PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Prosper*, 2023 NSPC 27

Date: 20230518
Docket: 8360013, 8360014
Registry: Dartmouth

Between:

His Majesty the King

v.

Tanya Rhodes Elizabeth Prosper

DECISION REGARDING APPLICATION FOR A STAY OF PROCEEDINGS

Judge:	The Honourable Judge Bronwyn Duffy
Heard:	April 20, 2023, in Dartmouth, Nova Scotia
Decision	May 18, 2023
Charges:	ss. 320.14(1)(a), 320.14(1)(b) *Criminal Code of Canada*
Counsel:	Hartwell Millett, for the Public Prosecution Service James Giacomantonio, for the Defence

By the Court:

[1] The Applicant, Tanya Prosper, is charged with two impaired operation offences, alleged to have occurred on 2 June 2019. The Crown elected to proceed summarily. The chronology of this matter is not straightforward.

Procedural History

[2] The case chronology follows.

- 2 June 2019: allegation date.
- 5 July 2019: Information sworn and Ms. Prosper arrested and served with process.
- 31 July 2019: arraignment date; prosecution elects summary process and defence counsel seeks adjournment to review disclosure.
- 5 September 2019: the Applicant appeared with counsel, Mr. Cragg, who entered pleas of not guilty on her behalf and a trial date of 4 December 2019 was scheduled.
- 3 December 2019: Defence requested an adjournment of the trial scheduled for the following day, and a new trial date of 27 May 2020 was scheduled.
- 1 April 2020: matter called by the Court due to the suspension of in-person proceedings in Provincial Court, further to the declaration of the state of emergency in Nova Scotia per the *Emergency Management Act*, SNS 1990, c 8, § 12 (2020) NS Gaz I, 531. (For a detailed list of Provincial Court restrictions on in-person proceedings with corresponding dates and website uniform resource locators, see *R. v. Graham*, 2022 NSPC 10, para. 7). The matter was adjourned to 8 June 2020 to set a trial date.
- 8 June 2020: all counsel appeared and a new trial date of 15 September 2020 was scheduled.

- 15 September 2020: trial proceeded, and all evidence was before the Court. Argument had not commenced. Defence requested a transcript. The matter was adjourned to 18 November 2020 for status on the transcript.

- 18 November 2020: a further adjournment was requested by Defence due to a failure to request the transcript. Trial continuation was accordingly scheduled for 30 March 2021, for the purpose of closing submissions.

- 23 March 2021: matter brought forward by Defence to request an adjournment. 30 March 2021 date vacated and new trial continuation date scheduled for 4 June 2021.

- 27 May 2021: matter brought forward because the Court was not sitting on 4 June 2021, the reason for which was not specified in the transcript. The first available date thereafter, July 28, the Crown was not available, and the second available date, September 15, the Defence was not available. The matter was scheduled for 6 October 2021.

- 6 October 2021: the case was argued, and trial concluded. Decision hearing was scheduled for 23 November 2021.

- 23 November 2021: Counsel appeared, and the Court indicated that the judge was "not available to render her decision." The matter was scheduled for status on 20 December 2021.

- 20 December 2021: The record for this appearance is long and rather oblique, with the end result that a date was scheduled, ostensibly for decision rather than to set a date for decision, for 18 May 2022. Defence provided a waiver of delay.

- 18 May 2022: The Applicant appeared and dismissed her counsel. Mr. Cragg was removed as solicitor of record. The Court confirmed that "back on the 12th of April I received confirmation that [the Judge] will remain on leave for an indeterminate period of time". The Court set out options for proceeding, which included further adjournments or the

declaration of a mistrial and recommencement of proceedings pursuant to section 669.2 *Criminal Code*. The Crown sought "to re-commence the trial as soon as possible", but noted that "the Crown is of the view that another adjournment as being the appropriate request in this matter, as we're unaware of when [the judge] will be available." Ms. Prosper wished to "have a delay in this matter to seek out counsel again to get… you know, to be able to make an informed decision on how I would like to proceed with this matter." The matter was adjourned to 27 June 2022.

- 27 June 2022: Mr. Giacomantonio appeared on behalf of Ms. Prosper. The transcript relates the comment from Defence that "the Crown is in the same position that we are, which is to say we're waiting for a decision from [the judge], but we're in a holding pattern at this point." Defence goes on to suggest that "I wonder if it would make sense to put this over to the August intake and at that point pick a path…" The transcript includes no comment at all from the Crown during this Court appearance. The matter was adjourned to 5 August 2022.

- 5 August 2022: There was no update on the expected return of the trial judge, and as such both parties agreed that a mistrial be declared. At the instance of the Court, the declaration of the mistrial was adjourned to 23 August 2022.

- 23 August 2022: the mistrial was formalized and a new trial date was scheduled for 26 May 2023. The first offered date was 10 February 2023; the Defence was not available, but indicated that a matter scheduled for that day might resolve. Defence also gave notice of a potential delay application. A status date of 26 September 2022 was scheduled.

- 26 September 2022: Defence confirmed they were unavailable for the 10 February 2023 date. Defence proposed scheduling a pre-trial conference, the same which was scheduled for 4 November 2022, at which time the Defence would file 11(b) supporting documentation. On both August 23 and September 26 there was discussion on

record about holding a date of 24 February 2023 as well, but this did not crystallize on the record and that date was not scheduled.

- 4 November 2022: Crown and Defence both believed that the date of 24 February was held in addition to the 26 May 2023 trial date; the Court confirmed that only the May 26 date was scheduled. The 11(b) application was scheduled for 21 April 2023 at 130pm.

Issue

[3] The Applicant claims that her constitutional right to be tried within a reasonable time guaranteed by section 11(b) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11(*Charter*) was violated, because the matter exceeds the presumptive 18-month ceiling directed by the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27. The Applicant argues the ceiling is exceeded by more than 18 months, and seeks a judicial stay as the appropriate remedy pursuant to section 24(1) *Charter* (*R. v. Rahey*, [1987] 1 SCR 588).

Analysis

[4] I wish to say at the outset that counsel have been very fair in working cooperatively to narrow the contested timeframes, and have been most helpful in their written and oral advocacy to focus in on the areas requiring the Court's particular attention.

[5] *Jordan* established a clear formula for evaluating whether an accused's constitutionally-guaranteed right to be tried within a reasonable time has been met. There is a presumptive ceiling for trials in provincial court, beginning when the charge is laid, and ending at the anticipated end-of-trial date (*Jordan*, *supra*, para 47). Our Court of Appeal summarized the approach in *R. v. Mouchayleh*, 2017 NSCA 51 at paragraph 6:

1. First, calculate the total delay.

2. Deduct from the total delay any delay waived or caused by the defence.

3. Where the net total exceeds the presumptive ceiling, the onus shifts to the Crown to rebut the presumption of unreasonable delay by demonstrating that there are exceptional circumstances. If the Crown fails to do so, a stay must follow.

4. Where net delay is within the presumptive ceiling, the defence has the onus of showing that the delay is unreasonable. The defence can do this by showing that it took "meaningful steps that demonstrate a sustained effort to expedite proceedings; and the case took markedly longer than it should have".

[6] Defence delay must be clear and unequivocal, and does not include defence actions legitimately taken to respond to the charges; *Jordan* at paragraph 65:

> [65] To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

[7] An exceptional circumstance falls under one of two rubrics:

a. a discrete, exceptional event that lies outside the Crown's control in that it is reasonably unforeseen or reasonably unavoidable, and the Crown cannot reasonably remedy the resultant delay (*Jordan*, para 69); or

b. a complex case that because of its evidentiary nature or the issues involved, requires inordinate trial or preparation time that justifies the delay (*Jordan*, para 77).

Agreed Attributions

[8] Before detailing the agreed timeframes, I wish to spend a moment on terminology. Our Court of Appeal has set out the appropriate terms for the various aspects of the *Jordan* analysis, in *R. v. Pearce; R. v. Howe*, 2021 NSCA 37:

> [59] Recognizing the potential for confusion, we believe these terms should be distinguished in the steps on the *Jordan* analytical ladder: categorization or attribution refer to what a trial judge does when they decide, based on the facts before them, who caused the delay and why it was caused. These determinations are subject to a deferential standard of review. Characterization or

allocation refer to what a judge does when they determine who should "wear" the delay and what constitutes the net delay. This is assessed on a correctness standard.

[60] The terminology issue was recently addressed by the British Columbia Court of Appeal in *R. v. Virk*, 2021 BCCA 58. *Virk* provides a helpful explanation of the use of attribution or categorization (standard of review – palpable and overriding error) and allocation or characterization (standard of review – correctness):

> [13] ...When a judge determines what caused a delay or whether steps were taken with the intention of delaying proceedings and was thus illegitimate, the judge is making a finding of fact or drawing an inference. This attribution of responsibility is therefore owed deference on appeal. Allocation is distinct from attribution. Allocation involves the application of legal principles to the facts found concerning the cause of delay, in order to categorize the period of delay within the *Jordan* or *Morin* framework. Attribution (deciding who or what caused a delay) will often effectively determine allocation (under *Jordan* whether that delay will be deducted), but that is not always so. They are distinct steps, and different standards of review apply to each step.
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> [14] The distinction between attribution and allocation can be demonstrated by way of example. If a judge were to find that defence counsel caused a period of delay by not being available to set trial dates when both the Crown and court were, that is a finding of fact to which deference is owed. But if the judge were, at that point, to decide that the resulting delay should not be allocated to defence delay because defence counsel cannot be expected always to be available, that would be an error of law. There is an established principle that such delay is to be allocated to defence delay: *Jordan* at para. 64.

[61] *Virk* points out that its own court has used "characterization" in discussing whether defence conduct was legitimate or not, a determination that is owed deference. That determination should be more properly termed a "categorization" exercise. The interchangeable usage of these terms has made the process of reading *Jordan* decisions more challenging. Indeed, even in *Virk*'s very clear explanation there is a description of step two of the *Jordan* analysis as follows: "[a]llocation of periods of delay - categorizing periods of delay as either defence delay or as an exceptional circumstance" (at para. 23). As I have explained, categorization is the terminology to be used in the analysis of a trial judge's attribution of responsibility for the delay, a determination that is owed deference.

[9] For certain timeframes throughout the course of this case, the parties have agreed upon who caused the delay and why, properly described as attribution or categorization. In addition to certain agreed attributions of delay by the parties as noted earlier, a mathematical exercise engaged at the commencement of argument also resulted in the parties' agreement on the number of days elapsed between various appearances. The parties are agreed that the time elapsed is 1422 days from the date the charge was laid, 5 July 2019, to the anticipated end of trial, 26 May 2023. This is not necessarily the total delay as contemplated by *Jordan* in this circumstance; I will return to that issue shortly.

[10] The parties are agreed that the days elapsed between 5 July 2019 and 2 December 2019 is 151 days, and are further agreed that this time period forms part of the total delay, and is therefore included in the count to determine the 18-month presumptive ceiling.

[11] The timeframe between 3 December 2019 and 1 April 2020 is fairly conceded by the Defence to be attributable to the Defence, and the parties agree this is 121 days.

[12] From 2 April 2020 to 8 June 2020 is agreed by the parties to constitute 68 days. The Crown argued that this was a period of Covid shutdown that should be characterized as an exceptional circumstance in the delay calculation. To be clear, the Court recognizes at this stage the total delay must first be calculated, from which the Defence delay must then be subtracted, and only if the 18-month presumptive ceiling is exceeded, does the burden shift to the Crown to rebut the presumption of unreasonable delay by demonstrating that there are exceptional circumstances. In any event, the Defence argued in written submissions that a 50% "discount" should be applied to this period, but during the course of oral argument conceded the point and agreed this timeframe is properly a Covid shutdown period and accordingly an exceptional circumstance. I will assess this in the context of the appropriate *Jordan* framework later in this judgment.

[13] 9 June 2020 to 15 September 2020 is agreed by all involved to comprise 99 days. It is agreed to constitute a "Covid-19 reschedule", and will be evaluated as such in the calculation.

[14] 16 September 2020 to 17 November 2020 is agreed by the parties to be a period of 68 days, and the agreement ends there. The Crown Attorney argues this period is properly attributable to the Defence, and the Defence says this is time legitimately taken to the respond to the allegations and make full answer and defence. I will return to this period later in the analysis.

[15] The Defence quite fairly and properly concedes the delay is attributable to Ms. Prosper for the 191-day period from 18 November 2020 to 27 May 2021.

[16] 131 days are agreed to have elapsed from 28 May 2021 to 5 October 2021. Counsel have again worked cooperatively and agreed that 28 May to 2021 to 27 July 2021, a 62-day timeframe, is included in the total delay count but counsel are agreed 50% is attributable to Covid and is therefore an exceptional circumstance in the event the 18-month ceiling is breached. The 49 days from

29 July 2021 to 15 September 2021 is part of the total delay calculation – the Crown was unavailable. From 16 September 2021 to 5 October 2021 is defence delay – the Defendant was unavailable.

[17] The hotly contested timeframes are two-fold: that between 6 October 2021 and 5 August 2022 (or perhaps 23 August 2022), the former marking the case conclusion and the parties thereafter awaiting decision of the Court, to the declaration of mistrial in August 2022; and then from the mistrial to 26 May 2023, the anticipated end-of-trial date. This is where the thrust of the argument lies, and where careful thought is required to sort through the unusual trajectory of this case.

[18] This section that sets out the various agreed-upon time periods between counsel is lengthy, and that reflects the cooperation and reasoned approach taken by the Defence and the Crown Attorney, and I commend counsel for that.

Total Delay

[19] The first step in the *Jordan* evaluation is to calculate the total delay. The period from 6 October 2021 to 5 August 2022; that is, 304 days, will be subject to a separate, but related, analysis.

[20] I have thus determined a total delay of 1118 days, or 36.8 months.

Defence Delay

[21] From that total delay count must be deducted any delay waived or caused by the defence. Defence counsel concedes the period from 3 December 2019 to 1 April 2020 as attributable to the Defence; that is, 121 days, which was in substance a defence request for adjournment of the trial date. Defence counsel also concedes the timeframe from 18 November 2020 to 27 May 2021 as Defence delay, due to failure to procure a timely transcript and resulting adjournment. This is 191 days. This combined period of 312 days is to be deducted from total delay.

[22] The 20 days from 16 September 2021 to 5 October 2021, the Defence agrees is attributable to Ms. Prosper.

[23] Counsel disagree on the attribution of the 64-day period from 15 September 2020 to 18 November 2020. On 15 September 2020, trial proceeded, and all evidence was before the Court. Argument had not commenced. Defence requested a transcript. The matter was adjourned to 18 November 2020 for

status on the transcript. To put this in context, I think it is helpful to recapitulate the *Jordan* instruction to assess defence delay:

> [63] The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises "those situations where the accused's acts either directly caused the delay . . . or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial" (*Askov*, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.
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> [64] As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable. This should discourage unnecessary inquiries into defence counsel availability at each appearance. Beyond defence unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay (see, e.g., *R. v. Elliott* (2003), 114 C.R.R. (2d) 1 (Ont. C.A.), at paras. 175-82).
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> [65] To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

[24] Notably here, defence applications and requests that are not frivolous will generally not count against the defence. The Crown and Court were indeed prepared to proceed; however, while the evidentiary record is not as fulsome as one might hope, Mr. Cragg did say that some of the answers to the questions were not clear and he felt a transcript would be necessary for him to respond appropriately. I do take into account the additional guidance of the Supreme Court in *R. v. Cody*, 2017 SCC 31, paragraphs 32 and 33, as to defence conduct that causes delay, as well as the comments of Judge Derrick (as she then was) in *R. v. Spears*, 2017 NSPC 51 in relation to the treatment of defence unavailability in paragraphs 53 through 56. Further, it is important to note that even legitimate defence motions can be attributable to the defence depending on the manner – particularly the untimeliness – of the defence conduct (*R. v. Boulanger*, 2022 SCC 2, paragraph 5). However, in this case, Mr. Giacomantonio makes the point, well taken, that the trial would not have completed on the September date, with or without the transcript, and some reasonable period of time must be built in to accommodate the completion of

the trial. I am not prepared to make the finding that the Defence request for a transcript at that juncture was a frivolous one, and I count this 64-day period as part of the time required for Ms. Prosper to respond legitimately to the charge against her, and therefore not deducted from the total delay. I hasten to add that the following six months (191 days) are indeed attributed to the Defence due to the failure to procure the transcript in a timely manner.

[25] The total delay of 1118 days less the 396 days that I conclude to be allocated to the Defence, leaves 722 days, or 23.8 months of delay, which exceeds the presumptive ceiling. The onus shifts to the Crown to rebut the presumption of unreasonable delay by demonstrating that there are exceptional circumstances.

Exceptional Circumstances

[26] The Crown can demonstrate exceptional circumstances by satisfying the Court that the case is particularly complex, or by discrete event(s) that are beyond the Crown's control due to being reasonably unforeseeable or unavoidable, and the Crown being unable to reasonably remedy the resulting delay (for direction on its application, see *R. v. Hanan*, 2023 SCC 12).

[27] The Crown has not advanced a submission that the case was complex; indeed, the impaired operation charges are scheduled for a single-day trial.

[28] Counsel have agreed that a period of time lapsed in the course of this matter is properly categorized as Covid-related delay. The Crown has offered comprehensive submissions detailing the effects of Covid on the operation of the justice system across Canada (see *R. v. Ansari*, 2021 ONSC 186; *R .v. Henry*, 2021 ONSC 3303; *R. v. Moeketsi*, 2021 ABPC 99; *R. v. Kalashnikoff*, 2021 ABQB 327). Within our province, Covid delay has been deducted as discrete event, as "not something that could have been anticipated or expected, nor is it something that [could be] easily remedied" *R v. LeRoy,* 2023 NSSC 124.

[29] In *R. v. Graham*, 2022 NSPC 10, aff'd 2022 NSSC 370, Judge Atwood provides a detailed list of Provincial Court restrictions on in-person proceedings with corresponding dates; see also *R. v. Yeo*, 2023 NSPC 11, and for a specific assessment of the scheduling backlog in the Dartmouth Provincial Court, see *R. v. Nagy-Willis*, 2022 NSPC 29.

[30] I will not spend a great deal of time on the evaluation of Covid as an exceptional circumstance in this case and the Crown's role in assessing the true

state of the prosecution (*R. v. Lee*, 2023 NSCA 3), because counsel are largely agreed that it should be categorized as such, for the time periods that I will specify shortly, and the strenuously contested timeframes in this matter do not involve the period that Covid rescheduling was a live issue.

[31] The 68 days from 2 April 2020 to 8 June 2020 is agreed by the parties to be a Covid shutdown that constitutes an exceptional circumstance. I agree, and this period is deducted from the 722 days, or 23.8 months, in calculating the net or adjusted delay.

[32] On 8 June 2020, the parties appeared in Court to set a new trial date, which was scheduled for 15 September 2020. This time is agreed by all involved to comprise 99 days. The Crown argues this is an exceptional circumstance due to the rescheduling that occurred while in the midst of Covid. The Defence referred to this time in his brief as a "Covid-19 reschedule", and acknowledged the Covid-19 pandemic as a discrete event as contemplated by *Jordan* but submits that the failure to triage is fatal to claim the entire period as a subtraction from net delay. Following the analysis of our Supreme Court in *R. v. Burgess,* 2022 NSSC 335, in which Justice Coady upheld a s. 11(b) breach and found no evidence of mitigation or making an effort to prioritize the case by the Crown, apportioning roughly 50% of the delay to the pandemic and the remainder to the Crown for failing to triage, Defence counsel argues that a "50% discount" should be applied to this period because the Crown failed to mitigate. In any event, I find that this three-month period is properly allocated as an exceptional circumstance. In the midst of the Covid shutdown in April, the matter was rescheduled to June to set a new trial date, and that new trial date was scheduled only three months hence, in September of that year – a 3-month turnaround in a busy provincial court demonstrates to me that the case was sufficiently prioritized by all involved. I find this 99-day period represents an exceptional circumstance and is deducted to calculate the net delay.

[33] The net delay is 555 days, or 18.3 months, leading into what I will refer to as the mistrial period that I conclude properly begins on 5 August 2022 and ends on the anticipated end-of-trial date of 26 May 2023.

Mistrial

[34] By 5 August 2022, the sitting judge in DPC3 had been absent since 25 October 2021, some nine months, with no update on an expected return date. Both parties agreed that a mistrial must be declared. At the instance of the

Court, for reasons that are not entirely clear from the record, the declaration of the mistrial was adjourned to 23 August 2022, 18 days later.

[35] On 23 August 2022, the mistrial was formalized and a new trial date was scheduled for 26 May 2023 – nine months later. The parties agree this period is 276 days. The route to get to that May 26 date was, unfortunately, rather meandering. I think it is important to detail that route here.

[36] On 23 August 2022, the first offered date was 10 February 2023; the Defence was not available, but indicated that a matter scheduled for that day might resolve. Defence also gave notice of a potential delay application. A status date of 26 September 2022 was scheduled.

[37] On 26 September 2022, Defence confirmed they were unavailable for the 10 February 2023 date. Defence proposed scheduling a pre-trial conference, the same which was scheduled for 4 November 2022, at which time the Defence would file 11(b) supporting documentation. On both August 23 and September 26 there was discussion on record about holding a date of 24 February 2023 as well, but in a twist of misfortune, this did not crystallize on the record and that date was not scheduled.

[38] On 4 November 2022, Crown and Defence both believed that the date of 24 February was held in addition to the 26 May 2023 trial date; the Court confirmed that only the May 26 date was scheduled. The 11(b) application was scheduled for 21 April 2023 at 130pm.

[39] The evaluation of how to address the declaration of a mistrial and the resulting delay of trial in the context of an 11(b) analysis is addressed by Justice Gabriel in *R. v. Melvin*, 2017 NSSC 149. The Court in that case noted that while mistrials do happen, they "do not occur as a matter of routine or regularity". While the analysis must always be contextual, and a mistrial must not automatically give rise to exceptional circumstances, in that case the Court determined on examination of the record that there was nothing the Crown or the institution could have done to accommodate a jury trial more quickly than it did, and found the Crown demonstrated the mistrial was an exceptional circumstance, with the resulting delay subtracted accordingly.

[40] In this case, while acknowledging that a mistrial is something of a rarity, and certainly not a commonly arising situation, the longer the sitting judge was on leave, absent details or expected return, the more foreseeable this eventuality

became. *R. v. Way*, 2022 ABCA 1, provides helpful and relevant analysis that I consider instructive as it relates to the task before me:

> [32] Proving "exceptional circumstances" based on the discrete event of this hung jury, was not only arguable by the Crown, but appropriately characterized what took place in this case while still obligating the Crown to mitigate any further delay, as is reasonably possible. Here where the trial process unexpectedly went on longer despite the parties' good faith efforts and required a retrial with a new jury, the delay was unavoidable, and therefore amounted to a "discrete, exceptional event".
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> [33] A similar finding was made in ***R v Mallozi***, 2017 ONCA 644 at para 41, 390 CRR (2d) 57 [***Mallozi***], where the Ontario Court of Appeal determined that two mistrials in that case (one by reason of too few empanelled jurors, the other because a juror was dating a police officer involved in the case), qualified as discrete, exceptional events that were reasonably unforeseeable. More recently, in ***R v JT***, 2021 ONSC 365 [***JT***], the Ontario Superior Court also examined the issue of delay time caused by a mistrial, as compared to a retrial ordered after appeal; at paras 29-30:
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> > . . . in my view there is good reason to approach delay after a mistrial differently than delay after an appellate order for a new trial. It can take a year (and often much longer) for an appeal to be heard. Once a new trial is ordered, numerous steps must be retraced. . . .
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> > In contrast, after a mistrial, often the same lawyer will be available to conduct the next trial. No need to delay matters to retain new counsel. No need for new counsel to learn the file from scratch. No need for legal issues to be reargued; rulings rendered at the first trial usually apply. After a mistrial, the parties will often be ready to conduct the next trial in short order. Given this, in my view a complete reset of the *Jordan* clock is generally not warranted after a mistrial. Rather, delay flowing from a mistrial should usually be characterized as exceptional circumstances. I say 'usually' as each case must be assessed on its own facts. There may be instances where the Crown, having caused a mistrial, would be hard-pressed to claim exceptional circumstances. In the same vein, if the defence has caused the mistrial, it may be more appropriate to view the attending delay as defence delay.

[41] The Crown submits that the entirety of the period beginning from the mistrial to the anticipated trial's end should be characterized as an exceptional circumstance and deducted in the calculation of the adjusted or net delay.

[42] I do not accept that a mistrial should result in an automatic characterization of exceptional circumstance, and indeed that is not what *Way* envisions either. Each circumstance must be evaluated, and an assessment of whether some or all of the resulting delay from the mistrial should be allocated to either Crown or Defence must be engaged. With a view to paragraph 75 of Jordan, the *Way* Court confirmed that if the Crown fails to mitigate as a result of a discrete

event, any portion of the delay that could have been mitigated and was not, will not be subtracted from the total delay. At paragraphs 39 through 41:

> [39] However, it must be made perfectly clear that not every mistrial will justify a deduction of delay as an exceptional circumstance between the end of the first trial and the start of the second trial. Such a broad pronouncement would permit automatic deductions in favour of the Crown, and consign accused to almost certain failure in s 11(b) applications, a consequence which does not align with the constitutional principles laid down in ***Jordan***.
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> [40] More specifically, we foresee situations involving prosecutorial misconduct leading to mistrial which could not meet the parameters of exceptional circumstances beyond the Crown's control. Both ***Wu*** at para 79 and ***Beckett*** at para 163, discuss a mistrial resulting from an inflammatory closing address made by the Crown that could not be neutralized by an instruction to the jury. In ***R v JHT***, 2016 BCSC 2382, prejudicial statements made by a Crown witness in front of the jury were found to be under the control of the Crown.
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> [41] Needless to say, these examples do not form an exhaustive list. Many other situations might result in mistrial, including something done by defence counsel, or comments or actions of a trial judge culminating in a successful application for a mistrial based on a reasonable apprehension of bias. We emphasize that each case is to be assessed on its own facts. Deduction of the gap between a mistrial and a retrial must never to be treated as invariable, or inevitable.

[43] The Defence, relying on the approach taken in *Pinkowski*, 2021 ONCJ 35 and *Burgess*, *supra*, proposes that two to three months is a reasonable time period in the circumstances to reschedule a short trial that was already well past the *Jordan* ceiling. Following the *Way* analysis on mitigation, Defence counsel argues the Crown should not be able to rely on the whole of the nine-month timeframe as exceptional. The Defence submits that a minimum of six months be attributed to the Crown and the institution and not deducted as an exceptional circumstance. Although not explicitly stated, it may be that the Defence discounts three of those months to account for the time period between February and May, as the Court first offered a trial date in February 2023, declined by the Defence, and the next available date was 26 May 2023.

[44] In the context of this case, however, should I allocate any time exceeding two weeks in this mistrial period as an exceptional circumstance, it brings us below the 18-month presumptive ceiling, and to the next stage of the analysis. I do find that the declaration of this mistrial and the profoundly peculiar circumstances that preceded it does constitute an exceptional circumstance, and I accord four months as a reasonable timeframe to have prioritized the matter within the existing docket and schedule a trial date. That four months is an exceptional circumstance and is deducted from the total delay. This is a very difficult exercise to engage in *post-hoc*, and avoiding arbitrariness in these timeframes is top of mind. I land on this four-month figure by noting that

rescheduling this same trial two years' earlier during a Covid shutdown took only three months. The remaining roughly two months, I consider is properly inherent or institutional delay and is not allocated as an exceptional circumstance.

[45] I emphasize, however, that given my analysis prior to assessing the mistrial, the count was 18.3 months, or 555 days – 18 months is 547 days. Therefore, should I allocate any of the mistrial time exceeding eight days as an exceptional circumstance – and I do - that brings us below the 18-month presumptive ceiling and to the next stage of the test.

[46] Where net delay is within the presumptive ceiling, the defence has the onus of showing that the delay is unreasonable. The defence can do this by showing that it took "meaningful steps that demonstrate a sustained effort to expedite proceedings; and the case took markedly longer than it should have".

Markedly longer and KGK Analysis

[47] The Supreme Court was clear in *Jordan* that it did not expect findings of delay under this fourth step to be a common occurrence, and that it be limited to clear cases where Defence meets this burden.

[48] While the Defence has gone some distance in persuading me that the case took markedly longer than it should have, I do not find that the record shows the sort of sustained effort by Defence to expedite proceedings contemplated by *Jordan*, and so on this two-pronged fourth step, I am not satisfied that there is an 11(b) breach. However, the analysis does not end here.

[49] On 6 October 2021, all trial evidence was before the Court, the case was argued, and trial concluded. Decision hearing was scheduled for 23 November 2021. On 25 October 2021, the trial judge went on leave, and remains so to date. Defence counsel concedes that the 49 days from 6 October 2021 to 23 November 2021 is verdict deliberation time. The remaining time, from 24 November 2021 to the declaration of the mistrial on 5 August 2022, counsel agree to constitute 255 days.

[50] I have determined that this timeframe from the end of the first trial to the declaration of the mistrial, is not properly considered within the *Jordan* analysis, but Ms. Prosper's constitutionally-guaranteed right to be tried within a reasonable time does not disappear for this period; it is not frozen in time, only to be re-engaged after the mistrial is declared. Her 11(b) rights never cease to be

live. In fact, 11(b) also applies from verdict to sentence (*R. v. MacDougall* [1998], 3 SCR 45). I turn to *R. v. KGK*, 2020 SCC 7.

[51] *KGK* instructs trial courts how to determine whether verdict deliberation time is reasonable within the meaning of section 11(b). At paragraph 65:

> [65] Where an accused claims that the trial judge's verdict deliberation time breached their s. 11(*b*) right to be tried within a reasonable time, they must establish that the deliberations took markedly longer than they reasonably should have in all of the circumstances. This is — appropriately, in my view — a high bar. As indicated, the presumption of judicial integrity operates in this context to create a presumption that the trial judge balanced the need for timeliness, trial fairness considerations, and the practical constraints they faced, and took only as much time as was reasonably necessary in the circumstances to render a just verdict. Only where the trial judge's verdict deliberation time is found to have taken *markedly* longer than it reasonably should have will this presumption be displaced. The reason the threshold is so high — "markedly longer" rather than just "longer" or some lesser standard — is because of the "considerable weight" that the presumption of integrity carries (*Cojocaru*, at para. 20). Stays in this context are significant and, although distinct from stays below the ceiling, they too are likely to be "rare" and limited to "clear cases" (*Jordan*, at para. 48). It bears repeating, however, that where a trial judge's verdict deliberation time is found to have taken markedly longer than it reasonably should have in a particular case, this should not be taken as casting doubt on the judge's overall competence or professionalism.

[52] The period that I conclude is correctly within the analytical framework of *KGK* is 304 days, or 10 months. This is four months beyond the legislated deadline for provincial court judges to render a decision. Further, I take into account that the only information I have in relation to the sitting judge that heard the trial is that the judge is on leave. There is nothing in the evidentiary record, or the case chronology, to indicate that there was verdict deliberation ongoing at any time after 25 October 2021. I should not, and will not, engage in speculation or assumptions. I will rely on the information provided, as above. Even were there information that verdict deliberation were ongoing, provincial courts are statutory courts and we are legislatively bound to render a decision within six months:

> Reservation of judgment
> 8 Upon the hearing of any proceeding the presiding judge may, of his own motion, or by consent of parties, reserve judgment until a future day, not later than six months from the day of reserving judgment. Provincial Court Act. R.S., 1989 c. 238. R.S., c. 238, s. 8.

[53] While trial judges can and should consider proximity to the Jordan ceiling in determining how to prioritize cases in their workload (*KGK*, para 61), it must be approached from presumption of integrity from which judges benefit (para. 54).

KGK comments on the six-month guideline set by the Canadian Judicial Council, which is characterized as an adjudicative duty associated with judicial office (para. 63); however, the provincial court is a statutory court, so the six months is more of a bright line than a guideline in the case at bar. Nevertheless, verdict deliberation time, while strictly speaking characterizes the time period from 6 October 2021 to the declaration of the mistrial in August 2022, it is not the whole story. Indeed, the specific situation here is novel in this province, and across the country so far as I can tell.

[54] I have found it helpful to examine cases involving a seized judge on leave. The case of *R. v. Botsford*, [2022] OJ No. 1634 involved an assessment of net delay due to defence delay and a determination of the remaining delay due to exceptional circumstances. The applicants were arrested on 2 January 2019, on charges of possession of fentanyl and cocaine for the purpose of trafficking contrary to subsection 5(2) CDSA, and the anticipated end-of-trial date was 26 October 2022, some 45 months, exceeding the presumptive ceiling of 30 months for superior court cases. The exceptional circumstances in issue turned on the impact of Covid-19 and the illness of the judge assigned. The judge went on an unexpected medical leave of indefinite duration, with a *Charter* application in mid-evidence. A mistrial was eventually declared by consent of the parties.

[55] The Court discussed that the decision to remove a seized judge from a case should be made carefully, at para 92:

> **92** The judge was seized of the case at the time of his illness. The decision to replace a judge and recommence a proceeding is not to be taken lightly. The Supreme Court of Canada has recognized that while it can be safely said the Crown should bring an application to replace the judge when it is clear the judge will not recover or return to judicial duties, the matter is more difficult where the expectation is that a judge seized of the case will recover and return. The removal of a judge from an unconcluded case has the potential to interfere with the independence of the judiciary and the right of an accuse[d] to a fair trial: *R. v. MacDougall*, [1998] 3 S.C.R. 45 at para. 51.

[56] In that case, the Crown submitted the judge's illness gave rise to delay caused by exceptional circumstances beginning when the application dates were adjourned due to the judge's illness, and continuing to when the judge failed to return from his extended medical leave, or when the matter was next scheduled to be argued. The Court accepted that argument and deducted that time from the net delay due to exceptional circumstances.

[57] In the case at bar, the judge's leave, for reasons and duration unknown on this record, occurred after the case had concluded and the matter was in the hands of the Court for verdict deliberation. In accordance with the direction by the Supreme Court of Canada, and unlike the circumstance in *Botsford*, the assessment is not whether that qualifies as an exceptional circumstance that should be deducted to determine net delay, but rather is squarely within the parameters of *KGK*, whether the deliberation time took markedly longer than it reasonably should have in all of the circumstances. At paragraph 31:

> [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.

[58] I am satisfied that this period of time should be assessed in the *KGK* framework, because the case was at that time turned over to the trier of fact; however, it is complicated by the reality that the record does not indicate that this period was actually verdict deliberation time. The sitting judge was on leave commencing 25 October 2021, the scheduled decision date of 23 November 2021 came and went, and the judge remains on leave now, with no additional information in the intervening period.

[59] The *Jordan* framework involves precision; it sets a ceiling beyond which delay is presumptively unreasonable. It is intended to give meaningful direction to stakeholders to ensure trials are concluded within a reasonable timeframe, and "provide some assurance to accused persons, to victims and their families, to witnesses, and to the public that s. 11(*b*) is not a hollow promise" (para. 50). At the same time, while requiring a *Jordan* analysis, these circumstances also require an evaluation of unique circumstances within the *KGK* framework, but that do not entirely reflect verdict deliberation time. While Ms. Prosper's constitutionally-guaranteed rights remain very much live throughout, it is impossible to disentangle these periods entirely and I am wary of parsing to oblivion. I must emphasize that the Crown has comported itself most reasonably throughout, in my view. This Court most emphatically does not place blame at the feet of any of the involved stakeholders. However, I have arrived at the conclusion that the 10 months from case conclusion in October 2021 to mistrial declaration in August 2022, after Ms. Prosper's case had been in process since July 2019, is simply too long. The equities must lie in favour of the accused. In the particular circumstances of this case, on this record, Ms. Prosper's right to be tried within a reasonable time has been contravened. A

judicial stay of proceedings is the appropriate remedy in relation to both counts. Judgment accordingly, bringing to an end all associated process. The Court is indebted to Mr. Millett and to Mr. Giacomantonio for your professional approach to this difficult case and for your extensive written and oral submissions.

Bronwyn Duffy, JPC