PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. McNeil*, 2023 NSPC 32

Date: 20230612
Docket: 8498084, 8498085
8498086, 8498087
8498088, 8498089
Registry: Dartmouth

Between:

His Majesty the King

v.

Brandon William McNeil

Restriction on Publication: 486.4

Any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way.

DECISION REGARDING APPLICATION FOR A STAY OF PROCEEDINGS

Judge:	The Honourable Judge Bronwyn Duffy,
Heard:	May 16, 2023 in Dartmouth, Nova Scotia
Decision	June 12, 2023
Charge:	§ 153(1)(a), 151, 271 *Criminal Code of Canada*
Counsel:	Jane Mills, for the Public Prosecution Service Mark Holden, for the Defence

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

By the Court:

Synopsis

[1] The Applicant, Brandon McNeil, is charged with offences under sections 151, 271, and 153(1)(a) of the *Criminal Code*. The matters are proceeding by Indictment. These offences are alleged to have occurred between 11 February and 27 February 2021. The Court is addressing an application to stay proceedings due to unconstitutionally lengthy delay.

Procedural History

[2] Counsel have detailed the case chronology in table format based on the transcript of proceedings, which is before the Court. Most appearances are captured in the transcript, though not all.

- 11-27 February 2021: allegation dates.

- 12 March 2021: Information sworn and Mr. McNeil arrested, brought before the Court and arraigned.

- 17 March 2021: show cause hearing.

- 21 April 2021: adjourned for election and plea to 12 May 2021.

- 12 May 2021: adjourned for election and plea to 14 June 2021.
- 14 June 2021: election to Provincial Court, pleas of not guilty entered, and matter adjourned to 18 June 2021 to set a trial date.
- 18 June 2021: two-day trial scheduled for 28 July 2021 and 19 August 2021.
- 28 July 2021: trial proceeded.
- 19 August 2021: trial continuation (day 2) proceeded. Scheduled for 21 September 2021 for trial continuation.
- 21 September 2021: evidence concluded. Discussion on pages 99 through 109 of the transcript (TC) indicates that Defence and Crown would provide written submissions to the Court on 8 October 2021 and 15 October 2021, respectively, and a return date was scheduled for 29 October 2021, which the Court characterized as for "potential follow-up, whether there were questions from me or things that arose as a result" (TC p. 101), later described as "for questions or uncertainty" (TC p. 103), and also scheduled a decision date for 25 November 2021 (TC pp. 101, 103).
- 26 October 2021: Matter brought forward, not confirmed expressly on record whether at the instance of the Court. Both counsel confirmed they had

no further submissions, and the decision date of 25 November 2021 was confirmed. It was not explicit from the record that the trial judge was unavailable for the 29 October 2021 date.

- 25 November 2021: This appearance resulted in an adjournment to 20 December 2021, as the judge was not available to render a decision.

- 20 December 2021: The Court noted to counsel that "I haven't had a chance to communicate with [the trial judge] myself, but through the administration office, they've asked me to put the matter over to February 1 to set a date for the decision. I think that's the earliest that I can put things over based on a … again, the limited information that I have." The matter was accordingly scheduled for 1 February 2022 to set a date for decision.

- 1 February 2022: Counsel appeared, both eager to move the matter forward. Defence counsel emphasized that his client remained in custody waiting to be dealt with according to law. It was noted on record that Ms. Mills for the Crown had made inquiries as to whether a decision could be expedited. The Court scheduled the matter for decision on 22 March 2022, commenting that "at that point, we should have some concrete idea as to [the trial judge's] availability."

- 8 February 2022: This appearance was not noted by counsel in their written submissions, but was in the transcript of proceedings, and involved a discussion regarding a show cause hearing scheduled for later that day, which I understand from the transcript to have proceeded via Teams. Mr. McNeil had formulated a release plan and applied for bail pursuant to the judicial interim release provisions of the *Criminal Code*.

- 22 March 2022: During this appearance, the Court confirmed the trial judge has "been on leave for a considerable period of time. I do not know when [the judge] may return to work but it's not going to be before the middle of May by all indications." The Court invited counsel to give consideration to the provisions of 669.2 *Criminal Code,* and scheduled the matter for 4 April 2022 to hear submissions from counsel in that regard.

- 4 April 2022: This appearance saw counsel jointly request an adjournment, as they agreed they were not prepared at that stage to "make that application", understood to be an application for a mistrial (see TC p. 132). The Crown Attorney is on record asking the Court to offer the reason why the trial judge is not available to render a decision. The Court responded that "the best I can say is medical reasons". The Crown went on to say that "by virtue of the nature of the charges and the age of the children

involved, Mr. Holden and I would like not this [sic] to be a mistrial due to the unavailability or illness of the judge, but maybe that is for another day given what we have discussed." The matter was scheduled for status on 31 May 2022.

- 31 May 2022: This appearance was particularly informative. With no additional information forthcoming vis-à-vis a trial judgment, the Crown Attorney formulated a proposal, as follows: "So uppermost in my mind is doing whatever I can do to prevent a retrial. And so I really am coming here today not… not really wanting to invite the Court. In fact, I don't want the Court to declare a mistrial and I am in … I have this letter which …which Your Honour did send out to Mr. Holden and myself indicating that the trial judge will continue to be on leave for an indeterminate period." The proposal was in effect to reserve trial dates, but not to declare a mistrial *per se*, so that if the trial judge returned in the intervening period, a decision could be rendered. Further, the suggestion was to fix a status date, and if the judge has not returned at that time, there would be a mistrial – or a recommencement of proceedings – per 669.2 *CC*. Defence counsel agreed with the approach, a discussion regarding an insufficient roster of judges followed, and ultimately 16 and 17 May 2023 were reserved for trial in the

event that the trial needs to recommence due to the judge's unavailability. A status date was set for 14 February 2023, to determine whether a new trial will proceed.

- 14 February 2023: Counsel appeared, and the May 2023 trial dates were confirmed for a trial *de novo*. Defence counsel confirmed that there was not consent to use the transcript from the earlier trial being filed as evidence on the merits in the new trial (see section 669.2(3) *CC*; also see *R. c. J.D.*, 2022 SCC 15).

Issue

[3] The Applicant claims that his 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. The Applicant seeks a judicial stay as the appropriate remedy pursuant to section 24(1) *Charter* (*R. v. Rahey*, [1987] 1 SCR 588).

Analysis

[4] *R. v. Jordan*, 2016 SCC 27 established a precise formula for evaluating compliance with an accused's constitutionally-guaranteed right to be tried within a

reasonable time. 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*, ¶ 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".

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

[6] 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*, ¶ 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*, ¶ 77).

[7] There are no express agreed attributions of delay between counsel; that is, who caused the delay and why (see *R. v. Pearce; R. v. Howe*, 2021 NSCA 37, ¶ 59-61 for direction by our Court of Appeal on appropriate terms to be engaged for various aspects of the 11(b) analysis). Counsel are, however, of like mind in general terms that the front end of the proceedings - from charging date to evidence and argument conclusion - does not raise 11(b) concerns. The nucleus of the delay contention is the timeframe beginning on 29 October 2021 and ending on the anticipated end of the trial *de novo*, 17 May 2023.

[8] The focus of this analysis is three-fold:

1. the period between 26 October 2021 and the confirmation of recommencement of proceedings per the loss-of-trial-judge-while-seized provisions of 669.2, which in effect operates as a mistrial, and the determination of when that mistrial crystallized;

2. whether exceptional circumstances enter into the equation; and

3. the application of the *KGK* framework (*R. v. KGK*, 2020 SCC 7).

Total Delay

[9] The first step in the Jordan evaluation is to calculate the total delay. The time elapsed from the date the charge was laid and Mr. McNeil was taken into custody, 12 March 2021, to the anticipated end of trial, 17 May 2023, is 797 days – or 26.2 months. This is not necessarily the total delay as contemplated by Jordan in this circumstance.

[10] I am of the view that the end of the first trial to the declaration of the mistrial is not properly considered within the *Jordan* analysis, but is to be evaluated within the *KGK* framework, and I will return to that in more detail later in these reasons. The total and net delay calculations under the Jordan analysis follow from that conclusion.

[11] Further to the procedural history in paragraph two above, I determine that the case was concluded by the parties and turned over to the trier of fact on 26 October 2021. The return date of 29 October 2021 “for questions or uncertainty” scheduled by the trial judge never did come to fruition, as the judge departed on 25 October 2021 and the institution brought the matter forward on 26 October 2021. It was on this date that counsel confirmed there were no further submissions and the decision date of 25 November 2021 stood.

[12] If the 669.2 declaration takes effect on 31 May 2022, as the Crown argues, that excises the 218-day, or 7.2-month, period from 26 October 2021 to 31 May 2022 as subject to a separate but related *KGK* analysis. In that formulation, the total delay is 579 days, or 19 months.

[13] If instead the 669.2 finding crystallizes on 14 February 2023, the accounting for total delay figures at 320 days, or 10.5 months.

[14] The first delay calculation would exceed the presumptive ceiling; the second would not. This changes the landscape of the analysis. It does not, however, change the end result in this Court’s estimation. For ease of reference, I am calling the timeframe between case conclusion and mistrial declaration the *KGK* period. Whether this period is 7.2 months or 15.6 months, the effect in this situation is the

same. It is a distinction without a difference when evaluating the reality of this case and the argument becomes academic. I will explain why.

[15] Based on the record before me, and particularly the 31 May 2022 appearance, I conclude that the proposal formulated by counsel was to reserve trial dates but not declare a mistrial, so that if the sitting judge returned in the intervening period, a decision could be rendered. Accordingly, the 669.2 declaration occurred on 14 February 2023, when it was confirmed a new trial would be heard. The timeframe henceforth is properly within the Jordan analysis and included in the calculation to arrive at the presumptive ceiling.

[16] The total delay is 320 days, or 10.5 months.

[17] At this stage I will say that Crown counsel, Ms. Mills', proposal to reserve trial dates but not declare a mistrial was a reasonable course of action in the circumstances. It was a thoughtful method of navigating a quagmire. The Crown was faced with a second prosecution of a serious case involving child complainants that would have to testify for a second time. Rather than embark on this highly unsatisfactory route, it left open the door for a verdict to be rendered upon return of the trial judge prior to a new trial. Her approach is commendable, as was it for Defence counsel to join in the request.

[18] Notwithstanding this calculation of total delay, which is below the presumptive ceiling, I will remark briefly on defence delay.

Defence Delay

[19] From the total delay count must be deducted any delay waived or caused by the defence. The procedural history detailed in paragraph two reflects a 229-day, or 7.5-month period from charging date to conclusion of the first trial, 12 March 2021 to 26 October 2021, the latter date when counsel confirmed submissions were complete and the matter was turned over to the trier of fact. The accused was in custody and the case progressed quickly; the entirety of this period is within the proper scope of legitimate action taken by the defendant to respond to the charges and enable full answer and defence.

[20] I allocate no delay to the Defence. If the net delay at this stage exceeds the presumptive ceiling of 18 months, the onus shifts to the Crown to rebut the presumption of unreasonable delay by demonstrating that there are exceptional circumstances.

[21] Where net delay is within the presumptive ceiling, as it is here, 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”.

Meaningful Steps and Markedly Longer

[22] 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.

[23] In assessing the timeframes I conclude to be properly within the Jordan analysis, and on an assessment of the case chronology as summarized in paragraph two, I do not find that this record shows the sort of sustained effort by Defence to expedite proceedings contemplated by *Jordan*. Falling short of one branch of this two-pronged fourth step ends that portion of the analysis; I am not satisfied that the defence has discharged their onus of showing that the delay is unreasonable.

Verdict Deliberation and *KGK* Analysis

[24] On 21 September 2021, all trial evidence was before the Court, counsel had agreed to conduct argument by written submission and briefs were filed by mid-October. It was confirmed on 26 October 2021 that no further submissions were forthcoming. Decision hearing was scheduled for 25 November 2021. On 25

October 2021, the trial judge went on leave. By 14 February 2023, the sitting judge in DPC3 had been absent since 25 October 2021 - one year, three months and 21 days - with no update on an expected return date. Both parties agreed that a mistrial be formally declared and the trial dates reserved some nine months prior were confirmed.

[25] 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. The temporal span of *Jordan* is itemized with a fine point by the Supreme Court in *KGK*:

> [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.
>
> [32] In *Jordan*, this Court set out a new framework under s. 11(*b*) of the *Charter*. At the heart of this framework were two presumptive ceilings, beyond which delay is presumed to be unreasonable: (1) an 18-month ceiling for single-stage cases proceeding in the provincial court; and (2) a 30-month ceiling for cases proceeding in the superior court or in the provincial court after a preliminary inquiry (para. 49). Those ceilings operate as follows:
>
> > If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) *exceeds* the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.
> >
> > If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls below the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must

> establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases. [Emphasis in original; paras. 47-48.]
>
> [33] While *Jordan* states that the presumptive ceilings apply "from the charge to the actual or anticipated end of 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.

[26] In arriving at the *Jordan* ceiling calculation, the time to be included in that count applies from the charge to the end of the evidence and argument, full stop. It is essential to appreciate that this does not require proof on some standard - or require an evidentiary basis at all - that the trial judge was actually deliberating on the matter during some or all of that time. When a judge hears a case, whether that same judge spends eight hours per day or 24 hours per day deliberating on that case until a verdict is delivered some time thereafter is immaterial. Rather, verdict deliberation time is the time after which the case is no longer in the hands of the parties and their legal counsel, but has been turned over to the judge to render a decision.

[27] Furthermore, just because this timeframe is not assessed within the *Jordan* configuration, Mr. McNeil's constitutionally-guaranteed right to be tried within a reasonable time continues, and the *Charter* protection to which he is entitled loses

no potency. Section 11(b) rights are live throughout the piece, from charge to verdict, and continuing from verdict until sentence (*R. v. MacDougall* [1998], 3 SCR 45).

[28] *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.

[29] The period that I conclude is properly within the analytical framework of *KGK* is 477 days, or 15.7 months. I have not located a case involving a matter awaiting verdict where the judge is on indeterminate leave – except in this Court (*R. v. Prosper*, 2023 NSPC 27). That case involved a 10-month period from case conclusion to mistrial declaration.

[30] This is just shy of ten months beyond the legislated deadline for provincial court judges to render a decision (*Provincial Court Act*. R.S., 1989 c. 238. R.S., c. 238, s. 8, Reservation of judgment). The province does not have constitutional competency to legislate on criminal procedure, so if this statutory deadline is within the scope of criminal procedure, that leaves in question whether the time limit for rendering a decision in the provincial legislation is applicable to a criminal proceeding; however, it is at the very least a practical limit. The information on record is spare in relation to the absence of the sitting judge that heard the trial - the judge is on leave. When pressed by the Crown Attorney, the information provided by the institution was "the best I can say is medical reasons". A letter to involved counsel on cases affected by this circumstance, sent by administration on 12 April 2022, noted only that the judge will be "on leave for an indeterminate period." There is nothing on the record to indicate that there was actual verdict deliberation ongoing at any time after 25 October 2021. As earlier discussed, that point is of little import.

[31] The delay analysis for the verdict deliberation period must be approached from presumption of integrity from which judges benefit:

> [55] This test should be approached in light of the presumption of integrity from which judges benefit. This presumption "acknowledges that judges are bound by their judicial oaths and will carry out the duties they have sworn to

> uphold" (*Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357, at para. 17, quoting *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267, at para. 29, per Abella J., dissenting). As part of their duty to uphold *Charter* rights, judges are under an obligation to minimize delay at all stages of the trial process, including during the verdict deliberation phase. Post-*Jordan*, judges — like all participants in the justice system — should be acutely aware of the issues that promote delay and which can, in turn, give rise to a s. 11(*b*) violation.

[32] *KGK* comments on the six-month guideline set by the Canadian Judicial Council, which is characterized as an adjudicative duty associated with judicial office at paragraph 63. However, unlike the Court of Queen's Bench that was the *KGK* trial court, which delivered a verdict in slightly over nine months (at ¶ 5), the provincial court is a statutory court, so the six months is legislated rather than a guideline by the Canadian Judicial Council, the latter which governs the superior court with inherent jurisdiction.

[33] *KGK* offers trial courts a non-exhaustive list of factors to consider in the deliberation time analysis. Whether the case was closely up against the *Jordan* ceiling prior to deliberation time is one of them. It was not in the case at bar; the matter was just seven months beyond the charging date when turned over to the trier of fact and this factor does not support a markedly longer determination as it relates to deliberation time.

[34] The overall complexity of the case is another notable consideration. The Crown Attorney did raise a complex case submission, as a comparative assessment

between the case at bar and both *KGK* and *Prosper, supra*. I agree with Ms. Mills that the case is more complex than the latter two, given the time scheduled for trial, and the evidentiary procedure that applies to the evidence of child complainants. That said, *KGK* at ¶ 70 when referencing case complexity hearkens to the Jordan analysis of a complex case argument at ¶ 88. When expanding upon what constitutes a complex case, the Court returned that a typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance (¶ 78). I do not consider that this matter, scheduled for two days of trial, meets the threshold for a complex case as contemplated by *Jordan*.

[35] Court communications on length of deliberation is relevant. As has been remarked throughout, and which is evident from the case chronology set out in paragraph two, there is little information to go on. The trial judge went on leave, for duration unknown and reasons largely unknown. The administration did say at one juncture that it was for medical reasons. In correspondence to the lawyers involved in affected cases, the information was thin - just that the leave was indeterminate. It is at this juncture that it becomes apparent that this is not the sort of verdict deliberation time that is reflected in *KGK* and motivated that analysis. *KGK* did not involve a judge on leave; *KGK* did not involve a “mistrial” period thereafter, leaving the verdict deliberation time bookended by proceedings before

and after. This period must be analysed within that framework because it is the period following the end of the evidence and argument; it is most assuredly not properly assessed within the *Jordan* context.

[36] I have examined cases involving a seized judge on leave (see *Prosper*, *supra*, ¶ 53-56). 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 total delay in that case was 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.

[37] The hearing judge in *Botsford* 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.

[38] The Court accepted that the judge's illness gave rise to delay caused by exceptional circumstances and deducted the time 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, from the net delay due to exceptional circumstances. None of the cases citing *Botsford* map any more closely onto the particular circumstances involved in the case at bar.

[39] Unlike the circumstance in *Botsford*, the assessment here is not whether that time qualifies as an exceptional circumstance that should be deducted to determine net delay, but rather is within the parameters of *KGK*, as the matter was in the hands of the Court for verdict deliberation.

[40] The sitting judge was on leave commencing 25 October 2021, counsel confirmed on 26 October 2021 the case was concluded, and the scheduled decision date of 25 November 2021 passed. The accused remained awaiting verdict for 15.7 months, until the mistrial was declared and it became a foregone conclusion that the case must be tried anew.

[41] Section 11(b) protects individual interests from the charging date to the date the verdict is rendered. *KGK* reminds us at paragraph 59 that while awaiting verdict, accused persons remain subject to “the same liberty restrictions, stresses,

and stigma that existed between the laying of charges and the end of the evidence and argument at trial," and that these interests are best protected by concluding proceedings as quickly as possible.

[42] It is particularly important to reflect on the comments of the Supreme Court in *KGK* as it relates to trial fairness, and how it its characterization differs in the *Jordan* context as compared to verdict deliberation time (¶ 60). Deliberation time reflects the time for a trial judge to "justly adjudicate a particular case." The careful and thoughtful assessment of the trier of fact results in this time "inur[ing] to the benefit of the accused and society at large." It is crucial to acknowledge that these 15.7 months did not inure to the benefit of Mr. McNeil.

[43] For these reasons, a judicial stay of proceedings is the appropriate remedy in relation to both counts. I will go on to explain why the decision to 'call' the mistrial on 14 February 2023 or on 31 May 2022 does not alter the conclusion by this Court.

[44] If the mistrial is declared on 31 May 2022, the timeframe subject to *KGK* verdict deliberation analysis is 218 days, or 7.2 months. In that formulation, the total delay is 579 days, or 19 months.

[45] I have allocated no delay to the Defence, (¶ 19-20); accordingly, the net delay in this scenario exceeds the presumptive ceiling by one month. The onus shifts to the Crown to rebut the presumption of unreasonable delay by demonstrating that there are exceptional circumstances.

Exceptional Circumstances

[46] 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 (*R. v. Hanan*, 2023 SCC 12; R. v. Jordan, supra).

[47] I do not accept that this case is sufficiently complex to warrant allocation as an exceptional circumstance, for the reasons detailed in paragraph 34.

[48] By 31 May 2022, the sitting judge in DPC3 had been absent since 25 October 2021, with no update on an expected return date. Trial dates were reserved for 16 and 17 May 2023.

[49] Justice Gabriel addressed the declaration of a mistrial and consequent delay in the context of 11(b) in *R. v. Melvin*, 2017 NSSC 149. The *Melvin* Court emphasized that the analysis must always be contextual, and that while mistrials

are infrequent, they do occur from time to time, 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 discharged its burden to rebut the presumption of unreasonable delay by demonstrating exceptional circumstances, and the delay was subtracted accordingly.

[50] Here, the case was in the hands of the trier of fact for seven months when the parties reserved new trial dates in contemplation of a mistrial. *R. v. Way*, 2022 ABCA 1, is instructive. In that case, the trial process exceeded expectations in length despite the parties' efforts to expedite, and required a retrial with a new jury; the Court determined this amounted to a discrete, exceptional event of the type contemplated by *Jordan* (*Way*, *supra*, at ¶ 32). The Ontario Court of Appeal arrived at a similar conclusion in *R. v. Mallozi*, 2017 ONCA 644, in its determination that two mistrials were properly characterized as discrete, exceptional events that were reasonably unforeseeable (¶ 41). In *R. v. JT*, 2021 ONSC 365, the Ontario Superior Court examined mistrial delay and concluded that a reset of the *Jordan* clock is not the appropriate approach, but rather that the delay flowing therefrom should usually be characterized as exceptional, with the notable

caveat that each case must be assessed on its facts; if Crown or Defence was responsible for the delay, the allocation would change accordingly (¶ 29-30).

[51] 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.

[52] Defence counsel argues the Crown should not be able to rely on the whole of this timeframe as exceptional (See *R. v. Burgess*, 2022 NSSC 335 and *R. v. Pinkowski*, 2021 ONCJ 35 for apportionment of delay within a single appearance timeframe).

[53] A mistrial should not result in an automatic characterization of exceptional circumstance. Each circumstance must be evaluated, and an assessment to which party it is properly allocated must be undertaken.

[54] In this case, should I allocate any time exceeding one month in this mistrial period as an exceptional circumstance, it is then below the 18-month presumptive ceiling. I do find that the declaration of this mistrial does constitute an exceptional circumstance; this event was reasonably unforeseeable and beyond the Crown's control to remedy, unclouded by prosecutorial misconduct, nor by any Defence action that would support a contrary allocation. I accord six months as a reasonable

timeframe to have prioritized the matter and schedule a trial date. That six-month block is an exceptional circumstance and is deducted from the total delay, and I arrive at that figure by noting that the initial scheduling of this trial took only three months from charging date to conclusion of trial evidence. The remaining six months I consider is properly inherent or institutional delay and is not allocated as an exceptional circumstance.

[55] Where net delay is within the presumptive ceiling, the defence has the onus of showing that the delay is unreasonable. As discussed in paragraphs 22 and 23 of these reasons, I am not satisfied that there is an 11(b) breach on this step.

Conclusion

[56] The analysis thus returns to *KGK* deliberation time, and in this analytical construct the period is 7.2 months.

[57] My reasoning at paragraphs 31 through 35 is of equal effect; the time exceeds the statutory limit for a provincial court decision; the case conclusion date remains unchanged so the consideration of temporal proximity to the Jordan ceiling prior to deliberation is the same; the case complexity factor does not differ in character under this analysis. The question of court communications and the appropriate action when a seized judge is on leave is the centre of the issue,

because although this is verdict deliberation time in the sense that the case was in the hands of the court, the reality of the question is at what point should the decision have been made to replace the judge and recommence the proceeding. With little to no information regarding return of the trial judge, it is a very difficult call to make. Furthermore, it is clear from the record that the decision was not made then. Trial dates were reserved – for a year down the line – but the mistrial was not declared. If anything could have been improved, it would have been to access trial dates less than a year hence. It is in the forefront of my mind that it easy to say the mistrial should have been declared early with the benefit of information now known.

[58] It bears repeating that I am wholly satisfied the Crown did what they could to prioritize this case – there were emails filed asking for updates from administration, and the transcript speaks for itself. The proposal by Ms. Mills to reserve trial dates but not declare a mistrial was a thoughtful action that permitted the possibility of the judge returning and rendering a verdict rather than engage a second prosecution involving vulnerable complainants. Likewise, the Defence cannot be faulted or construed to be conceding delay for joining in this proposal; to do so would be misguided censure. Counsel did what they could. There is no easy answer to this quandary. To arrive at a conclusion, I return to the principles in

Jordan and *KGK*. Any person charged with an offence has the right to be tried within a reasonable time. In *Jordan*, the Court established a framework to combat the complacency that had taken root in the criminal justice system and was causing excessive delays in bringing accused persons to trial. In *KGK*, recognizing the individual and societal interests protected by 11(b), trial fairness and timely trials among them, the Court set out a formulation within which to assess delay occasioned by verdict deliberation and encourage bringing proceedings to an end in a timely way. Mr. McNeil's trial ended in October 2021. He has yet to receive a verdict.

[59] This is not a failing on the part of the prosecution. Nevertheless, were the accused individual to bear this delay at the expense of *Charter*-enshrined rights, the public at large is disadvantaged - deprived of timely trials that are important for victims, for accused, and for public confidence in the system - and consequently the administration of justice is diminished. This is a problem of inherency that must be borne by the institution as a whole. A judicial stay of proceedings is recorded.

Bronwyn Duffy, JPC