255] For the period from **December 13, 2022 to February 1, 2023 (50 days or about 1.6 months),** Defence Counsel acknowledges that the **Jordan** application adds to the time of the trial and acknowledges that **this period of time should be considered as "Defence delay."**

R) February 1, 2023 to June 15, 2023 (134 days or 4.4 months)

[256] As mentioned previously, the June 15, 2023 date had only been reserved, as a result of the **Jordan** application and would only be needed for the closing submissions of counsel if the **Jordan** application was dismissed by the Court. In my earlier analysis, it is clear that the parties initially considered June 15, 2023 as the "anticipated end of the trial."

[257] Defence Counsel had submitted that this period of time should be attributed as additional "institutional delay" in the trial.

[258] For her part, the Crown Attorney had submitted that, but for the filing of the **Jordan** application, the **December 13, 2022 court date could have been utilized for closing submissions and should be considered as the "anticipated end of the trial."** While **Defence Counsel acknowledges** that between **December 13, 2022 and February 1, 2023, is "defence delay**," the Crown Attorney submitted that the **Jordan** application should be considered as *a discrete exceptional event*,

which caused the cascading delay from December 13, 2022 to February 1, 2023 (**Jordan** decision) and then to the June 15, 2023 scheduled date for the closing submissions on the trial proper as the "*anticipated end of the trial."* She maintained that the entire period from December 13, 2022 until June 15, 2023 should be considered as either "defence delay" or a "discrete and exceptional event."

[259] In the further alternative, the Crown Attorney submitted that the parties should have been prepared to make their closing submissions on February 1, 2023 and in that circumstance, or submit written submissions to bring the trial to a conclusion much more quickly than June 15, 2023.

[260] As I have indicated earlier in the decision, based upon the comments of the Supreme Court of Canada in **KGK**, *supra*, at para. 33, "the end of the trial" does not include post-trial applications and the "actual or anticipated end of the trial" is when the parties could have made their closing submissions and argument on the trial proper and turned the matter over to the trial judge to render a verdict. For the reasons outlined previously, I have concluded that the "anticipated end of the trial" would have been on February 1, 2023, but for the Defence **Jordan** application, which was made on December 13, 2022.

[261] As a result, I have determined that the period between February 1, 2023 and June 15, 2023, which is the date that has been scheduled for closing submissions if the **Jordan** application was dismissed, created an additional delay after what I have determined to be the "actual or anticipated end of the trial." In those circumstances, the delay caused by the timing of the **Jordan** application essentially delayed the time for the closing submissions and argument in the trial proper, which but for the **Jordan** application could have been scheduled for February 1, 2023.

[262] Based upon the statements of the Supreme Court of Canada in **KGK**, the **Jordan** ceilings apply from the charge to the "actual or anticipated end of the evidence and argument and no further." **Based upon the fact that the evidence in the trial had concluded on November 21, 2022 and the closing arguments could have been made, *but for the Jordan application*, on February 1, 2023, I find that the period between February 1, 2023 and June 15, 2023 should <u>not</u> comprise part of the "total delay" in this trial.**

2. Determination of the "Net Delay"

[263] Based upon the **Jordan** analytical framework for the purposes of a section 11(b) **Charter** application, the start of the period of time for the calculation of the "total delay" is when the Information before the court was sworn. In this case, the parties agree that the start date for the calculation of the "total delay" was on July 19, 2018. Based upon my analysis of the time or "total delay" that has elapsed from that starting point to the "actual or anticipated end of the trial," which I have determined to be February 1, 2023, the "total delay" in this matter has been 1659 days or about 54.4 months.

[264] In order to determine the "net delay" and whether that "net delay" exceeds the **Jordan** 18 month "ceiling" in the Provincial Court and, as such, is then "presumptively unreasonable," the Court must first deduct defence delay that was waived, either explicitly or implicitly or defence "caused delay."

[265] In the preceding analysis of what transpired on or between scheduled trial dates to determine the issue of "defence delay," I have previously determined that there were five (5) distinct periods of time which could be defined in the **Jordan** framework as being "defence delay":

1. December 14, 2018 to February 25, 2019 - 73 days or about 2.4 months;
2. June 10, 2019 to December 3, 2019 - 177 days or about 5.9 months;
3. December 4, 2019 to March 31, 2020 - 118 days or about 3.9 months;
4. March 18, 2021 to June 29, 2021 - 103 days or about 3.4 months; and
5. December 13, 2022 to February 1, 2023 - 50 days or about 1.6 months.

[266] As a result, I find that the total "defence delay" is 521 days or about 17.2 months.

[267] **When I deduct that "defence delay" of 521 days or about 17.2 months from what I have determined to be the "total delay"** from the start date to the "actual or anticipated end of the trial" which was a total of 1659 days or 54.4 months**, I find that the "net delay" in this case is 1138 days or about 37.2 months.**

[268] In those circumstances, I find that the "net delay" exceeds the **Jordan** ceiling of 18 months in the Provincial Court and as such, is "presumptively unreasonable." As a result of that determination, the Crown bears the onus of

justifying delays that exceed that "presumptive ceiling" and may rebut that presumption by showing that the delay is reasonable because of the presence of "exceptional circumstances" [**Jordan**, *supra*, at para. 68]. The Crown must establish the presence of exceptional circumstances and if it cannot, the delay is unreasonable, and a stay will follow. [**Jordan**, *supra*, at para. 47].

Did the Crown Establish Exceptional Circumstances or Discrete Events?

[269] In **Jordan**, *supra*, at para. 69 the Supreme Court of Canada provided their definition of what could be considered as an "exceptional circumstance:"

> "[69] Exceptional circumstances ***lie outside the Crown's control*** in the sense that (1) they are reasonably unforeseen ***or*** reasonably unavoidable, ***and*** (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances, once they arrive. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon." [Emphasis in original text]

[270] The Supreme Court of Canada also pointed out, in **Jordan**, *supra*, at para. 70 and that the Crown must also show that it took "reasonable available steps to avoid and address the problem ***before*** the delay exceeded the ceiling." Those steps could include case management processes or seeking the assistance of Defence Counsel to streamline evidence or issues at trial or to coordinate pretrial applications or other procedural means. However, the Court emphasized, *supra* at para. 70, that the Crown "is not required to show that the steps it took were ultimately successful – rather, just that it took reasonable steps to try to avoid the delay."

[271] The Supreme Court of Canada noted, in **Jordan**, *supra*, at para. 71 that it would be "impossible" to identify in advance all circumstances that may qualify as "exceptional" for the purposes of adjudicating a section 11(b) application. Ultimately, the determination of whether circumstances are "exceptional" will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: "discrete events and particularly complex cases."

[272] While indicating that it would not be possible to identify, in advance, all circumstances which may qualify as being "exceptional," the Supreme Court of Canada, in **Jordan**, *supra*, at paras. 72-74 provided some examples of what might

comprise "discrete events and particularly complex cases." First, with respect to "discrete, exceptional events", the Court stated:

> "[72] Commencing with the former, by way of illustration, it is to be expected that medical or family emergencies (whether on the part of the accused, important witnesses, counsel or the trial Judge) would normally qualify. Cases with an international dimension, such as cases requiring the extradition of an accused from a foreign jurisdiction, may also meet the definition.
>
> [73] Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected – even where the parties have made a good-faith effort to establish realistic time estimates – then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.
>
> [74] Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling. Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a timely solution. For this reason, it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.
>
> [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 to 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. Vassal,*** 2016 SCC 26). 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)."

[273] Then, in **Jordan**, *supra*, at para. 77, the Supreme Court of Canada provided some elaboration for "exceptional circumstances" which also cover a second category, namely, cases that are particularly complex.

> [77]… Particularly complex cases are cases that, because of the nature of the *evidence* or the nature of the *issues*, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence,

> hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence and charges covering a period of time. Particularly complex cases arising from the nature of the issues may be characterized by among other things, a large number of charges and pretrial applications, novel or complicated legal issues, and a large number of significant issues in dispute."

[274] The Supreme Court of Canada noted, **Jordan**, *supra*, at para. 79 that the determinations of what might be a particularly complex case "fall well within the trial Judge's expertise." And, of course, the trial Judge will also want to consider whether the Crown, having initiated what could reasonably be expected to be a complex prosecution, developed and followed a concrete plan to minimize the delay occasioned by such complexity. Where it has failed to do so, the Crown will not be able to show exceptional circumstances, because it will not be able to show that the circumstances were outside its control.

[275] In summarizing the consideration of exceptional circumstances, Moldaver J. stated in **Jordan**, *supra*, at para. 81:

> "[81] To be clear, the presence of exceptional circumstances is the ***only basis*** upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. As discussed, an exceptional circumstance can arise from a discrete event (such as an illness, extradition proceeding, or an unexpected event at trial) or from a case's complexity. The seriousness or gravity of the offence cannot be relied on, although the more complex cases will often be those involving serious charges, such as terrorism, organized crime, and gang-related activity. Nor can chronic institutional delay be relied upon. Perhaps, most significantly, the absence of prejudice can in no circumstances be used to justify delays after the ceiling is breached. Once so much time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay."

Discrete and Exceptional Circumstances Submitted by the Crown

[276] The Crown Attorney has submitted that the progress of the trial was impacted by a series of "discrete exceptional circumstances." Those "discrete and exceptional circumstances" related to the following events:

1) Between December 4, 2019 and March 31, 2020 –

[277] With respect to this period of time, the Crown Attorney raised the issue of the timeliness of the Section 8 **Charter** application with respect to reasonable

grounds to make the ASD demand. She referred to the Supreme Court of Canada's comments in **Cody**, *supra*, at para. 32, where the Supreme Court of Canada pointed out that "defence conduct encompasses both substance and procedure and the decision to take a step as well as the manner in which it is conducted, may attract scrutiny." In particular, the Supreme Court mentioned that "compliance with any notice or filing requirements and timeliness of defence applications may be relevant."

[278] For those reasons, the Crown Attorney submitted that the timing of the filing of the **Charter** *voir dire* had an impact on the trial progress and should be considered as "defence delay" or in the alternative a "discrete exceptional circumstance." She submits that, although there had been some indication that the application would be made, the timing of the actual application meant that there was, in reality, no opportunity to mitigate the delay caused by the application. In those circumstances, and as previously determined, during the analysis of those periods of time attributed to "defence delay," while the period of time could be regarded as an exceptional circumstance, this period of time has been already deducted from the "total delay" as a period of "defence delay."

[279] However, there is an aspect to this period of time which is fundamentally important to what I have referred to as the "trajectory" of the trial. First, the 4 Days for trial in December 2019 had been scheduled on February 25, 2019 and confirmed at the Pre-Trial Conference on July 3, 2019 as being sufficient for the trial. At the time when those trial dates were scheduled, the Pre-Trial Conference and a couple of subsequent status dates, the parties had indicated, based upon their good faith estimates of the time required for trial, that the "anticipated end of the trial" of a four-day trial, would be December 18, 2019.

[280] The important consequence for the trial "trajectory" which occurred as a result of the filing of the **Charter** application three weeks before those four days which had been set for the trial proper was that the **Charter** *voir dire* was able to be heard three weeks later. However, but in order to do so, the first impact of that application was that two of the four scheduled trial days were used for the **Charter** application. The other two days scheduled for the trial proper were released altogether, as it was a standalone application. However, Defence Counsel and the Crown Attorney also acknowledged that the **Charter** decision would have an impact on the trial issues and number of witnesses.

[281] As I previously indicated, and the Crown Attorney has acknowledged, the **Charter** *voir dire* was certainly consistent with Mr. Yeo's opportunity to make full answer and defence to the charges before the court. However, the second impact of that application from a **Jordan** "delay" perspective was that a date had to be scheduled for the Court's decision on the **Charter** application **and**, since the **Charter** application was not going to be determinative of all of the charges before the court, the parties requested, and the court scheduled the same four days that had originally been scheduled on the good faith estimates by the parties. Unfortunately, the **Charter** decision and the rescheduled trial dates were cancelled by the onset of Covid 19 pandemic, the public health measures to control the spread and the cancellation of in person proceedings in the court.

[282] As a result, in terms of the "trajectory" of this trial, it was only after the first five days for trial were held in early December, 2020 and in January 2021, that it became apparent that the "good-faith estimate" of the "anticipated end of the trial" was inadequate and that the trial was going to go much longer than either the Crown Attorney or Defence Counsel had indicated to the Court on any prior occasion. Despite the parties "good faith efforts to establish realistic time estimates" as Justice Moldaver mentioned in **Jordan**, *supra*, at para. 73: "then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance."

[283] As I mentioned previously, the Crown Attorney had submitted that this period of time be considered as "defence delay" or, in the alternative, as a "discrete exceptional circumstance." *Having already considered this period of time as "defence delay," there will be no further deduction from the "net delay," on an equally valid consideration as a "discrete exceptional circumstance."*

2) Between December 13, 2022 and June 15, 2023 –

[284] This period of time relates to the **Jordan** application brought by the defence as a result of the notice of the **Charter** application having been filed a few weeks before the December 13, 2022 court date, that trial continuation date was converted from a potential date for the closing arguments as the "anticipated end of the trial" to the date for the oral submissions on the **Jordan** section 11(b) **Charter** application. The Crown Attorney has submitted that this should be considered as a "discrete exceptional circumstance" and Defence Counsel has acknowledged that it did create "delay" at least until the proposed date of the **Charter** decision on February 1, 2023.

[285] Based on those positions advanced by the parties, I have already dealt with the "delay" during this period of time as being a combination of Defence "delay" as Defence Counsel has acknowledged in making the **Jordan** application at that point in time. As a result, I have found that, but for the **Jordan** application, a reasonable date for the closing submissions and argument would have been on February 1, 2023. As a result, the period between December 13, 2022 and February 1, 2023 has been deducted from the "total delay" as" defence delay". I have also determined that February 1, 2023 should be considered as the "actual or anticipated end of the trial" for the purposes of the **Jordan** analytical framework, based upon the comments of the Supreme Court of Canada in the **KGK** case.

[286] Having previously come to those conclusions, I find that there is no need for any further deduction from the "net delay" for what the Crown Attorney had submitted to be a "discrete exceptional circumstance."

3) Covid 19 Public Health Measures and Court Closures –

(a) from March 31, 2022 to December 2, 2020 (247 days or about 8.2 months) and

[287] There is no dispute between the parties that Covid 19 public health measures had an impact on the timely progress of this trial. They both acknowledge that Covid 19 was a "discrete exceptional circumstance" which resulted in the suspension of court operations during two periods of time, which had a direct impact on the trial dates actually scheduled for this trial.

[288] In fact, there were a total of three (3) suspensions of the Provincial Court's in-person trial proceedings due to the public health measures implemented to control the spread of Covid 19. The first suspension of proceedings covered the period between March 17, 2020 and July 2, 2020 which cancelled the first four (4) days of trial which had already been rescheduled for the first time on November 26, 2019 for March 31, April 22, April 29, May 5 and May 13, 2020 as result of utilizing two of the original trial dates and releasing the other two trial dates to address the **Charter** *voir dire* in December, 2019. The date of March 31, 2020 had been scheduled as the anticipated date of the Court's **Charter** *voir dire* decision and as a result, the Court added May 13, 2020 on December 18, 2019 to replace the originally scheduled four (4) days for trial, based upon the parties' original good-faith estimates of the trial length.

[289] However, with respect to this period of time, the parties differ significantly, in their submissions, on the extent of the impact of Covid 19 as a "discrete exceptional circumstance." The Crown Attorney submits that the entire initial period of time from March 31, 2022 to December 2, 2020 [when the first of the rescheduled 4 days for trial was actually held] should be considered as a "discrete exceptional circumstance" and should be deducted from the "net delay." Defence Counsel submits that only the first 106 days of that period of time, being from March 31, 2020 to July 15, 2020 when a date was considered for the **Charter** decision, but the Court indicated a little extra time would be required to complete the decision. Defence Counsel submits that the period of time from July 15, 2020 to December 2, 2020 should be considered as "institutional delay."

[290] In this case, the record reflects that Chief Judge Williams, based upon the Covid 19 cancellation of in person proceedings being put in place, adjourned this trial as result of those measures on March 30, 2020. The Court, in instituting the measures to address Covid 19, had issued a public notice that all matters before the court were going to be adjourned with their next appearance to be some time after May 31, 2020. Speaking to this matter specifically, Chief Judge Williams did not reschedule any date for the **Charter** *voir dire* decision, nor did she reschedule any of the cancelled trial dates. The record reflects that June 23, 2020 was scheduled to set a new date for the decision on the **Charter** *voir dire* and to reschedule trial continuation dates.

[291] Although the Court had indicated that a "little" additional time would be needed to complete the **Charter** *voir dire* decision during the June 23, 2020 conference call to set new dates for both the **Charter** decision and the trial, the Court then canvassed dates with the parties for that decision. The parties had requested, and the Court had agreed that it would be helpful to have the **Charter** decision well in advance of the rescheduled trial dates to be able to determine the outstanding issues and witnesses, including expert witnesses that might be called by the parties.

[292] After several attempts to find a date where the Court, a courtroom and the parties were available for the **Charter** decision, the Court indicated that a date for the decision could be found, the bottom line presented if necessary, but given the fact that there were already many trials and court time scheduled well into the fall from earlier in the year and now having to reschedule all trials that had been cancelled due to Covid as well as other new matters being scheduled for trial, the Court asked the clerk to canvass the four earliest dates for trial. The four days

rescheduled for the trial were based upon the amount of time that the parties had indicated in their good faith estimates of the trial on all previous occasions.

[293] After the clerk canvassed possible trial dates to replace the four days which had been cancelled due to the Covid 19 measures, the Court secured 4 days for the start of the trial proper on December 2, 2020, January 5, 6, and 12, 2021. Once those dates were set then, the Court canvased dates for the delivery of the **Charter** *voir dire* decision, which would still provide the parties with a reasonable amount of time to prepare for the first four days of the trial proper.

[294] In my opinion, I agree with the Crown Attorney's assessment of this period of time that the impact of Covid 19 measures to close the court's in person proceedings for three months, resulted in the cancellation of the four rescheduled days for trial which, once again, had to be rescheduled. The rescheduling did not occur in a vacuum where only those Covid 19 cancellations were being scheduled. The first four days for trial proper had to be rescheduled in a timeframe where other trials, which had not been impacted by the Covid measures had already been scheduled, cases which had come up in the interim were also looking for the earliest trial dates and the Court placing a priority on the rescheduling or scheduling of trials for people who were in custody pending a trial date or some other disposition.

[295] While the Court certainly could have delivered the **Charter** *voir dire* decision on a date earlier than October 22, 2020, which was ultimately the date that the Court, a courtroom and the parties were available, it did not have any impact on the rescheduling of the earliest possible four days for the trial proper. The Court scheduled four (4) relatively contiguous days on June 23, 2020 for December, 2020 and January, 2021 with the **Charter** *voir dire* decision being delivered about 6 weeks prior to those rescheduled trial dates. In those circumstances, I cannot agree with Defence Counsel that the timing of the **Charter** *voir dire* decision created any additional institutional delay. I find that the scheduling of the Court's **Charter** *voir dire* decision did not create any additional delay to the four earliest trial days, which were rescheduled for the trial after the Covid 19 cancellation of the previously scheduled four days for trial. Of course, these replacement dates for the start of the trial proper were required after the four (4) original trial dates were utilized or released for the **Charter** *voir dire* in December 2019.

[296] The onset of the Covid 19 pandemic, which was a global pandemic that resulted in a virtual "lockdown" of all day-to-day activities and had the obvious

impact on court operations. There can be no doubt that the Covid 19 pandemic and public health measures to address the spread were undoubtedly a "discrete and exceptional circumstance" that directly cancelled four days for trial in this matter, necessitating a rescheduling of trial dates for the cancelled trials [backlog], when recent matters were requesting the earliest possible trial dates, while taking into account the fact that many previously scheduled trial dates had not been impacted by the Covid 19 closures of in person proceedings. I find that it was in the context of those complex exceptional circumstances, created by the Covid 19 pandemic and the public health measures that the court was closed for several months, which caused the delay between March 31, 2020 and December 2, 2020 to reschedule four days for trial based upon the "good faith" estimates of the parties.

[297] As a result, I conclude that this entire period of time should be considered as a discrete exceptional circumstance, which clearly was outside the Crown's control as it was reasonably unforeseen and certainly reasonably unavoidable. Moreover, Crown counsel could not reasonably remedy the delay emanating from that discrete exceptional circumstance which resulted in the cancellation of the first four days for the trial, other than to request that they be rescheduled at the earliest possible dates when everyone was available.

[298] Having come to those conclusions, I find that Covid 19 was a discrete and exceptional circumstance **which caused the delay from March 31, 2020 to December 2, 2020 (247 days or about 8.2 months) and that period of time should be deducted from the "net delay."**

(b) from January 14, 2022 to May 3, 2022 (109 days or about 3.6 months)

[299] Although there was a second Covid 19 suspension of the Provincial Court's in person proceedings from April 26, 2021 until June 14, 2021, fortuitously that seven-week period of time did not result in the cancellation of the June 29, 2021 trial date.

[300] However, there was also a third suspension of the Provincial Court's in-person proceedings due to Covid 19 and public health measures between January 4, 2022 and February 14, 2023, which did directly result in the cancellation of previously scheduled trial dates for January 14, 2022 and January 31, 2022. Those two trial dates for continuation had been scheduled on December 15, 2021. In addition, the Court had confirmed that there were also dates available for this trial continuation on February 8 and 9, 2022, if additional time was needed to complete

the defence evidence and the rebuttal evidence which the Crown Attorney had previously indicated would be called.

[301] Unfortunately, the first cancellation of court operations on this third occasion was from January 4 to January 14, 2022, which cancelled the January 14, 2022 trial date. Since the court closure was to be re-evaluated, there was a possibility that the January 31, 2022 date could still be utilized. However, on January 25, 2020, the Provincial Court extended the Covid 19 suspension of in-person proceedings until February 11, 2022, which meant that the the January 31st date and possible trial dates on February 8 and 9, 2022 were not able to be utilized.

[302] During the January 31, 2022 conference call, it was confirmed that the trial did not proceed due to the impact of the Covid 19 cancellation of the two previous trial dates. The Court confirmed that the parties were available and May 3, 2022 was scheduled as the next full day for trial.

[303] There is no dispute between the parties that this period of time represents a discrete exceptional circumstance due to the impact of the global Covid 19 pandemic and public health measures which resulted in the closure of the Provincial Court to in person proceedings. There can be no doubt that this period of time, represented exceptional circumstances outside the Crown's control and that they were reasonably unforeseen, certainly unavoidable and there was simply no way that the Crown could remedy the delay, short of rescheduling trial dates from the loss of four (4) trial dates in January and February 2022.

[304] Having come to those conclusions, I find that Covid 19 was a discrete event, and exceptional circumstance **which caused delay from January 14, 2022 to May 3, 2022 (109 days or about 3.6 months) and that period of time should be deducted from the "net delay."**

4) The Medical Issues of the Defence Expert Witness

(a) From March 18, 2021 to June 29, 2021

[305] Prior to completing the cross-examination of the Crown's expert witness, Josette Hackett, on January 28, 2021, Defence Counsel informed the Court that his pharmacology expert witness had recently undergone an emergency bypass surgery, was recovering and needed a recuperation period of a minimum of 90 days. Rather than incur delay by adjourning his cross examination until Mr. Johnstone could be available, Defence Counsel proceeded and concluded his cross

examination of the Crown's expert witness. Shortly thereafter, the Crown Attorney closed her case and during the remaining time on January 28, 2021, Defence Counsel called his first witness, and his evidence was completed before the end of the day.

[306] On January 12, 2021, based upon the fact that the only Crown evidence outstanding was the completion of the cross-examination of Ms. Hackett, the Court had scheduled three full days [March 15, 16 and 17, 2021] for the witnesses to be called by Defence Counsel. In fact, on March 17, 2021, a further half-day was added on March 18, 2021, to complete the testimony of Defence Counsel's expert respirology witness [Dr. Leblanc.].

[307] However, given the fact that it was known that Mr. Johnstone would not be available during any of those March 2021 dates and another date would be needed for his evidence, Defence Counsel had indicated that a date after May 15, 2021 would probably be convenient for his expert witness. As a result, during proceedings on January 28, 2021, the Court scheduled June 29, 2021 for the evidence of Mr. Johnstone.

[308] As mentioned in the earlier analysis of "defence delay." I found that the period of time between March 18, 2021 and June 29, 2021 should be attributed as "implicit defence delay" as it was known that Mr. Johnstone was not available to testify during any of those March dates and Defence Counsel had requested that an additional day be scheduled after May 15, 2021, for his evidence. In the alternative, I had also indicated that the period between March 18, 2021 and June 29, 2021 could have been deducted from the "total delay" as a "discrete and exceptional circumstance" due to Mr. Johnstone's medical situation, which was the reason for Defence Counsel's request to schedule another day when he would be available to present his evidence.

[309] In either alternative, there was a defence request to schedule an additional day for Mr. Johnstone's evidence, due to his unavailability on the dates which had been scheduled up to that point in time, and the fact that his recuperation period of time required that a date be scheduled after May 15, 2021. While Mr. Johnstone's operation and the necessary recuperation period had not caused the cancellation of any of the scheduled dates for defence evidence, which had been scheduled for mid-March 2021, it necessitated a Defence request for an additional day to be scheduled for his evidence.

[310] Having previously concluded that the period of time from March 18, 2021 to June 29, 2021 [103 days or about 3.4 months] be deducted as "implicit defence delay," I find that there is no need for any further deduction from the "net delay" as a "discrete exceptional circumstance."

(b) From October 19, 2021 to December 15, 2021 [57 days or about 1.9 months]

[311] During the proceedings on March 18, 2021, the Court had scheduled June 29, 2021 for Mr. Johnstone's evidence and had also scheduled a full day for trial continuation on October 19, 2021 as well as a further half-day for the trial on December 15, 2021.

[312] On June 29, 2021, Defence Counsel was able to complete the qualifications evidence for Mr. Johnstone and about half of his direct examination. As a result, it was estimated that Mr. Johnstone's direct examination and cross examination could be completed on October 19, 2021. The parties also estimated that if Mr. Johnstone's evidence was concluded on October 19, 2021, the next date on December 15, 2021 could be utilized for the Crown Attorney to call Ms. Hackett to present rebuttal evidence.

[313] Unfortunately, the October 19, 2021 trial date [Day #11 of the trial] had to be cancelled at the last moment due to the fact that Mr. Johnstone had undergone an unplanned, additional surgery on October 18, 2021. Since Mr. Johnstone was the last defence witness, no other evidence was called and a full day was lost due to the unforeseen medical issue of the defence expert witness.

[314] As a result, I conclude that this period of time should be considered as a discrete exceptional circumstance, which clearly was outside the Crown's control as it was reasonably unforeseen and certainly reasonably unavoidable. Moreover, neither Defence counsel nor Crown counsel could reasonably remedy the delay emanating from that discrete exceptional circumstance which resulted in the cancellation of that trial date, other than to request that a day be rescheduled when everyone was available.

[315] In view of those circumstances, I find that there is no doubt that the period of time **from October 19, 2021 to December 15, 2021 [57 days or about 1.9 months] should be deducted from the "net delay" as a "discrete event and exceptional circumstance**."

[316] At this stage in the **Jordan** Analytical Framework, having determined that the Crown has established several unavoidable and unforeseeable "discrete events" as "exceptional circumstances" which the Crown could not reasonably remedy, it is important to quantitatively take account by deducting the delay on account of "discrete events" to reach a "net adjusted delay" total.

[317] Having reached the foregoing conclusions as to the "discrete events" which have constituted "exceptional circumstances" during the trial, the following periods of time should be deducted from the "net delay:"

(a) The Covid 19 suspension of in-person proceedings in the Provincial Court as a discrete and exceptional circumstance **which caused the delay from March 31, 2020 to December 2, 2020 (247 days or about 8.2 months).**

(b) The Covid 19 suspension of in-person proceedings in the Provincial Court was a discrete event, and exceptional circumstance **which caused the delay from January 14, 2022 to May 3, 2022 (109 days or about 3.6 months).**

(c) Mr. Johnstone's unplanned, additional surgery the day before the continuation of his evidence was scheduled, which was a discrete and exceptional circumstance which resulted in a delay and having to utilize another date for his evidence **from October 19, 2021 to December 15, 2021 (57 days or about 1.9 months).**

[318] Having come to those conclusions in relation to those three periods of time, which I have considered to have been reasonably unavoidable or reasonably unforeseeable "discrete events" as "exceptional circumstances," **I find that quantitative total for the those "exceptional circumstances" is 413 days or about 13.7 months.**

[319] In addition, having concluded that those "discrete events" as "exceptional circumstances," given the nature of those "discrete events," I also find that they occurred outside the control of the Crown **and** the Crown Attorney could not reasonably remedy the delays emanating from those circumstances once they arose. In those circumstances, the quantitative total of delay occasioned by "exceptional circumstances" shall be deducted from the "net delay" to determine the "net adjusted delay."

[320] In this case, I have previously found that the "net delay" was 1138 days or about 37.2 months. From that total, the deduction of the quantitative total for "discrete events" as "exceptional circumstances being 413 days or 13.7 months**, I hereby conclude that the "net adjusted delay" is 725 days or about 23.5 months.**

[321] **Therefore, i**n my analysis, **at this point in the Jordan Analytical Framework, the "net adjusted delay" being at about 23.5 months, is about 5.5 months above the 18-month ceiling and at this point, remains presumptively unreasonable**, unless there are any other "exceptional circumstances" which may be established by the Crown to bring the delay below the Provincial Court "ceiling" of 18 months.

Exceptional Circumstances – Trial Taking Longer Than Expected and Complexity of the Case

[322] The Crown Attorney submits that there were several periods of time which should be considered as discrete and exceptional circumstances, where several additional days for trial had to be scheduled, where the parties had made good-faith efforts to establish realistic timelines.

[323] She submits that the Crown Attorney and Defence Counsel, who are both experienced counsel and despite their good-faith efforts to accurately estimate the amount of time that the trial would take, on several different occasions, they underestimated the amount of time required and the trial simply has gone longer than anyone reasonably anticipated. Her submissions with respect to this "exceptional circumstance" in relation to periods of time are based more on a qualitative assessment based upon the comments of the Supreme Court of Canada in **Jordan**, *supra*, at para. 73. She also submits that, once the trial took longer than anyone had anticipated by their good-faith estimates, the Crown could not reasonably remedy the delay emanating from those inaccurate time estimates, any more than had already been undertaken.

[324] Given the fact that the Crown Attorney's submissions with respect to other "discrete or exceptional events" that may arise at trial which relate to more of a qualitative assessment of the delay in the trial, it is helpful to refer to the specific comments in **Jordan**, *supra*, at para. 73:

> [73] Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or

> unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected – even where the parties have made a good-faith effort to establish realistic time estimates – then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.

[325] In my opinion, Justice Moldaver's description of a trial "not being a well oiled machine" and "the trial going longer than reasonably expected – even where the parties have made a good-faith effort to establish realistic time estimates" and the conclusion provided by him - "then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance" is exactly what has occurred in this case.

[326] With respect to those good-faith efforts to establish realistic estimates for the trial, I will provide a brief summary as all of these points have been extensively covered by me in earlier discussions around whether there was defence delay or "discrete and exceptional circumstances" which fundamentally impacted what I have described as the "trajectory" of this trial.

[327] For this analysis, it is important to go back to when the trial date was set on February 25, 2019. The Crown Attorney had estimated that her evidence for the trial would likely be 2.5 days. Defence Counsel, after hearing the Crown's estimate of the time required for trial, estimated that four days would be required, and the Crown Attorney did not disagree. Defence Counsel stated that it would be preferable to have consecutive or contiguous dates for the trial and the four-day trial was scheduled for December 3, 4, 10 and 17, 2019.

[328] The Court held a Pre-Trial Conference, in chambers, on July 3, 2019 and, although the issue of a **Charter** application had been canvassed, it was evident from the Court's summary of that Conference, which was forwarded to both counsel, that no final decision on a **Charter** application had been made at that point. Most importantly, with respect to the estimated time for the trial, the note of the Court confirms that the need for additional time was posed, both parties felt the time was sufficient and neither party requested any additional time for trial.

[329] Following the Pre-Trial Conference, given the fact that the Crown had indicated they may be calling as many as 22 witnesses, the Crown would have an expert witness for extrapolation evidence and Defence Counsel indicated that he would possibly be calling two experts, the Court scheduled a status date on October 8, 2019 to check the parties' any progress on their discussions to narrow

the witness list and trial issues. Immediately after the Pre-Trial Conference, the Court released December 3, 2019, due to a possible conflict for Defence Counsel, but added December 18, 2019 as the fourth day for the trial.

[330] During the October 8, 2019 status date for the Court to check on the progress of the discussions to streamline the witness list, whether there were agreements between the parties that might narrow some of the issues, it was noted by Defence Counsel that even if the witness list was streamlined, the fact that there were likely to be three experts called during the trial, it was reasonable to foresee lengthy cross examination by both sides. There was no request by either party to add any additional trial dates to the original estimate of four (4) days for the trial.

[331] During the subsequent status date on November 12, 2019, Defence Counsel advised that he had received instructions to file a **Charter** application. In addition, the parties advised the court that they were still discussing whether they could conclude some agreed facts or admissions to narrow the witness list as well as some trial issues. Given the fact that the first trial date was roughly 3 weeks away, there was simply no opportunity to schedule the **Charter** *voir dire* before the trial proper. The timing of the **Charter** application and the manner in which Defence Counsel had legitimately preferred to proceed as a standalone **Charter** *voir dire*, meant that two of the original four (4) trial dates were converted to be utilized for the **Charter** *voir dire* evidence and argument, while the other two trial dates were released outright.

[332] On November 26, 2019, the Court held its final status date before the **Charter** *voir dire*, the Court indicated that the date for the **Charter** decision would be determined after the oral submissions on December 18, 2019. The Court also rescheduled the originally requested four days for the trial proper in April and May, 2020. Once again, the rescheduling of those four days was based upon the parties' good-faith and original estimates of the trial time required for this case. Neither party had requested any additional time be scheduled for this trial, as neither party adjusted their "good-faith estimate" that this trial would take 4 days.

[333] Unfortunately, the date for the **Charter** *voir dire* decision and the rescheduled trial dates in April and May, 2020 were cancelled due to the onset Covid 19 global pandemic and public health measures which resulted in the Provincial Court suspending in person proceedings.

[334] On June 23, 2020, when the parties appeared virtually to reschedule trial dates, the Crown Attorney expressed a concern that four days may not be sufficient

unless agreements were made to streamline the trial but added that counsel were working on those agreements or admissions. Once again, neither one of the experienced counsel requested any additional court time beyond their original "good faith estimates" that this case would require four days for trial.

[335] It is fair to say that neither the Crown Attorney nor Defence Counsel had ever advised the Court to schedule additional trial dates, at the outset, during the pretrial conference or subsequent status additional trial dates or when the four dates for trial were replaced after the Covid 19 cancellation of the March, April and May, 2020 trial dates. It is fair to say that no one expected this trial would take 14 days to reach the "actual or anticipated end of the trial."

[336] In fact, based upon the **Jordan** analytical framework, due to the release of earlier trial dates and cancellation of other trial dates due to the Covid 19 health measures on court operations, it was only at the end of January, 2021, when the Crown Attorney closed her case on Day #5 of the trial. At that point, which was about 30 months after the charge had been laid, I find that it was only then that the parties realized that their good faith estimates of requiring only four days for the trial to the "anticipated end of the trial" were wholly inadequate.

[337] As a result of the Crown Attorney's case going approximately twice as long as she had originally estimated, 3 days for trial were scheduled in mid-March 2021 to accommodate Defence Counsel's estimate of the time required to present the defence evidence. When that estimated time did not complete the defence case due to the length of the direct examination and cross-examination, as well as Mr. Johnstone's health issues, further dates had to be incrementally added and the net effect of the trial going longer than anybody had anticipated, was to significantly delay the "actual or anticipated end of the trial."

[338] Of course, the parties' good faith estimates of the trial time required to reach the "actual or anticipated end of the trial" were based on their estimates of the length of the direct and cross-examination of the witnesses. In that regard, direct examinations took longer than anticipated or estimated, cross examinations took longer than anticipated or estimated, even the parties' agreement that it would not be necessary to conduct a formal **Mohan** *voir dire* with respect to the expert witnesses took longer than anticipated as there were certain aspects of the proposed area of qualifications that were contested. When time was available, the defence respirology expert [Dr. Leblanc] had important Covid ICU commitments which limited his availability to testify to half days, where full days had been scheduled.

Fortunately, on March 17, 2021, the Court was able to schedule a further half-day on March 18, 2021 to complete his testimony, otherwise, it would have been scheduled for June 29, 2021 which had been scheduled for Mr. Johnstone's expert opinion evidence.

[339] Then, with respect to Mr. Johnstone, there was, of course, his major heart surgery in January 2021, and his recuperation period of time, which meant that he would not be available on the three days which had been scheduled based upon Defence Counsel's projected plan for his witnesses. Once Mr. Johnstone completed a good portion of his direct examination, on June 29, 2021, Defence Counsel then indicated that it will probably take two more days to conclude Mr. Johnstone's evidence.

[340] Unfortunately, due to another serious medical condition and an operation the day they before Mr. Johnstone was scheduled to return to the witness stand [October 19, 2021], the trial time could not be utilized as he was the last defence witness. Dates which had previously been scheduled for other purposes had to be repurposed, which had the consequential effect of adding dates or amending the purpose of a previously scheduled date due to the inaccuracy of the parties "good-faith estimates" of the time required to reach the "actual or anticipated end of the trial."

[341] In the final analysis, the Crown's evidence, which was originally estimated as requiring 2.5 days, ended up taking just over five days and there was one additional day for Crown rebuttal evidence scheduled for November 21, 2022, when Defence Counsel closed his case on July 27, 2022. The intention of the Crown to call rebuttal evidence had been made known on January 5, 2021, as a result of the Crown Attorney's request for directions and a possible adjournment of Ms. Hackett's evidence, given the fact that she had only received 11 "clear days" notice of an amended defence expert report.

[342] On the other hand, the defence evidence, originally estimated as requiring three days, ended up being heard over roughly 8 days, with half days being utilized on March 17 and 18, 2021 to accommodate Dr. Leblanc's Covid ICU schedule, and May 3, 2022 to accommodate Mr. Johnstone's request for the time needed to perform the calculations "longhand" outside the court, that had been posed by the Crown Attorney during his cross examination. The Defence's case, like the Crown's case, turned out to be more than double the number of days that Defence Counsel had estimated that their case would take.

[343] In the final analysis, despite the "good-faith efforts" of two experienced counsel to accurately estimate the amount of time the trial would take on multiple occasions, the trial simply took much longer than anybody had reasonably expected, despite the parties having made, on several occasions, good-faith efforts to establish realistic time estimates.

[344] The Crown Attorney has submitted that, even if the trial had only taken twice as long as originally estimated (i.e., 8 days instead of 4 days), the eighth day of this trial was on March 17, 2021 and if needed, there was a further half-day also scheduled for March 18, 2021. However, despite the "good-faith efforts" of two experienced counsel to estimate the length of the trial, in the final analysis, to complete the trial evidence has taken much longer than the estimated amount of time that the parties initially, and on several other occasions, estimated to reach the "actual or anticipated end of the trial".

[345] In those circumstances, the Crown Attorney has submitted, and I agree with her submission, that the trial simply took much longer than the parties' "good-faith efforts to establish realistic time estimates" and in those circumstances, as Justice Moldaver stated, in **Jordan**, *supra*, at para. 73 the delay was likely not reasonably foreseeable and as a result the delay emanating from the inaccurate time estimates could not reasonably be remediated by the Court or the Crown.

[346] I agree with the Crown Attorney that the "good-faith efforts to establish realistic time estimates" by both parties on several occasions throughout the trial constitutes a "discrete and exceptional event" which meant that there were several occasions where unforeseeable or unavoidable developments arose, which caused this case, using Justice Moldaver's words "to quickly go awry, leading to delay."

[347] However, the Supreme Court stated in **Jordan**, *supra*, para. 74 that trial judges should be alive to the practical realities of trials, especially when they were scheduled to conclude below the presumptive ceiling, but in the end, exceeded it. In those cases, the focus should be on whether the Crown has made reasonable efforts to respond and to conclude the trial under the ceiling, bearing in mind that it would be more difficult for the Court and the Crown to respond in a timely fashion where the issue arises at trial close to the ceiling.

[348] In view of the fact that the parties initial good-faith estimates of the time required for the trial were clearly inaccurate, by March 18, 2021, evidence had been called on eight days. I note from my review of the comments of counsel as trial dates were being added, that when the June 29, 2021 trial date was confirmed

based upon the progress of the trial, they had projected that date as a possible date for the parties to make their closing submissions.

[349] Following that, due to the health issues of Mr. Johnstone, instead of dates being utilized for closing submissions as contemplated by the parties and scheduled by the Court, due to underestimating the length of direct examination and cross-examination of witnesses based upon what was now becoming an unexpectedly long trial, instead of reaching the "anticipated end of the trial," further dates were required to be set for trial evidence.

[350] As Justice Moldaver stated, in **Jordan**, *supra*, at para. 73, I have no doubt that this trial has gone on much longer than anyone could have reasonably expected, despite the good faith estimates of the parties to establish realistic timelines. I have no doubt that delay was caused by inaccurate estimates of trial time required as well as by several unforeseeable and unavoidable developments, which neither the Court nor the Crown could realistically remedy, due amount to a discrete and exceptional circumstance.

[351] In this case, there can be no doubt that the trial has gone on much longer than anybody reasonably expected, but the length of the trial, in my opinion, has not been caused by a culture of complacency on the part of the Crown, Defence Counsel or the Court. The additional dates which had to be scheduled at various points in time while dealing with Covid 19 cancellations, the cascading effect of replacing counsel trial dates in a timeframe when other trials that already been scheduled as well as new matters, especially those involving people in custody wishing to have an early trial date further complicated the scheduling of trial dates in this matter in a Court that deals exclusively with criminal prosecutions.

[352] Notwithstanding those challenges, additional trial dates were obtained with minimal delays as the Crown Attorney and the Court prioritized this case in the ways described previously in this decision to minimize delay between trial dates in a trial that had already gone on far longer than anybody could have reasonably expected.

[353] Justice Moldaver in **Jordan**, *supra*, at para. 73 probably had a case like this in mind when he made the comments that "trials are not well-oiled machines" and that "unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay." I find that the fact this case has gone much longer than anybody reasonably anticipated despite the good-faith efforts to establish realistic time estimates by the parties, and as such, it should be considered as a "discrete

and exceptional circumstance" which could not reasonably remedied by the Court or the Crown.

[354] If it is necessary to specifically quantify an amount of delay to be deducted from the "net delay," I find that it the most logical point in time would be when the parties were indicating that additional trial dates be scheduled for the "anticipated end of the trial" when the parties would make their closing submissions and argument. In carefully reviewing what transpired on each of the 14 days that trial evidence was called in this matter, there was mention of June 29, 2021 possibly being scheduled as that "anticipated end of the trial." Mr. Johnstone's health issues meant that the June 29, 2021 trial date would be used for his testimony, his testimony went longer than expected and based upon the record, when the date was set on March 18, 2021, then December 15, 2021 was being considered as a possible date for the closing submissions.

[355] In those circumstances, if it is necessary to quantify a specific period of delay, one of the dates after Mr. Johnstone was able to testify, which had been tentatively scheduled for the closing submissions and arguments was December 15, 2021, which eventually became Day #11 in the trial. In those circumstances, if that date had been utilized, as it was originally planned to be the "anticipated end of the trial," then I will determine the "delay" from that date to what I have already determined to be the "actual end of the trial " to be on February 1, 2023, bearing in mind that I have also calculated some periods of defence delay in that same timeframe by virtue of the Defence **Jordan** application having been made on December 13, 2022.

[356] In my opinion, if it is necessary to deduct a specific period of delay in these circumstances, I find that the following periods of time should be deducted as being a "discrete and exceptional circumstance" due to the fact that the trial has taken much longer than anyone expected despite the good faith estimates to establish realistic time estimates between what was projected as the "anticipated end of the trial" and the "actual end of the trial":

1. From December 15, 2021 to January 14, 2022 - 30 days or about one month.
2. From May 3, 2022 to July 27, 2022 - 85 days or about 2.8 months.
3. From July 27, 2022 to November 21, 2022 - 121 days or about 4 months.

4. From November 21, 2022 to December 13, 2022 - 18 days or 0.6 months.

[357] As a result, **I find that the reasonable total amount of delay which could be attributed to this trial going much longer than anyone anticipated, which in my opinion should be attributed as a "discrete and exceptional circumstance" is the total of 254 days or about 8.4 months.**

[358] I should also mention that these are not necessarily contiguous dates as I have previously determined that there was either "defence delay" or a previously quantifiable amount of delay as a "discrete and exceptional circumstance" based upon Covid 19 implications or the filing of the **Jordan** application.

[359] Having previously determined that the "net adjusted delay" was 725 days or about 23.5 months, when I deduct this further amount of 254 days or about 8.4 months as a result of what I have determined to be a further "discrete and exceptional circumstance," due to the trial taking much longer than reasonably expected, **I find that the final total for the "net adjusted delay" is a total of 471 days or about 15.1 months which is *below* the Jordan presumptive ceiling of 18 months.**

[360] In terms of those "discrete and exceptional circumstances" which I have found to be were unforeseeable and unavoidable developments, Justice Moldaver also noted in **Jordan**, *supra*, at para. 75 that, in order to subtract those events from the total period of delay, the Crown and the Court must also be prepared to mitigate delay resulting from those discrete exceptional circumstances.

[361] With respect to the efforts of the Crown and the court to mitigate Covid delay, there was absolutely nothing that either the Court or the Crown could do during the first suspension of Provincial Court in person proceedings on March 17, 2020 as that decision occurred just a couple of weeks before the scheduled trial dates. The Crown Attorney has pointed out in her brief that Crown counsel immediately began to craft release conditions for accused persons in custody as that had been a stated priority of the Court to prioritize trials of persons in custody and attempted to streamline or resolve matters to reduce the future stress on the court system.

[362] When court proceedings recommenced, the Court noted in this case as well as in **R. v. Nagy-Willis**, 2022 NSPC 29 that this court, in particular, was double booking trials to address the backlog of cases which had been cancelled by the

Provincial Court's implementation of Covid 19 public health measures and the suspension of in person proceedings.

[363] In addition, the Court was regularly scheduling Pre-Trial Conferences and subsequent status dates [as was done in this case] on any trials anticipated to be of one or more days in duration in order to ensure that if the matter was going to trial there was an accurate assessment of the issues and time required for the trial or on a status date, to determine if the trial would be adjourned, resolved or proceeding on the date scheduled. Based upon information gleaned during those meetings, the court was strategically "double booking" trials that needed additional time [like this one] or to prioritize matters that were getting close to the **Jordan** "ceiling."

[364] In this particular case, after the initial Covid cancellations of the first four days for trial, the subsequent four days scheduled for the trial were impacted by other trials that that were also cancelled due to Covid, trials that were already scheduled at a time which was not affected by Covid and, at the same time, having to schedule recently charged accused who wish to have a trial at the earliest possible time, with the priority being allocated to those accused who were being held in custody matters at the earliest possible dates. Despite the complex matrix of factors to consider in scheduling a rescheduling trials during this period of time, the measures taken by the Court to prioritize this matter meant that several additional trial dates were obtained with relatively minimal delay from the previous trial date.

[365] The Crown Attorney and Defence Counsel worked together on admissions which streamlined some issues and definitely shortened the potential large number of witnesses that the Crown had mentioned might be called at the Pre-Trial Conference. The Crown Attorney indicated that she was proactively reviewing the upcoming court dockets to determine what other matters could be resolved or rescheduled to identify early trial continuation dates.

[366] The Court was able to make arrangements, with no delay, to have court staff and a vacant courtroom available on March 18, 2021 in order to allow Dr. Leblanc to complete his expert opinion evidence it an expedient manner, especially given his Covid ICU commitments at that time. The Court also a made arrangements to have another Judge assume this Court's responsibilities in order to be available for proposed trial continuation dates in January 2022.

[367] In terms of proactive efforts to mitigate delay by the Crown, it is worthy to note that when the Crown Attorney who had handled this case from the outset, was

not available to conduct the rebuttal evidence on November 21, 2022, her colleague stepped in on short notice and continued with the trial rather than seek an adjournment. In addition, when the original Crown was not available to address the **Jordan Charter** application, her colleague prepared the brief and made oral submissions on the **Charter** application on December 13, 2022.

[368] As a result, I find that the Crown and the Court took several reasonable steps to mitigate delay resulting from, "discrete and exceptional circumstances." In addition, with respect to this case, the scheduling of trial dates with relatively little delay between dates, was the result of the Court working with the parties to prioritize this case and proactively schedule trial dates as early as possible given the complex matrix of circumstances that the Court faced as a result of the Covid 19 cancellations of trials and suspension of in person proceedings on three occasions during the time that this matter has been before the court.

[369] Finally, the **Jordan** analytical framework also allows for a qualitative assessment of exceptional circumstances of a second category, namely, cases that are "particularly complex." Justice Moldaver stated, in **Jordan**, *supra*, at para. 77 that particularly complex cases are ones because of the nature of the evidence or the nature of the issues require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of a particularly complex case include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence and charges covering a long period of time.

[370] While the Crown Attorney acknowledges that the definition of a "particularly complex," case is a relatively high bar, and Defence Counsel submits that this case does not meet that "particularly complex" definition, I do note that there are certainly some aspects of the Supreme Court of Canada's definition that are present in this case.

[371] First, in relation to "the nature of the evidence or the nature of the issues require an inordinate amount of trial or preparation time." In this case, which involves the charge of impaired operation of a motor vehicle and operating a motor vehicle with over 80 mg of alcohol in 100 mL of blood and causing bodily harm, and in circumstances where extrapolation evidence would <u>not</u> have been required, the very large majority of most of those trials involving those charges, but not necessarily the bodily harm aspect, could be concluded in 2 to 4 days. Perhaps, the

parties based their initial estimation of 4 days being required for the trial on what might be considered a relatively long trial involving those charges.

[372] In addition, the fact that this trial has required 14 days where evidence has actually been called, putting aside several other days that were scheduled but were cancelled for various reasons, it is certainly appears to be a trial which has required an "inordinate amount of trial time."

[373] Furthermore, in this case, the parties had indicated during the Pre-Trial Conference that extrapolation evidence would be called by the Crown and Defence Counsel indicated that he was considering calling two experts. A trial involving three expert witnesses, in my opinion, certainly has the hallmarks of one which has "significant requirements" for expert evidence.

[374] In this case, a significant amount of trial time was dedicated to the introduction and cross-examination of the expert witnesses. Notwithstanding the fact that the parties agreed that no formal **Mohan** *voir dire* was required for any of the proposed experts, there were contested areas which required a significant amount of time to qualify the experts to determine the scope of their expertise. In addition, during their testimony, the parties often differed on whether a particular expert had stepped outside his or her designated "lane" of expertise to provide opinion evidence to assist the court.

[375] As these issues arose with respect to the expert opinion evidence, it was the Court's opinion that the matrix of issues in the trial and the expert evidence made this a "complex trial." The complexity of the trial and the significant requirements of expert evidence, certainly go a long way towards an explanation why this trial had 14 days of evidence, after the **Charter** *voir dire* which was conducted before the trial proper, but given its timing, utilized time that had been scheduled for the trial proper. I should add that the **Charter** *voir dire* certainly added to the nature of the issues that had to be addressed during the trial, and in that regard, did add to the complexity of the trial and contributed to the inordinate amount of trial time needed to deal with the nature of the trial evidence and issues.

[376] While the parties were able to streamline the number of witnesses so that as many as 22 witnesses did not have to testify and the case did not involve voluminous disclosure or cover a long period of time, or a large number of charges, there was the pre-trial **Charter** application and certainly through the expert evidence, the case does raise some novel or complicated legal issues.

[377] Based upon a qualitative assessment of whether this case also involves the second category of so-called "exceptional circumstances" which Justice Moldaver referred to in **Jordan**, *supra*, at para. 77 as being "cases that are particularly complex," for the reasons outlined above, I am of the opinion that this case is one that is "particularly complex" as a further qualitative assessment of how this case has required an inordinate amount of trial time. Having come to that qualitative conclusion, I find that this is another "exceptional circumstance" which presents a rational explanation which justifies the time that the case has taken to reach the point of its "actual or anticipated end of the trial."

Defence Initiative – Meaningful and Sustained Steps and Time Markedly Exceeded

[378] In the **Jordan** analytical framework if the "Adjusted Delay" is determined to be below the 18 month "presumptive ceiling" for trials in the Provincial Court, then the defence bears the onus to show that the delay is still unreasonable. To do so, the Supreme Court of Canada stated in **Jordan**, *supra*, at para. 82: "the defence must establish two things: (1) it took meaningful steps that demonstrate us sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. Absent those two factors, the section 11(b) application must fail.

[379] Defence Counsel submits that they have taken meaningful steps to expedite the hearing by not requiring the Crown to lead a factual foundation during the **Charter** *voir dire* evidence of Const. Thomas. Defence Counsel also points to the fact that they have admitted witness statements and scene photographs to avoid requiring the four named victims who allegedly suffered bodily harm as result of the accident to be a compelled to attend court and testify. As a further example, when the defendant's expert witness was unable to attend court due to his medical issues, Defence Counsel proceeded with the cross-examination of the Crown's expert toxicology witness in order to avoid any further delay in the trial and despite the fact that the parties had agreed that their experts would be present during the hearing of the other parties expert evidence.

[380] Defence Counsel submits that the trial has taken markedly longer than it reasonably should have and based upon a date for the closing submissions, if this application was dismissed by the court, he maintains that the matter will have been ongoing for 58.9 months. He also maintains that there have been 34 appearances on a case that is, in his opinion, "not complex." He maintains that the defence was

cooperative with and responsive to the Crown and the Court and put the Crown on timely notice when delay was becoming a problem.

[381] For her part, in response to the position of the defence, the Crown Attorney agrees that there were substantial agreements and admissions to streamline the number of witnesses that would have to be called and medical information which would relate to the nature of the bodily harm suffered as a result of a motor vehicle accident on the highway by the individuals named in the Information.

[382] However, the Crown Attorney submits that the late filing of the **Charter** Notice, despite holding a Pre-Trial conference and several status dates prior to the first scheduled day for the trial, meant that the four earliest days for this trial, which were scheduled before the onset of the Covid 19 global pandemic, were not able to be utilized for the trial proper. Instead, two days were released altogether, and 2 days were utilized in December 2019 for the **Charter** *voir dire* evidence and the submissions on the **Charter** *voir dire*.

[383] The Crown Attorney also points to the late filing and only 11 days clear notice of the amended version of the defence pharmacology expert's opinion as being problematic. The Crown Attorney who was handling the trial at that time was contemplating an adjournment as a result of the late notice, which led ultimately led to a decision to not seek the adjournment to have the Crown expert witness prepare an amended report, but rather, to proceed with the "natural flow" of evidence based on the Crown's expert's understanding of certain factors.

[384] However, the Crown Attorney made it known at that time that, in all likelihood, she would then call rebuttal evidence after the defence case. Defence Counsel has submitted that the rebuttal evidence was unnecessary and added to the delay in the trial. As a result, the last witness called during the trial was the Crown expert, Ms. Hackett to present rebuttal evidence on Day #14 of the trial proper.

[385] While Defence Counsel acknowledged that the defence was not available on certain dates, while asking for the earliest trial date possible, he was cooperative with and responsive to the Crown and the Court. He also put the Crown on timely notice when delay was becoming a problem. While the delay application was certainly conducted reasonably and expeditiously, as the Crown has indicated, the timing of the **Charter** *voir dire* necessitated converting the use of trial time scheduled many months earlier and releasing other dates altogether.

[386] In terms of the meaningful and sustained steps aspect of defence initiative, in **Jordan**, supra, at para. 84, the Court states that the defence must demonstrate that it took meaningful, sustained steps to expedite the proceedings and that 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.

[387] In this regard, the fact is that both the Crown Attorney's and Defence Counsel's good-faith estimates of the time required for trial were inaccurate. In those circumstances, it is difficult to determine that Defence Counsel took steps to actually have that case heard as quickly as possible when the original estimate of time for the trial by both counsel was four days and the trial ultimately took 14 days, excluding the two days utilized for the **Charter** *voir dire*.

[388] The reality that this trial was going to take a lot longer than either the Crown Attorney or Defence Counsel had estimated, really only came to light after many months as I have indicated previously in this decision. While the Crown Attorney certainly underestimated the length of her evidence, Defence Counsel also underestimated the length of his evidence. In those circumstances, the time to conduct the case markedly exceeded what was estimated, but given the complexity that I have found by virtue of the expert witnesses involved in the trial and direct examinations and cross examinations going much longer than expected, the trial may not have exceeded the reasonable time requirements of the case.

[389] As the Supreme Court of Canada stated, all other factors being equal, the more complicated the case, the longer it will take to prepare for trial and for the trial to be conducted once it begins. In this case, there were inaccurate estimates of the time required, but I cannot conclude that, in the end, the time taken in the trial markedly exceeded the reasonable time requirements of the case itself.

[390] In considering the reasonable time requirements of the case, the Supreme Court of Canada has stated, in **Jordan**, at para. 89, that trial judges should employ the knowledge they have of their own jurisdiction, including how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances. As I have indicated in the complexity analysis, cases of this nature do not generally take anywhere near 14 days, but in this case, the Crown evidence in total took a little over five days and Defence Counsel's evidence took around eight days.

[391] As part of this analysis of defence initiative, the Supreme Court of Canada states, in **Jordan**, *supra,* at para. 90 where the Crown has done its part to ensure

the matter proceeds expeditiously – including responding to defence efforts, seeking to opportunities to streamline the issues and evidence and adapting as the case progresses, it is unlikely that the reasonable time requirements for the case will have been markedly exceeded. As with assessing the conduct of the defence, trial judges should not hold the Crown to a standard of perfection.

[392] In introducing this aspect in the **Jordan** analytical framework, Justice Moldaver stated that "we expect stays beneath the ceiling to be granted only in clear cases." Having considered the relevant aspects of taking meaningful and sustained steps as well as the reasonable time requirements of the case being markedly exceeded for the purposes of this analysis, while both the Crown Attorney and Defence Counsel took steps to expedite the proceedings and were cooperative and responsive with each other and the Court, the fact is, that the reasonable time requirements of this case were increased by the complexity of the case.

[393] Furthermore, based upon the fact that both the Crown Attorney and Defence Counsel, in making their good-faith efforts to establish realistic time estimates for the trial, which were significantly underestimated, meant that it was difficult to determine the reasonable time requirements for the case. In addition, I have found that this case was somewhat complex and has needed the trial time to canvass the issues and I cannot say that the defence has taken significant steps to expedite the case, since it has markedly exceeded the reasonable time requirements.

[394] Coming back to the Supreme Court of Canada's introductory point that "stays beneath the ceiling be granted only in clear cases" while the defence cooperated with and was responsive to the Crown and the Court, I cannot conclude that this is one of those "clear cases" where I have found that the " net adjusted delay" is below the presumptive limit of 18 months and that the defence has discharged the onus upon them at this stage.

[395] Having come to all of the foregoing conclusions, I hereby dismiss this application for a stay of proceedings pursuant section 11(b) of the **Charter**.

Theodore Tax, JPC