SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Adam Joseph Drake*, 2024 NSSC 430

Date: 20240215
Docket: CRH 519166
Registry: Halifax

Between:

His Majesty the King

v.

Adam Joseph Drake

Decision on s. 11(b) *Charter* Application
***Voir Dire* #3**

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	January 26, 2024
Oral Decision:	February 15, 2024
Written Release to Parties:	February 15, 2024
Release for Publication:	June 17, 2025
Counsel:	Cory J. H. Roberts and Carla B. Ball, for the Provincial Crown
	Stanley W. MacDonald, K.C. and Allan F. MacDonald, for the Applicant, Adam Joseph Drake

By the Court (Orally):

[1] Tyler Ronald Joseph Keizer died on Gottingen Street in Halifax, Nova Scotia, on November 21, 2016. Adam Joseph Drake has been charged with first-degree murder in relation to his death. Mr. Drake's trial is scheduled to be heard in this court from April 2 to May 3, 2024. Preliminarily, he says that his right to be tried within a reasonable period of time, as set out in section 11(b) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), has been infringed. He therefore asks this Court to impose a stay of proceedings.

Background *(Overview)*

[2] Mr. Drake was originally charged in an Information sworn on March 7, 2019. On December 13, 2019, a direct Indictment was preferred. That preferred Indictment was replaced on November 6, 2020, because the original was discovered to have contained a typographical error. The trial was scheduled to commence on November 2, 2021.

[3] A number of applications were heard in anticipation of that start date. They included records applications, an application to produce witness protection records, a *Charter* application alleging unreasonable search and seizure, applications to introduce certain types of evidence which were presumptively inadmissible, and the like.

[4] On October 29, 2021, counsel were before the (then) trial judge, Justice Boudreau, addressing some issues tangential to one of her rulings, as well as some jury selection issues. At that time, the Crown withdrew the charges set out in the Indictment of December 13, 2019, as amended on November 6, 2020 (to which I subsequently refer to as "the first Indictment"). A transcript of the exchange leading to the withdrawal of the charge appears in Tab D of an affidavit filed by Jack A.F. MacDonald, dated August 25, 2023. I reproduce it below:

THE COURT:	Thank you, please be seated. Alright this afternoon we return to the matter of the Queen and Adam Drake. We adjourned from this morning. Mr. Harlen needed some time. Mr. Hartlen, are you ready to proceed?
MR. HARTLEN:	I am My Lady. With regard to the Indictment currently before the Court, CR number 495087 charging Adam Joseph Drake with first degree murder, the Crown at this time upon review

	of the available evidence, is withdrawing the charge. We are specifically not undertaking not to relay. Thank you.
THE COURT:	I'm taking it Mr. Hartlen and I don't need any details but I'm taking it this is because of brand new information? The only reason I ask is because you recall two weeks ago I had asked about whether this was proceeding. This Courtroom now won't be used because its too late to offer it to someone else.
MR. HARTLEN:	I appreciate that My Lady.
THE COURT:	Alright, thank you. So, the charge is being withdrawn by the Crown. Mr. Drake I believe is on a Recognizance, is that correct?
MR. MACDONALD:	That's correct.
THE COURT:	Alright so that Recognizance then would be vacated unless someone can tell me why it shouldn't be.
MR. HARTLEN:	It should be.
MR. MACDONALD:	No reason why the Recognizance shouldn't be vacated. The only issue that I have to take a look at, is it was issued out of the Nova Scotia Court of Appeal. So, I have to follow up on that. I just don't know off hand whether that, I mean with the Crown withdrawing the charge, no doubt the Recognizance I'm sure follows. But just because it's a different situation I just want to make sure of that.
THE COURT:	Alright, so I guess I'll just note for the record that in principle it's understood that that Recognizance would be vacated but you'll double check on that Mr. MacDonald, to make sure the paperwork doesn't, there's no confusion there?
MR. MACDONALD:	Correct. Thank you.
THE COURT:	Alright, is there anything further then on the matter?
MR. HARTLEN:	No, My Lady thank you.
MR. MACDONALD:	One moment, My Lady. No, that's everything. Thank you.
THE COURT:	Thank you. Alright the charge is withdrawn. The matter is concluded. Thank you all.

[5] On October 8, 2022, almost one year later, a second Information was laid. The charge therein was identical to the one in the first Indictment. On November 17, 2022, this "second Indictment" was preferred against Mr. Drake. This is the third *voir dire* that this Court has heard since the preferment of the second Indictment. The decisions with respect to the other two have not yet been published, since Mr. Drake's jury trial has not yet taken place.

A more specific description of what occurred

[6] The foregoing is a very broad overview of the proceedings. Nonetheless, the parties are almost completely agreed as to what intermediate events occurred between the above referenced "goalposts". Predictably, where they part ways is with respect to the complexion which the Court ought to place upon them, and the consequent attribution, in some instances, of delay which was occasioned along the way.

[7] A chronology was included with Mr. Drake's brief filed on November 24, 2023. I have largely followed it when preparing the following:

Date	**Court Appearance**	**Provincial Court – 1st Charge**
March 7, 2019		Information laid
March 7, 2019	1st	First appearance in Halifax Provincial Court
March 19, 2019	2nd	The Court was advised that some preliminary disclosure had been made. The matter was set over to April 10, 2019.
April 10, 2019	3rd	The Court was advised that some disclosure had been made. The matter was adjourned to May 1, 2019.
May 1, 2019	4th	Some disclosure had been received that morning. Court was advised that a bail hearing had been set for May 21 & 22, 2019. The matter was set over to May 29, 2019, to review disclosure, await the outcome of the bail hearing and potentially set Preliminary Inquiry dates.
May 29, 2019	5th	The Court was advised that the bail hearing was continuing. The matter was set over to June 17, 2019.
June 17, 2019	6th	The Court was advised that Mr. Drake's application for bail was denied. The Court was also advised that five days would be required for the Preliminary Inquiry, so the file was transferred to Halifax Provincial

		Courtroom #6 (the "long trial" court) on July 2, 2019 for scheduling.
July 2, 2019	7th	The parties appeared before Judge Buckle for the purpose of setting Preliminary Inquiry dates. Five days were required. Judge Buckle offered two sets of dates in September, 2019. Mr. MacDonald was involved in a murder trial that was set for those dates and not available. Co-counsel Ian Hutchison was not available. The Court then offered the week of December 2nd and Mr. MacDonald declined, but both Mr. Hutchison and Mr. MacDonald were available on the week of December 16th. The Court was not. In the end result, the Preliminary Inquiry was set to begin on January 27, 2020.
September 3, 2019	8th – Focus Hearing	Outstanding disclosure was discussed.
October 15, 2019	9th – Focus Hearing	The Court was advised that the defence had just received a hard drive containing additional disclosure. Outstanding further disclosure issues were raised.
November 12, 2019	10th – Focus Hearing	The Court was advised that Mr. Drake was provided with disclosure and that counsel were to meet with him on November 14, 2019, to discuss committal issues.
December 2, 2019	11th	A Statement of Issues and Witnesses had been filed the previous week. There were discussions about calling certain witnesses.
December 13, 2019		The direct Indictment (the first Indictment) was preferred. It had been signed on December 16, 2019 (copy attached in Book of Materials at Tab 2) and filed with the Court.

December 16, 2019	12th	Ongoing disclosure issues discussed. Defence was advised that first the first Indictment has been preferred. The Crown subsequently filed an amended direct Indictment dated November 6, 2020 to correct a typographical error.
Date	**Court Appearance**	**Supreme Court – 1st Charge**
January 2, 2020	1st - First Appearance in Crownside	Pre-Trial Conference was set for January 17, 2020, and return to Crownside set for January 23, 2020.
January 23, 2020	2nd - Crownside	During that appearance, trial dates were set. There was no indication that any earlier trial dates were available. Trial was set for March 16, 2021, to April 28, 2021.
March 13, 2020	Jury Trials suspended due to COVID-19	
December 18, 2020	3rd	This appearance was initiated by the Crown to attempt to juggle outstanding serious jury trials as a result of the COVID pandemic. It was precipitated by a letter to the Court from Paul Carver dated November 6, 2020. Defence wrote to the Court on November 18, 2020, advising that Mr. Drake was opposed to an adjournment of his existing trial dates. The trial was ultimately adjourned to commence on November 2, 2021 and end on December 9, 2021, 7 months and 11 days after the earlier dates which had been scheduled.
April 1, 2021	Jury Trials able to resume at Mellor Jury Facility	
April 24, 2021	Jury Trials again suspended	
June 7, 2021	Jury Trials resume again	
Various Court appearances and applications		

October 29, 2021		Crown withdrew charge in first Indictment.
Date	**Court Appearance**	**Provincial Court – 2nd Charge**
October 22, 2022		New Information Laid
October 31, 2022	1st	First appearance in Halifax Provincial Court. The Court was advised that a direct Indictment would be filed.
November 17, 2022		Direct Indictment is issued (second Indictment)
Date	**Court Appearance**	**Supreme Court – 2nd Charge**
November 24, 2022	1st – Crownside	First appearance in Crownside. A date was set for a Pre-Trial Conference (December 13th) and return to Crownside on December 15, 2022.
December 15, 2022	2nd – Crownside	Crownside – April 2 to May 3, 2024 dates were set for trial (earliest available dates).

Issue

[8] The only issue to be determined at this time is whether Mr. Drake's right to be tried within a reasonable time, pursuant to section 11(b) of the *Charter*, has been infringed.

Law and Analysis

[9] All parties concede that the well-known framework set out in *R. v. Jordan*, 2016 SCC 27, and reaffirmed in *R. v. Cody*, 2017 SCC 31, is applicable. Some of the basic principles to be extracted from these cases include:

- There are 2 presumptive ceilings: 18 months for cases tried in Provincial Courts and 30 months for cases tried in Superior Courts (*Jordan*, para. 46).

- Step 1 of the analysis involves the calculation of the total delay "from the charge to the actual or anticipated end of trial" (*Jordan*, para. 60).

- Step 2 requires the calculation of delay that the Court considers should be attributed to the defence. This is then subtracted from the total delay (calculated in Step 1). The result is then compared to the applicable presumptive ceiling (*Jordan*, para. 67).

[10] What happens after steps one and two have been completed is described in *Cody* as such:

> [23]If the net delay falls below the 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. [Emphasis in original.]
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> [24]If the net 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.
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> [Emphasis added]

[11] In attempting to discharge the burden established in *Jordan* (and discussed in *Cody)*, and cite "exceptional circumstances" to excuse delay, the Crown must be able to point to circumstances that were outside of its control. These would be things which were reasonably unforeseeable or unavoidable, and not reasonably remediable. If steps were available that could have avoided or addressed the problem before the delay exceeded the ceiling, they would need to be shown to have been taken. (*Jordan*, paras. 66 – 70)

[12] What is also very clear in *Jordan* is that these deadlines are not mere "aspirational targets". Justice Moldaver was unequivocal on this point:

> [54] … although prejudice will no longer play an explicit role in the s. 11(*b*) analysis, it informs the setting of the presumptive ceiling. Once the ceiling is breached, we presume that accused persons will have suffered prejudice to their *Charter*-protected liberty, security of the person, and fair trial interests. As this Court wrote in *Morin*, "prejudice to the accused can be inferred from prolonged delay" (p. 801; see also *Godin*, at para. 37). This is not, we stress, a rebuttable presumption: once the ceiling is breached, an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one.
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> [Emphasis added]

Total Delay

[13] The defence contends that the total delay in this case amounts to 1885 days, or 61 months and 27 days (November 24, 2023 brief, para. 12). The Crown, in its brief, says that the cumulative total is 1886 days (Crown brief, January 10, 2024 - Table, para. 6, page 3). I find that the total delay is 1886 days, or 61 months and 28 days.

Defence Delay

[14] What will constitute defence delay in this context was explained in *Cody*:

> [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 insomuch as it is not taken to respond to the charges. As we said in *Jordan*, the most straightforward example is "[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests" (*Jordan*, at para. 63). Similarly, where the court and 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).
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> [Emphasis added]

i) Preliminary Inquiry ("PI") Dates

[15] The first bone of contention relates to a period immediately after the original Information was sworn on March 7, 2019. The Crown concedes that the "Jordan clock" extends to "the last date of PI hearing dates offered by court when Crown was available" (Brief, para. 6). They argue, however, that at an appearance in the Provincial Court of Nova Scotia on July 2, 2019, Judge Elizabeth Buckle offered two sets of dates (September 23 - 27, 2019, and the week of September 30 – October 4, 2019) during which the Court and Crown were available and Defence counsel were not. Other dates in December (the week of December 2, 2019) were also declined by the defence. Defence counsel were available the week of December 16, 2019, and the Court was not.

[16] Ultimately, dates for the PI were set. The proceeding was to begin on January 27, 2020 and run for 5 days. The Crown's position is that, as a consequence of all of this 77 days should be deducted from the 285 days which transpired between March

7, 2019 and December 16, 2019. The latter date was the one on which the direct Indictment was preferred, thus requiring that the "PI format" be jettisoned.

[17] The defence explains that counsel's unavailability in September 2019 was a consequence of Mr. MacDonald having been scheduled for a murder trial relating to an in-custody accused during the dates that were offered, and (then) co-counsel Ian Hutchison also being unavailable. Counsel for Mr. Drake argues that "...rejecting the proposed September dates for this reason was not only reasonable but the correct thing to do" (Defence brief, para. 26).

[18] Defence counsel cites *R. v. Hanan*, 2022 ONCA 229, aff'd 2023 SCC 12 in support of its position, and in particular, the following paragraphs (unless otherwise indicated, all subsequent references are to the Court of Appeal decision):

> [136] I am also prepared to agree with my colleague's treatment of the second period of delay starting on June 3, 2019. Like my colleague, I reject the Crown's contention that the entire period of the delay between the two trial dates should be attributable to the defence. In so agreeing, however, I should not be taken as agreeing with the deduction of the six-week period when defence counsel could not proceed because of another trial commitment. In my view, that deduction is not consistent with the decision in *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, where Cromwell J. said, at para. 23:
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> Scheduling requires reasonable availability and reasonable cooperation; it does not, for s. 11(*b*) purposes, require defence counsel to hold themselves in a state of perpetual availability … "To hold that the delay clock stops as soon as a single available date is offered to the defence and not accepted, in circumstances where the Crown is responsible for the case having to be rescheduled, is not reasonable." [Emphasis added.]
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> [137] In this case, defence counsel had another trial set for that timeframe involving a client who was in custody. It is the antithesis of reasonable cooperation to hold that defence counsel, who is otherwise scheduled for trial, must essentially abandon another client in order to take a re-scheduled trial date, or face the consequence that the resulting delay will be attributed to the defence. However, as the appellant did not take issue with the deduction of this six-week period in this case, it is unnecessary to resolve the issue, notwithstanding that the Crown took issue with the whole period of delay and its proper attribution.

[19] It is important to bear in mind, however, the particular circumstances with which the court dealt in *Hanan*. In that case, the appellant was charged with first-degree murder and attempted murder on December 24, 2015. On July 8, 2016, the Supreme Court released its decision in *Jordan*. On July 21, 2016, the defence requested an adjournment because of a change in counsel and also pointed out that

further disclosure was needed. Crown counsel expressed the need to move the case forward.

[20] Without delving too far into the minutiae of what went on in the meantime, in February 2018, a six-week jury trial was scheduled to commence on November 5, 2018. What happened next was this:

> [27] On the eve of trial, the Crown encountered two significant challenges. First, the surviving victim refused to testify and could not be compelled to do so because he was not in Canada. As a result, the Crown intended to apply to introduce his preliminary hearing testimony and police statement as evidence at the trial, which would entail motions that would inevitably delay the start of the trial. Second, the police had succeeded in analyzing the appellant's cell phone and had provided a report to the Crown at the last minute. The Crown intended to rely on this evidence, but the police had not provided the Crown with the information to obtain ("ITO") and search warrant authorizing the search of the phone.
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> [28] On November 2, three days before the jury trial was to begin, the Crown informed the court of these problems. The defence raised the possibility of re-electing to a trial by judge alone under s. 561 of the *Criminal Code*, to avoid an adjournment. The Crown asked for time to consider the possibility of re-election. The trial judge warned the Crown that, while the matter was "fine if we proceed right now", if there was further delay, they "might start having *Jordan* problems". The trial judge told the Crown to obtain and disclose the ITO and search warrant over the weekend, given that the defence was concerned about potential *Charter* problems with the cell phone evidence.
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> [29] On November 5, 2018, the date on which the trial was scheduled to begin, the Crown advised that it would not consent to a re-election. The defence requested an adjournment, and Crown counsel conceded that the defence request was appropriate. The trial judge asked about the s. 11(b) consequences of granting an adjournment. Defence counsel confirmed that, if the trial could not be rescheduled in the next six months, he would likely bring a s. 11(b) application. The trial judge deferred consideration of the adjournment request to the following day. The ITO for the cell phone search was provided to the Crown and disclosed to the defence after court on November 5.
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> [30] On November 6, after confirming the Crown's position regarding re-election, the trial judge adjourned the trial to October 28, 2019, almost a year later. The court had offered to reschedule the six-week jury trial beginning on June 3, 2019, after making exceptional efforts to reorganize the trial judge's schedule. However, defence counsel was unavailable because he was conducting another trial for an in-custody client at that time. Later that day, after the trial was adjourned, the Crown advised that, having reviewed the ITO, it no longer intended to rely on the cell phone evidence.

[21] The trial judge had dismissed the appellant's section 11(b) application (even although the delay exceeded the *Jordan* ceiling of 30 months), in part because this was a transitional case where transitional exceptional circumstance applied. He also factored in what he considered to be 12.5 months of delay attributable to the defence.

[22] However, some elaboration upon of the concept of "defence delay" was provided by the Court of Appeal that is relevant to my consideration of the case at bar:

> [52] In *Cody*, the Supreme Court elaborated on its definition of this category of defence delay, describing it as delay "which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate insomuch as it is not taken to respond to the charges": at para. 30. The court cited again the example "where the court and Crown are ready to proceed, but the defence is not": at para. 30.
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> [53] Typically, aside from time legitimately taken to respond to the charges, the delay that results when the court and the Crown are ready to proceed and the defence is not is counted as defence delay: *R. v. Thanabalasingham*, 2020 SCC 18, 390 C.C.C. (3d) 400, at para. 9; *Jordan*, at para. 64. There is, however, a qualification: "periods of time when the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable": *Jordan*, at para. 64.
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> [54] The issue of defence delay in the context of defence unavailability was addressed recently by the Supreme Court in *R. v. Boulanger*, 2022 SCC 2, in an appeal from a decision of the Québec Court of Appeal that upheld a stay of proceedings for breach of the respondent's s. 11(b) rights. One of the issues concerned the attribution by the trial judge of 112 days of delay to the defence between May 21 and September 10, 2019, where additional trial dates were required, and the defence was not available on certain dates in May 2019. Kasirer J., for the Supreme Court, concluded that the majority in the Court of Appeal was correct to intervene because this delay could not be attributed entirely to the respondent, despite the fact that his counsel was unavailable on certain dates. Referring to para. 64 of *Jordan*, where the court explained that where the court and the Crown are ready to proceed but the defence is not, the resulting delay is attributable to the defence, Kasirer J. noted that "in some cases, the circumstances may justify apportioning responsibility for delay among [the participants in the criminal justice system] rather than attributing the entire delay to the defence". He recognized that the delay was caused by the conduct of defence counsel, as well as changes in Crown strategy, institutional delay and the court's lack of initiative in obtaining earlier dates. Kasirer J. stated that, in the particular circumstances of this case, it was "fair and reasonable" for the Court of Appeal to have apportioned responsibility for the 112-day delay, attributing up to half the delay to the defence (as well as ten additional days based on a defence concession in the Court of Appeal). In the end, however, the 30-month *Jordan* ceiling was exceeded, no

> exceptional circumstance had been raised to justify exceeding the ceiling, and a stay of proceedings was warranted. The Supreme Court dismissed the appeal.
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> [55] In my view, that is the appropriate approach to take in this case.
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> [56] Once it is accepted that the reason for defence unavailability (other than legitimate defence preparation time) is not taken into account in determining defence delay, it does not necessarily follow, as the Crown urges this court to find, that there is a "bright-line" rule that, once the defence is unavailable, all of the delay until the next available date is characterized as defence delay. That would be inconsistent with the principle that the delay must be "solely or directly" caused by the defence, and the qualification that "periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable": *Jordan*, at para. 64. Like Roberts J.A. in *R. v. Albinowski*, 2018 ONCA 1084, 371 C.C.C. (3d) 190, I would reject the "categorical approach" proposed by the Crown that all of the delay following the rejection of a date offered by the court must be characterized as defence delay, and I agree with her statement that "it is necessary to consider the circumstances of [the] case": at para. 46. The court must take a contextual approach that considers the circumstances relevant to whether, in respect of a particular period of time, the defence refusal of a date is the "sole or direct" cause of the resulting delay.
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> [Emphasis added]

[23] The Court refused to treat the comments in *Cody*, noted above, as having laid down a categorical or "bright line" approach to the attribution of defence delay. It acknowledged that, as a general rule, when the Court and Crown are available on a particular date, and the defence is not, the norm is that the intervening delay will fall at the feet of the defence. However, this is not invariably so, and the Court indicated that a contextual approach, one that takes into account all relevant circumstances, is required to determine whether the defence refusal of a date was the "sole or direct" cause of all of the resulting delay.

[24] In *Hanan*, the Court next proceeded to explain why it was not dealing with a normative case:

> [58] In the present case, however, a six-week jury trial had been scheduled for November 2018 when the matter first arrived in the Superior Court in January 2018, after specific consideration of when the *Jordan* threshold would be exceeded (February 2019). A last-minute adjournment was required because of the unexpected refusal of the surviving victim to testify, and the Crown's late disclosure of the cell phone data. The appellant offered to re-elect to avoid losing the original trial dates, and the Crown refused. Through significant efforts, including an adjustment to the trial judge's schedule, the court was able to offer a six-week period commencing on June 3, 2019 for the trial. Defence counsel was already scheduled for another matter, so the trial was scheduled to proceed on the

> next available dates in October 2019. In these circumstances, the defence was only the "direct or sole" cause of the six-week delay starting June 3, 2019, because during this period the Crown and the court were ready to proceed and the defence was not. However, after that six-week period, there was no availability in the court schedule until October 28. The trial judge took the correct approach in concluding that this was not defence delay because the court was unable to accommodate the trial sooner.
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> [59] The trial judge, in determining what portion, if any, of the delay between June and October 2019 should be attributed to the defence, applied an appropriate contextual approach that is faithful to *Jordan*. The trial judge's refusal to attribute more than six weeks to the defence was, in the circumstances of this case, a fair allocation and entirely appropriate, considering that it was the trial adjournment that resulted in the need for new dates, and the court had no other dates available between June and October 28, 2019. In the circumstances, it would not have been "fair and reasonable" to characterize as defence delay the remaining months when the court could not accommodate a trial. This was not delay that was "solely or directly" caused by the defence.
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> [Emphasis added]

[25] When *Hanan* reached the Supreme Court of Canada, Justices Coté and Rowe, writing for the majority, stated:

> [9] Like the majority and the dissent below, we reject the Crown's proposed "bright-line" rule according to which all of the delay until the next available date following defence counsel's rejection of a date offered by the court must be characterized as defence delay. We agree with van Rensburg J.A. and Tulloch J.A., as he then was, at para. 56, that this approach is inconsistent with this Court's understanding of defence delay. Defence delay comprises "delays caused solely or directly by the defence's conduct" or "delays waived by the defence" (*Jordan*, at para. 66). Furthermore, "periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable" (para. 64). All relevant circumstances should be considered to determine how delay should be apportioned among the participants (*R. v. Boulanger*, 2022 SCC 2, at para. 8). We share the view of the majority and dissenting judges in the Court of Appeal that, in the circumstances of this case, it is unfair and unreasonable to characterize the entire period between June and October 2019 as defence delay (paras. 59 and 136).
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> [Emphasis Added]

[26] With respect, this is simply a direct application of what that Court had earlier stated in *Jordan* and *Cody*. Defence-caused delay will be attributable to the defence. The authorities recognize, however, that in certain cases, it will not be fair to categorize the defence conduct as the "sole or direct" cause of all of the delay

between a particular step in a proceeding, and the next one. In circumstances (such as those which existed in *Hanan*, above, and, indeed, in *R. v. Boulanger*, 2022 SCC 2) where it would be unfair to attribute the entire delay as having been "solely" or "directly" caused by the defence, it may be necessary to apportion the delay between the parties in order to do justice between them, so that the defence is only attributed that portion of the delay for which it is directly responsible.

[27] The circumstances in which it is appropriate to take such a step are, in my view, atypical, but by no means rare. They often arise in the aftermath of an adjournment of an originally scheduled event which was occasioned by something other than Defence fault.

[28] For example, in the recently released decision of *R. v. Bowen-Wright*, 2024 ONSC 293, Schreck, J. stated:

> [4] As the Supreme Court of Canada made clear in *Jordan,* at para. 111, the days of determining s. 11(*b*) applications by engaging in "complicated micro-counting" are over. Courts must instead conduct a global assessment based on a "bird's eye-view" of the case: *Jordan,* at para. 97. In this case, the trial did not proceed as scheduled because, as is frequently the case in this jurisdiction, no judge was available. This is not an acceptable state of affairs which can be remedied by expecting defence counsel to make themselves available on short notice. Counsel for both parties did everything they could to protect Mr. Bowen-Wright's s. 11(*b*) rights, which were imperilled solely because of institutional shortcomings. The fact that they were unable to do so is not the fault of the defence, nor was this a particularly complex case. The delay in this case was unreasonable. The charges are stayed.
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> [Emphasis added]

[29] Schreck, J. proceeded to elaborate:

> [39] It is now clear from *Hanan* and other cases that rather than apply a "bright line" rule, a "contextual approach" that considers all of the relevant circumstances of the case must be applied to determine how delay should be apportioned: *R. v. Boulanger,* 2022 SCC 2, 469 D.L.R. (4th) 63, at para. 8; *R. v. Albinowski,* 2018 ONCA 1084, 371 C.C.C. (3d) 190, at para. 46; *Hanan* (C.A.), at paras. 54-56, *per* van Rensburg J.A., at paras. 136-137, *per* Nordheimer J.A., dissenting; *R. v. Zahor,* 2022 ONCA 449, at paras. 101-102.
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> *(b) Relevant Factors*
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> [40] The factors that must be considered when applying the "contextual approach" will vary depending on the circumstances of each case. In determining

> what delay, if any, should be attributed to the defence because of defence unavailability, the following factors will usually be relevant:
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> - the reason for the need to reschedule and whether it was caused by the defence;
> - the extent to which the defence was available;
> - the reasons for defence unavailability;
> - the extent of the notice given of the new available date.
>
> *(c) The Reasons for Rescheduling*
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> [41] Why a trial had to be rescheduled will be important in determining how to apportion subsequent delay. Where the defence is responsible for the need to reschedule, it is more likely that delay caused by defence unavailability will be found to be "caused solely or directly by the defence's conduct."
>
> [42] The principle established in *R. v. M.(N.N.)* (2006), 2006 CanLII 14957 (ON CA), 209 C.C.C. (3d) 436 (Ont. C.A.), at para. 23, that "a party who causes an adjournment is responsible for the entire period of delay until the matter can be rescheduled, unless the other party is unavailable for an unreasonable length of time" continues to apply after *Jordan*: *R. v. Picard,* 2017 ONCA 692, 137 O.R. (3d) 401, at para. 117. <u>There is no principled reason why the same approach should not be taken where the Crown or the court causes an adjournment. In such a case, the subsequent delay should not be attributed to the defence unless the defence is unavailable for an unreasonable length of time</u>.
>
> [43] <u>In this case, the issue of the defence's availability in the fall only arose because the trial did not proceed in May, an event for which the defence bears no responsibility</u>: *R. v. Bailey,* 2023 ONSC 2814, at para. 39; *R. v. Arth,* 2022 ONCJ 216, 512 C.R.R. (2d) 233, at paras. 27-28.
>
> *(d) The Extent to Which the Defence Was Unavailable*
>
> [44] As the defence did not cause the adjournment, an application of the principle in *M.(N.N.)* results in the defence not being responsible for the subsequent delay unless the defence was "unavailable for an unreasonable length of time."
>
> [Emphasis added]

[30] In the case at bar, it is certainly true that Mr. MacDonald's decision to refuse the earlier PI dates because they conflicted with those assigned for the trial of another (bail-denied) client was a reasonable one. It is one for which he cannot be faulted in the least.

[31] But this is not about assignment of fault to counsel. It is about Mr. Drake having retained very busy counsel. Neither Mr. MacDonald (nor Mr. Hutchison for

that matter) was available for these earlier dates. It would be unfair to attribute the delay from the September dates to December 16, 2019 (when a direct Indictment was preferred) to Crown or institutional delay. Obviously, neither the Crown nor the Court has any control over the availability of an accused's counsel of choice.

[32] This accords with the observation of Derrick, J.A., in *R. v. Pearce*, 2021 NSCA 37:

> [139] The Appellants were represented by busy defence counsel. They were obviously in high demand and conducted this case while discharging their obligations to other clients. This did not neutralize their responsibilities in this case under the new *Jordan* framework. There was time after *Jordan* was released for defence counsel to have corrected the approach they had been taking. They did not do so. They were well aware of *Jordan* – as Mr. Pearce's counsel noted on August 4, 2017, he had to keep other clients' "*Jordan* rights in mind" when reserving additional dates in 2018.

[33] Accordingly, I deduct the 77 days, having attributed them to the defence. The net delay, therefore, from March 7, 2019 to December 16, 2019, is 208 days.

[34] The Crown concedes that the time elapsed between December 17, 2019 and March 12, 2020 (the time from the filing of the direct Indictment until jury trials were suspended due to COVID- 19 outbreak) is inherent delay, which adds another 87 days, bringing the net delay, as of March 12, 2020 to 295 days.

ii) COVID-19

[35] Strictly speaking, this is something which was argued to be an "exceptional circumstance". As such, it would ordinarily be considered only in the event that, after defence delay is calculated (at step two), the net delay still exceeds the *Jordan* threshold.

[36] However, in order to maintain chronological integrity and proceed in the order in which the parties have dealt with the issues, I will address it now. The Crown's position, simply stated, is that jury trials were suspended due to COVID from March 13, 2020 to March 30, 2021, the latter being the date when the satellite Mellor Jury Court ("Mellor") was first opened. The Crown takes the position that this is an "exceptional circumstance" and says it should be able to deduct this entire period of 383 days (12 months and 17 days) from the period of total delay.

[37] The defence points out that, on January 23, 2020, before the COVID epidemic struck and forced closure of the courts in Nova Scotia, trial dates had been set for

March 16, 2021 to April 28, 2021. As a consequence (the argument continues) COVID did not cause the delay between March 13, 2020 to March 16, 2021, because the trial was not scheduled to begin until the latter date anyway.

[38] As these contending arguments are considered, I begin with a review of the manner in which COVID had impacted not only the courts in this Province but nationwide. For example, both counsel have referenced the recent case of *R. v. Agpoon*, 2023 ONCA 449, where the Ontario Court of Appeal observed:

> [19] The pandemic falls within a category of "discrete exceptional circumstances" laid out in *Jordan*, which the court defined, at para. 69: "[e]xceptional 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 arise" (emphasis in original). This is the "only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling": *Jordan*, at para. 81. The court acknowledged, at para. 72, that medical emergencies could qualify as a discrete exceptional circumstance. Although this comment was made in the context of individual medical emergencies, in our view it can be, and should be, generalized for the pandemic.
>
> [20] *Jordan* imposed certain conditions on the Crown. For example, the burden is put on the Crown to show that "it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling": at para. 70 (emphasis in original). But this was clearly impossible in the case of the pandemic. Further, the court referred to the Crown's obligation to make efforts to mitigate the delay resulting from a discrete exceptional circumstance, noting, at para. 75, that "within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events". This principle applies to dealing with the backlog of cases in the emergence of the justice system from the pandemic.
>
> [21] In our view, there is a systemic perspective within which the pandemic must be seen. The *Jordan* court said, at para. 103, "[t]he reasonableness of a period of time to prosecute a case takes its colour from the surrounding circumstances." The surrounding circumstances here are systemic.
>
> [Emphasis added]

[39] In *R. v. Riley*, 2023 NSSC 81, Arnold, J. considered a number of authorities, and had no difficulty recognizing the pandemic as an exceptional circumstance within the meaning of *Jordan* caselaw. He continued:

> [53] … As noted by the Crown, various courts have now pronounced on the exceptional circumstances created by the pandemic. As noted in the pre-COVID case of *R. v. Allen* (1996), 1996 CanLII 4011 (ON CA), 110 CCC (3d) 331 (Ont.

C.A.), no case can be considered completely on its own when judicial resources are in question:

> **27** I turn next to the length of the delay which resulted when the case was adjourned. Justice Ferguson held that the entire six months could be attributed to a chronic scarcity of judicial resources. I disagree. When addressing s. 11(b), one must consider the inherent time requirements needed to get a case into the system and to complete that case: *R. v. Morin*, *supra*, at p. 16. Those time requirements can include adjournments necessitated by the need to find additional court time when initial time estimates prove inaccurate: *R. v. Hawkins* (1991), 1991 CanLII 7148 (ON CA), 6 O.R. (3d) 724 at 728 (C.A.), aff'd, (1992), 1992 CanLII 42 (SCC), 11 O.R. (3d) 64 (S.C.C.); *R. v. Philip* (1993), 1993 CanLII 14721 (ON CA), 80 C.C.C. (3d) 167 at 172-73 (Ont. C.A.). The inherent time requirements needed to complete a case are considered to be neutral in the s. 11(b) calculus. The recognition and treatment of such inherent time requirements in the s. 11(b) jurisprudence is simply a reflection of the reality of the world in which the criminal justice system operates. No case is an island to be treated as if it were the only case with a legitimate demand on court resources. The system cannot revolve around any one case but must try to accommodate the needs of all cases. When a case requires additional court resources the system cannot be expected to push other cases to the side and instantaneously provide those additional resources.
>
> [Emphasis added]

[40] One of the authorities considered in *Riley* was *R. v. Simmons*, 2020 ONSC 7209. In *Simmons*, the Court pointed out:

> [69] First, while the jurisprudence about COVID-19 as a discrete exceptional event within the meaning of s. 11(b) is relatively new, most trial courts have deducted the entire time from the start of the impact of COVID-19 on the courts to the date of the scheduled trial as opposed to only the time period where trials have been actually suspended: *R. v. Gutierrez,* 2020 ONSC 6810 at paras. 11 – 20; *R. v. Cathcart*, 2020 SKQB 270, [2020] S.J. No. 415, at para. 20; *R. v. Folster,* [2020] M.J. No. 187 (P.C.) at paras. 29 – 30; *R. v. Ismail,* 2020 BCPC 144, [2020] B.C.J. No. 1228, at para. 155; *R. v. Harker,* 2020 ABQB 603, [2020] A.J. No. 1091, at para. 23.
>
> [70] Second, the impact of the COVID-19 pandemic on the criminal justice system is not limited to those periods of time when the court had to adjourn scheduled cases or when jury trials were suspended. It has had numerous and far-reaching impacts upon how we do things, and, on the people, who do them. Not the least has been the necessity to take measures to protect the health and safety of justice participants and the public. The way trials are conducted needed to be transformed. Physical courtrooms had to be changed. Some trials are now conducted virtually. This in turn, has had a significant impact on scheduling.

> Scheduling new trials and rescheduling existing trials have become more complex and difficult. A backlog of cases has ensued. A lack of resources was not the cause. Rather, COVID-19 was. It has had a system-wide impact of unprecedented proportions, never seen before in our lifetime.
>
> [71] Third, taking such a realistic perspective regarding the impact of a discrete event is not novel. Take, for an example, when a judge falls ill. As a result, the trial must be adjourned to a new date. This is a recognized discrete event. The period of delay caused by this discrete exceptional event does not end the moment the judge recovers from their illness and is again capable of hearing cases. Rescheduling takes place in the reality of the courthouse. The new trial date takes into account the availability of the judge, the Crown, the defence counsel, and witnesses: *Coulter*, at paras. 81 – 84.
>
> …
>
> [73] Fourth, the COVID-19 pandemic and its effects on the judicial system are not over. Now, the pandemic is getting worse. We are in the second wave. The number of infections is far greater than in the first wave. Despite promising news about potential vaccines that are being developed, there remains much uncertainty. The Superior Court of Justice in Toronto Region—which has now suspended jury trials again since October 9, 2020—has recently extended the suspension of jury trials to January 4, 2021. In short, when it comes to assessing COVID-19's impact on the criminal justice system, this discrete event continues.
>
> …
>
> [76] As said by many of our public health leaders, we are all in this together. We have done the best we can in the circumstances. Therefore, we should not be quick to cast blame or be overly critical of the actions of the criminal justice system or its participants as we continue to meet the challenges of getting trials heard amidst the ongoing pandemic.
>
> [Emphasis added]

[41] As Renke, J., in *R. v. Pettitt*, 2021 ABQB 84, put it:

> [20] The adjournment of jury trials in March 2020 did not freeze the number of jury trials and non-jury trials in the queue. Like river water accumulating behind a dam, the reservoir of unheard matters comprised not only the matters scheduled for trial over the months when jury trials were not heard, but the new jury and non-jury trials that moving through the system. And the Courts are responsible for more than criminal matters. Family, civil, commercial, and judicial review matters also accumulated. Bail and Chambers matters had to be dealt with. Emergency matters had to be dealt with. All this at sitting points across the Province.

[42] As we apply the case law to this specific set of facts, it is helpful, in my view, to break this 383-day "COVID" period into two discrete segments. The first (and by

far the largest) begins on March 13, 2020 and ends on March 16, 2021, the date that Mr. Drake's trial had been scheduled to begin. The second concerns itself with the comparatively short period March 16, 2021 to March 30, 2021.

[43] Integral to the Court's view of the first such period is the observation that, on January 23, 2020, dates for this trial were assigned. The trial was to begin on March 16, 2021, and run until April 28, 2021. This scheduling occurred, of course, before anyone was aware that there would eventually be a need to shut the courts down (and suspend jury trials), which is what occurred on March 13, 2020, and lasted until March 30, 2021.

[44] The defence, as earlier mentioned, argues that, since Mr. Drake's trial was scheduled to start March 16, 2021 and end April 28, 2021, COVID had nothing to do with the period March 13, 2020 to March 16, 2021, and that this period (of over one year) should not be treated as having been caused by the pandemic.

[45] With respect, I do not find this argument to be persuasive. I will explain why this is so.

[46] To begin, I observe that, in *Riley*, the Court laid out the chronology of the COVID epidemic, and described its impact upon the courts this way:

> [60] As detailed by the Crown in their brief, the delays to jury trials generally occasioned by the pandemic were far reaching:
>
> > [31] The systemic impact of COVID-19 on the scheduling of jury trials is clear from the Record of Proceedings in the Accused's matter. The Accused's matter was grouped together with a group of more than twenty complex jury trials – many of them homicides, including at least two other homicide retrials (Sandeson and Whynder) – which were being dealt with by Duncan, ACJ in a specialized process due to the obvious impact that COVID-19 was having on jury trials in the Halifax region. The scheduling of these matters was handled for the Crown by the Chief Crown for the PPS' Halifax Region, Mr. Carver, KC. The Crown noted that given the ***Jordan*** situation that it was open to reassigning matters to new counsel to prosecute in order to secure earlier trial dates. These efforts both reflect the impact the pandemic had on the jury trial system, but also the efforts made by the Court and the Crown to proceed as expeditiously as possible, in the circumstances. Systemic delay, however, was inevitable...
> >
> > …
> >
> > [33] In the Halifax region, the Chief Justice suspended jury trials on March 13, 2020 for a period of 60 days. That suspension was continued on May 11, 2020 until September 8, 2020. While jury trials outside of Halifax

> resumed on that date, jury trials in the Halifax region were not able to resume until the opening of the COVID-19 compliant satellite court facility on Mellor Avenue in Dartmouth on March 30, 2021. In this period, on November 3, 2020, the Supreme Court of Canada sent the Accused's matter back to this Honourable Court for retrial.
>
> [34] The commencement of jury trials was unfortunately brief, as on April 24, 2021 the Supreme Court in Halifax once again commenced an essential services model, with only jury trials already underway continuing at the Mellor Avenue location. This continued until the adoption of the safe services model on June 7, 2021 which once again permitted in-person trials to commence.
>
> [35] Due to the rapidly spreading Omicron variant of COVID-19, jury trials were once again suspended on December 17, 2021, again, with jury trials already underway permitted to continue until they concluded. This suspension of jury trials was continued on December 28, 2021, January 14, 2022, and January 26, 2022, before an announcement on February 9, 2022 that jury trials would resume effective February 14, 2022.

[47] With the foregoing in mind, I observe that if we focus exclusively upon the net effect of COVID upon Mr. Drake's trial, we would ignore the far-reaching and systemic problems which were created for the Court by virtue of the pandemic. Matters accumulated between March 2020 and March 2021 which could not be scheduled, and which the court was required to nevertheless recognize and, if necessary, prioritize as a consequence.

[48] To refer to only one (albeit, poignant) example of the specific collateral damage which ensued, Markel Downey's case may be considered.

[49] In *R. v. Downey*, 2017 NSSC 39, Wood, J. (as he then was) acquitted Mr. Downey with respect to the charges (which included first-degree murder and attempted murder) which he faced. In *R. v. Downey*, 2018 NSCA 33, the Nova Scotia Court of Appeal overturned that acquittal and ordered a new trial. Mr. Downey was in pre-trial custody while awaiting (his second) trial.

[50] On December 18, 2020, the Court was doing its best to "direct traffic". The availability of a new courtroom (Mellor) within which to hear jury trials (while the pandemic was still raging) was on the horizon and expected within a matter of months. The trajectories of the dates which had been assigned for the commencement of Mr. Drake's trial conflicted with the priorities of Mr. Downey's circumstances. By this time, Mr. Drake was released, albeit on strict conditions, while awaiting his trial. Mr. Downey as mentioned earlier, was not.

[51] What follows is an excerpt of the discussion between counsel (Mr. MacDonald, counsel for Mr. Drake; Mr. Paul Carver, for the Crown; and Associate Chief Justice Duncan (counsel for Mr. Downey was also present during the exchange):

> **MR. MacDONALD**:… but… again, and I appreciate Your Lordship's difficulty and I appreciate the Crown's position but Mr. Drake does not want to adjourn his trial.
>
> **THE COURT**: Well ... and I'm not surprised by that. And in the circumstances, I'm going to go back to Mr. Carver. I'll just make the observation that there is … and I can assure everyone and I don't think you'll be surprised to know that I spent a lot of time trying to think of how this might be done. And at the end of the day concluded that the domino effect of moving multiple trials around is just ... it creates as many problems, more problems, frankly, than it would solve because we have other people with serious trials who are booked. As I said in my opening comments, when we booked these trials back in September, when I look at Mr. Carver's priority list, those trials that we booked through March into ... into September, were his number two, three, four, six, seven files. So Markel Downey was number one. So I think we've accomplished as much as we can to meet that priority list which conformed with my own assessment at the time, interestingly. But now it's … now it's ... you know there's a point where there's just a limitation on what I can do.
>
> Mr. Carver, you've heard what Mr. MacDonald said. So basically what he's saying is he can ... he believes it can be cut down to 25 days. I can't accommodate 25 days unless we go into July, starting in June. However, that's not ... that is a problem because of the unavailability of defence counsel. As well, the unavailability of defence counsel in September and October, means that we're effectively looking at a trial date in November which will take us two months past the *Jordan* timeframe. I can offer times in November. As I've said, I've got from September onward. I can book things and we will … that's what we'll be working with for the most part today. And so, given that position, what do you want me to do, Mr. Carver?
>
> **MR. CARVER**: Well, I'm ... and certainly Your Lordship can appreciate that this is a difficult decision for the Crown essentially trying to pick one matter over the other, in the sense that they're both murders. Both charged as murder. I would have to remain committed to my assessment that Markel Downey remains as a priority matter based on the fact that it is a ... it a substantially older matter and Mr. Downey is remanded. I understand the implications of what I'm submitting to the Court. But you've asked for my position and my position is that the Markel Downey matter remains a priority matter.
>
> **THE COURT**: All right. Mr. MacDonald, I'm going to have to say that for the reasons that were expressed by Mr. Carver, I have the same view. I'm very familiar with Mr. Markel Downey's case. He is on remand. He's been on remand

> for a very lengthy period of time. Mr. Drake is not, notwithstanding his strict conditions. Mr. Downey is here on a re-trial effectively, although he was to be on re-trial. It's a convoluted history but the offence date was in 2014. So we're now six years past the date of the alleged murder, or the events that led to the murder trial. And the Courts of Appeal have made it clear to us that when a matter is coming back for what is in effect a second trial, although in kind of unusual circumstances here, that is to be accorded priority by the Court in scheduling. And so while I'm very sympathetic to Mr. Drake's situation, I don't think I can accommodate … when put in that stark choice, I can't accommodate Mr. Drake's matter in the time that was previously scheduled. And for that I'm sorry but it's a reflection of the difficult position that all of us are in. And so, let's talk about the rescheduling of the Drake matter. You've said May, September and October are out for defence counsel. Mr. Carver, what was the Crown's position with respect to availability in those time frames?
>
> **MR. CARVER**: The Crown will be available any time the Court sets, My Lord.
>
> [Emphasis added]
>
> (Defence Book of Materials, Tab 23, pp. 34-37, p. 38 lines 1-4)

[52] So, Mr. Drake's trial was delayed due to the impact of COVID upon the Courts, system wide. The delay was caused, directly, by virtue of the pandemic, preventing the Court from scheduling Mr. Downey (who as it turns out, was once again acquitted when his second trial was heard) or any other more urgent trials any earlier than the dates which had formerly been assigned to Mr. Drake. The cause of that delay to Mr. Drake's trial occurred when COVID forced the closure of the courts and the suspension of jury trials on March 20, 2020, even if it might not have been immediately apparent to Mr. Drake, on that date, that this would flow from that occurrence. This was merely one of an avalanche of scheduling problems which the pandemic left in its wake. More on the issue of these scheduling problems will be said below.

[53] Mr. Drake contends that:

> 41. Second, and more significantly, the Crown could have easily mitigated the delay of Mr. Drake's matter by offering either Mr. Drake or Mr. Downey (or others) the option of re-electing to tried by judge alone. The central reason for bumping Mr. Drake's matter was because the courts could not handle jury trials at 1869 (sic) Upper Water Street; it would have been no issue to hold a judge alone trial at the same venue during the relevant dates. If Mr. Dake had been offered the option to re-elect, it would have allowed Mr. Drake to take his trial dates with no prejudice to his own *Charter* rights. The reverse scenario also applies. However, this option was not offered by the Crown.

(Defence Brief, November 27, 2023, at para. 41)

[54] I observe that I was unable to find a reference in any transcript whereby the Defence expressed a willingness to re-elect to a judge alone trial, nor asked if the Crown would consent to same, while the parties and the Court were involved in the process of rescheduling Mr. Drake's trial. Nor was I referred to correspondence between counsel or to the court (pre-dating a letter dated of December 6, 2022 from Mr. MacDonald, which will be discussed further in these reasons) where such was bruited.

[55] I certainly agree with the observation in *Riley* as follows:

> [37] The Crown has the complete and unfettered discretion to refuse an offer by the accused to re-elect to judge alone on a murder charge. However, considering the clear exhortations from the Supreme Court of Canada in *Jordan* and *Cody* directing all justice participants, including the Crown, to examine their own historical practices in an effort to find ways to avoid previously tolerated delays, along with their comments in *J.F.,* calling on the Crown and the courts to prioritize re-trials, it is hard to reconcile the Crown's refusal in this regard. In *Jordan*, the majority emphasized the Crown's responsibility to exercise its prosecutorial discretion in a manner that conforms to an accused's s.11(b) right. The majority stated:
>
> > [79] It bears reiterating that such determinations 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 (*R. v. Auclair,* 2014 SCC 6, [2014] 1 S.C.R. 83, at para. 2). 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. In a similar vein, and for the same reason, the Crown may wish to consider whether multiple charges for the same conduct, or trying multiple co-accused together, will unduly complicate a proceeding. While the court plays no supervisory role for such decisions, Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s. 11(b) right (see, e.g., *Vassell*). As this Court said in *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760:
> >
> > > Certainly, it is within the Crown's discretion to prosecute charges where the evidence would permit a reasonable jury to convict. However, some semblance of a cost-benefit analysis would serve the justice system well. Where the additional or heightened charges are marginal, and pursuing them would necessitate a substantially more complex trial process and jury charge, the Crown should

> carefully consider whether the public interest would be better served by either declining to prosecute the marginal charges from the outset or deciding not to pursue them once the evidence at trial is complete. [para. 45]
>
> [Emphasis added]

[56] With that said, there is no evidence before me that the Crown refused a Defence offer (at the relevant times) to proceed with a judge alone trial in an effort to vitiate some delay. Absent evidence of a request from the Defence, before or at the time that Mr. Drake's trial was being re-scheduled, which was refused by the Crown, I can see no basis for Mr. Drake's argument on this point.

[57] I am not prepared to second guess the decisions made by this Court (or any other for that matter) with respect to the prioritization of certain cases over others, as necessitated by the pandemic. It was an unenviable situation into which this Court (along with those across the country) was thrust.

[58] Net delay as of March 30, 2021, remains at 295 days, as a consequence.

[59] Next, I add 23 days with respect to the period of April 1 – 23, 2021, and subtract 45 days to account for the period of April 24, 2021 – June 7, 2021, when jury trials were once again suspended. As of June 7, 2021, accordingly, the net delay is 318 days.

[60] With respect to the period of time June 8 – July 31, 2021, the following discussions augment the earlier quoted portions of the transcript of December 18, 2020:

> **THE COURT**: Yeah. I don't think … yeah, the … so as it stands now Mr. Drake's matter it … it could not start … you see the Purvis matter is set for most of April. And so Drake, as it's currently scheduled, is to end on April 28th. So we'd have to go into May and in May it would conflict with Nelson and Landry. I think a more likely scenario, and of course I'm going to hear from Mr. MacDonald, is that if it was going to be something in the 20 to 23-day range as opposed to 30, then we could be looking at the month of June. But if it's not going to be then we could still look at the month of June but we're probably looking at having to go into July and that may create challenges with juries and counsel and witnesses, I don't know. And then as you point out, June. And, yes, you've correctly noted that … with respect to the Drake's … the Drake … 30-month period since the swearing of the Information, it is September 7th. That you're quite right as well that the trial … that number will be exceeded by the time the evidence is concluded. So I have your motion to change that. And of course it conforms with what Mr. Jeffcock would wish. Mr. MacDonald, I'm going to hear from you.

MR. MacDONALD: Thank you, My Lord. So, My Lord, you have the submissions. You've mentioned them already, the written submissions that we've made. I don't have anything to add to that and I believe that you've set them out accurately.

What I can indicate, My Lord, is that I believe that we could complete this trial in 25-days. We have 30 full days set aside. They are set over dates some holidays, the Easter holiday.

THE COURT: Uh, huh.

MR. MacDONALD: So we're actually 30 Court dates. I think we could do this in 25 Court dates if that's of any assistance. We do not want to move the existing trial dates. The problem that we will run into, My Lord, is that Ian Hutchison and I are co-counsel. Mr. Hutchison is not available in June, nor is he available in September or October. I could potentially be available in June but I'm not available in September either. But I am available in October and to the end of the year. So we get into some very difficult scheduling issues that I know have been alluded to in the past in these proceedings. But right now if it's of any value at all, and it probably isn't. I mean we could have some days off the trial if that was of any assistance in terms of leaving it on the days in March and April. Or we could shave those dates off the front end so that the trial would primarily be held during the month of April.

THE COURT: Uh, huh.

…

THE COURT: All right. So, Mr. MacDonald, what … tell me when you would like the trial beginning as … any time after … from September onward?

MR. MacDONALD: My Lord, in the circumstances, we have to look at November 1st as the commencement date.

THE COURT: That's fine, Mr. MacDonald. So do you want me to book 25 days or more days? I … I will tell you one thing. A trial of this length and this is something I've reflected on, I think the five-day weeks for multiple weeks is too much to ask people. I know that for our trial judges, and for counsel, especially in cases of this type, you're making your daily notes at the end of the day and preparing for the following day, evidentiary issues arise on short notice, often very complex without a lot of time for reflection. And then of course, counsel have other matters, both the prosecution and defence, to attend to. So I'm inclined to go with four-day weeks for a trial of this length. So it may amount to the same thing because as you know if we book four days and give Fridays off and you start to run short, then you can come back in. The parties can agree to sit on a Friday. So that's my approach to it. So what I would prefer to do is actually start November 2nd, so for jury selection. I believe with Mr. … no, there's no … yes, there is a challenge for cause as I understand it. Is that right?

MR. MacDONALD: Yes, yeah.

> **THE COURT**: Yeah. So I would prefer to start November 2nd to allow for that process. So it would be … so I take it the 2nd, 3rd, 4th and 5th. That's four days. Remembrance Day is the following Thursday, so that's another four-day week. Eight, nine, ten. Fifteen to nineteen, I think because of the … well, yeah, we'll say fifteen to eighteen, four days there. Twenty-two to twenty-five, four days there. We're up to sixteen. Do you have … I kind of shot ahead of counsel on this question of five-day weeks. I could do some five-day weeks interspersed in between. Mr. MacDonald, do you have a preference?
>
> [Emphasis added]
>
> (Book of Materials, Tab 23, p. 31 lines 5-18; pp. 32-33; p. 38 lines 5-18; p. 39 and p. 40 lines 1-6)

[61] From the above, although specific dates in June and/or July were not provided, it is clear that there would have been dates during those months when the Court and Crown were available: "The Crown will be available any time the Court sets" (*Paul Carver for the Crown*, Book of Materials, Tab 23, p. 38, line 3-4). Under the circumstances, I treat the June 8 – July 31, 2021 interval (55 days) as institutional delay. The period of August 1 – October 29, 2021 (the latter being the date when the charges in the First Indictment were withdrawn), I treat as having been occasioned by Defence counsel's unavailability and I attribute it accordingly.

[62] Net delay, as of October 29, 2021, is 373 days.

(iii) October 30, 2021 – October 20, 2022

[63] This period of time represents the interval between the withdrawal of the charges in the first Indictment, and the Crown decision to re-lay the same charge in the second Indictment. Counsel for Mr. Drake contends:

> 48. It is respectfully submitted that the 364-day period of delay between the original Indictment being withdrawn and the second Information being laid should be attributable to the Crown. Given the manner in which the charge was withdrawn, it is submitted that Mr. Drake was aware that there was a very real prospect the charge would be re-laid in the future. Furthermore, the charge was withdrawn for reasons that were contributed to by complacency on the part of the Crown.
>
> (Defence brief, November 27, 2023, at para. 48)

[64] Counsel argues that, although Mr. Drake was not charged with any offences during this period of time and was not subject to release conditions, he was aware that he remained in legal jeopardy. His argument references specifically the

comment made by the prosecution at the time the charges in the first Indictment were withdrawn which were: "we are specifically not undertaking not to re-lay" (Tab 10).

[65] Defence counsel also argues that the delay between withdrawal of the charge in the first Indictment and the re-laying of the charge almost a year later could have been eliminated, or at least attenuated, had the Crown proceeded more promptly with the use of a newly available forensic tool to re-examine Mr. Drake's cell phone. In fact, he says that had the Crown done so more promptly, the First Indictment may not have needed to have been withdrawn at all.

[66] In this specific regard, the defence has observed:

> 54. Police conducted the new analysis of Mr. Drake's phone in August of 2022. However, D/Cst. Todd Bromley's can-say document shows that he had met with the Crown and recommended that Mr. Drake's phone be analysed using new technology on January 8, 2021, some 19 months earlier. (Book of Materials – Tab 8)
>
> 55. Inexplicably, the analysis was not done at that time as per D/Cst. Bromley's recommendation. This was certainly not for lack of opportunity – the police were in possession of Mr. Drake's cellphone in January of 2021 and could have completed the re-extraction and analysis of the phone at that time.
>
> (Defence brief, November 27, 2023, paras. 54 - 55)

[67] They rely upon *R. v. Spencer*, 2022 SKCA 135, and, in particular, the following:

> [73] Moreover, even if the Crown and the RCMP Forensic Laboratory are properly viewed as divisible entities, the delay associated to the Y-STR testing was something that arose from steps the Crown took to gather additional evidence to strengthen its case. Such delay will generally fall at the feet of the Crown. I would also note that more than a year passed from the time the Forensic Laboratory provided the first DNA report until Crown counsel actually contacted the DNA analyst to discuss the results or obtain more information. Based on this alone, it would be very difficult to conclude that the late-in-the-day discovery of the Y-STR method was reasonably unforeseeable, even if the prosecuting Crown and the Forensic Laboratory are seen as distinct entities. This was information that could have been easily obtained if communication between Crown counsel and the DNA analyst had taken place in a timely manner.
>
> [74] Nor does it appear, once Crown counsel learned of the availability of the Y-STR technique, that all reasonable steps were taken to mitigate any resulting delay. Although the initial DNA report had been in existence for a full year, and in the hands of Crown counsel for 11 months before she contacted the DNA analyst to discuss it, Crown counsel made the decision to proceed with the Y-STR testing

> in full knowledge that doing so would inevitably lead to further delay. The Crown also did so without exploring other potential options that may have expedited the process, such as having the Y-STR testing done by a private lab. While these are all decisions that fall within the sphere of prosecutorial discretion, over which the courts have no supervisory role, "Crown counsel must be alive to the fact that any delay resulting from their [exercise of] prosecutorial discretion must conform to the accused's s. 11(b) right" (*Jordan* at para 79). Taking all of that into account, I conclude that deference is owed to the trial judge's finding that the Crown's late-gained awareness of the availability of Y-STR analysis did not amount to an exceptional circumstance under *Jordan*. At bottom, his conclusion in that respect was based on his understanding of the context of the pre-trial proceedings and trial readiness of the parties in this case, and his assessment of the evidence before him. He was well-positioned to make the factual findings that he made, and I see no error in his application of the law to those findings. It follows that there is no basis to disturb his conclusion that this portion of the delay did not amount to an exceptional circumstance.
>
> [Emphasis added]

[68] As will be readily seen, however, in *Spencer*, charges were not initially laid and then withdrawn. The accused remained in jeopardy for the entire time. The Court simply did not give any credence to the Crown's argument that the availability of new technology with which to analyse the DNA sample in that case should be deducted from the total delay, given that the Crown was unable to justify an 11-month hiatus, during which it was aware of the new testing technology, and did nothing to utilize it while the accused remained in jeopardy.

[69] In *R. v. Kanda*, 2021 BCCA 267, the court noted:

> [104] In considering this last point, it is essential to bear in mind the appropriate comparator. This follows from both *Potvin* and *Kalanj*. Section 11(b) applies to people who have been charged with an offence. People not charged with an offence but who are under investigation are subject to different considerations.
>
> [105] Pre-charge delays in investigation may engage section 7 interests, as discussed in *Kalanj*. Notably, in that case, the accused were arrested without warrant, then released without charges being laid while the investigation carried on. In my view, the fact of charges being laid then stayed before the investigation carries on does not per se convert those section 7 interests into section 11(b) interests. As a result, where the charge is stayed or withdrawn, one must look at the reason for doing so, and the surrounding circumstances.
>
> [Emphasis added]

[70] In *R. v. Buckley*, 2018 NSSC 3, the Court had occasion to reference principles formulated both by the Supreme Court of Canada and that of the United States

(albeit, some of which were pre-*Jordan*) when dealing with a section 11 (b) *Charter* case:

> [31] Justice Sopinka went on to discuss similar considerations undertaken by the Supreme Court of the United States:
>
> > 67 A similar conclusion was reached by the Supreme Court of the United States. In *United States v. Loud Hawk*, 474 U.S. 302 (1986), it was argued that the speedy trial guarantee in the 6th Amendment applied to an appeal by the government from a dismissal of charges prior to a trial on the merits by reason of excessive delay in prosecuting the charges. The court stated, at pp. 311-12:
> >
> > > During much of the litigation, respondents were neither under indictment nor subject to bail. Further judicial proceedings would have been necessary to subject respondents to any actual restraints.... As we stated in *MacDonald*: "(W)ith no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, a citizen suffers no restraints on his liberty and is (no longer) the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer'." ...
> >
> > [Emphasis added]
>
> [32] In concluding that the delay occasioned by an appeal is not subject to s. 11(b) *Charter* scrutiny, Sopinka J. stated:
>
> > 69 The conclusion I have reached applies to appeals from acquittals and convictions. Furthermore, I see no valid reason to distinguish between an acquittal on the merits and a judicial stay. In light of the interest protected under s. 11(b), the differences between an acquittal and a judicial stay are purely technical. In both cases the accused can plead *autrefois acquit* and no proceedings may be brought in respect of the same charge unless the acquittal or stay is set aside on appeal. No restraints can be placed on the liberty of the former accused pending appeal. There is no basis on which to assume that the theoretical existence of a charge that has been stayed carries any greater stigma or causes greater anxiety to the respondent in an appeal from a judicial stay than an appeal from acquittal. Certainly there is no evidence on this point. I doubt that the public understands the difference. An unpopular acquittal generates as much public indignation as a stay. The degree of anxiety is dictated more by the strength of the grounds of appeal than by the form of the verdict. These observations were neatly summed up by Estey J. in *Amato v. The Queen*, [1982] 2 S.C.R. 418, at p. 457:
> >
> > > While the charge may be said to hang over the head of the accused, this is a wholly theoretical observation because there is no forum for its further processing.

> [33] This approach was followed in *R. v. Manasseri*, 2016 ONCA 703, application for leave to appeal dismissed, [2016] S.C.C.A. No. 513, where Watt J.A. stated:
>
> > 335 As a result of the Crown's application for certiorari and subsequent appeal, Kenny was not a "person charged with an offence" from December 9, 2008 until at least June 2, 2010 and, more likely, until his formal committal on August 12, 2010. In accordance with previous authority, counsel exclude from the total delay the 18 month period during which certiorari and appellate proceedings were on foot. See: *R. v. Potvin*, [1993] 2 S.C.R. 880, at pp. 907-908.

[71] At para. 48, the Court in *Buckley* stated:

> [48] The gap period between the withdrawal of the second-degree murder charge and the laying of the first-degree murder charge cannot be used in calculating the overall delay that occurred in this case. During that time no charges were active against Mr. Buckley and he was not subject to any judicial process. He may have felt the police were interested in him, but charges were not imminent. He was not subject to any restriction on his liberty. He was free to go about his life unimpeded by any court process.

[72] The above comments track Mr. Drake's circumstances during the almost one year "gap" period. To put a finer point upon it, there is no evidence that the Crown withdrew the first Indictment to "buy time" with respect to the investigation or to "fix problems" with respect to it. Nor was the withdrawal to await the outcome of parallel litigation, on the expectation that the charges would be relayed if the outcome permitted it. Mr. Drake was subject to no bail conditions or any other restrictions on his liberty.

[73] The general rule established in the cases discussed above and others, is to the effect that s.11 (b) *Charter* rights are not engaged during the gap between October 30, 2021 and October 28, 2022. While there are exceptions, as there are to almost every "general rule", I am not persuaded that this case falls into any one of them.

[74] Accordingly, the period in question, 364 days, must be subtracted from the total delay, leaving a net delay, as of October 28, 2022, of 373 days.

(iv) October 29, 2022 – May 3, 2024

[75] This interval accounts for 551 days.

[76] The Crown has argued that this period, too, was impacted by COVID, because of the scheduling backlog which the virus left behind it. It continued:

> 48. Further, as set out in ***Riley*** and ***Nagy-Willis***, the Crown submits it is appropriate to deduct 3-4 months from the total delay due to general COVID-19 backlog that continued to plague all Court matters even when the applicant's trial was set for April 2024 on November 24, 2022 following the Crown re-laying charges against the applicant.

[77] As I consider this argument, first I reference *R. v. Nagy-Willis*, 2020 NSPC 29, where Tax, J.P.C. pointed out:

> [104] As I have already indicated, I find that the Covid 19 pandemic created a discrete event as well as an exceptional circumstance that could not reasonably be foreseen or mitigated by the court nor the Crown. During those periods of time where the court was closed to in person trials, there can be no doubt that a backlog was created, which needed to be addressed in a timely matter.
>
> [105] In this court, I find that, dealing with that backlog has had an obvious and very significant impact on any trials being scheduled during or shortly after the points in time when in person trials were not conducted or only went forward on a limited basis for persons in custody. In addition, in my opinion, dealing with the backlog and rescheduling trials at the same time as new matters were set for trial, has to be regarded as a discrete, unforeseen and exceptional event or circumstance and not the consequence of any complacency or insufficient response by either the Crown or the court or any other actors in the criminal justice system.
>
> …
>
> [107] In some reported decisions, as previously mentioned, other courts have determined that the entire period of the restricted court operations and trials should be considered as an exceptional circumstance or a discrete event which created a backlog that had to be addressed with the incoming cases/trials and therefore deducted from the net delay. As the Supreme Court of Canada stated in **Jordan**, *supra*, at para. 75 discrete exceptional events can be deducted from delay if the Crown and the justice system could not reasonably foresee and mitigate the delay.
>
> [108] At a minimum, with regard to the amount of time that can be attributed to exceptional circumstances of backlog created by the Covid 19 pandemic in the Dartmouth court, the Crown Attorney has indicated that prior to the pandemic half day trials in that court could usually be accommodated within 4 to 6 months. Given the fact that there was a 9.6-month delay between December 18, 2020 and October 6, 2021, I am prepared to deduct, **at a minimum**, 3.6 months of delay due to the Covid 19 Pandemic discrete exceptional event or circumstance from the net delay of 19.1 months.
>
> [Emphasis added]

[78] Next, *Riley*:

> [66] Mr. Riley's re-trial entered the system some eight months after the arrival of the COVID pandemic. It is impossible to say with precision what impact COVID has had on the overall delay in the scheduling and re-scheduling of this matter, other than to acknowledge that it would be nonsensical to suggest that COVID has had zero impact on delay simply because Mr. Riley's case was not specifically adjourned due to a particular COVID wave. The entire world essentially ground to a halt several times since March 2020. Duncan ACJ described on the record in this proceeding the backlog and pressure on the courts in scheduling jury trials during the various COVID waves.
>
> [67] Nonetheless, the caselaw imposes upon the Crown a duty to show that all reasonable efforts to mitigate the delay have been attempted, for example by having another prosecutor replace Mr. Craig for the first scheduled trial (which was not done), consenting to re-election when searching for dates for the second re-scheduled trial (which was not done) or ensuring the disclosure of the WPP materials were provided in a timely fashion (which was not done, despite the best efforts of the prosecution team), well in advance of the re-trial.

[79] The Court in Riley, nonetheless deducted 6 months from the total delay as attributable to the scheduling backlog created by the COVID pandemic.

[80] While the circumstances in Mr. Drake's case are not identical to those in *Nagy-Willis* or *Riley*, there is some legitimacy to the Crown's reference to the scheduling backlog, and its "knock-on" effect upon the scheduling of all cases post COVID closure as an exceptional circumstance created by the virus. The Crown argues for a 3-4 month deduction, which aligns with *Nagy-Willis*.

[81] It is difficult to quantify the impact of the backlog on the scheduling of Mr. Drake's trial with respect to the charge contained in the second Indictment. Much like the Court in *Riley*, I observe, however, it would be "nonsensical" (para. 66) to assume that it had no impact. As a consequence, in the specific circumstances of this case, I am prepared to deduct a minimum of two months from the total delay due to the backlog leading to scheduling delays.

[82] This brings the net delay to 864 days and amounts to 28.8 months. A chart summarizing my findings will be annexed as Appendix A to this decision. Since this is below the *Jordan* ceiling, in order to succeed with this application, it was incumbent upon the Defence to demonstrate that the delay was nonetheless unreasonable in accordance with the parameters set out in *Jordan* and *Cody* (see para. 23 of *Cody*). The Defence has not done so.

(v) *Complexity*

[83] If I am found to be in error with respect to any of the above, and the net delay exceeds the 30-month level established in *Jordan*, I would have concluded that this excess was justified by the complexity of the proceeding.

[84] I am mindful that a murder trial is not "*prima facie*" complex (*Jordan*, para. 78) by any means. However, after the charges were re-laid, the parties filed pre-trial memoranda in advance of an anticipated Pre-Trial Conference with Justice Boudreau. Mr. MacDonald's memorandum was presented in letter form, dated December 6, 2022 (Book of Materials on behalf of Adam Drake, November 27, 2023, Tab 7). Fourteen issues were identified in that letter that had to be dealt with before the trial was heard, the headings of which, together with some excerpts, are reproduced below:

1. Status of existing Indictment [this ended up being voir dire #2].
2. The operative Indictment [dealt with in *voir dire #2*].
3. Status of the pre-trial rulings [prior to withdrawal of first Indictment October 29, 2021].

   > [These were] … numerous and substantive. They would have a major impact on evidence called at trial. … The Crown has indicated its willingness to be bound by these rulings. However, that does not resolve the legal issue of whether these rulings remain binding in these proceedings. (Letter, December 6, 2022, p. 2)

4. Rationale for existing proceedings:

   > The Crown took the highly unusual step of withdrawing a charge of first degree murder … It then took the extraordinary step of purporting to re-lay that charge a year later … This is certainly a rare occurrence. The Crown has an obligation to provide information to Mr. Drake and the Court regarding the reasons behind its decisions. Failure to provide this information raises the issue of abuse of process [abuse of process to be dealt with in *voir dire #4*]. (Letter, December 6, 2022, p. 3)

5. Disclosure issues [the parties were subsequently able to resolve this issue prior to the date scheduled for the *voir dire* to deal with it].
6. Direct Indictment re-election.
7. Quash Indictment (November 17, 2022).
8. Disreputable conduct [see Issue #3].
9. Wiretap evidence.
10. Stay of Proceedings [dealt with in *voir dire #4*].

11. Exclusion of evidence [(alleged contravention of ss. 489.1 - 490 CC) (dealt with in *voir dire #1*)].
12. Third party records.
13. Other suspects.
14. Character of the victim.

[85] Clearly, on the basis of the above, including the amount of "pre-trial work" identified by the Defence, it must be observed that the "hallmarks of complexity" do exist. When coupled with the volume of disclosure, and an (anticipated) 50 Crown witnesses, this proceeding is "complex", no matter how that descriptor is defined.

Conclusion

[86] Mr. Drake's application pursuant to s. 11(b) of the *Charter* is dismissed.

Gabriel, J.